JUDGMENT OF THE COURT (Grand Chamber)

5 October 2010 *

In Case C-512/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 25 November 2008,

European Commission, represented by N. Yerrell, G. Rozet and E. Traversa, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by A. Czubinski and G. de Bergues, acting as Agents,

defendant,

* Language of the case: French.

supported by:

Kingdom of Spain, represented by J.M. Rodríguez Cárcamo, acting as Agent,

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

United Kingdom of Great Britain and Northern Ireland, represented by I. Rao, and subsequently by S. Ossowski, acting as Agents, assisted by M.-E. Demetriou, Barrister,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts (Rapporteur), J.-C. Bonichot and C. Toader, Presidents of Chambers, K. Schiemann, P. Kūris, E. Juhász, G. Arestis, A. Arabadjiev, J.-J. Kasel and M. Safjan, Judges,

Advocate General: E. Sharpston,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 2 March 2010,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2010,

gives the following

Judgment

1 By its application, the European Commission of the European Communities asks the Court to declare that, by making, pursuant to Article R. 332-4 of the Social Security Code, subject to the grant of prior authorisation reimbursement for medical services available at a general practitioner's surgery and requiring the use of major medical equipment listed in Article R. 712-2-II of the Public Health Code (now Article R. 6122-26 of that code); on the one hand, and on the other by failing to provide, in Article R. 332-4, or in any other provision of French law, for it to be possible for a patient, insured under the French social security system, to be granted additional reimbursement in the circumstances set out in paragraph 53 of the judgment of 12 July 2001 in Case C-368/98 *Vanbraekel and Others* [2001] ECR I-5363, the French Republic has failed to fulfil its obligations under Article 49 EC.

Legal context

The relevant provisions of European Union law

2 Under Article 22(1) of Regulation (EEC) No 1408/71 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 most recently 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'):

'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;

…'

Relevant provisions of national law

The Social Security Code

3 Responsibility for payment of medical treatment for persons insured under the French system provided outside France is governed, in particular, by Articles R. 332-3 and R. 332-4 of the Social Security Code, which were introduced into that code by Decree No 2005-386 of 19 April 2005 on responsibility for payment for treatment received outside France and amending the Social Security Code (second part: decrees in the Council of State) (JORF of 27 April 2005, p. 7321).

4 Those articles of the Social Security Code provide:

‘Article R. 332-3

Health insurance funds shall reimburse the cost of treatment given to insured persons and to those entitled under them in a Member State of the European Union or party to the Agreement on the European Economic Area, on the same conditions as if the treatment had been received in France, subject to the proviso that the amount reimbursed may not exceed the total sum paid out by the insured person and subject to the adjustments provided by Articles R. 332-4 to R. 332-6.

Article R. 332-4

Except in the case of unforeseen treatment, only on prior authorisation may health insurance funds reimburse the cost of hospital treatment or treatment requiring the use of major medical equipment referred to at section II of Article R. 712-2 of the public health code given to insured persons and to those entitled under them in another Member State of the European Union or State party to the Agreement on the European Economic Area and appropriate to their condition.

That authorisation referred to may be refused only if one of the following conditions applies:

1 The proposed treatment is not one of those in respect of which the French rules provide for responsibility for its payment;

2 Treatment that is identical or equally effective can be obtained in good time in France, taking into account the patient's condition and the likely development of his illness.

The insured person shall send his request for authorisation to the fund to which he is affiliated. The decision shall be taken by the medical examination board. It must be notified within a period compatible with the degree of urgency and availability of the treatment proposed and at the latest two weeks after receipt of the request. If no reply has been given at the end of that period, authorisation shall be deemed to have been granted.

Decisions to refuse authorisation shall state the reasons and shall be actionable on the conditions of general law before the court competent to hear social security cases. Nevertheless, when challenges to those decisions relate to the assessment of the patient's condition made by the medical officer, to the appropriateness to the patient's condition of the treatment proposed or to whether the same or an equally effective treatment is available in France they shall be subject to a medical report on the conditions laid down in Chapter I of Title IV of Book I of this Code.'

