Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

30 April 2019 *

(Civil service — Social security — JSIS — Reimbursement of medical expenses — Agreement concluded, in particular, between the European Union, Luxembourg and the Entente des hôpitaux luxembourgeois on the scales of fees for hospital care received by JSIS members — Plea of illegality — Principle of non-discrimination on grounds of nationality — First paragraph of Article 18 TFEU — Articles 20 and 21 of the Charter of Fundamental Rights — Article 39 of the Joint Rules on sickness insurance for officials)

In Case T-737/17,

Francis Wattiau, former official of the European Parliament, residing in Bridel (Luxembourg), represented by S. Orlandi and T. Martin, lawyers,

applicant,

supported by

Association des seniors de la fonction publique européenne (SFPE), established in Brussels (Belgium), represented by Orlandi and Martin, lawyers,

intervener,

v

European Parliament, represented by J. van Pottelberge and M. Rantala, acting as Agents,

defendant,

APPLICATION under Article 270 TFEU seeking annulment, first, of the decision of the Luxembourg Settlements Office for the Joint Sickness Insurance Scheme of the European Union, as evidenced by payment slip No 244 of 25 January 2017, making the applicant liable for the sum of EUR 843.01 and, second, of the decision of the Secretary-General of the Parliament, as the appointing authority, of 2 August 2017, confirming that decision,

THE GENERAL COURT (Ninth Chamber),

composed of S. Gervasoni, President, L. Madise and R. da Silva Passos (Rapporteur), Judges,

Registrar: E. Coulon,

gives the following

* Language of the case: French.

Judgment

Legal framework

1 Article 72 of the Staff Regulations of Officials of the European Union ('the Staff Regulations') provides:

'1. An official, his spouse, where such spouse is not eligible for benefits of the same nature and of the same level by virtue of any other legal provision or regulations, his children and other dependants within the meaning of Article 2 of Annex VII [of the Staff Regulations] are insured against sickness up to 80% of the expenditure incurred subject to rules drawn up by agreement between the appointing authorities of the institutions of the Union after consulting the Staff Regulations Committee. This rate shall be increased to 85% for the following services: consultations and visits, surgical operations, hospitalization, pharmaceutical products, radiology, analyses, laboratory tests and prostheses on medical prescription with the exception of dental prostheses. It shall be increased to 100% in cases of tuberculosis, poliomyelitis, cancer, mental illness and other illnesses recognised by the appointing authority as of comparable seriousness, and for early detection screening and in cases of confinement. However, reimbursement at 100% shall not apply in the case of occupational disease or accident having given rise to the application of Article 73 [of the Staff Regulations].

…

2. An official who has remained in the service of the Union until pensionable age or who is in receipt of an invalidity allowance shall be entitled to the benefits provided for in paragraph 1 after he has left the service. The amount of contribution shall be calculated by reference to the amount of pension or allowance.

…'

2 For the purposes of defining the conditions for application of Article 72 of the Staff Regulations, the institutions adopted Joint Rules on sickness insurance for officials of the European Union ('the Joint Rules').

3 Article 1 of the Joint Rules establishes a Joint Sickness Insurance Scheme of the European Union ('the JSIS').

4 Paragraph 3 of Article 2 of the Joint Rules, entitled 'Membership', provides that:

'The following shall be members of this [JSIS]:

– former officials and temporary staff in receipt of a retirement pension

…'

5 Article 39(2)(e) of the Joint Rules provides that the Central Office shall, 'in liaison with the Settlements Offices, endeavour to negotiate, wherever possible, with the representatives of the medical profession and/or the competent authorities, associations and establishments, agreements specifying the rates for both medical treatment and hospitalisation applicable to persons covered by this Scheme, account being taken of local conditions and, where appropriate, the scales already in force'.

