Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

12 July 2012*

(Action for failure to fulfil obligations — Article 56 TFEU — German legislation regarding care insurance — Benefits in kind for assistance at home are unavailable where the person reliant on care is temporarily staying in another Member State — Lower level of exportable cash benefits — Failure to reimburse hire costs of care equipment in other Member States)

In Case C-562/10,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 30 November 2010,

European Commission, represented by F. Bulst and I. Rogalski, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by T. Henze and J. Möller, acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, U. Lõhmus, A. Rosas, A. Ó Caoimh (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: V. Trstenjak,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 18 April 2012,

gives the following

* Language of the case: German.

Judgment

1 By its action, the European Commission asks the Court to declare that by:

— limiting entitlement to care allowance, pursuant to the wording of Paragraph 34(1)(1) of Book XI of the Social Security Code (Sozialgesetzbuch — Elftes Buch), in the version applicable to the present case ('SGB XI'), to a maximum of six weeks where a person reliant on care temporarily stays in another European Union Member State;

— not providing for, or by excluding through Paragraph 34(1)(1) of the SGB XI, reimbursement of care related benefits in kind at the same rate as granted in Germany in respect of care services used by a person reliant on care staying temporarily in another Member State and supplied by a service provider established in another Member State;

— not reimbursing costs relating to the hire of care equipment where a person reliant on care stays temporarily in another Member State, or by excluding reimbursement through Paragraph 34(1)(1) of the SGB XI, even where those costs would be reimbursed in Germany or the care equipment would be provided and the reimbursement would not lead to the accumulation of or other increase in the costs of the services granted in Germany,

the Federal Republic of Germany failed to fulfil its obligations under Article 56 TFEU.

Legal context

European Union ('EU') law

2 Article 1 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), as amended by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008 (OJ 2008 L 177, p. 1) ('Regulation No 1408/71'), provides:

'For the purpose of this Regulation:

...

(i) "stay" means temporary residence;

...

(o) "competent institution" means:

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

or

…

(p) “institution of the place of residence” and “institution of the place of stay” mean respectively the institution which is competent to provide benefits in the place where the person concerned resides and the institution which is competent to provide benefits in the place where the person concerned is staying, under the legislation administered by that institution or, where no such institution exists, the institution designated by the competent authority of the Member State in question;

(q) “competent State” means the Member State in whose territory the competent institution is situated;

...’

3 As may be seen from its title, Title III of Regulation No 1408/71 lays down provisions specific to various categories of benefits.

4 Articles 18 to 36 of Regulation No 1408/71 appear in Chapter I of Title III, which is entitled ‘Sickness and Maternity’.

5 As may be seen from its title, Article 22 of Regulation No 1408/71 covers, inter alia, stays of insured persons outside the competent State within the meaning of that regulation. Article 22(1) states:

‘An employed or self-employed person who satisfies the conditions

of the legislation of the competent State for entitlement to benefits … and:

…

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

shall be entitled:

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

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

6 Article 31 of Regulation No 1408/71, which is entitled 'Stay of a pensioner and/or members of his family in a Member State other than the State in which they reside', is included in Section 5 of Chapter I, which is entitled 'Pensioners and members of their families'. Article 31(1) provides:

'A pensioner entitled to a pension or pensions under the legislation of one Member State or to pensions under the legislation of two or more Member States who is entitled to benefits under the legislation of one of those States shall, with members of his family who are staying in the territory of a Member State other than the State in which they reside, receive:

(a) benefits in kind which become necessary on medical grounds during a stay in the territory of the Member State other than the State of residence, taking into account the nature of the benefits and the expected length of the stay. These benefits in kind shall be provided by the institution of the place of stay, in accordance with the provisions of the legislation which it administers, on behalf of the institution of the place of residence of the pensioner or of the members of his family;

(b) cash benefits provided, where appropriate, by the competent institution ..., in accordance with the provisions of the legislation which it administers. However, upon agreement between the competent institution and the institution of the place of stay, these benefits may be provided by the latter institution on behalf of the former, in accordance with the provisions of the legislation of the competent State.'

7 In accordance with Article 36 of Regulation No 1408/71, benefits in kind provided by the institution of one Member State on behalf of the institution of another Member State are, pursuant to Articles 22 or 31 of that regulation, to be fully refunded. Such refunds are inter alia to be determined and made in accordance with Articles 93 to 95 of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition 1972 (I), p. 159), as amended by Commission Regulation (EC) No 120/2009 of 9 February 2009 (OJ 2009 L 39, p. 29).

