JUDGMENT OF THE COURT (Grand Chamber)

15 June 2010 *

In Case C-211/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 20 May 2008,

European Commission, represented by E. Traversa and R. Vidal Puig, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by J.M. Rodríguez Cárcamo, acting as Agent, with an address for service in Luxembourg

defendant,

* Language of the case: Spanish.

supported by:

Kingdom of Belgium, represented by M. Jacobs and L. Van den Broeck, acting as Agents,

Kingdom of Denmark, represented by J. Bering Liisberg and R. Holdgaard, acting as Agents,

Republic of Finland, represented by A. Guimaraes-Purokoski, acting as Agent,

United Kingdom of Great Britain and Northern Ireland, represented by H. Walker, acting as Agent, and M. Hoskins, Barrister,

interveners,

THE COURT (Grand Chamber),

composed of A. Tizzano, President of the First Chamber, acting for the President, J.N. Cunha Rodrigues, K. Lenaerts (Rapporteur), J.-C. Bonichot and P. Lindh, Presidents of Chambers, P. Kūris, G. Arestis, A. Borg Barthet, M. Ilešič, J. Malenovský, L. Bay Larsen, T. von Danwitz and A. Arabadjiev, Judges,

Advocate General: P. Mengozzi,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 24 November 2009,

after hearing the Opinion of the Advocate General at the sitting on 25 February 2010,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that the Kingdom of Spain has failed to fulfil its obligations under Article 49 EC by refusing persons insured under the Spanish national health scheme reimbursement of medical expenses which they have incurred in another Member State for hospital treatment received in accordance with Article 22(1)(a)(i) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), and as subsequently amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 (OJ 2006 L 392, p. 1) ('Regulation No 1408/71'), in so far as the level of cover applicable in the Member State where the treatment is administered is lower than that provided for under the Spanish legislation.

Legal context

European Union legislation

2 Article 22 of Regulation No 1408/71, entitled 'Stay outside the competent State – Return to or transfer of residence to another Member State during sickness or maternity – Need to go to another Member State in order to receive appropriate treatment', provides:

'1. An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, and:

(a) whose condition requires benefits in kind which become necessary on medical grounds during a stay in the territory of another Member State, taking into account the nature of the benefits and the expected length of the stay;

or

...

(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 … 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;

…

2. …

The authorisation required under paragraph 1(c) may not be refused where the treatment in question is among the benefits provided for by the legislation of the Member State on whose territory the person concerned resided and where he cannot be given such treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of the disease.'

3 Article 34a of Regulation No 1408/71 provides:

'… Articles 22(1)(a) and (c), … 22(2), second subparagraph, … shall apply by analogy to students and the members of their families as required.'

4 Article 36(1) of Regulation No 1408/71 provides:

'Benefits in kind provided in accordance with the provisions of this chapter by the institution of one Member State on behalf of the institution of another Member State shall be fully refunded.'

5 Article 21(1) of Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, as amended and updated by Regulation No 118/97, and as subsequently amended by Commission Regulation (EC) No 311/2007 of 19 March 2007 (OJ 2007 L 82, p. 6) ('the Implementing Regulation'), provides:

'In order to receive benefits in kind under Article 22(1)(a)(i) of [Regulation No 1408/71], an employed or self-employed person shall submit to the care provider a document issued by the competent institution certifying that he is entitled to benefits in kind. That document shall be drawn up in accordance with Article 2. …

…'

6 Article 34(1) of the Implementing Regulation states:

'If it is not possible during an employed or self-employed person's stay in a Member State other than the competent State to complete the formalities provided for in Articles 20 … and … 21 … of the Implementing Regulation, his expenses shall, upon his application, be refunded by the competent institution in accordance with the refund rates administered by the institution of the place of stay.'