6 On 18 November 1996, the European Communities and the European Investment Bank (EIB), represented by the Director-General for Personnel and Administration at the Commission of the European Communities, concluded the agreement on the scales of fees for hospital care received by

members of the JSIS and of the EIB's sickness insurance fund ('the 1996 Agreement') with the Entente des hôpitaux luxembourgeois (Luxembourg Hospitals Group) and the Grand Duchy of Luxembourg. That agreement was amended on 26 October 1999.

7 The Commission concluded that agreement on the basis of Article 39(2)(e) of the Joint Rules.

8 In accordance with its preamble, the 1996 Agreement provides for a charging scheme for hospital services provided in Luxembourg. Paragraph 2 of that preamble provides, inter alia, that fees are to be established on the basis of net cost, taking into account the units of work defined in Luxembourg domestic legislation, as established by the agreement concluded between the Luxembourg Hospitals Group and the Union des caisses de maladie luxembourgeoise (Luxembourg Association of Sickness Insurance Funds, UCM) (now the agreement between the Caisse nationale de santé luxembourgeoise (Luxembourg National Health Fund, CNS) and the Fédération des hôpitaux luxembourgeois (Federation of Luxembourg Hospitals, FHL) ('the CNS-FHL agreement').

9 Article 1 of the 1996 Agreement defines the persons covered by the agreement, stating that the charging scheme applies to all recipients of hospital care covered by the JSIS.

10 Article 2 of the 1996 Agreement sets out the terms of payment. In particular, the first subparagraph introduces the principle of third-party payment as regards all inpatient treatment, with no limits on the duration of the patient's stay. The second subparagraph lays down the procedure for the submission of invoices to the JSIS by hospitals.

11 Article 3 of the 1996 Agreement lays down the fee structure, setting out, in the first paragraph, that treatment is to be invoiced based on the units of work generated, in accordance with the provisions of the CNS-FHL agreement. Under the second paragraph of that article, the annual fees for those units of work are based on the budgets negotiated between the various hospitals and the UCM (now the CNS) and are then increased by a flat correction coefficient of 15%.

12 Article 4 of the 1996 Agreement provides for the creation of a technical committee and Article 5 for the establishment of a fee structure and for the communication of those fees.

13 Article 6 of the 1996 Agreement provides that it entered into force on 1 January 1996. It is stated that the agreement is tacitly renewed by the parties for 1 year at each renewal, if none of the parties raises any objection to it by registered letter 2 months before the deadline of 31 December.

Background to the dispute

14 The applicant, Mr Francis Wattiau, of Belgian nationality, former official of the European Parliament and currently retired, is a member of the JSIS.

15 Between 1 and 11 March 2016, he had nine oxygen therapy sessions in a hyperbaric chamber in the Emile Mayrisch hospital centre ('the CHEM') in Esch-sur-Alzette (Luxembourg).

16 On 17 March 2016, the medical practice at the CHEM sent the applicant a first invoice for EUR 815.40 for the nine sessions. On 30 May 2016, the CHEM sent him a second invoice for EUR 5 620.10 for the nine sessions at EUR 568.90 per session, plus EUR 500 for two audiometric tests.

17 On 13 June 2016, the applicant wrote to the CHEM to dispute the amount of the second invoice.

18 By email of the same date, sent to the head of the JSIS Settlements Office in Luxembourg ('the Settlements Office'), the applicant asked the Settlements Office to contact the CHEM to 'reject the duplication of invoicing', which he found to be a 'highly abnormal' practice.

19 By emails of 7 and 20 July 2016, the Office for Administration and Payment of individual entitlements (Paymaster Office — PMO) replied, in essence, that the second invoice issued by the CHEM complied with the 1996 Agreement.

20 By letter of 28 November 2016, the CHEM's legal department replied to the applicant's letter of 13 June 2016, stating that the invoices in question had been issued on the basis of a scale of fees revised annually in accordance with the JSIS, namely the '2016 JSIS Fees', which is applicable to officials of the EU institutions.