German law

8 The SGB XI provides for an insurance scheme against the risk of reliance on care ('care insurance'). The first sentence of Paragraph 1(2) of the SGB XI provides that 'any person insured under a statutory health insurance scheme is automatically covered by care insurance'.

9 So far as concerns care at home, persons insured under the compulsory care insurance are entitled to benefits in kind ('Pflegesachleistung'), under Paragraph 36 of the SGB XI and/or a 'care allowance' ('Pflegegeld'), under Paragraph 37 or 38 of the SGB XI. The amount of such benefits, benefits in kind as well as cash benefits, depends on the degree of reliance on care, which is classified in categories from I to III. The provision of care equipment is governed by Paragraph 40 of the SGB XI.

10 Under Paragraph 36 of the SGB XI, persons requiring care at home are entitled to general care ('Grundpflege') and domestic help ('häusliche Pflegehilfe'). Those benefits in kind are provided either by care assistants employed by a care fund or by out-patient care providers with whom care funds have concluded a service agreement ('Versorgungsvertrag'). The costs of those services are paid by care funds, subject to a monthly ceiling which varies according to the extent to which the beneficiary is reliant on care. On expiry of the period laid down in the reasoned opinion in the present case, that ceiling was EUR 440, EUR 1 404 or EUR 1 510 per month according to the level of dependency. For those requiring intensive assistance, referred to as 'hardship cases', that ceiling may rise to EUR 1 918.

11 Paragraph 37 of the SGB XI provides that, instead of benefits in kind, persons reliant on care may apply for a care allowance paid in cash. The entitlement requires the person reliant on care to secure for himself general care and domestic help in an appropriate way. The amount of the fixed care

allowance independent of the costs actually incurred was, on expiry of the period laid down in the reasoned opinion in the present case, EUR 225, EUR 430 or EUR 685 per month according to the level of dependency. No provision is made for a specific amount for hardship cases.

12 Paragraph 38 of the SGB XI governs combined benefits ('Kombinationsleistung'), that is to say a combination of benefits in kind within the meaning of Paragraph 36 of the SGB XI and the care allowance provided for in Paragraph 37 of the SGB XI. In accordance with Paragraph 38, an insured person who does not use all the benefits in kind to which he is entitled pursuant to Paragraph 36 may obtain, in parallel, the care allowance referred to in Paragraph 37, of which the amount, however, decreases in proportion to the use of the benefits in kind referred to in Paragraph 36. It is for the beneficiary to decide the proportion of the benefits in kind he intends to use. The insured person is bound, for a period of six months, by the decision as to what proportion of cash benefits and benefits in kind he wants to avail himself of.

13 Paragraph 40 of the SGB XI provides that persons reliant on care are entitled to the provision of care equipment which contributes to making care easier or alleviating the difficulties faced by that person or which facilitates a more independent lifestyle for him, provided that the equipment is not provided by other competent authorities. If, pursuant to those provisions, the insured person is entitled to the provision of care equipment, the care funds must provide the equipment on loan in so far as it is possible to do so with regard to the type of equipment. Where that is not possible, the costs for the equipment will be reimbursed, although a portion of the costs remains payable by the insured person.

14 Paragraph 34(1), which is entitled 'Suspension of entitlement to benefits', states as follows:

'The entitlement to benefits shall be suspended:

(1) for the period that the insured person is abroad. In respect of temporary stays abroad of up to six weeks in the calendar year the care allowance under Paragraph 37 or the benefit pro rata under Paragraph 38 must continue to be provided. This only applies to care-related benefits in kind if the care assistant who normally supplies the care-related benefits in kind accompanies the person reliant on care during the stay abroad,

...'

15 Pursuant to Article 7 of the Law of 22 June 2011 coordinating the social security system in Europe and amending other statutes (Gesetz zur Koordinierung der Systeme der sozialen Sicherheit in Europa und zur Änderung anderer Gesetze), Paragraph 34(1) of the SGB XI was amended by adding the following text:

'(1a) The entitlement to a care allowance under Paragraph 37 or a proportionate care allowance under Paragraph 38 is not suspended for insured persons reliant on care staying in a Member State of the European Union, a Contracting State to the Agreement on the European Economic Area or Switzerland.'