7 On the basis of Article 2(1) of the Implementing Regulation, the Administrative Commission on Social Security for Migrant Workers – set up pursuant to Article 80 of Regulation No 1408/71 – drew up a model for the certificate relating to the application of Article 22(1)(a)(i) of Regulation No 1408/71, namely, form 'E 111'. Form E 111 was replaced, with effect from 1 June 2004, by the 'European health insurance card' pursuant to a number of decisions of the Administrative Commission of the European Communities on Social Security for Migrant Workers: Decision No 189 of 18 June 2003 aimed at introducing a European health insurance card to replace the forms necessary for the application of Council Regulations No 1408/71 and No 574/72 as regards access to health care during a temporary stay in a Member State other than the competent State or the State of residence (OJ 2003 L 276, p. 1); Decision No 190 of 18 June 2003 concerning the technical specifications of the European health insurance card (OJ 2003 L 276, p. 4); and Decision No 191 of 18 June 2003 concerning the replacement of forms E 111 and E 111 B by the European health insurance card (OJ 2003 L 276, p. 19).

8 The scope of Article 22(1)(a)(i) of Regulation No 1408/71 was defined by Decision No 194 of the Administrative Commission of the European Communities on Social Security for Migrant Workers of 17 December 2003 concerning the uniform application of Article 22(1)(a)(i) of Regulation No 1408/71 in the Member State of stay (OJ 2004 L 104, p. 127; 'Decision No 194').

9 The seventh recital in the preamble to Decision No 194 states:

'The criteria set out in Article 22(1)(a)(i) … cannot be interpreted in such a way that chronic or existing illnesses are excluded. The Court of Justice ruled [in Case C-326/00 *IKA* [2003] ECR I-1703] that the concept of "necessary treatment" cannot be interpreted "as meaning that [the benefit of that provision is] limited solely to cases where the treatment provided has become necessary because of a sudden illness. In particular, the circumstance that the treatment necessitated by developments in the insured person's state of health during his temporary stay in another Member State may be linked to a pre-existent pathology of which he is aware, such as a chronic illness, does not mean that the conditions for the application of these provisions are not fulfilled".'

10 The enacting terms of Decision No 194 provide:

'1. Benefits in kind which become medically necessary and which are granted to a person staying temporarily in another Member State, are covered by the provisions of Article 22(1)(a)(i) … with a view to preventing an insured person from being forced to return before the end of the planned duration of stay to the competent State to obtain the treatment he/she requires.

The purpose of benefits of this type is to enable the insured person to continue his/her stay under safe medical conditions, taking account of the planned length of the stay.

However, the situation where the aim of the temporary stay is to receive medical treatment is not covered by these provisions.

2. In order to determine whether a benefit in kind meets the requirements set out in Article 22(1)(a)(i), … only medical factors within the context of a temporary stay, taking into account the medical condition and past history of the person considered, shall be considered.

National legislation

11 Article 43 of the Spanish Constitution enshrines the right to the protection of health and confers upon the public authorities responsibility for organising the health system and protecting public health through the provision of the necessary benefits and services.

12 To that end, General Law on health No 14/1986 (Ley 14/1986, General de Sanidad) of 25 April 1986 (BOE No 102, 29 April 1986, p. 15207; 'the General Law on Health') lays the foundations for a national health service which is public, universal and free of charge.

13 The benefits provided by the national health service to persons covered by that system are entirely free of charge. However, under Article 17 of the General Law on Health, benefits provided outside that system are, as a general rule, to be paid for by the insured person and are not to be reimbursed by bodies within the national health system.

14 Article 5 of Royal Decree 63/1995 on the organisation of health benefits within the national health service (Real Decreto 63/1995, sobre ordenación de prestaciones sanitarias del Sistema Nacional de Salud) of 20 January 1995 (BOE No 35, 10 February 1995, p. 4538), provided:

'1. The means available within the national health service shall be used for the provision of benefits …

2. The provision of benefits … may be required only of the personnel and [facilities] of the national health service, whether internal or under contract, without prejudice to the provisions laid down in international agreements.

3. In cases where immediate, urgent, life-saving treatment has been administered outside the national health system, the related costs shall be reimbursed provided that it is shown that it was not possible to use the services of that system in good time and that the treatment does not amount to an inappropriate use or an abuse of this exception.'

15 Law 16/2003 on the consistency and quality of the national health service (Ley 16/2003, de cohesión y calidad del Sistema Nacional de Salud) of 28 May 2003 (BOE No 128, 29 May 2003, p. 20567) catalogues the benefits and services to be available under that system.

