JUDGMENT OF THE COURT

13 May 2003 *

In Case C-385/99,

REFERENCE to the Court under Article 234 EC by the Centrale Raad van Beroep (Netherlands) for a preliminary ruling in the proceedings pending before that court between

V.G. Müller-Fauré

and

Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA,

and between

E.E.M. van Riet

and

Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen,

* Language of the case: Dutch.

on the interpretation of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, M. Wathelet (Rapporteur) R. Schintgen and C.W.A. Timmermans (Presidents of Chambers), D.A.O. Edward, A. La Pergola, P. Jann, F. Macken, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Ms Müller-Fauré, by J. Blom, advocaat,

— Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA, by J.K. de Pree, advocaat,

— the Netherlands Government, by M.A. Fierstra, acting as Agent,

— the Belgian Government, by P. Rietjens, acting as Agent,

— the Danish Government, by J. Molde, acting as Agent,

— the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

— the Spanish Government, by N. Díaz Abad, acting as Agent,

— the Irish Government, by M.A. Buckley, acting as Agent, and N. Hyland BL,

— the Italian Government, by U. Leanza, acting as Agent, and I.M. Braguglia, avvocato dello Stato,

— the Swedish Government, by A. Kruse, acting as Agent,

— the United Kingdom Government, by R. Magrill, acting as Agent, and S. Moore, Barrister,

— the Icelandic Government, by E. Gunnarsson, H.S. Kristjánsson and V. Hauksdóttir, acting as Agents,

— the Norwegian Government, by H. Seland, acting as Agent,

— the Commission of the European Communities, by P. Hillenkamp and H.M.H. Speyart, acting as Agents,

after considering the additional written observations submitted at the Court's request on behalf of:

— Ms Van Riet, by A.A.J. van Riet,

— Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA, by J.K. de Pree,

— Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen, by H.H.B. Limberger, acting as Agent,

— the Netherlands Government, by H.G. Sevenster, acting as Agent,

— the Spanish Government, by N. Díaz Abad,

— the Irish Government, by D.J. O'Hagan, acting as Agent,

— the Swedish Government, by A. Kruse,

— the United Kingdom Government, by D. Wyatt QC, acting as Agent, and S. Moore,

— the Norwegian Government, by H. Seland,

— the Commission, by H.M.H. Speyart,

having regard to the Report for the Hearing,

after hearing the oral observations of Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA, represented by J.K. de Pree; Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen, represented by R. Out, acting as Agent; the Netherlands Government, represented by H.G. Sevenster; the Danish Government, represented by J. Molde; the Spanish Government, represented by N. Díaz Abad; the Irish Government, represented by A. Collins BL; the Finnish Government, represented by T. Pynnä, acting as Agent; the United Kingdom Government, represented by D. Lloyd-Jones QC, and the Commission, represented by H. Michard, acting as Agent, and H.M.H. Speyart, at the hearing on 10 September 2002,

after hearing the Opinion of the Advocate General at the sitting on 22 October 2002,

gives the following

Judgment

1 By order of 6 October 1999, received at the Court on 11 October 1999, the Centrale Raad van Beroep (Higher Social Security Court) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC).

2 Those questions have been raised in two sets of proceedings between Ms Müller-Fauré and Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA (mutual sickness insurance fund; 'the Zwijndrecht Fund'), established in Zwijndrecht (Netherlands), and between Ms Van Riet and Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen ('the Amsterdam Fund'), established in Amsterdam (Netherlands), concerning the reimbursement of medical costs incurred in Germany and Belgium respectively.

National legal framework

3 In the Netherlands, the sickness insurance scheme is based *inter alia* on the Ziekenfondswet (Law on Sickness Funds) of 15 October 1964 (*Staatsblad* 1964, No 392), which has been subsequently amended ('the ZFW'), and on the Algemene Wet Bijzondere Ziektekosten (Law on general insurance for special sickness costs) of 14 December 1967 (*Staatsblad* 1967, No 617), which has also been subsequently amended, ('the AWBZ'). Both the ZFW and the AWBZ

establish a system of benefits in kind under which an insured person is entitled not to reimbursement of costs incurred for medical treatment but to free treatment. Both laws are based on a system of agreements between sickness funds and providers of health care.

4 Under Articles 2 to 4 of the ZFW, workers whose annual income does not exceed an amount determined by that law, persons treated as such and persons in receipt of social benefits, as well as dependent members of their families living with them in the same household, are compulsorily and automatically insured under that law.

5 Article 5(1) of the ZFW provides that any person coming within its scope who wishes to claim entitlement under that law must be affiliated to a sickness fund operating in the municipality in which he resides.

6 Article 8 of the ZFW provides:

'1. An insured person shall be entitled to benefits in the form of necessary medical care, provided that he is not entitled to such care under the Algemene Wet Bijzondere Ziektekosten... Sickness funds shall ensure that any insured person registered with them is able to rely on that right.

2. The nature, content and extent of the benefits shall be defined by or pursuant to a Royal Decree, it being understood that they shall in any event include

medical assistance, the extent of which remains to be defined, and also the care and treatment provided in categories of institutions to be defined. Furthermore, the grant of a benefit may be conditional on a financial contribution by the insured person; this contribution need not be the same for all insured persons.

...'

7 The Verstrekkingenbesluit Ziekenfondsverzedering (Decree on sickness insurance benefits in kind) of 4 January 1966, (*Staatsblad* 1966, No 3), which has been subsequently amended ('the Verstrekkingenbesluit'), implements Article 8(2) of the ZFW.

8 The Verstrekkingenbesluit thus determines entitlement to benefits and the extent of such benefits for various categories of care, including in particular the categories 'medical and surgical assistance' and 'in-patient hospital care'.

9 The principal features of the system of agreements put in place by the ZFW are as follows.

10 Article 44(1) of the ZFW provides that the sickness funds are to 'enter into agreements with persons and establishments offering one or more forms of care, as referred to in the Royal Decree adopted to implement Article 8'.

11 Article 44(3) of the ZFW provides that such agreements are to include as a minimum provisions concerning the nature and extent of the parties' mutual

obligations and rights, the categories of care to be provided, the quality and effectiveness of the care provided, supervision of compliance with the terms of the agreement, including supervision of the benefits provided or to be provided and the accuracy of the amounts charged for those benefits, and also an obligation to communicate the information necessary for that supervision.