The pre-litigation procedure and the procedure before the Court

16 Following a complaint made in 2006 against the German authorities in respect of reimbursement of care services and the costs relating to the hire of care equipment by a German couple who stayed in Spain for two months, the Commission's attention was drawn to the fact that, where an insured person reliant on care temporarily stays in a Member State other than the Federal Republic of Germany, Paragraphs 36, 37 and 40 of SBG XI were said to provide for significantly lower benefits than in the case of care received in Germany, contrary to Article 56 TFEU.

17 The Commission accordingly asked the German authorities to clarify the national legislation at issue and, in that regard, the Commission sent a letter of formal notice to the Federal Republic of Germany dated 17 October 2008.

18 Not satisfied with the replies given by the Federal Republic of Germany, the Commission sent, on 23 November 2009, a reasoned opinion to that Member State, calling upon it to adopt the measures necessary to achieve compliance within two months of receipt.

19 Since the Federal Republic of Germany maintained its position in its reply of 25 January 2010, the Commission brought the present action.

20 After learning of the amendment made to Paragraph 34 of the SGB XI by the Law of 22 June 2011 from the Federal Republic of Germany's rejoinder, the Commission informed the Court, on 2 December 2011, that it was withdrawing part of its action in so far as it sought a declaration that the Federal Republic of Germany failed to fulfil its obligations under Article 56 TFEU limiting entitlement to a care allowance, pursuant to the wording of Paragraph 34(1)(1) of the SGB XI, to a maximum of six weeks where a person reliant on care temporarily stays in a Member State other than the Federal Republic of Germany.

The action

21 Following its partial withdrawal as outlined in paragraph 20 above, the Commission submits, in essence, by its first head of claim, that the Federal Republic of Germany failed to fulfil its obligations under Article 56 TFEU in so far as it did not provide — in the same amount as granted in Germany — for the reimbursement of care related benefits in kind in respect of care services used by a person reliant on care staying temporarily in that other Member State and supplied by a service provider established in that Member State.

22 By its second head of claim, the Commission alleges that the Federal Republic of Germany failed to fulfil its obligations under Article 56 TFEU in so far as it did not reimburse costs relating to the hire of care equipment where a person reliant on care stays temporarily in a Member State other than the Federal Republic of Germany, even where those costs would be reimbursed in Germany or the care equipment would be provided and the reimbursement would not lead to the accumulation of or other increase in the costs of the services granted in Germany.

23 The arguments underlying those two heads of claim are similar and those heads of claim fall to be considered together in the present case.

Arguments of the parties

The existence of restrictions on the freedom to provide services

24 The Commission asserts that the case-law on the reimbursement of medical expenses incurred in other Member States may be applied to the present case. In that connection it cites Case C-158/96 *Kohll* [1998] ECR I-1931; Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473; Case C-368/98 *Vanbraekel and Others* [2001] ECR I-5363; Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509; Case C-56/01 *Inizan* [2003] ECR I-12403; and Case C-372/04 *Watts* [2006] ECR I-4325.

25 In those circumstances, the Commission submits, by its first head of claim, that German legislation on benefits in kind, namely Paragraph 36 of the SGB XI, establishes a discriminatory restriction in so far as it does not provide for the reimbursement of the costs of care services used by a person reliant on

care staying temporarily in another Member State and supplied by a service provider established in that Member State. Moreover, the care allowance is stated to be lower than the amount that would be reimbursed in that regard.

26 According to the Commission, the German service agreements scheme does not treat service providers established in Germany in the same way as those established abroad. Whereas in Germany many service providers have signed a service agreement, as far as the Commission is aware, there are no contracted service providers in the other Member States. Consequently, those persons reliant on care in Germany are not entitled, in other Member States, to the benefits in kind under their care insurance that they are entitled to receive in Germany from contracted service providers.

27 By its second head of claim, the Commission claims that German legislation regarding the provision of care equipment under Paragraph 40 of SBG XI establishes a discriminatory restriction in so far as the hire costs of such care equipment in other Member States are not reimbursed even though they would qualify for reimbursement, at least up to a certain threshold, in Germany.

28 The Federal Republic of Germany submits that the reimbursement of out-patient care services under Paragraph 36 of the SGB XI is not a restriction on the freedom to provide services. It states that if persons reliant on care avail themselves of benefits in kind provided by service providers who have not concluded service agreements with a care fund, the care fund in question will not reimburse the costs incurred either in other Member States or in Germany. Accordingly, service providers who have not concluded service agreements with a care fund will be treated in the same way.