16 In accordance with Article 14 of the General Law on Health, Article 9 of Law 16/2003 provides:

'Without prejudice to the provisions of international agreements to which Spain is party, medical benefits and services under the national health system shall be provided only by the staff lawfully authorised to do so, using the [facilities], whether in-house or under contract, of the national health service, except in life-threatening situations where it is shown that it was not possible to use the facilities of that system.'

17 Provisions for the implementation of Law 16/2003 have been laid down in Royal Decree 1030/2006 establishing the catalogue of common services available under the national health system and the procedure for its revision (Real Decreto 1030/2006, por el que se establece la cartera de servicios comunes del Sistema Nacional de Salud y el procedimiento para su actualización) of 15 September 2006 (BOE No 222, 16 September 2006, p. 32650). Royal Decree 1030/2006 repealed and replaced Royal Decree 63/1995.

18 Article 4(3) of Royal Decree 1030/2006 states:

'All common services shall be provided solely by facilities belonging to the national health system or under contract thereto, except in life-threatening situations where it is shown that it was not possible to use the facilities of that system. In cases where immediate, urgent, life-saving treatment has been administered outside the national health system, the related costs shall be reimbursed provided that it is shown that it was not possible to use the facilities of that system in good time and that the treatment does not amount to an inappropriate use or an abuse of this exception. The present paragraph shall be without prejudice to the provisions of international agreements to which Spain is party or the provisions of domestic law governing treatment in the event of services being provided abroad.'

19 It follows from those provisions that, where a person insured under the Spanish national health system receives hospital treatment in another Member State, the necessity for which was brought about by changes in his state of health during a temporary stay in that Member State, the institution to which he is affiliated covers the costs of that treatment only within the limits of its obligation under the combined provisions of Articles 22(1)(a)(i) and 36 of Regulation No 1408/71, except in the circumstances described in the second sentence of Article 4(3) of Royal Decree 1030/2006 and subject to the conditions set out therein. That exception aside, therefore, such a person has no right to insurance cover at the expense of the Spanish institution in respect of that part of the cost of the treatment which is not covered by the institution of the Member State of stay.

Pre-litigation procedure

20 The Commission received a complaint from a French citizen resident at the material time in Spain and insured under the Spanish national health system. On returning to Spain after being admitted to hospital during a stay in France, under cover of form E 111, that person met with refusal on the part of the Spanish institution to reimburse the portion of the hospitalisation costs which, in accordance with the French legislation, the French institution had left him to pay.

21 After requesting the Kingdom of Spain, in vain, for information concerning its legislation on the refunding of costs incurred for healthcare received in another Member State, the Commission asked that Member State by letter of 19 December 2005 to provide a satisfactory response within two months.

22 By letter of 13 February 2006, the Kingdom of Spain replied that its legislation did not provide for the possibility that a person insured under the Spanish national health system could obtain reimbursement from the competent institution for healthcare costs incurred outside that system, save in the exceptional circumstances envisaged, at that time, in Article 5 of Royal Decree 63/1995.

23 On 18 October 2006, the Commission sent the Kingdom of Spain a letter of formal notice in which it drew Spain's attention to the incompatibility of its domestic legislation with Article 49 EC in so far as that legislation precluded, with exceptions, the reimbursement pursuant to Article 22(1)(a)(i) of Regulation No 1408/71 – by the competent institution to the person insured under the national health system – of costs incurred for hospital treatment received in another Member State, where there was a positive difference between the levels of cover respectively applicable in Spain and in that other Member State.

24 By letter of 29 December 2006, the Kingdom of Spain essentially stated in reply to that letter of formal notice that the position taken by its administrative authorities vis-à-vis the complainant referred to in paragraph 20 above was in conformity with Regulation No 1408/71; that the circumstances of the person concerned were different from those of the dispute which led to the judgment in Case C-368/98 *Vanbraekel and Others* [2001] ECR I-5363; and that the interpretation argued for by the Commission would affect the financial balance of its national health system.

25 Dissatisfied with that reply, the Commission sent the Kingdom of Spain a reasoned opinion on 19 July 2007, in which it stated that the Spanish legislation was contrary to Article 49 EC and requested that Member State to adopt the measures necessary to put an end to the infringement within two months of receiving the reasoned opinion.