5 The application of Decree No 2005-386 was the subject of Circular DSS/DACI/2005/235 of 19 May 2005 ('the circular of 19 May 2005'), which contains the following statements:

'Decree No 2005-386... completes the integration into national law of Community case-law relating to freedom to provide services and the free movement of goods in the area of medical care.

...

It determines the conditions for payment for treatment received abroad depending on the geographical area in which it was provided: Article 3 creates four new articles (R. 332-3, R. 332-4, R. 332-5 and R. 332-6) particular to treatment received in the European Union-European Economic Area (the EU-EEA).

…

II — Responsibility for payment for treatment received in the EU-EEA (Articles R. 332-3, R. 332-4, R. 332-5, R. 332-6)

Those four new articles specifically concern treatment received in the EU-EEA.

They consist of one article of general application affirming the principle of responsibility for payment for treatment received abroad and three articles adapting to particular situations.

…

B — Particular adaptations (Articles R. 332-4, R. 332-5 and R. 332-6)

Articles R. 332-4, R. 332-5 and R. 332-6 supplement Article R. 332-3, making certain adaptations to the principle laid down by that article in the following situations:

1 – Hospital treatment (Article R. 332-4)

— Article R. 332-4 deals with payment for the hospital treatment and the use of major medical equipment – MRI, PET-SCAN type etc. – listed in part II of Article R. 712-2 of the Public Health Code..., to which access may be had outside hospital at a general practitioner's surgery.

— That article does not apply to unforeseen treatment provided during a temporary stay (undertaken for business, family, tourism reasons etc.), responsibility for payment of which must be taken on the basis of Regulations Nos 1408/71 and 574/72 coordinating social security schemes in Europe, whether or not the insured person has produced a Community document in the State of treatment certifying his entitlement.

— Responsibility for payment for hospital treatment and the use of major medical equipment remains subject to the issuing of prior authorisation by the organ to which the person seeking to obtain those services in the EU-EEA is affiliated.

That restriction has been allowed by [the Court of Justice of the European Communities], hospital treatment such as use of major medical equipment being capable, in the case of absolute freedom of access outside national territory, of undermining the organisation of the health system or the financial balance of the social security system of the State in which the insured person is affiliated.

In practice, however, health insurance bodies must not systematically refuse to issue prior authorisation for that kind of service proposed in another Member State.

In point of fact, prior authorisation may not be refused if the treatment proposed is reimbursable in France and if that treatment, or treatment having equivalent effect, are not available in good time, that is to say, within a period compatible with the patient's condition and with the probable development of his illness.

…

— Reasons must, of course, be given for refusals. When prior authorisation is refused, the [Court of Justice] does not permit the decision not to inform the insured person specifically of the reasons why he is not allowed to obtain treatment in another Member State. Thus, the mere statement, without further details, that there exists treatment which could be provided in good time in France, cannot be considered sufficient having regard to the [Court of Justice's] requirements. If, therefore, the applicant is told that treatment having equivalent effect can be provided in France, the refusal must include the facts supporting that assertion. In particular, it may be useful to provide a list of establishments or professionals capable of administering to the patient the treatment needed within the period required.

— In regions in which the supply of specific hospital treatment or major medical equipment is inadequate, the health insurance bodies must systematically authorise payment for certain categories of treatment proposed in the EU-EEA. Another circular will soon specify the regions and the kinds of hospital treatment or major medical equipment concerned by that provision.'

6 The circular of 19 May 2005 was amended and added to by Circular DSS/DACI/2008/242 of 21 July 2008 on responsibility for payment for treatment received in another Member State of the EU-EEA ('the circular of 21 May 2008') which states, in particular, that 'even if the [Vanbraekel] decision is henceforth to be applied by the funds', the latter face many real difficulties. In that circular, the competent minister 'nevertheless calls on the competent authorities to continue to do what is necessary in order to give effect to the differential additional amount, when requested by the insured person'.

The Public Health Code

7 Article L. 6121-1 of the Public Health Code provides:

'The object of the health organisation plan is to provide for and create the developments needed for the supply of preventive, curative and palliative care in order to satisfy physical and mental health needs. It also includes the supply of care to cover pregnant women and the newborn.