21 On 16 December 2016, the applicant sent a letter to the administrative and financial director of the CHEM, complaining of the difference in treatment between him and a CNS member. Moreover, he stated that third-party payment introduced by the 1996 Agreement meant that the excessively high fees accepted by the JSIS should be invoiced directly to that scheme, and that the patient should not have to pay the full amount at issue. Finally, he stated that the JSIS was unable to give any reason, in this case, for the invoice amounts being so high. He therefore requested the administrative and financial director of the CHEM to contact the JSIS in order to reintroduce third-party payment and to invoice the JSIS for the overcharge on the invoices at issue.

22 By email of 11 January 2017, the PMO stated that the Settlements Office could, with the applicant's approval, agree to be billed directly for 85% of the amount of the invoices at issue. Specifically, that meant that the Settlements Office would, initially, be billed directly for the whole amount — EUR 5 620.10 — of the second invoice issued by the CHEM.

23 By email of 12 January 2017, the applicant accepted that proposal, while also stating that he disputed the merits of the CHEM's charging practices.

24 By email of 17 January 2017, the Luxembourg Settlements Office informed the applicant that the 1996 Agreement had, in this case, been properly applied and that 15% of the total amount of the invoices at issue remained payable by him. By letter of the same date, the head of the Settlements Office announced that the applicant had been granted direct billing in the amount of EUR 5 620.10 for the healthcare services at issue, and that the applicant would receive a statement showing the portion of costs that remained payable by him.

25 By email of 20 January 2017, the applicant confirmed to the Settlements Office that he intended to challenge the fact that he was being made liable for 15% of the total amount of the invoices at issue.

26 On 25 January 2017, the applicant received statement No 244 by which the Settlements Office made him liable for 15% — EUR 843.01 — of the EUR 5 620.10 total of the second invoice issued by the CHEM ('the contested decision').

27 By letter of 17 April 2017 the applicant submitted a complaint, under Article 90(2) of the Staff Regulations, against the contested decision seeking reimbursement in the amount of EUR 843.01. In support of that complaint, the applicant claimed that the invoices issued by the CHEM had overcharged for the services at issue, since the rate invoiced was 8.37 times higher than that which would have been charged to a person covered by the national health system. He claimed that there had been an infringement of EU law and of the rules stemming from the case-law.

28 By decision of 2 August 2017, the Secretary-General of the Parliament, as appointing authority, rejected the applicant's complaint as unfounded ('the decision rejecting the complaint').

Procedure and forms of order sought

29 By application lodged at the Registry of the General Court on 7 November 2017, the applicant brought the present action.

30 On 30 January 2018, the Parliament lodged its defence.

31 By letter from the Registry of 22 February 2018, the General Court informed the parties of the time limit for the applicant to submit a reply. By letter lodged at the Registry of the General Court on 4 April 2018, the applicant informed the General Court that he waived the right to submit a reply.

32 By document lodged at the Registry of the General Court on 19 March 2018, the Association des seniors de la fonction publique européenne (SFPE) sought leave to intervene in the present proceedings in support of the form of order sought by the applicant.

33 By order of 5 June 2018, the President of the Ninth Chamber of the General Court granted that leave to intervene. No application for confidential treatment of procedural documents was submitted.

34 The intervener lodged its statement in intervention on 17 July 2018. By letter of 6 August 2018, the Parliament stated that 'it [reserved] the right to respond to all the substantive arguments of the applicant and the intervener in a rejoinder'. By letter of 7 August 2018, the applicant submitted his observations on that statement. By letter of 22 August 2018, the Parliament informed the General Court that it was not requesting a hearing.

35 By letters of the Registry of the General Court of 27 September 2018, the Grand Duchy of Luxembourg and the Commission were asked by the General Court, under the second paragraph of Article 24 of the Statute of the Court of Justice of the European Union and Article 89(3)(c) of the Rules of Procedure of the General Court, to provide written answers to the questions regarding the 1996 Agreement and the hospital fees established by the Luxembourg authorities.