26 Since, in its reply of 19 September 2007 to the reasoned opinion, the Kingdom of Spain maintained its position, the Commission decided to bring the present action.

Admissibility

27 The Kingdom of Spain contests the admissibility of the action.

28 It argues that the submissions made by the Commission are confused, as the Commission alleges infringement of Article 49 EC while acknowledging that the practice of the Spanish administration is in conformity with Regulations No 1408/71 and No 574/72. Not only that, but the application contains a complaint alleging that the second sentence of Article 4(3) of Royal Decree 1030/2006 does not comply with Article 49 EC, whereas circumstances such as those of the complainant referred to in paragraph 20 above fall within the scope of the last sentence of Article 4(3) of the decree, which refers to European Union law ('EU law').

29 The Kingdom of Spain also argues that, in so far as the Commission complains that Spain is in breach of Article 34 of the Implementing Regulation because the Spanish administration refuses to pay persons insured under its national health system the difference between the total cost of hospital treatment received in another Member State and the costs covered by the competent Spanish institution in relation to that treatment, the fact that this complaint was put forward out of time renders it inadmissible.

30 In addition, the Kingdom of Spain contends that the application contains a complaint which was not put forward during the pre-litigation procedure, alleging that Article 4(3) of Royal Decree 1030/2006 is incompatible with Article 22(1)(a) of Regulation No 1408/71.

31 The Kingdom of Belgium contends that Article 49 EC was not mentioned at all in the reasoned opinion and, in consequence, the application may not contain an argument based on that provision.

32 In that regard, it should be borne in mind that it follows from Article 38(1)(c) of the Rules of Procedure of the Court of Justice and from the case-law relating to that provision that the application initiating proceedings must state the subject-matter of the dispute and a summary of the pleas in law on which the application is based and that that statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application. It is therefore necessary for the essential points of law and of fact on which a case is based to be indicated coherently and intelligibly in the application itself and for the heads of claim to be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a claim (Case C-195/04 *Commission* v *Finland* [2007] ECR I-3351, paragraph 22 and the case-law cited, and Case C-343/08 *Commission* v *Czech Republic* [2010] ECR I-275, paragraph 26).

33 Moreover, the subject-matter of an action brought under Article 226 EC is circumscribed by the pre-litigation procedure laid down in that provision. Consequently, the Commission's reasoned opinion and its application must be based on the same complaints (*Commission* v *Finland*, paragraph 18).

34 In the present case, the application and the submissions made by the Commission meet those various requirements.

35 Neither the reasoned opinion nor the application sets out a complaint alleging failure by the Kingdom of Spain to fulfil its obligations under Regulations No 1408/71 and No 574/72. In furtherance of the position consistently maintained by the Commission during the pre-litigation procedure, the application seeks only a declaration that Spain has failed to fulfil its obligations under Article 49 EC.

36 It is quite clear from the Commission's application and from its submissions that the shortcoming which the Commission alleges resides in the fact that, in the case of persons insured under the Spanish national health system whose state of health makes hospital treatment necessary during a temporary stay in another Member State, for the purposes of Article 22(1)(a)(i) of Regulation No 1408/71, the legislation at issue denies – except in the case of life-saving treatment, as referred to in the second sentence of Article 4(3) of Royal Decree 1030/2006 – the right, which derives from Article 49 EC, to receive complementary reimbursement from the Spanish institution where the level of cover applicable in the Member State of stay is lower than that which is applicable in Spain.

37 In that context, the reference which the Commission makes, inter alia, in its submissions to Article 22(1)(a)(i) of Regulation No 1408/71 is not intended to form the basis for an autonomous complaint, but to define the group of insured persons to whose detriment the legislation at issue constitutes, in the view of the Commission, an infringement of Article 49 EC.

38 It follows that the action is admissible.

Substance

Arguments of the parties

39 The Commission submits that Article 49 EC applies to the healthcare services covered by the Spanish legislation, including where the need for such treatment arises during the insured person's temporary stay in another Member State.

40 After pointing out that Article 22 of Regulation No 1408/71 and Article 49 EC are complementary, the Commission asserts that, in the present case, the effect of the Spanish legislation is to restrict not only the provision of hospital care, but also the provision of tourist or educational services, the obtaining of which can be the reason for a temporary stay in another Member State.