The health organisation plan is designed to give rise to alterations and additions in the supply of care, and to cooperation also, in particular among health establishments. It shall fix objectives for the purpose of improving the quality, accessibility and efficiency of the health organisation.

It shall take account of the linkage of the resources of health establishments to general practice and the social and medico-social sector and also of the supply of care in adjacent regions and cross-border territories.

A decree of the minister for health shall fix the list of subject areas, care activities and major equipment that must compulsorily be included in a health organisation plan.

The health organisation plan shall be drawn up on the basis of an assessment of the population's health needs and of their development, taking into account demographic and epidemiological data and progress in medical techniques and after a quantitative and qualitative analysis of the current supply of care.

The health organisation plan may be revised in whole or in part at any time. It shall be re-examined at least every five years.'

8 Article L. 6122-1 of that code states:

'Projects relating to the creation of any healthcare establishment, the creation, conversion and merging of healthcare services, including alternatives to hospitalisation, and the installation of major medical equipment shall require prior authorisation by the regional hospital authority.

The list of healthcare services and major medical equipment subject to authorisation shall be laid down by decree of the Council of State.'

9 Article R. 6122-26 of the Public Health Code, reproducing Article R. 712-2-II of that code, provides:

'The major medical equipment listed below shall be subject to the prior authorisation provided for in Article L. 6122-1:

1. Scintillation camera with or without positron emission coincidence detector, emission tomography or positron camera;

2. Nuclear magnetic resonance imaging or spectrometry apparatus for clinical use;

3. Medical scanner;

4. Hyperbaric chamber;

5. Cyclotron for medical use.'

The pre-litigation procedure

10 In response to a complaint, on 18 October 2006 the Commission sent the French Republic a letter of formal notice in which it alleged that Article R. 332-4 of the Social Security Code was incompatible with Article 49 EC, as interpreted by the Court. Three specific complaints were set out in support of that allegation, viz.:

— the requirement of prior authorisation for reimbursement of certain non-hospital treatment provided in another Member State;

— the lack of any provision requiring acknowledgment of receipt to be sent to persons seeking prior authorisation of payment for hospital treatment given in another Member State;

— the lack of any provision enabling a person insured under the French system to receive an additional reimbursement in the circumstances laid down in paragraph 53 of *Vanbraekel and Others*.

11 Paragraph 53 of that judgment states:

'…

Article [49 EC] is to be interpreted as meaning that, if the reimbursement of costs incurred on hospital services provided in a Member State of stay, calculated under the rules in force in that State, is less than the amount which application of the legislation in force in the Member State of registration would afford to a person receiving hospital treatment in that State, additional reimbursement covering that difference must be granted to the insured person by the competent institution.'

12 By letter of 1 March 2007, the French Republic answered that letter of formal notice.

13 With regard to the first complaint, that Member State made known its intention to amend Article R. 332-4 of the Social Security Code to the effect demanded by the Commission and, pending that amendment, to issue a circular designed to ensure compliance with the requirements imposed by European Union law.

14 The French Republic challenged the substance of the second complaint, arguing that the French social security bodies are bound, being administrative authorities to which the national legislation on the rights of citizens in their relations with the administration applies, to issue to applicants for prior authorisation for payment for treatment proposed in another Member State acknowledgement of receipt mentioning, in particular, the date of receipt of the request and the period at the end of which the latter may be deemed to have been approved.

15 With regard to the third complaint, the French Republic maintains that the circumstance alleged by the Commission was ascribable to uncertainty as to the precise implications of *Vanbraekel and Others*, which was to be discussed by the Member States in the Council of the European Union. Referring to Circular DSS/DACI/2003/286 of 16 June 2003 on the application of the rules for ensuring access to treatment for persons insured under a French social security scheme within the European Union and the European Economic Area ('the circular of 16 June 2003'), that Member State added, however, that it was in no way its intention to conceal from those insured persons the existence of the right to additional reimbursement laid down in that judgment. Furthermore, it stressed that French administrative authorities afforded that judgment a broad meaning, in accordance with the case-law of the Cour de cassation.

16 In the light of that reply, the Commission sent to the French Republic a reasoned opinion on 23 October 2007 in which it stated, first, that it withdrew the second complaint set out in its letter of formal notice and, secondly, that it maintained its two other complaints and invited that Member State to take the measures necessary to comply with that reasoned opinion within a period of two months from its receipt.