29 Moreover, according to the Federal Republic of Germany, the Commission disregards the fact that, during a temporary stay, forfeiture of the possibility to seek benefits in kind through the Federal Republic of Germany is outweighed by the possibility, provided for under secondary EU law, to seek benefits in kind through relevant institutions in the Member State in which the person reliant on care is temporarily staying. In those circumstances, there is no restriction on the freedom to provide services.

30 The Federal Republic of Germany admits that the mere fact that a national provision complies with Regulation No 1408/71 does not absolve Member States from the obligation to comply with primary law on the freedom to provide services. However, the Federal Republic of Germany considers that it does not follow that the rights under secondary law specifically intended to protect insured persons are irrelevant in respect of a declaration that there exists a restriction on the freedom to provide services. Moreover, if the position were otherwise, both the spirit and purpose of Regulation No 1408/71 would be called into question, as well as the spirit and purpose 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 (OJ 2004 L 166, p. 1), which replaced it.

31 According to the Federal Republic of Germany, it is of no consequence that the amount of benefits provided for under a system to cover against the risk of reliance on care in other Member States is not the same as that provided for by care insurance. EU law is based on the idea that the differences in the amount of benefits provided under national social security systems in the different Member States can and must be accepted. If that were not so, the coordination of social security institutions, in particular in respect of the limits of their respective competences, would always be uncertain since any reference to a less favourable social security system would become impossible with regard to the freedom to provide services. The Federal Republic of Germany takes the view that according to the case-law of the Court, through the interplay between secondary and primary law, EU law accepts that there are differences in the amounts of benefits granted by social security systems in the different Member States.

32 Likewise, so far as concerns the second head of claim, regarding the failure to reimburse hire costs of care equipment in Member States other than the Federal Republic of Germany, that State claims that the possibility of an accumulation of benefits means that there is no restriction on the freedom to provide services. The Federal Republic of Germany observes that even the Commission, in its application, excluded the possibility of a restriction on the freedom to provide services where the hire of care equipment in a Member State other than the Federal Republic of Germany represents, for German care funds, an additional charge on top of the financing of care equipment in Germany.

Justification

33 If a restriction on the freedom to provide services were established, the Federal Republic of Germany claims first of all that, in Germany, strict requirements for the approval of those services and frequent inspections ensure the quality assurance of care services. According to that Member State, since quality assurance requirements concern both the type of activities and individual measures of quality assurance, it would be difficult to establish whether services provided in another Member State comply with those requirements.

34 Next, the Federal Republic of Germany claims that maintaining a system of out-patient care services requires considerable organisation and financial resources. Accordingly, it is important to avoid, inter alia, the under-use of trained care workers during holiday periods.

35 Lastly, according to that Member State, the financial equilibrium of the German social security system would be at risk if care-related benefits in kind provided abroad were covered. The Federal Republic of Germany observes in that regard that, with regard to care insurance, unlike health insurance, there is a separate exportable benefit, that is to say the care allowance, which enables persons reliant on care to secure for themselves, in Germany and abroad, care provided by service providers who have not concluded service agreements with a care fund. If insured persons reliant on care could export care-related benefits in kind and not only cash benefits, namely the care allowance, the German legislature's intention to encourage persons reliant on care to rely on care provided by their own family might be undermined.

36 According to the Federal Republic of Germany, the obligation to export care-related benefits in kind abroad would impose a considerably higher financial burden on care insurance, thereby undermining the principle of solidarity-based financing upon which care insurance is based. Such a transfer would impose additional charges on care insurance of up to EUR 100 million per year.

37 Moreover, the quality standards imposed in respect of the reimbursement of care providers are stated to be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the national authorities' discretion.

38 The Commission claims that the argument regarding the protection of public health and, in particular, compliance with quality assurance requirements cannot be accepted in so far as the Federal Republic of Germany has neither established the existence of a public health risk if the care provided fails to meet those requirements, nor that the systematic refusal of reimbursement was proportionate.

39 The Commission submits, in essence, that, contrary to the Federal Republic of Germany's position, considerations regarding an adequate, balanced and permanent supply of high-quality hospital treatment and the requirement that the financial stability of the health insurance system be assured that derive from the case-law relating to hospital care cannot be applied by analogy to the out-patient care at issue in the present case.