12 The sickness funds are free to enter into agreements with any care provider, subject to a twofold reservation. First, under Article 47 of the ZFW, every sickness fund 'is required to enter into an agreement... with any establishment in the region in which it operates or which the population of that region regularly attends'. Second, agreements can be entered into only with establishments which are duly authorised to provide the care in question or with persons lawfully authorised to do so.

13 Article 8a of the ZFW provides:

'1. An establishment providing services such as those referred to in Article 8 must be authorised to do so.

2. A Royal Decree may provide that an establishment belonging to a category to be defined by Royal Decree is to be regarded as authorised for the purposes of this Law....'

14 Under Article 8c(a) of the ZFW approval of an establishment operating a hospital facility must be refused if that establishment does not meet the requirements of the Wet ziekenhuisvoorzieningen (Law on hospital facilities) on distribution and

needs. That law, its implementing directives (in particular the directive based on Article 3 of the law, *Nederlandse Staatscourant* 1987, No 248) and also the district plans determine in greater detail national needs in relation to various categories of hospitals and their distribution between the various health regions within the Netherlands.

15 As regards the specific exercise of the right to benefits, Article 9 of the ZFW provides:

'1. Save as provided for in the Royal Decree referred to in Article 8, an insured person wishing to claim entitlement to a benefit shall apply to a person or an establishment with whom or with which the sickness fund with which he is registered has entered into an agreement for that purpose, subject to the provisions of paragraph 4.

2. The insured person may choose from among the persons and establishments mentioned in paragraph 1, subject to the provisions of paragraph 5 and the provisions regarding conveyance by ambulance, as laid down in the Wet ambulancevervoer ((Law on conveyance by ambulance), *Staatsblad* 1971, No 369).

3. [repealed]

4. A sickness fund may, by way of derogation from paragraphs 1 and 2 hereof, authorise an insured person, for the purpose of claiming entitlement to a benefit, to apply to another person or establishment in the Netherlands where

this is necessary for his health care. The Minister may determine the cases and circumstances in which an insured person may be granted authorisation, in claiming entitlement to a benefit, to apply to a person or an establishment outside the Netherlands.

...'

16 The Minister exercised the powers conferred on him by the final sentence of Article 9(4) of the ZFW in adopting the Regeling hulp in het buitenland ziekenfondsverzekering (Regulation on care provided abroad under the sickness insurance rules) of 30 June 1988, (*Nederlandse Staatscourant* 1988, No 123; 'the Rhbz'). Article 1 of the Rhbz provides:

'A sickness fund may authorise an insured person claiming entitlement to a benefit to apply to a person or establishment outside the Netherlands in those cases in which the sickness fund has determined that such action is necessary for the health care of the insured person.'

17 In the event of an insured person obtaining authorisation to apply to a provider established outside the Netherlands, the cost of any treatment is wholly assumed by the sickness fund to which the person is affiliated.

18 The Centrale Raad van Beroep explains that, according to its established case-law, applications for authorisation to undergo medical treatment abroad funded under the ZFW must be submitted to the insured person's sickness fund and the latter must, except in exceptional circumstances such as an emergency,

have given its prior agreement to the provision of treatment, failing which it will not be possible to obtain reimbursement of the cost of the treatment.

19 Furthermore, as regards the condition laid down in Article 9(4) of the ZFW and Article 1 of the Rhbz that the insured's treatment abroad must be medically necessary, it appears from the documents before the Court that the fund takes account, in practice, of the methods of treatment available in the Netherlands and ascertains whether appropriate treatment can be provided there without undue delay.

The main proceedings

The Müller-Fauré case

20 While on holiday in Germany, Ms Müller-Fauré underwent dental treatment involving the fitting of six crowns and a fixed prosthesis on the upper jaw. The treatment was provided between 20 October and 18 November 1994 without recourse to any hospital facilities.

21 When she returned from her holiday, she applied to the Zwijndrecht Fund for reimbursement of the costs of the treatment, which amounted to a total of DEM 7 444.59. By letter of 12 May 1995 the Fund refused reimbursement on the basis of the opinion of its advisory dental officer.

22 Ms Müller-Fauré sought the opinion of the Ziekenfonsraad, which is responsible for supervising the management and administration of sickness funds and which,

on 16 February 1996, confirmed the Zwijndrecht Fund's decision on the ground that insured persons are entitled only to treatment itself and not to reimbursement of any related costs, except in exceptional circumstances which did not exist in this case.

23 Ms Müller-Fauré then brought an action before the Arrondissementsrechtbank te Rotterdam (District Court, Rotterdam) (Netherlands). By judgment of 21 August 1997, that court upheld the Fund's decision, having also found that the case entailed no exceptional circumstances such as to justify reimbursement of the costs, given, in particular, the scale of the treatment and the fact that it extended over several weeks.

24 The Centrale Raad van Beroep points out that in any event only a limited part of the treatment received by Ms Müller-Fauré is covered by the Verstrekkingenbesluit and is therefore eligible for reimbursement. Furthermore, it finds that Ms Müller-Fauré voluntarily sought treatment from a dentist established in Germany while she was on holiday there because she lacked confidence in dental practitioners in the Netherlands. Such circumstances cannot, according to the case-law of the court concerned, provide grounds under the national legislation for reimbursement in respect of medical treatment undergone abroad without authorisation from the insured person's fund.

The Van Riet case

25 Ms Van Riet had been suffering from pain in her right wrist since 1985. On 5 April 1993, the doctor treating her requested that the Amsterdam Fund's medical adviser should grant authorisation for his patient to have an arthroscopy performed in Deurne hospital (Belgium) where that examination could be carried out much sooner than in the Netherlands. The Fund rejected that request by letters of 24 June and 5 July 1993 on the ground that the test could also be performed in the Netherlands.