17 In its answer to that reasoned opinion, dated 13 December 2007, the French Republic mentioned the forthcoming adoption of a decree intended to adapt Article R. 332-4 of the Social Security Code to the requirements of European Union law and to add to Articles R. 332-2 to R. 322-6 of that code with regard to the right to an additional

reimbursement provided for by *Vanbraekel*. It stated also that a circular to replace that of 19 May 2005 was in the process of finalisation.

18 In response to a reminder sent to it by the Commission on 10 June 2008, the French Republic communicated to the latter the circular of 21 July 2008. In addition, it mentioned various technical difficulties delaying the definitive adoption of the reform of the Social Security Code announced in its reply to the reasoned opinion.

19 Being dissatisfied with those explanations, the Commission decided to bring this action.

The action

The first head of claim, concerning the requirement of prior authorisation in respect of responsibility for payment for non-hospital treatment proposed in another Member State and requiring the use of major medical equipment

Arguments of the parties

20 The Commission argues that the requirement of prior authorisation for the purpose of responsibility for payment by the competent institution for treatment available at a general practitioner's surgery in another Member State and requiring the use of major medical equipment constitutes a restriction of the freedom to provide services.

21 It argues that, while it is true that planning objectives may justify such a requirement for the purpose of social cover for hospital treatment proposed in another Member State, that requirement is not, by contrast, justified in the sphere of non-hospital treatment, as held by the Court in Case C-158/96 *Kohll* [1998] ECR I-1931 and Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509.

22 Taking the view, in the light of paragraph 75 of *Müller-Fauré and van Riet*, that the characteristic feature of hospital treatment is that it cannot be offered except within a hospital setting, the Commission maintains that, so far as treatment requiring the use of major medical equipment available outside hospital infrastructures is concerned, there is no objective justification for maintaining a requirement of prior authorisation.

23 It adds that several circumstances, such as the application of limitations of cover and of conditions for the grant of social security benefits in force in the Member State of affiliation, linguistic and geographic factors, the lack of information about the nature of the treatment available in the other Member States or yet the living expenses inherent in staying in another Member State for medical purposes, permit the inference that to do away with the requirement of prior authorisation in the sphere of treatment involving the use of major medical equipment would not lead to a huge exodus of insured persons from the French system to other Member States and would not endanger the financial balance of the national social security system.

24 The French Republic, supported by the Kingdom of Spain, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland, challenges the merits of that first head of claim.

25 Those Member States argue that the Court's case-law allowing, for the sake of overall planning objectives, an authorisation decision before the competent institution may become liable to pay for hospital treatment given in another Member State (see *Müller-Fauré and van Riet*, paragraphs 67 and 77 to 80, and Case C-372/04 *Watts* [2006] ECR I-4325, paragraphs 104 and 108 to 111) can be transposed to the context of medical treatment calling for the use of major medical equipment outside hospital infrastructures, having regard to the very high costs of that equipment and to its impact on the budget of social security systems.

Findings of the Court

26 A preliminary point to note is that under Article R. 332-4 of the Social Security Code the prior authorisation requirement does not apply in the case known as 'unforeseen treatment', that is to say, treatment the need for which arises while the insured person is temporarily staying in another Member State. As is apparent from the Commission's pleadings, the first head of claim is thus confined to the case of what is known as 'planned' treatment, that is to say, treatment that the insured person intends to obtain in another Member State.

27 It is moreover to be stressed that that head of claim does not relate to any alleged failure to comply with Article 22(1)(c) of Regulation No 1408/71, under which the competent institution is, except in special situations relating, in particular, to the insured person's state of health or to the urgency of the treatment needed (see, to that effect, Case C-173/09 *Elchinov* [2010] ECR I-8889, paragraphs 45 and 51), entitled to make subject to prior authorisation responsibility for the payment, on its own account, for treatment proposed in another Member State, by the institution of the Member State of stay depending on the rules governing cover in that latter Member State.