Findings of the Court

40 As a preliminary point, it should be noted that, as is apparent from paragraphs 21 and 22 above and as the Advocate General has noted in point 48 of her Opinion, the present action is not directed against the German system of agreements between out-patient care providers and persons reliant on care.

41 As the Court has repeatedly held, in proceedings for failure to fulfil obligations, it is for the Commission to prove the alleged failure by placing before the Court all the information needed to enable the Court to establish that the obligation has not been fulfilled (see, in particular, Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6, and Case C-512/08 *Commission* v *France* [2010] ECR I-8833, paragraph 56).

42 In this case, it is a question of whether, in the context of the Commission's two heads of claim, set out in paragraphs 21 and 22 above and which it is appropriate to examine together, the Commission has discharged its burden of proof.

43 As can be seen from paragraph 24 above, the Commission considers that the case-law relating to the reimbursement of medical expenses incurred in other Member States can be applied to German legislation on the risk of reliance on care in order to establish that there is a restriction on the freedom to provide services.

44 In that regard, it must be clarified at the outset that the notion of dependence refers, in essence, to a situation in which, as a result of his reduced autonomy, a person is reliant on the assistance of others in order to carry out the basic routines of everyday life (see, to that effect, Case C-388/09 *da Silva Martins* [2011] ECR I-5737, paragraphs 39 and 40).

45 It also follows from the case-law deriving from Case C-160/96 *Molenaar* [1998] ECR I-843 that, in the absence of provisions in Regulation No 1408/71 referring specifically to the risk of reliance on care, the Court has treated benefits relating to that risk as 'sickness benefits' within the meaning of that regulation (see, to that effect, *da Silva Martins*, paragraphs 39 to 48).

46 It follows from that same case-law that care insurance benefits consisting in the direct payment or reimbursement of the costs incurred as a result of the insured person's reliance on care, in particular the costs entailed by care services at home provided by third persons as well as the provision and installation of necessary care equipment, fall within the definition of 'benefits in kind' within the meaning of Title III of Regulation No 1408/71 (see, to that effect, *Molenaar*, paragraphs 5, 6, 23 and 32, and Joined Cases C-502/01 as well as C-31/02 *Gaumain-Cerri and Barth* [2004] ECR I-6483, paragraph 26).

47 In addition, according to settled case-law, medical services supplied for consideration fall within the scope of the provisions of the FEU Treaty on the freedom to provide services, there being no need to distinguish between care provided in a hospital environment and care provided outside such an environment (see, in particular, *Smits and Peerbooms*, paragraph 53, and *Commission* v *France*, paragraph 30).

48 In that respect, the fact that the applicable rules are social security rules or provide for benefits in kind does not mean that the medical treatment in question falls outside the scope of the freedom to provide services guaranteed by the FEU Treaty (see, to that effect, *Müller-Fauré and van Riet*, paragraph 39).

49 According to equally well-established case-law, whilst EU law does not detract from the power of the Member States to organise their social security systems and whilst, in the absence of harmonisation at EU level, it is for the legislation of each Member State to determine the conditions for the grant of social security benefits, the fact nevertheless remains that, when exercising that power, Member States must comply with EU law and, in particular, with the provisions on the freedom to provide services

(see, to that effect, in particular, *Kohll*, paragraphs 17 to 21; Case C-208/07 *von Chamier-Glisczinski* [2009] ECR I-6095, paragraph 63; and Case C-490/09 *Commission* v *Luxembourg* [2011] ECR I-247, paragraph 32 and the case-law cited).

50 However, contrary to what the Commission seems to assume in its pleadings, it cannot simply be inferred from the case-law, referred to in paragraph 24 above, relating to the reimbursement of medical expenses incurred in other Member States that the German legislation at issue in the present action constitutes a restriction on the freedom to provide services.

51 Although, as is apparent from paragraph 45 above, in the absence of provisions in Regulation No 1408/71 referring specifically to the risk of reliance on care, benefits relating to that risk are to be assimilated to 'sickness benefits' within the meaning of that regulation, the fact remains that there are differences between benefits relating to the risk of reliance on care and sickness benefits in respect of medical treatment (see, to that effect, in particular, *da Silva Martins*, paragraphs 47 and 48). In particular, unlike sickness benefits in respect of medical treatment, benefits relating to the risk of reliance on care — being generally long-term benefits — are not, in principle, intended to be paid on a short-term basis (see, to that effect, *da Silva Martins*, paragraph 48).