26 In the meantime, Ms Van Riet had already had the arthroscopy carried out at Deurne hospital in May 1993 and, following that examination, the decision was taken to carry out an ulnar reduction to relieve the patient's pain. Care before and after the treatment, and the treatment itself, were provided in Belgium, partly in hospital and partly elsewhere. The Amsterdam Fund refused to reimburse the cost of the care, which amounted to a total of BEF 93 782. That decision was confirmed by the Ziekenfondsraad on the ground that there was no emergency nor any medical necessity such as to justify Ms Van Riet receiving treatment in Belgium, since appropriate treatment was available in the Netherlands within a reasonable period. The competent Arrondissementsrechtbank rejected as unfounded Ms Van Riet's action against the decision for the same reasons as the Amsterdam Fund.

27 The Centrale Raad van Beroep, before which the applicant in the main proceedings brought an appeal, states that, although it is not disputed that most of the treatment given to Ms Van Riet is indeed covered by the Verstrekkingenbesluit, the treatment was provided in Belgium without prior authorisation and without it being established that Ms Van Riet could not reasonably wait, for medical or other reasons, until the Amsterdam Fund had taken a decision on her application. Furthermore, in that court's view, the time which Ms Van Riet would have had to wait for the arthroscopy in the Netherlands was not unreasonable. The documents before the Court show that the waiting time was about six months.

28 The referring court submits that, in this instance, the conditions for application of Article 22(1)(a) 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, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1; 'Regulation No 1408/71'), were not met, since neither Ms Müller-Fauré's nor Ms Van Riet's state of health necessitated immediate treatment during a stay in the territory of another Member State. Furthermore, nor has it been established, in conformity with Article 22(1)(c) and (2), second paragraph, of that regulation that the treatment concerned could not, account being taken of the state of health of the applicants in the main actions, be given in the Netherlands within the time 'normally

necessary', a fact which would have obliged the sickness funds to authorise treatment in another Member State.

29 The national court none the less raises a question as to the compatibility of the decisions refusing reimbursement with Articles 59 and 60 of the Treaty in the light of the judgment in Case C-158/96 *Kohll* [1998] ECR I-1931. It notes that the national provisions at issue do not of themselves prevent insured persons from applying to a service provider established in another Member State but impose a precondition that the sickness insurance fund of which the insured persons are members must have entered into an agreement with that provider, something which, as a rule, is not the case. In the absence of such an agreement, reimbursement of costs incurred in another Member State is subject to prior authorisation, which is not granted unless 'it is necessary for [the insured person's] health care', which in general is the case only where the contracted care providers cannot offer all the appropriate care. The obligation to obtain prior authorisation therefore works to the advantage of contracted medical care providers — which are virtually always from the Netherlands — and to the detriment of care providers from other Member States. The referring court adds that the administrative powers of the Netherlands authorities do not extend to care providers established in other Member States, which may hinder the conclusion of agreements with those providers.

30 If it were found that the authorisation required by Article 9(4) of the ZFW impedes the freedom to provide services, the Centrale Raad van Beroep seeks to ascertain whether the requirement is justified.

31 In that connection, the referring court draws attention to the characteristics of the Netherlands sickness insurance scheme. In essence, unlike 'reimbursement' schemes, the scheme guarantees that benefits in kind will be provided. In the submission of the defendants in the main actions, the financial balance of the scheme could be jeopardised if it were possible for insured persons to obtain reimbursement, without prior authorisation, of the costs of care provided in

another Member State. The national court refers in that regard to national measures taken to control the costs of hospital care, in particular the rules laid down in the Wet ziekenhuisvoorzieningen concerning the planning and geographical distribution of care, and those in the ZFW limiting reimbursement to care provided by authorised hospitals.

The questions referred for a preliminary ruling

32 Those were the circumstances in which the Centrale Raad van Beroep decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Are Articles 59 and 60 of the EC Treaty... to be interpreted as meaning that in principle a provision such as Article 9(4) of the Ziekenfondswet, read in conjunction with Article 1 of the Regeling hulp in het buitenland ziekenfondsverzekerig, is incompatible therewith in so far as it stipulates that in order to assert his entitlement to benefits a person insured with a sickness insurance fund requires the prior authorisation of that fund to seek treatment from a person or establishment outside the Netherlands with whom or which the sickness insurance fund has not concluded an agreement?

2. If so, do the objectives of the Netherlands system of benefits in kind referred to above constitute an overriding reason in the general interest capable of justifying a restriction on the fundamental principle of freedom to provide services?

3. Does the question whether the treatment as a whole or only a proportion thereof involved hospital care affect the answers to these questions?'

33 By letter of 12 July 2001, the Court Registry asked the referring court whether it wished to maintain its reference for a preliminary ruling in the light of the judgment delivered on that date in Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473.

34 By letter of 25 October 2001, the referring court informed the Court that it was maintaining the reference since *Smits and Peerbooms* did not specifically deal with the attributes of the Netherlands sickness insurance scheme, which is a benefits-in-kind scheme based on agreements. It also asked the Court to explain the import of paragraph 103 of the judgment, which states:

'... the condition concerning the necessity of the treatment, laid down by the rules at issue in the main proceedings, can be justified under Article 59 of the Treaty, provided that the condition is construed to the effect that authorisation to receive treatment in another Member State may be refused on that ground only if the same or equally effective treatment [for the patient] can be obtained without undue delay from an establishment with which the insured person's sickness insurance fund has contractual arrangements.'

35 More specifically, the referring court asks the Court what is meant by 'without undue delay' and, in particular, whether that condition must be assessed on a strictly medical basis, regardless of the waiting time for the treatment sought.

36 By letter of 6 March 2002, the Court Registry requested the parties to the main actions, the Member States and the Commission to submit any observations which they might have on the conclusions to be drawn from the judgment in *Smits and Peerbooms* in the light of the questions raised by the Centrale Raad van Beroep.

The first question

37 By its first question, the national court is essentially asking whether Articles 59 and 60 of the Treaty are to be interpreted as precluding legislation of a Member State, such as the legislation at issue in the main proceedings, which makes assumption of the costs of care provided in another Member State, by a person or an establishment with whom or which the insured person's sickness fund has not concluded an agreement, conditional upon prior authorisation by the fund.

38 It should be borne in mind, as a preliminary point, that it is settled case-law that medical activities fall within the scope of Article 60 of the Treaty, there being no need to distinguish in that regard between care provided in a hospital environment and care provided outside such an environment (see, most recently, *Smits and Peerbooms*, paragraph 53).