28 The first head of claim, based on Article 49 EC, seeks, therefore, to allege that it is not compatible with that article to require prior authorisation for the purpose of responsibility for payment by the competent institution, in accordance with the rules governing cover in force in the Member State of affiliation, for treatment planned in a non-hospital setting in another Member State and involving the use of major medical equipment.

29 Those preliminary points having been made, it is to be emphasised that, in the absence of harmonisation at European Union level, it is for the legislation of each Member State to determine, in particular, the conditions for the grant of social security benefits covering treatment such as that concerned by the first head of claim. The fact remains, nevertheless, that when exercising that power the Member States must comply with European Union law, in particular, with the provisions on freedom to provide services (see, to that effect, Case C-211/08 *Commission* v *Spain* [2010] ECR I-5267, paragraph 53 and the case-law cited).

30 According to settled case-law, medical services supplied for consideration fall within the scope of those provisions, there being no need to distinguish between care provided in a hospital environment and care provided outside such an environment (see, in particular, Case C-8/02 *Leichtle* [2004] ECR I-2641, paragraph 28; *Watts*, paragraph 86; and Case C-444/05 *Stamatelaki* [2007] ECR I-3185, paragraph 19).

31 It has also repeatedly been held that the freedom to provide services includes the freedom for the recipients of services, including persons in need of medical treatment, to go to another Member State in order to receive those services there without being hampered by restrictions (see, in particular, to that effect, *Watts*, paragraph 87, and *Commission* v *Spain*, paragraph 49).

32 In the circumstances of the case, the prior authorisation to which the national legislation makes subject responsibility for payment by the competent institution, in accordance with the rules governing cover in force in the Member State to which it belongs, for treatment planned in another Member State and involving the use of major medical equipment outside hospital infrastructures is capable of deterring, or even preventing, persons insured under the French system from applying to providers of medical services established in such another Member State in order to obtain the treatment in question. It constitutes, therefore, for both the insured persons and the providers of those services, a restriction of the freedom to provide services (see, to that effect, *Müller-Fauré and van Riet*, paragraphs 44 and 103, and *Watts*, paragraph 98).

33 With regard to objective justification of such a restriction, it is to be borne in mind that the Court has on several occasions held that planning requirements relating, on the one hand, to the object of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the Member State concerned and, on the other, to the wish to control costs and avoid, so far as possible, any waste of financial, technical and human resources may justify the requirement of prior authorisation for financial responsibility on the part of the competent institution for treatment proposed in another Member State (see, to that effect, Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraphs 76 to 81; *Müller-Fauré and van Riet*, paragraphs 76 to 81, and *Watts*, paragraphs 108 to 110).

34 Such considerations, expressed in respect of medical services provided in a hospital setting, can be reproduced with regard to medical services involving the use of major medical equipment, even if those services, like those at issue in the Commission's first head of claim, are supplied outside such a setting.

35 In this connection, it is true that in paragraph 75 of *Müller-Fauré and van Riet*, after emphasising how difficult it is to distinguish 'hospital services' from 'non-hospital services', the Court pointed out that services provided in a hospital environment but that could also be 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.

36 Contrary to the position defended by the Commission, it cannot, however, be deduced from that passage in that judgment that the fact that treatment involving the use of major medical equipment may be provided outside a hospital setting renders considerations relating to planning requirements quite irrelevant.

37 Regardless of the setting, hospital or otherwise, in which it is intended to be installed and used, it must be possible for the major medical equipment exhaustively listed in Article R. 6122-26 of the Public Health Code to be the subject of planning policy, such as that defined by the national legislation at issue, with particular regard to quantity and geographical distribution, in order to help ensure throughout national territory a rationalised, stable, balanced and accessible supply of up-to-date treatment, and also to avoid, so far as possible, any waste of financial, technical and human resources.

38 Such waste would be all the more damaging because the conditions for the installation, operation and use of the five types of equipment exhaustively listed in Article R. 6122-26 of the Public Health Code are especially onerous, while the budgetary resources which the Member States are able to make available for up-to-date treatment and, in particular, the subsidising of such equipment, are not unlimited, whatever the mode of funding applied (see, by analogy, with regard to medicinal products, Case C-531/06 *Commission* v *Italy* [2009] ECR I-4103, paragraph 57, and Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, paragraph 33).

