

**Case C-169/07**

**Hartlauer Handelsgesellschaft mbH**

**v**

**Wiener Landesregierung**

**and**

**Oberösterreichische Landesregierung**

(Reference for a preliminary ruling  
from the Verwaltungsgerichtshof)

(Freedom of establishment — Social security — National health system financed by the State — System of benefits in kind — System of reimbursement of costs paid by the person insured — Authorisation to set up a private outpatient dental clinic — Criterion of assessment of the need to set up a health institution — Objective of maintaining a balanced high-quality medical or hospital service open to all — Objective of preventing a risk of serious harm to the financial balance of the social security system — Consistency — Proportionality)

Opinion of Advocate General Bot delivered on 9 September 2008 . . . . . I - 1723  
Judgment of the Court (Grand Chamber), 10 March 2009 . . . . . I - 1751

**Summary of the Judgment**

*Freedom of movement for persons — Freedom of establishment — Freedom to provide services — Restrictions — National legislation requiring prior administrative authorisation based on the*

*needs of the market for setting up independent outpatient dental clinics — Not permissible — Justification by reason of the general interest — None*

*(Arts 43 EC and 48 EC)*

Articles 43 EC and 48 EC preclude national legislation under which authorisation is necessary for the setting up of a private health institution in the form of an independent outpatient dental clinic, and authorisation must be refused if there is no need for that outpatient clinic, having regard to the care already offered by contractual practitioners, where that legislation does not also subject group practices to such a system and is not based on a condition capable of adequately circumscribing the exercise by the national authorities of their discretion.

Such legislation is not appropriate for ensuring attainment of the objectives of maintaining a balanced high-quality medical service open to all and preventing the risk of serious harm to the financial balance of the social security system. First, that legislation does not pursue the stated objectives in a consistent and systematic manner, since it does not make the setting up of group practices subject to a system of prior authorisation, as is the case with new outpatient

dental clinics, even though group practices generally offer the same medical services as outpatient dental clinics, they are subject to the same market conditions, and in many cases the patient will not notice any difference between them. Second, if a prior administrative authorisation scheme is to be justified even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as adequately to circumscribe the exercise of the national authorities' discretion. That is not the case if the issue of authorisation to set up a new outpatient dental clinic is subject to the criterion of the number of patients per doctor, which is not fixed or brought in advance to the notice of the persons concerned in any way, or if the prior administrative authorisation scheme is based on a method which is liable to affect the objectivity and impartiality of the treatment of the application for authorisation.

(see paras 57, 58, 63-66, 68-72, operative part)