39 The Court also found, in paragraphs 54 and 55 of *Smits and Peerbooms*, that the fact that the applicable rules are social security rules and, more specifically, provide, as regards sickness insurance, for benefits in kind rather than reimbursement does not mean that the medical treatment in question falls outside the scope of the freedom to provide services guaranteed by the EC Treaty. Indeed, in the disputes before the national court, the treatment provided in a Member State other than that in which the persons concerned were insured resulted in direct payment by the patient to the doctor providing the service or the establishment in which the care was provided.

40 Since medical services fall within the ambit of freedom to provide services for the purposes of Articles 59 and 60 of the Treaty, it is necessary to determine whether the legislation at issue in the main actions introduces restrictions on that freedom

in making assumption of the costs of care provided in a Member State other than that in which the insured person's sickness fund is established, by a person or establishment which has not concluded an agreement with that fund, conditional upon prior authorisation by the fund.

41 In that regard the Court has already held, in paragraph 62 of the judgment in *Smits and Peerbooms*, that while the ZFW does not deprive insured persons of the possibility of using a service provider established in a Member State other than that in which the sickness fund covering the insured is situated, it does nevertheless make reimbursement of the costs thus incurred subject to prior authorisation, which may be given, as the referring court points out, only where provision of the care at issue, irrespective of whether it involves a hospital, is a medical necessity.

42 Since the requirement of medical necessity is in practice satisfied only where adequate treatment cannot be obtained without undue delay from a contracted doctor or hospital in the Member State in which the person is insured, this requirement by its very nature is liable severely to limit the circumstances in which such authorisation will be issued (*Smits and Peerbooms*, paragraph 64).

43 Admittedly, it is open to the Netherlands sickness insurance funds to enter into agreements with hospital establishments outside the Netherlands. In such a case no prior authorisation would be required in order for the cost of treatment provided by such establishments to be assumed under the ZFW. However, with the exception of hospitals situated in regions adjoining the Netherlands, it seems unlikely that a significant number of hospitals in other Member States would ever enter into agreements with those sickness insurance funds, given that their prospects of admitting patients insured by those funds remain uncertain and limited (*Smits and Peerbooms*, paragraphs 65 and 66).

44 The Court has therefore already held that rules such as those at issue in the main proceedings deter, or even prevent, insured persons from applying to providers of medical services established in Member States other than that of the insurance fund and constitute, both for insured persons and service providers, a barrier to freedom to provide services (*Smits and Peerbooms*, paragraph 69).

45 However, before coming to a decision on whether Articles 59 and 60 of the Treaty preclude rules such as those at issue in the main actions, it is appropriate to determine whether those rules can be objectively justified, which is the subject of the second question.

The second and third questions

46 By its second and third questions, which it is appropriate to examine together, the referring court is asking whether legislation such as that at issue in the main proceedings, which has restrictive effects on freedom to provide services, can be justified by the actual particular features of the national sickness insurance scheme, which provides not for reimbursement of costs incurred but essentially for benefits in kind and is based on a system of agreements intended both to ensure the quality of the care and to control the costs thereof. It also wishes to know whether the fact that the treatment at issue is provided in whole or in part in a hospital environment has any effect in that regard.

The arguments submitted to the Court

47 In the submission of the Netherlands Government and the Zwijndrecht Fund, the authorisation required by Article 9(4) of the ZFW is an integral part of the

Netherlands sickness insurance scheme. Sickness cover by way of benefits in kind, as provided by that scheme, necessitates the prior conclusion, between the fund and care providers, of agreements dealing with the volume, quality, effectiveness and costs of health care in order, first, to allow for needs-based planning and expenditure control and, second, to ensure that a high-quality medical service is provided, that benefits are comparable and thus that insured persons are treated equally. A system of agreements of that kind is in the main advantageous to the insured.

48 In those circumstances, insured persons must apply to contracted care providers alone or, if they none the less wish to be treated by a non-contracted doctor or establishment established in the Netherlands or abroad, obtain prior authorisation from the sickness insurance scheme to which they belong.

49 The Netherlands Government and the Zwijndrecht Fund add that, if there were no requirement for prior authorisation, it would never be in the interest of care providers to participate in the system of agreements by becoming subject to contractual clauses dealing with the availability, volume, quality, effectiveness and cost of services, with the result that the authorities managing the sickness insurance scheme would be unable to make any needs-related plans by adjusting expenditure to needs and to ensure that a high-quality medical service was open to all. The system of agreements would thus lose its *raison d'être* as a means of managing health care, which would prejudice the sovereign power of the Member States, recognised by the Court's case-law, to organise their social security systems. The Netherlands Government explains in that connection that there are waiting lists because of the limited financial resources available for health-care cover and that this gives rise to a need to quantify the benefits to be provided and to make them subject to priorities which must be strictly observed.

50 Furthermore, the Netherlands sickness funds cannot be forced to conclude agreements with a greater number of care providers than is necessary to meet the

needs of people living in the Netherlands. The Netherlands Government points out that it is specifically to meet those needs that most of the agreements are entered into with care providers established in the Netherlands since demand from the insured is clearly greatest within the national territory.

51 Finally, as regards the way in which it is appropriate to determine whether 'the same or equally effective treatment can be obtained without undue delay', in the words of paragraph 103 of *Smits and Peerbooms*, the Zwijndrecht Fund submits that the mere fact of a person being on a waiting list does not mean that such treatment is not available. If it were to adopt a different interpretation, the Court would significantly extend the conditions in which benefits are awarded, which are a matter of national competence. Moreover, it would cast uncertainty over all attempted planning and rationalisation in the health-care sector aimed at avoiding over-capacity, supply-side imbalance, wastage and loss.

52 The Netherlands Government argues, in that regard, that it is quite apparent from paragraph 103 of *Smits and Peerbooms* that the period within which medical treatment is necessary is to be determined by reference to the patient's medical condition and history. It is the national court's responsibility to ascertain whether the treatment is available within that period, which amounts to a factual assessment.

53 The Danish, German, Spanish, Irish, Italian, Swedish and United Kingdom Governments, together with the Icelandic and Norwegian Governments, generally endorse the foregoing observations.