39 Without being contradicted by the Commission, the French Republic and the United Kingdom, taking as an example positron emission tomography, used in the detection and treatment of cancer, have emphasised that that equipment represents costs of hundreds of thousands, even millions, of euro, in both its purchase and in its installation and use.

40 If persons insured under the French system could, freely and in any circumstances, obtain at the expense of the competent institution, from service providers established in other Member States, treatment involving the use of major medical equipment corresponding to that listed exhaustively in the Public Health Code, the planning endeavours of the national authorities and the financial balance of the supply of up-to-date treatment would as a result be jeopardised.

41 That possibility could lead to under-use of the major medical equipment installed in the Member State of affiliation and subsidised by it or yet to a disproportionate burden on that Member State's social security budget.

42 Having regard to those dangers to the organisation of public health policy and to the financial balance of the social security system, the requirement, except in special circumstances such as those referred to at paragraph 27 above, of prior authorisation by the competent institution in order for the latter to be responsible for payment, according to the rules governing cover in force in the Member State to which it belongs, for treatment planned in a non-hospital setting in another Member State and involving the use of major medical equipment mentioned in Article R. 6122-26 of the Public Health Code, would appear, as European Union law now stands, to be a justified restriction (see, by analogy, *Müller-Fauré and van Riet*, paragraph 81).

43 It is to be borne in mind also that, according to settled case-law, a prior authorisation scheme must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily. Such an authorisation system must, furthermore, 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 it must, in addition, be possible for refusals to grant authorisation to be challenged in judicial proceedings (see, to that effect, *Smits and Peerbooms*, paragraph 90; *Müller-Fauré and van Riet*, paragraph 85; and *Watts*, paragraph 116).

44 In this case, the Commission has put forward no specific criticism with regard to the procedural and substantive rules regulating the prior authorisation measure at issue, in particular to the exhaustive conditions on which that authorisation may, pursuant to Article R. 332-4 of the Social Security Code, be refused.

45 In those circumstances, the allegation in the first head of claim of failure to fulfil obligations under Article 49 EC is not well founded. That head must, therefore, be rejected.

The second head of claim, relating to the lack of any provision of French law providing for persons insured under the French system to be entitled to an additional reimbursement on the conditions laid down in paragraph 53 of Vanbraekel and Others

Arguments of the parties

46 The Commission maintains that, given the lack in French law of any provision making possible an additional reimbursement on the conditions laid down in paragraph 53 of

Vanbraekel and Others, persons insured under the French system cannot be entitled to such reimbursement. The solution flowing from that judgment cannot, therefore, be considered to have been given effect in French law.

47 The Commission goes on to say that mere administrative practices cannot be regarded as constituting the proper fulfilment of obligations under the EC Treaty. Moreover, the circulars of 16 June 2003, 19 May 2005 and 21 July 2008, addressed to the French social security bodies by the Ministry of Health, are evidence of ambiguity existing in the French legislation apt to give rise to misunderstanding and, consequently, to make it impossible for persons insured under the French system actually to exercise the right stemming from *Vanbraekel and Others*.

48 The Commission maintains also that the cases, mentioned by the French Republic, of insured persons being able to receive additional reimbursement in accordance with that judgment, or being about to receive such reimbursement, are not enough to establish actual observance of the rights of the persons insured under the French system as a whole.

49 The French Republic, supported at the hearing by the United Kingdom, argues that, having regard to the direct effect of Article 49 EC and to the national courts' obligation to protect the rights conferred on individuals by that article, acquisition under that article of entitlement to an additional reimbursement on the conditions set out in paragraph 53 of *Vanbraekel and Others* does not call for any specific implementing measure in domestic legislation. It adds that Article R. 332-3 of the Social Security Code covers, in particular, the hypothesis mentioned in paragraph 53. The solution laid down in that judgment has, moreover, actually been applied by the Cour de cassation in a judgment of 28 March 2002.

50 The French Republic asserts that, in those circumstances, a circular intended to remind the competent bodies of that solution is enough to ensure its implementation. The circulars adopted to that end were, furthermore, followed by a practical effect, as shown by the establishment in the course of the year 2006 of a Centre national des soins à l'étranger (national centre for healthcare abroad) responsible for managing, in particular, in accordance with that solution, applications for reimbursement in respect of treatment provided in another Member State or in a non-member country to persons insured under the French system.