41 Pointing out that the situation envisaged in Article 22(1)(a) of Regulation No 1408/71 covers all cases where treatment becomes necessary during a temporary stay in another Member State owing to a deterioration in the health of the insured person, the Commission submits that the legislation at issue is liable to induce a person insured under the Spanish national health system, who is faced with such a situation and has a choice between going to hospital in the Member State of stay and an early return to Spain to be treated there, to choose the second option whenever the level of cover applicable in the Member State of stay is less favourable than that applicable in Spain.

42 The Commission adds that the legislation at issue is such as to dissuade elderly insured persons or those suffering from a chronic illness – with the attendant risk of having to be admitted to hospital – from travelling, as tourists or students, to a Member State in which the conditions governing insurance cover for hospital treatment are less advantageous than in Spain.

43 The Commission argues that the restriction brought about by that legislation is not justified. In particular, it has not been shown that there is a need for such a restriction in the light of the objective of ensuring that the financial balance of the national health system is maintained, given that the costs supported by the Spanish national health service in respect of hospital care administered in another Member State to a person insured under the Spanish system cannot, in any case, exceed the cost of equivalent treatment in Spain.

44 The Spanish Government, supported by the Belgian, Finnish and United Kingdom Governments, challenges the view that the legislation at issue constitutes a restriction on the freedom to provide medical, tourist or educational services and contends that, in any event, the alleged restriction is justified by overriding reasons relating to the public interest in maintaining the financial balance of the national health system concerned.

Findings of the Court

45 First of all, it should be borne in mind that the applicability of Article 22 of Regulation No 1408/71 - and specifically, in the present case, of Article 22(1)(a)(i) - does not mean that Article 49 EC cannot apply at the same time. The fact that national legislation may be in conformity with Regulation No 1408/71 does not have the effect of removing that legislation from the scope of the provisions of the EC Treaty (see, to that effect, Case C-372/04 *Watts* [2006] ECR I-4325, paragraphs 46 and 47).

46 That said, it must first be determined whether, in the case of a person insured under the national health system whose state of health makes hospital care necessary during a temporary stay in another Member State, the services identified by the Commission in its action are cross-border services and, as such, within the scope of Article 49 EC (see, to that effect, Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraph 13).

47 With regard, on the one hand, to healthcare services, it should be noted that, according to settled case-law, medical services provided for consideration fall within the scope of the provisions on the freedom to provide services, including situations where care is provided in a hospital environment (see, to that effect, *Watts*, paragraph 86 and the case-law cited, and Case C-444/05 *Stamatelaki* [2007] ECR I-3185, paragraph 19). Furthermore, the provision of medical services does not cease to be a provision of services for the purposes of Article 49 EC simply because, after paying the foreign provider for the care received, the insured person subsequently seeks reimbursement of the related costs through a social security system (see, to that effect, *Watts*, paragraph 89 and the case-law cited).

48 The Court has also held that Article 49 EC applies where the person providing the service and the recipient are established in different Member States (see Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 19). Services which the provider carries out without moving from the Member State in which he is established for recipients established in other Member States constitute the provision of cross-border services for the purposes of Article 49 EC (see, inter alia, Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraphs 21 and 22 and Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 53).

49 Furthermore, the Court has consistently held that the freedom to provide services involves not only the freedom of the provider to carry out services for recipients established in a Member State other than that in which the provider is established but also the freedom to receive or to benefit, as recipient, from the services carried out by a provider established in another Member State, without being hampered by restrictions (see, inter alia, *Gambelli and Others*, paragraph 55 and the case-law cited).

50 It follows that hospital services which are carried out in a Member State by a provider established there for a recipient established in another Member State are covered by the notion of the provision of services, for the purposes of Article 49 EC, including where – as in the present case – the reasons for which the recipient was staying temporarily in the Member State of establishment of the provider were not medical.

51 On the other hand, with regard to services other than medical services, such as tourist and educational services as specifically referred to by the Commission in its action, it is necessary to bear in mind, in addition to the case-law referred to in paragraph 48 above, that persons established in a Member State who travel to another Member State as tourists or on a study trip must be regarded as recipients of services for the purposes of Article 49 EC (Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16; Case 186/87 *Cowan* [1989] ECR 195, paragraph 15; and Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 16).