54 In particular, the Spanish Government maintains that any distinction between treatment provided by a practitioner and treatment provided in a hospital is

unnecessary where a sickness insurance scheme provides exclusively benefits in kind. If an insured person is given health care or purchases a medicinal product in a Member State other than that in which his insurance fund is established, the duties and taxes paid by providers or suppliers are not paid into the budget of the Member State of affiliation, which adversely affects one of the sources of financing of social security in that State.

55 The Irish and United Kingdom Governments submit that if insured persons were entitled to go to a Member State other than that in which they are insured in order to receive treatment there, there would be adverse consequences for the setting of priorities for medical treatment and the management of waiting lists, which are significant aspects of the organisation of sickness insurance. In that regard, the United Kingdom Government points out that the finite financial resources allocated to the National Health Service ('the NHS') are managed by local health authorities which establish timetables based on clinical judgments and medically determined priorities for different treatments. Patients do not have the right to demand a certain timetable for their hospital treatment. It follows that if patients could shorten their waiting time by obtaining, without prior authorisation, medical treatment in other Member States for which the competent fund was none the less obliged to assume the cost, the financial balance of the system would be threatened and the resources available for more urgent treatment would be severely depleted, thereby placing at risk its ability to provide adequate levels of health care.

56 The United Kingdom Government adds that if hospital services were to be liberalised, its own hospitals would be unable to predict either the loss of demand that would follow from recourse being had to hospital treatment in other Member States or the increase in demand that would follow from persons insured in those other States being able to seek hospital treatment in the United Kingdom. Those effects of liberalisation would not necessarily offset each other and the impact would be different for every hospital in the United Kingdom.

57 As regards the criteria by which it should be ascertained whether treatment which is the same or equally effective for the patient could be obtained without undue delay in the Member State in which the person is insured, the United Kingdom Government, like the Swedish Government, refers to Article 22(2), second paragraph, of Regulation No 1408/71, in conjunction with Article 22(1)(c), from which it is apparent that the person concerned may not be refused the authorisation required to go to the territory of another Member State to receive there the treatment where, taking account of his current state of health and the probable course of the disease, he cannot be given the treatment within the time normally necessary in the Member State of residence. There is also a reference to the way in which those provisions were interpreted in paragraph 10 of the judgment in Case 182/78 *Pierik* [1979] ECR 1977.

58 In that regard the United Kingdom Government draws attention to the fact that in practice authorisation for treatment in another Member State is generally given in the United Kingdom when there is a delay for treatment beyond the maximum waiting times. National waiting lists take account of the different needs of different categories of patients and permit the best possible allocation of hospital resources. The lists are flexible so that if a patient's condition suddenly deteriorates, he can be moved up the waiting list and treated more quickly. To compel the competent authorities to authorise treatment abroad in circumstances other than where there is a delay beyond the normal waiting time and to pass the cost on to the NHS would have damaging consequences for its management and financial viability.

59 In any event, the United Kingdom Government points to the specific characteristics of the NHS and asks the Court to uphold the principle that health care provided under such a national sickness insurance scheme does not fall within the scope of Article 60 of the Treaty and that the NHS, which is a non-profit-making body, is not a service provider for the purposes of the Treaty.

60 The Danish Government argues that there would be a risk of excessive consumption of medical services if patients had unrestricted access to free medical care in Member States other than that in which the insured's sickness insurance fund is established and also a risk, in the event of numerous journeys abroad for medical purposes, of it not being possible to maintain the competence of doctors established in national territories at an adequate level as regards unusual and complex diseases.

61 The Belgian Government submits that the specific nature of the Netherlands scheme, in providing not for reimbursement of costs incurred but for benefits in kind, does not amount *per se* to a general-interest reason justifying a restriction on freedom to provide services. It submits that it is appropriate to draw a distinction between services supplied elsewhere than in a hospital and those supplied in a hospital.

62 In the first case, there is no justification for any restriction on freedom to provide services, as can be seen from the judgment in *Kohll*. However, in the second case, there are sound reasons, linked to protecting the financial balance of the social security system and to maintaining a balanced medical and hospital service open to all, which justify requiring prior authorisation when services are to be provided in a hospital environment in a Member State other than that in which the insured's sickness insurance fund is established. Furthermore, in the absence of prior authorisation, the Member States with waiting lists for hospital treatment might have a tendency to send their nationals abroad for treatment instead of investing in their own infrastructure, thereby thwarting the other Member States' attempted hospital-related planning.

63 The Commission distinguishes between care provided in a surgery, which it places on the same footing as out-patient treatment within a hospital environment, and hospital treatment as such. As regards the first category, the analysis in the judgments in Case C-120/95 *Decker* [1998] ECR I-1831 and *Kohll* should be upheld, by regarding the requirement for prior authorisation as incompatible

with Community law, except in the case of certain services, dental work in particular, which are extremely costly and specialised. As to the second category of care, provided in a hospital environment, reference should be made to the analysis in the judgment in *Smits and Peerbooms*, and whilst it should be recognised that the requirement for prior authorisation is justified by planning needs, refusal of authorisation should none the less be subject to the limits set by the Court in that judgment.

64 As to the interpretation of the words 'without undue delay' employed in paragraph 103 of the judgment in *Smits and Peerbooms*, the Commission submits that only the patient's medical condition should be taken into account, as is clear from paragraph 104 of the judgment.

65 Finally, the Norwegian Government argues that the conditions on which benefits are granted and the periods within which they can be given are a matter solely for national legislation. Community law cannot confer on patients the right to receive, in a Member State other than that in which the persons concerned are insured, health care to which they are not entitled in their own Member State. Nor can it entitle them to receive treatment within a shorter time-limit than that provided for by national legislation. If it did so, it would prejudice the Member State's power to organise their social security systems and would go beyond the scope of the Treaty provisions on freedom to provide services.

Findings of the Court

66 It is clear from the documents before the Court that the reasons put forward to justify the requirement for prior authorisation where sickness insurance is to cover benefits provided in a Member State other than that in which the person concerned is insured, whether within a hospital environment or not, are linked (i)

to the protection of public health inasmuch as the system of agreements is intended to ensure that there is a high-quality, balanced medical and hospital service open to all, (ii) to the financial balance of the social security system in that a system of that kind also permits the managing authorities to control expenditure by adjusting it to projected requirements, according to preestablished priorities, and (iii) to the essential characteristics of the sickness insurance scheme in the Netherlands, which provides benefits in kind.