Findings of the Court

51 In paragraph 53 of *Vanbraekel and Others*, the Court, in connection with planned treatment provided in another Member State for which the authorisation necessary if the competent institution were to be responsible for its payment had been improperly refused, interpreted Article 49 EC as meaning that, if the reimbursement of costs incurred on hospital services provided in the Member State of stay, calculated under the rules in force in that State, is less than the amount which application of the legislation in force in the Member State of affiliation would afford to a person receiving hospital treatment in that State, additional reimbursement covering that difference must be granted to the insured person by that institution.

52 As the Court later made clear, the insured person's right to such additional reimbursement falls within the limits of the costs actually incurred in the Member State of stay (see, to that effect, *Watts*, paragraphs 131 and 143).

53 It is to be emphasised here that Article 49 EC, as interpreted in paragraph 53 of *Vanbraekel and Others*, being a directly applicable provision of the Treaty, binds all the authorities of the Member States, including administrative and judicial, which are, therefore, obliged to observe it, and there is no need to adopt domestic implementing

measures (see, to that effect, Case 168/85 *Commission* v *Italy* [1986] ECR 2945, paragraph 11 and Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, paragraphs 67 and 68).

54 The right of individuals to rely on that article, as interpreted by the Court, before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of that provision (see, to that effect, Case 72/85 *Commission* v *Netherlands* [1986] ECR 1219, paragraph 20; Case 168/85 *Commission* v *Italy*, paragraph 11; and Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraph 20).

55 It is necessary, in addition, that the legal order of the Member State in question should not give rise to an ambiguous situation that might keep the individuals concerned in a state of uncertainty as to the possibility of relying on that provision of European Union law with direct effect (see, to that effect, Case 168/85 *Commission* v *Italy*, paragraph 11; Case C-120/88 *Commission* v *Italy* [1991] ECR I-621, paragraph 9; and Case C-119/89 *Commission* v *Spain* [1991] ECR I-641, paragraph 8).

56 In that regard, it is, however, to be borne in mind that, in proceedings under Article 226 EC 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 C-160/08 *Commission* v *Germany* [2010] ECR I-3713, paragraph 116 and the case-law cited).

57 In this case, it is to be noted, first, that Article R. 332-3 of the Social Security Code lays down, as is confirmed by the circular of 19 May 2005, the general principle that the competent French institution is to be responsible for the costs of treatment provided to a person insured under the French system in another Member State or in a

State party to the Agreement on the European Economic Area 'on the same conditions as if the treatment had been received in France', and within the limits of the costs actually incurred by the person insured.

58 Its terms being so general, that provision covers entitlement to an additional reimbursement to be paid by the competent French institution in the situation set out in paragraph 53 of *Vanbraekel and Others*, of which, moreover, the Commission has taken formal note during the procedure before the Court.

59 That finding is not shaken by the 'intended amendments to Articles R. 332-4 to R. 332-6' of the Social Security Code referred to by Article R. 332-3 of that code, which relate to the requirement of prior authorisation for responsibility for payment for certain kinds of treatment provided in another Member State, to the opportunity offered to French social security bodies to conclude with healthcare establishments in another Member State or in a State party to the Agreement on the European Economic Area agreements defining the conditions of the stay of persons insured under the French system in such establishments and the detailed rules for reimbursement in respect of the treatment provided therein, and to the conditions for reimbursement of the costs of analyses carried out by a medical biology laboratory established in another Member State or in a State party to the Agreement on the European Economic Area, respectively.

60 As the French Republic observed at the hearing, the Commission has not, in any event, identified any provision of French law that might impede the application of the solution laid down in paragraph 53 of *Vanbraekel and Others*.

61 Secondly, it is to be noted that the Commission has not, in the present case, mentioned any decisions made by national courts that led to denying the right stemming from Article 49 EC for persons insured under the French system in the situation referred to in paragraph 53 of *Vanbraekel and Others*.