52 In those circumstances, it is insufficient in the present case, in order to demonstrate the existence of restrictions resulting from the legislation at issue, merely to invoke, without precision or detailed explanations, the case-law referred to in paragraph 24 above.

53 In addition, while the Commission points out that secondary legislation does not relieve the Member State of affiliation in matters of social security of its obligation to comply with primary legislation, which, as is apparent from paragraph 30 above, the Federal Republic of Germany does not, moreover, deny, the Commission failed however to address the Federal Republic of Germany's arguments, set out in paragraphs 29 to 32 above, to the effect that, pursuant to Regulation No 1408/71, insured persons reliant on care are entitled, when temporarily staying in a Member State other than the Federal Republic of Germany, to benefits in kind provided by the institution of the Member State of stay on behalf of the competent institution in Germany.

54 In any event, it must be noted that, in accordance with Regulation No 1408/71, the validity of whose relevant provisions are not disputed in the present case, and which was applicable between EU Member States at the end of the period laid down in the reasoned opinion, an insured person reliant on care may even be entitled to a combination of cash benefits and benefits in kind the total sum of which exceeds that of equivalent benefits provided for in the competent State.

55 Where the conditions for their application are satisfied, Article 22(1)(c) of that regulation and, as regards 'pensioners', Article 31 of that regulation are designed to ensure, inter alia, entitlement, in a Member State other than the competent Member State, to benefits in kind provided by the institution of the place of stay on behalf of the competent institution, in accordance with the legislation applicable to the institution of the place of stay, as well as to cash benefits, in accordance with the legislation applicable to the competent institution, either provided directly by that institution or on its behalf.

56 It should be added, in that regard, that the Court has already held, in the context of medical care, that the provision of benefits in kind guaranteed by Article 31 of Regulation No 1408/71 cannot be subject either to any authorisation procedure or to the requirement that the illness which necessitated the treatment in question manifested itself suddenly during that stay, making that treatment immediately necessary (see Case C-326/00 *IKA* [2003] ECR I-1703, paragraph 43).

57 Moreover, as Article 48 TFEU provides for the coordination, not the harmonisation, of the legislation of the Member States relating to social security, the rules of the FEU Treaty on free movement cannot guarantee an insured person that moving to another Member State will be neutral in terms of social security, in particular where sickness benefits or care-related benefits are concerned. In view of

the disparities existing between the schemes and legislation of the Member States in this field, such a move may, in financial terms and depending on the case, be more or less advantageous for the person concerned (see, to that effect, Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829, paragraphs 50 to 52; *von Chamier-Glisczinski*, paragraphs 84 and 85; and Case C-211/08 *Commission* v *Spain* [2010] ECR I-5267, paragraph 61 and the case-law cited).

58 Consequently, when temporarily staying in a Member State, the application, possibly under the provisions of Regulation No 1408/71, of the national legislation of that State which may be less favourable as regards social security benefits than that of the competent State, within the meaning of Article 1(q) of that regulation, may, in principle, be compatible with the requirements of primary EU law on the freedom of movement for persons (see, inter alia, by analogy, *von Chamier-Glisczinski*, paragraphs 85 and 87, and *da Silva Martins*, paragraph 72).

59 In addition, in the context of its second head of claim, set out in paragraph 22 above, the Commission ruled out the possibility that there is a restriction on the freedom to provide services where the hire of care equipment in a Member State other than the Federal Republic of Germany represents, for German care funds, an additional charge on top of the financing of care equipment in Germany.

60 However, it should be noted in that regard that, in accordance with Article 36 of Regulation No 1408/71, benefits in kind provided by the institution of one Member State on behalf of the institution of another Member State are, pursuant to Title III of that regulation, to be fully refunded.

61 It follows that the Commission has failed to respond meaningfully to the Federal Republic of Germany's arguments claiming that it is possible, pursuant to Title III of Regulation No 1408/71, that insured persons reliant on care are entitled, in a Member State other than the Federal Republic of Germany, to care equipment in addition to equivalent equipment already provided for in Germany.

62 In the light of all the foregoing considerations, it must be concluded that the Commission has failed to establish to the requisite legal standard the existence of restrictions on the freedom to provide services arising from the legislation at issue.

63 In those circumstances, since the heads of claim relied on by the Commission in support of its action are not well founded, the action must be dismissed.

Costs

64 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

65 Since the Commission has been unsuccessful, it must be ordered to pay the costs.

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

1. Dismisses the action;

2. Orders the Commission to pay the costs.

[Signatures]