The risk that the protection of public health may be adversely affected

67 It is apparent from the Court's case-law that the objective of maintaining a high-quality, balanced medical and hospital service open to all, may fall within one of the derogations provided for in Article 56 of the EC Treaty (now, after amendment, Article 46 EC), in so far as it contributes to the attainment of a high level of health protection (*Kohll*, paragraph 50, and *Smits and Peerbooms*, paragraph 73). In particular, that Treaty provision permits Member States to restrict the freedom to provide medical and hospital services in so far as the maintenance of treatment capacity or medical competence on national territory is essential for public health, and even the survival of the population (*Kohll*, paragraph 51, and *Smits and Peerbooms*, paragraph 74).

68 However, it is settled case-law that it is necessary, where justification is based on an exception laid down by the Treaty or indeed on an overriding general-interest reason, to ensure that the measures taken in that respect do not exceed what is objectively necessary for that purpose and that the same result cannot be achieved by less restrictive rules (see Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraphs 27 and 29; Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, paragraphs 17 and 18; Case C-106/91 *Ramrath* [1992] ECR I-3351, paragraphs 30 and 31, and *Smits and Peerbooms*, paragraph 75).

69 In this instance the arguments put forward to justify the requirement for prior authorisation seek to establish that, if it were open to patients to get treatment in a Member State other than that in which they are insured, without prior authorisation to that effect, the competent State could no longer guarantee that in its territory there would be a high-quality, balanced medical and hospital service open to all and hence a high level of public health protection.

70 As to the Danish Government's argument that the actual competence of practitioners, working in surgeries or in a hospital environment, would be undermined because of numerous journeys abroad for medical purposes, the Court finds that no specific evidence has been adduced in support of this argument.

71 The objective of maintaining a balanced medical and hospital service open to all is inextricably linked to the way in which the social security system is financed and to the control of expenditure, which are dealt with below.

The risk of seriously undermining the financial balance of the social security system

72 It must be recalled, at the outset, that, according to the Court's case-law, aims of a purely economic nature cannot justify a barrier to the fundamental principle of freedom to provide services (see, to that effect, Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 23, and *Kohll*, paragraph 41).

73 However, in so far as, in particular, it could have consequences for the overall level of public-health protection, the risk of seriously undermining the financial

balance of the social security system may also constitute *per se* an overriding general-interest reason capable of justifying a barrier of that kind (*Kohll*, paragraph 41, and *Smits and Peerbooms*, paragraph 72).

74 It is self-evident that assuming the cost of one isolated case of treatment, carried out in a Member State other than that in which a particular person is insured with a sickness fund, can never make any significant impact on the financing of the social security system. Thus an overall approach must necessarily be adopted in relation to the consequences of freedom to provide health-related services.

75 In that regard, the distinction between hospital services and non-hospital services may sometimes prove difficult to draw. In particular, certain services provided in a hospital environment but also capable of being provided by a practitioner in his surgery or in a health centre could for that reason be placed on the same footing as non-hospital services. However, in the main actions, the fact that the care at issue is partly hospital treatment and partly non-hospital treatment has not given rise to disagreement between the parties to the main proceedings or on the part of the Member States which have submitted observations under Article 20 of the EC Statute of the Court of Justice or the Commission.

Hospital services

76 As regards hospital services, such as those provided to Ms Van Riet in Deurne hospital, the Court, in paragraphs 76 to 80 of the judgment in *Smits and Peerbooms*, made the following findings.

77 It is well known that the number of hospitals, their geographical distribution, the way in which they are organised and the facilities with which they are provided, and even the nature of the medical services which they are able to offer, are all matters for which planning must be possible.

78 As may be seen, in particular, from the system of agreements involved in the main actions, this kind of planning generally meets a variety of concerns.

79 For one thing, it seeks to achieve the aim of ensuring that there is sufficient and permanent accessibility to a balanced range of high-quality hospital treatment in the State concerned.

80 For another thing, it assists in meeting a desire to control costs and to prevent, as far as possible, any wastage of financial, technical and human resources. Such wastage would be all the more damaging because it is generally recognised that the hospital care sector generates considerable costs and must satisfy increasing needs, while the financial resources which may be made available for health care are not unlimited, whatever the mode of funding applied.

81 In those circumstances, a requirement that the assumption of costs, under a national social security system, of hospital treatment provided in a Member State other than that of affiliation must be subject to prior authorisation appears to be a measure which is both necessary and reasonable.

82 As regards specifically the system set up by the ZFW, the Court clearly acknowledged that, if insured persons were at liberty, regardless of the circumstances, to use the services of hospitals with which their sickness insurance

fund had no agreement, whether those hospitals were situated in the Netherlands or in another Member State, all the planning which goes into the system of agreements in an effort to guarantee a rationalised, stable, balanced and accessible supply of hospital services would be jeopardised at a stroke (*Smits and Peerbooms*, paragraph 81).

83 Although Community law does not therefore in principle preclude a system of prior authorisation for this category of services, the conditions attached to the grant of such authorisation must none the less be justified in the light of the overriding considerations mentioned above and must satisfy the requirement of proportionality referred to in paragraph 68 above.

84 It likewise follows from settled case-law that a scheme of prior administrative authorisation cannot legitimise discretionary decisions taken by the national authorities, which are liable to negate the effectiveness of provisions of Community law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings (see Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 25; Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraphs 23 to 28, and Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 37).

85 Thus, in order for a prior administrative authorisation scheme to be justified even though it derogates from a fundamental freedom of that kind, it must be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily (*Analir and Others*, paragraph 38). Such a prior administrative authorisation scheme must likewise be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings (*Smits and Peerbooms*, paragraph 90).

86 In the main actions, the disputes do not concern the actual cover provided by the Netherlands sickness insurance scheme for the medical and hospital treatment with which Ms Müller-Fauré and Ms Van Riet were provided. In those actions, what is disputed is whether it was a medical necessity for them to have the treatment at issue in Germany and Belgium respectively, rather than in the Netherlands. In that regard, in paragraphs 99 to 107 of *Smits and Peerbooms*, the Court also ruled on that condition concerning the necessity of the proposed treatment, to which the grant of authorisation is subject.