52 It follows from the above considerations that the freedom to provide services encompasses the freedom of an insured person established in a Member State to travel – as a tourist or student, for example – to another Member State for a temporary stay and to receive hospital care there from a provider established in the latter Member State, where the need for such care during that stay arises because of his state of health.

53 Whilst it is established that EU law does not detract from the power of the Member States to organise their social security systems and that, in the absence of harmonisation at European Union 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, in particular, *Watts*, paragraph 92 and the case-law cited).

54 In those circumstances, it is appropriate, secondly, to consider whether the legislation at issue constitutes a failure to comply with those provisions.

55 It is settled law that Article 49 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services entirely within a single Member State (see, inter alia, *Stamatelaki*, paragraph 25 and the case-law cited).

56 In that connection, the Court has held that the fact that national legislation does not guarantee an insured person who has been authorised to receive hospital care in another Member State, in accordance with Article 22(1)(c) of Regulation No 1408/71, a level of insurance cover equivalent to that to which he would have been entitled had

he received hospital treatment in the Member State of affiliation is a restriction of the freedom to provide services, for the purposes of Article 49 EC, in that it may deter, or even prevent, that person from applying to providers of services established in other Member States (see, to that effect, *Vanbraekel and Others*, paragraph 45). The Court stated, with regard to national legislation under which hospital care was to be free of charge if provided within the national health service, that such a level of cover corresponds to the cost, in the system of the Member State of affiliation, of care equivalent to that provided to the insured person in the Member State of stay (see, to that effect, *Watts*, paragraphs 131 and 133).

57 The Court has held that, in so far as complementary reimbursement, which depends on the rules governing social insurance cover in the Member State of affiliation, does not by definition impose any additional financial burden on the sickness insurance scheme of that Member State as compared with the reimbursement to be made or the costs to be borne if hospital care had been provided in that State, it cannot be argued that making that sickness insurance scheme bear the costs of complementary reimbursement would be liable to have a significant effect on the financing of the social security system of that Member State (*Vanbraekel and Others*, paragraph 52).

58 However, with regard at least to hospital care, which is all that is at issue in the present case, cases of 'unscheduled treatment', as referred to in Article 22(1)(a) of Regulation No 1408/71 – and at issue in the present case – must be distinguished, in the light of Article 49 EC, from cases of 'scheduled treatment', as referred to in Article 22(1)(c) of that regulation, at issue both in *Vanbraekel and Others* and in *Watts*.

59 First of all, it should be noted that scheduled hospital treatment is received in another Member State under Article 22(1)(c) of Regulation No 1408/71 where – as is clear from the second subparagraph of Article 22(2) of that regulation – an objective find-

ing has been made that the treatment in question, or treatment which is comparable in terms of effectiveness, is not available in the Member State of affiliation within a medically acceptable length of time (see, to that effect, *Watts*, paragraphs 57 and 59). In such circumstances, as the Court held in *Vanbraekel and Others*, the Member State of affiliation must, if it is not to find itself in breach of the rules on freedom to provide services, ensure – in addition to meeting its obligations under Articles 22(1)(c) of Regulation No 1408/71, read in conjunction with Article 36 thereof – that, should the case arise, the insured person has a level of cover which is equally as advantageous as the level of cover which would have been recognised if that treatment had been available under its own national health system within a medically acceptable length of time.

60 However, the situation is different in the case of unscheduled treatment, as referred to in Article 22(1)(a) of Regulation No 1408/71.

61 With regard to an insured person whose travel to another Member State is for reasons relating to tourism or education, for example, and not to any inadequacy in the health service to which he is affiliated, the rules of the Treaty on freedom of movement offer no guarantee that all hospital treatment services which may have to be provided to him unexpectedly in the Member State of stay will be neutral in terms of cost. Given the disparities between one Member State and another in matters of social security cover and the fact that the objective of Regulation No 1408/71 is to coordinate the national laws but not to harmonise them, the conditions attached to a hospital stay in another Member State may, according to the circumstances, be to the insured person's advantage or disadvantage (see, by analogy, Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829, paragraphs 50 to 52; Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 55; and Case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 76).