62 On the contrary, the applicant institution has taken note, during the procedure before the Court, of the judgment of the Cour de cassation of 28 March 2002, in which that court held that 'it follows from Article 49 [EC], as interpreted by the Court of Justice [in *Vanbraekel and Others*], that the fund in the place of affiliation is obliged to take responsibility for medical costs incurred by its insured in another Member State according to the tariff applicable to the same treatment provided in France, with the result that if the reimbursement made in accordance with the rules in force in the State of stay is less than the amount which would have resulted from application of the legislation in force in the Member State of affiliation, additional reimbursement covering that difference must be granted to the insured person by the competent institution'.

63 Thirdly, the Commission has not established the existence of any administrative practice whatsoever that deprives persons insured under the French system of the right to additional reimbursement in the situation referred to in paragraph 53 of *Vanbraekel and Others*.

64 On the contrary, in its reasoned opinion it noted the statements in the French Republic's answer to the letter of formal notice to the effect that, in accordance with the judgment of the Cour de cassation of 28 March 2002 mentioned in paragraph 62 above, French social security bodies give broad application to the solution laid down in *Vanbraekel and Others*.

65 With regard to the circulars of 16 June 2003, 19 May 2005 and 21 July 2008 issued by the competent ministerial authorities, their object was not, contrary to the Commission's argument before the Court, to clarify an allegedly ambiguous situation. Nor were they intended to put an end to allegedly divergent practices followed by the French social security bodies, some of them leading to non-application of the solution laid down in *Vanbraekel and Others*.

66 As the Commission itself stated in its reasoned opinion, the circular of 16 June 2003 included, for the bodies concerned, a simple description of the solution provided by that judgment. The purpose of the circular of 19 May 2005, as is apparent from the passages from it in the file before the Court, was to explain the full significance of Articles R. 332-3 to R. 332-6 of the Social Security Code, introduced by Decree No 2005-386. For its part, the circular of 21 July 2008 contains the statement that that solution is 'henceforth to be applied by the funds' and calls on the latter to 'continue to do what is necessary in order to give effect to the differential additional amount', despite the real difficulties the funds had encountered in calculating that additional amount, on account, in particular, of the lack of any means of comparing the costs of the same treatment in France and in the other Member States, and of the slowness in cooperating of the national institutions concerned.

67 In the circumstances, while it is true that, in accordance with the settled case-law of the Court recalled by the Commission, mere administrative practices, by their nature alterable at will by the authorities, cannot, in the context of national legislation incompatible with European Union law, be regarded as constituting proper fulfilment of Treaty obligations (see Case C-197/96 *Commission* v *France* [1997] ECR I-1489, paragraph 14; Case C-358/98 *Commission* v *Italy* [2000] ECR I-1255, paragraph 17; and Case C-33/03 *Commission* v *United Kingdom* [2005] ECR I-1865, paragraph 25), the fact nevertheless remains that, in the circumstances of this case, the lack of any evidence of administrative practices contrary to European Union law bears out the finding that the French legislation, in particular Article R. 332-3 of the Social Security Code, does not give rise to a situation that deprives persons insured under the

French system of the rights conferred by Article 49 EC, as interpreted in *Vanbraekel and Others*.

68 Fourthly, the Commission has not, in the instant case, set out any complaint concerning any alleged refusal by a French social security body to allow an insured person the right to an additional reimbursement in the situation referred to in paragraph 53 of *Vanbraekel and Others*. On the contrary, during the procedure before the Court the French Republic supplied several examples of cases of persons insured under the French system finding themselves in the situation referred to in paragraph 53 of *Vanbraekel and Others* who had been, or were about to be, able to obtain an additional reimbursement in accordance with that judgment.

69 It follows from the foregoing considerations that the Commission has not established that the French legal order brings about a situation capable of depriving persons insured under the French system of the right to an additional reimbursement in the situation referred to in paragraph 53 of *Vanbraekel and Others*.

70 The second head of claim must, therefore, be rejected.

71 It follows that the action must be dismissed in its entirety.

Costs

72 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 French Republic 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. Under the first paragraph of Article 69(4) of those Rules, the Kingdom of Spain, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland, which have intervened in these proceedings, are to 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 Spain, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

[Signatures]