87 As the national court states, it follows from the wording of Article 9(4) of the ZFW and Article 1 of the Rhbz that in principle that condition applies irrespective of whether the request for authorisation relates to treatment in an establishment located in the Netherlands with which the insured person's sickness insurance fund has no agreement or in an establishment located in another Member State.

88 As regards hospital treatment carried out outside the Netherlands, the national court states that the condition concerning the necessity of the treatment is in practice interpreted as meaning that such treatment is not to be authorised unless it appears that appropriate treatment cannot be provided without undue delay in the Netherlands. The Netherlands Government explains that if Article 9(4) of the ZFW is read in conjunction with Article 1 of the Rhbz, authorisation must be refused solely where the care required by the insured person's state of health is available from contracted care providers.

89 The condition concerning the necessity of the treatment, laid down by the legislation at issue in the main proceedings, can be justified under Article 59 of the Treaty, provided that the condition is construed to the effect that authorisation to receive treatment in another Member State may be refused on that ground only if treatment which is the same or equally effective for the patient can be obtained without undue delay from an establishment with which the

insured person's sickness insurance fund has an agreement (*Smits and Peerbooms*, paragraph 103).

90 In order to determine whether treatment which is equally effective for the patient can be obtained without undue delay in an establishment having an agreement with the insured person's fund, the national authorities are required to have regard to all the circumstances of each specific case and to take due account not only of the patient's medical condition at the time when authorisation is sought and, where appropriate, of the degree of pain or the nature of the patient's disability which might, for example, make it impossible or extremely difficult for him to carry out a professional activity, but also of his medical history (see, to that effect, *Smits and Peerbooms*, paragraph 104).

91 The Court also stated, at paragraphs 105 and 106 of *Smits and Peerbooms*, that:

— thus construed, the condition concerning the necessity of treatment can allow an adequate, balanced and permanent supply of high-quality hospital treatment to be maintained on the national territory and the financial stability of the sickness insurance system to be assured;

— were large numbers of insured persons to decide to be treated in other Member States even when the hospitals having agreements with their sickness insurance funds offer adequate identical or equivalent treatment, the consequent outflow of patients would be liable to put at risk the very principle of having agreements with hospitals and, consequently, undermine all the planning and rationalisation carried out in this vital sector in an effort

to avoid the phenomena of hospital overcapacity, imbalance in the supply of hospital medical care and logistical and financial wastage.

92 However, a refusal to grant prior authorisation which is based not on fear of wastage resulting from hospital overcapacity but solely on the ground that there are waiting lists on national territory for the hospital treatment concerned, without account being taken of the specific circumstances attaching to the patient's medical condition, cannot amount to a properly justified restriction on freedom to provide services. It is not clear from the arguments submitted to the Court that such waiting times are necessary, apart from considerations of a purely economic nature which cannot as such justify a restriction on the fundamental principle of freedom to provide services, for the purpose of safeguarding the protection of public health. On the contrary, a waiting time which is too long or abnormal would be more likely to restrict access to balanced, high-quality hospital care.

Non-hospital services

93 As regards non-hospital medical services such as those supplied to Ms Müller-Fauré and, in part, to Ms Van Riet, no specific evidence has been produced to the Court, not even by the Zwijndrecht and Amsterdam Funds or the Netherlands Government, to support the assertion that, were insured persons at liberty to go without prior authorisation to Member States other than those in which their sickness funds are established in order to obtain those services from a non-contracted provider, that would be likely seriously to undermine the financial balance of the Netherlands social security system.

94 It is true that removal of the condition that there should be a system of agreements in respect of services supplied abroad adversely affects the ways in which health-care expenditure may be controlled in the Member State of affiliation.

95 However, the documents before the Court do not indicate that removal of the requirement for prior authorisation for that type of care would give rise to patients travelling to other countries in such large numbers, despite linguistic barriers, geographic distance, the cost of staying abroad and lack of information about the kind of care provided there, that the financial balance of the Netherlands social security system would be seriously upset and that, as a result, the overall level of public-health protection would be jeopardised — which might constitute proper justification for a barrier to the fundamental principle of freedom to provide services.

96 Furthermore, care is generally provided near to the place where the patient resides, in a cultural environment which is familiar to him and which allows him to build up a relationship of trust with the doctor treating him. If emergencies are disregarded, the most obvious cases of patients travelling abroad are in border areas or where specific conditions are to be treated. Furthermore, it is specifically in those areas or in respect of those conditions that the Netherlands sickness funds tend to set up a system of agreements with foreign doctors, as the observations submitted to the Court reveal.

97 Those various factors seem likely to limit any financial impact on the Netherlands social security system of removal of the requirement for prior authorisation in respect of care provided in foreign practitioners' surgeries.

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

The argument based on the essential characteristics of the Netherlands sickness insurance scheme

99 The Zwijndrecht Fund and the Netherlands, Spanish and Norwegian Governments have drawn attention to the fact that Member States are free to set up the social security system of their choice. In this instance, in the absence of prior authorisation, insured persons could apply freely to non-contracted care providers with the result that the existence of the Netherlands system of benefits in kind, the operation of which is in essence dependent upon the system of agreements, would be jeopardised. Furthermore, the Netherlands authorities would be obliged to introduce mechanisms for reimbursement into their method of organising access to health care since, instead of receiving free health services on national territory, the insured would have to advance the sums needed to pay for the services received and wait for some time before being reimbursed. Thus, Member States would be obliged to abandon the principles and underlying logic of their sickness insurance schemes.

100 In that regard it follows from settled case-law that Community law does not detract from the power of the Member States to organise their social security systems (see, in particular, Case 238/82 *Duphar and Others* [1984] ECR 523, paragraph 16, and Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, paragraph 27). Therefore, in the absence of harmonisation at Community level, it is for the legislation of each Member State to determine the conditions on which social security benefits are granted (see, in particular, Case 110/79 *Coonan* [1980] ECR 1445, paragraph 12; Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 15, and Joined Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira* [1997] ECR I-511, paragraph 36). However, it is nevertheless the case that the Member States must comply with Community law when exercising that power (*Decker*, paragraph 23, and *Kohll*, paragraph 19).