62 Next, it should be pointed out that, in the case of scheduled hospital treatment in another Member State, the insured person is, as a general rule, able to obtain an overall estimate of the cost of that treatment, in the form of a quote, enabling him to compare the levels of cover respectively applicable in the Member State of stay and the Member State of affiliation.

63 In those circumstances, the fact that the legislation of the Member State of affiliation does not guarantee the insured person the right to receive reimbursement from the competent institution of any positive difference between the level of cover applicable in that Member State and the level of cover applicable in the Member State in which the hospital treatment is scheduled to take place is likely to induce the insured person to cancel the treatment planned in that other Member State, which amounts to a restriction on the freedom to provide services, as the Court held in *Vanbraekel and Others* and in *Watts*.

64 However, as the Spanish Government has pointed out, the case of unscheduled treatment envisaged in Article 22(1)(a) of Regulation No 1408/71 covers, in particular, an indefinite number of cases in which the state of health of the insured person makes hospital treatment necessary, during a temporary stay in another Member State, because of circumstances – relating, inter alia, to the urgency of the situation, the seriousness of the illness or the accident, or even the fact that a return to the Member State of affiliation is ruled out for medical reasons – which, objectively, leave no alternative but to provide the insured person with hospital treatment in an establishment in the Member State of stay.

65 In all those cases, the legislation at issue cannot be regarded as having any restrictive effect on the provision of hospital treatment services by providers established in another Member State.

66 It is true that, as the Commission pointed out, the situation envisaged in Article 22(1)(a) of Regulation No 1408/71 also covers cases where the deterioration in the health of the insured person during a temporary stay in another Member State, while unexpected, is not such as to deprive him of the choice between going to hospital in that State and an early return to Spain to receive the necessary hospital treatment there.

67 Nevertheless, as paragraph 1 of the enacting terms of Decision No 194 makes clear, the system established under Article 22(1)(a)(i) of Regulation No 1408/71 is intended precisely to prevent the insured person from being constrained in such cases to return early to the Member State of affiliation to receive the necessary treatment there, by conferring on that person the right - which he would not otherwise have - of access to hospital treatment in the Member State of stay on conditions of reimbursement as favourable as those enjoyed by insured persons covered by the legislation of that State (see, by analogy, Case C-56/01 *Inizan* [2003] ECR I-12403, paragraphs 21 and 22).

68 In addition, it should be noted that the potential effect of the legislation at issue on the situation of an insured person in that position depends on a factor which is uncertain at the time when that person is faced with such a choice, that is to say, the possibility that the level of cover applicable in the Member State of stay for hospital treatment there – the overall cost of which is, at that time, not known – is lower than the cost of equivalent treatment in Spain.

69 As regards services other than medical services, such as tourist or educational services, it should be pointed out that cases of unscheduled treatment for the purposes of Article 22(1)(a) of Regulation No 1408/71 imply by definition that, at the time when the insured person plans to travel to another Member State – as a tourist or a student, for example – there is uncertainty as to whether hospital treatment will be needed during his temporary stay in that other Member State.

70 The situation of elderly insured persons and the situation of those suffering from chronic or pre-existing illness, both of which – according to paragraph 1 of the enacting terms of Decision No 194 and the seventh recital in the preamble to that decision – fall within the scope of Article 22(1)(a) of Regulation No 1408/71, is similarly uncertain in that regard.

71 Although they may run a higher risk of deterioration in their state of health, those insured persons, in common with other insured persons, are likely to be affected by the legislation at issue only if their state of health actually necessitates hospital treatment, other than the treatment referred to in the second sentence of Article 4(3) of Royal Decree 1030/2006, during a temporary stay in another Member State or if the level of cover applicable in that Member State is lower than the cost of equivalent treatment in Spain.