101 Two preliminary observations must be made on this point.

102 First, achievement of the fundamental freedoms guaranteed by the Treaty inevitably requires Member States to make some adjustments to their national systems of social security. It does not follow that this would undermine their sovereign powers in this field. It is sufficient in this regard to look to the adjustments which they have had to make to their social security legislation in order to comply with Regulation No 1408/71, in particular with the conditions laid down in Article 69 thereof regarding the payment of unemployment benefit to workers residing in the territory of other Member States when no national system provided for the grant of such benefits to unemployed persons registered with an employment agency in another Member State.

103 Second, as has already been made clear in paragraph 39 above, a medical service does not cease to be a provision of services because it is paid for by a national health service or by a system providing benefits in kind. The Court has, in particular, held that a medical service provided in one Member State and paid for by the patient cannot cease to fall within the scope of the freedom to provide services guaranteed by the Treaty merely because reimbursement of the costs of the treatment involved is applied for under another Member State's sickness insurance legislation which is essentially of the type which provides for benefits in kind (*Smits and Peerbooms*, paragraph 55). The requirement for prior authorisation where a person is subsequently to be reimbursed for the costs of that treatment is precisely what constitutes, as has already been stated in paragraph 44 above, the barrier to freedom to provide services, that is to say, to a patient's ability to go to the medical service provider of his choice in a Member State other than that of affiliation. There is thus no need, from the perspective of freedom to provide services, to draw a distinction by reference to whether the patient pays the costs incurred and subsequently applies for reimbursement thereof or whether the sickness fund or the national budget pays the provider directly.

104 It is in the light of those observations that it is appropriate to determine whether removal of the requirement for sickness insurance funds to grant prior authorisation for non-hospital health care provided in a Member State other than that of affiliation, is such as to call in question the essential characteristics of the system of access to health care in the Netherlands.

105 First, when applying Regulation No 1408/71, those Member States which have established a system providing benefits in kind, or even a national health service, must provide mechanisms for *ex post facto* reimbursement in respect of care provided in a Member State other than the competent State. That is the case, for example, where it has not been possible to complete the formalities during the relevant person's stay in that State (see Article 34 of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71) or where the competent State has authorised access to treatment abroad in accordance with Article 22(1)(c) of Regulation No 1408/71.

106 Second, as has already been stated in paragraph 98 above, insured persons who go without prior authorisation to a Member State other than the one in which their sickness fund is established to receive treatment there can claim reimbursement of the cost of the treatment received only within the limits of the cover provided by the sickness insurance scheme of the Member State of affiliation. Thus, in the present case, it is apparent from the documents before the Court that, in relation to the EUR 3 806.35 paid by Ms Müller-Fauré to a provider established in Germany, the Zwijndrecht Fund would in any event, given the extent of the insurance cover provided by the Fund, contribute only up to a maximum amount of EUR 221.03. Likewise, the conditions on which benefits are granted, in so far as they are neither discriminatory nor an obstacle to freedom of movement of persons, remain enforceable where treatment is provided in a Member State other than that of affiliation. That is particularly so in the case of the requirement that a general practitioner should be consulted prior to consulting a specialist.

107 Third, nothing precludes a competent Member State with a benefits in kind system from fixing the amounts of reimbursement which patients who have received care in another Member State can claim, provided that those amounts are based on objective, non-discriminatory and transparent criteria.

108 Consequently, the evidence and arguments submitted to the Court do not show that removal of the requirement that sickness insurance funds grant prior authorisation to their insured to enable them to receive health care, in particular other than in a hospital, provided in a Member State other than that of affiliation would undermine the essential characteristics of the Netherlands sickness insurance scheme.

109 In the light of all the foregoing considerations, the answer to the questions must be that:

— Articles 59 and 60 of the Treaty must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, which (i) makes the assumption of the costs of hospital care provided in a Member State other than that in which the insured person's sickness fund is established, by a provider with which that fund has not concluded an agreement, conditional upon prior authorisation by the fund and (ii) makes the grant of that authorisation subject to the condition that such action is necessary for the insured person's health care. However, authorisation may be refused on that ground only if treatment which is the same or equally effective for the patient can be obtained without undue delay in an establishment which has concluded an agreement with the fund;

— by contrast, Articles 59 and 60 of the Treaty do preclude the same legislation in so far as it makes the assumption of the costs of non-hospital care provided in another Member State by a person or establishment with whom or which the insured person's sickness fund has not concluded an agreement conditional upon prior authorisation by the fund, even when the national legislation concerned sets up a system of benefits in kind under which insured persons are entitled not to reimbursement of costs incurred for medical treatment, but to the treatment itself which is provided free of charge.

Costs

110 The costs incurred by the Netherlands, Belgian, Danish, German, Spanish, Irish, Italian, Finnish, Swedish, United Kingdom, Icelandic and Norwegian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Centrale Raad van Beroep by order of 6 October 1999, hereby rules:

— Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC) must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, which (i) makes the assumption of the costs of hospital care provided in a Member State other than that in which the insured person's sickness fund is established, by a provider with which that fund has not concluded an agreement, conditional upon prior authorisation by the fund and (ii) makes the grant of that authorisation subject to the condition that

such action is necessary for the insured person's health care. However, authorisation may be refused on that ground only if treatment which is the same or equally effective for the patient can be obtained without undue delay in an establishment which has concluded an agreement with the fund;

— by contrast, Articles 59 and 60 of the Treaty do preclude the same legislation in so far as it makes the assumption of the costs of non-hospital care provided in another Member State by a person or establishment with whom or which the insured person's sickness fund has not concluded an agreement conditional upon prior authorisation by the fund, even when the national legislation concerned sets up a system of benefits in kind under which insured persons are entitled not to reimbursement of costs incurred for medical treatment, but to the treatment itself which is provided free of charge.

Rodríguez Iglesias Wathelet Schintgen

Timmermans Edward La Pergola

Jann Macken Colneric

von Bahr Cunha Rodrigues

Delivered in open court in Luxembourg on 13 May 2003.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President