72 It follows that the possibility that persons insured under the Spanish national health system might be induced to return early to Spain in order to receive hospital treatment there which has been made necessary by a deterioration in their health during a temporary stay in another Member State, or to cancel a trip to another Member State – for tourism or study, for example – because, if their case does not fall within the scope of the second sentence of Article 4(3) of Royal Decree 1030/2006, they cannot count on the competent institution making a complementary contribution if the cost of equivalent treatment in Spain exceeds the level of cover applicable in that other Member State, appears too uncertain and indirect. Accordingly, the legislation at issue cannot, in general terms, be regarded as restricting the freedom to provide hospital treatment services, tourist services or educational services (see, by analogy, regarding the free movement of goods and freedom of movement for workers respectively, Case C-69/88 *Krantz* [1990] ECR I-583, paragraph 11, and Case C-190/98 *Graf* [2000] ECR I-493, paragraphs 24 and 25).

73 The case of the complainant referred to in paragraph 20 above confirms that conclusion. It shows that the effect of the legislation at issue is hypothetical, inasmuch as the application for complementary reimbursement submitted by the person concerned proved to be unfounded, as is apparent from the documents before the Court, because the cost of equivalent treatment in Spain is lower than the level of cover applied in the Member State of stay.

74 Lastly, it should be pointed out that, in contrast with the cases covered by point (c) of Article 22(1) of Regulation No 1408/71, those covered by point (a) of that provision are, for the Member States and the institutions responsible for social security in those States, unforeseeable.

75 In its capacity as the Member State of affiliation, every Member State is free, within the framework of its powers under Articles 153 TFEU and 168 TFEU to organise its public health and social security system (see to that effect, *Watts*, paragraphs 92 and 146, and Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-4629, paragraph 43), to adopt measures affecting the extent and the conditions – especially regarding time-limits – of the offer of hospital treatment in its own territory, so as to be able to control the number of authorisations to be issued, under Article 22(1)(c) of Regulation No 1408/71, for treatment in another Member State which has been scheduled by persons insured under its own system.

76 However, as the Danish and Finnish Governments have pointed out, the ever-increasing mobility of citizens within the European Union, particularly for reasons of tourism or education, is likely to mean an ever greater number of cases of unscheduled hospital treatment, for the purposes of Article 22(1)(a) of Regulation No 1408/71, which the Member States can in no way control.

77 In that context, where every Member State relies, as Member State of affiliation, on the application of the legislation of the Member State of stay as regards the level of cover, for which the competent institution is ultimately responsible, in respect of hospital treatment which becomes necessary owing to the state of health of the insured person during his temporary stay in the latter Member State, the combined application of Article 22(1)(a) of Regulation No 1408/71 and of Article 36 thereof, concerning the mechanism for reimbursement between the institutions concerned, is based on the principle of overall compensation of risk.

78 Thus, cases in which unscheduled hospital treatment provided to an insured person during a temporary stay in another Member State bring about – as a consequence of the application of the legislation of the Member State of stay – a heavier financial burden for the Member State of affiliation than if that treatment had been provided in one of its own establishments, are deemed to be counterbalanced overall by cases in which, on the contrary, application of the legislation of the Member State of stay leads the Member State of affiliation to incur lower costs for the hospital treatment in question than those which would have resulted from the application of its own legislation.

79 Consequently, the fact of imposing on a Member State the obligation to guarantee to persons insured under the national system that the competent institution will provide complementary reimbursement whenever the level of cover applicable in the Member State of stay in respect of the unscheduled hospital treatment in question proves to be lower that that applicable under its own legislation would ultimately undermine the very fabric of the system which Regulation No 1408/71 sought to establish. In every case concerning such treatment, the competent institution of the Member State of affiliation would be systematically exposed to the highest financial burden, whether through the application, in accordance with Article 22(1)(a) of that regulation, of the legislation of a Member State of stay under which the level of cover is higher than that provided for under its own or through the application of its own legislation in the contrary situation.

80 In the light of all the above considerations, the Commission has failed to show that, viewed globally, the legislation at issue constitutes a failure by the Kingdom of Spain to fulfil its obligations under Article 49 EC.

81 The action must therefore be dismissed.

Costs

82 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. Since the Kingdom of Spain has applied for costs to be awarded against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs. Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, the Kingdom of Belgium, the Kingdom of Denmark, the Republic of Finland and the United Kingdom, which have intervened in the proceedings, must bear their own costs.

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

1. Dismisses the action;

2. Orders the European Commission to pay the costs;

3. Orders the Kingdom of Belgium, the Kingdom of Denmark, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.

[Signatures]