36 On 31 October 2018, the Grand Duchy of Luxembourg and the Commission answered those questions.

37 By letters of 7 and 17 December 2018, the Parliament and the intervener informed the General Court that they did not wish to submit observations on those answers. By letter of 17 December 2018, the applicant submitted his observations on the answers provided by the Grand Duchy of Luxembourg and the Commission.

38 The General Court (Ninth Chamber) decided, pursuant to Article 106(3) of the Rules of Procedure, to rule on the action without an oral part of the procedure.

39 The applicant, supported by the intervener, claims that the Court should:

– annul the contested decision and, in so far as necessary, the decision rejecting the complaint;

– order the Parliament to pay the costs.

40 The Parliament contends that the Court should:

– dismiss the action as unfounded;

– order the applicant to pay the costs.

Law

Preliminary observations

41 As regards the subject matter of the action, it must be noted that the contested decision constitutes a statement in which the Settlements Office requests that the applicant reimburse EUR 843.01. That amount is equal to 15% of the amount of EUR 5 620.10 which appears on the second invoice, and which was directly billed to the JSIS. That second invoice for EUR 5 620.10 includes EUR 500 for the two audiometric tests and EUR 5 120.10 for nine oxygen therapy sessions at EUR 568.90 per session. It is apparent from the application that the applicant is disputing only the second invoice for EUR 5 620.10, directly billed to the JSIS, of which the JSIS requires the applicant to reimburse 15%.

First head of claim, inasmuch as it seeks annulment of the decision rejecting the complaint

42 According to settled case-law, a claim for annulment formally directed against the decision rejecting a complaint has the effect of bringing before the General Court the act against which the complaint was submitted, where that claim, as such, lacks any independent content (see judgment of 13 July 2018, *Curto* v *Parliament*, T-275/17, EU:T:2018:479, paragraph 63 and the case-law cited).

43 In the present case, given that the decision rejecting the complaint merely confirms the contested decision of the Settlements Office to charge the applicant EUR 843.01, it must be held that the claim for annulment of the decision rejecting the complaint lacks any independent content, and that there is therefore no need to rule on that claim specifically. However, when examining the legality of the contested decision, the statement of reasons for the decision rejecting the complaint should be taken into account, as it is deemed to cover the statement of reasons in the contested decision (see, to that effect, judgment of 9 December 2009, *Commission* v *Birkhoff*, T-377/08 P, EU:T:2009:485, paragraphs 58 and 59 and the case-law cited).

First head of claim, inasmuch as it seeks annulment of the contested decision

44 In support of the claim for annulment of the contested decision, the applicant raises a plea of illegality of the 1996 Agreement on two grounds. The first ground relates to the infringement of the principle of discrimination on grounds of nationality and the infringement of Articles 12 and 14 of Protocol No 7 on the privileges and immunities of the European Union (OJ 2010 C 83, p. 266, 'the Protocol'). The second ground relates to the infringement of the principle of sound financial management.

45 In support of the first ground, the applicant alleges infringement of the principle of non-discrimination on grounds of nationality. He submits that the 1996 Agreement allows healthcare service providers systematically to charge JSIS members higher fees than those applied to members of the national health insurance scheme, namely the Luxembourg National Health Fund (CNS), when both categories of members receive the same healthcare. Such a difference in treatment leads to discrimination on grounds of nationality, which is prohibited by Article 18 TFEU. The applicant also submits that, if the purpose of the 1996 Agreement is to compensate for the fact that JSIS members do not pay domestic taxes in Luxembourg, it is contrary to Articles 12 and 14 of the Protocol.

46 The Parliament states, at the outset, that the conclusion of the 1996 Agreement is based on Article 39(2)(e) of the Joint Rules. It follows from that provision that the Central Office of the JSIS, established by Article 1 of the Joint Rules and attached to the Commission, is responsible, in liaison with the Settlements Offices, for negotiating, wherever possible, with the representatives of the medical profession or the competent authorities, associations and establishments, agreements specifying the rates applicable to JSIS members. According to the Parliament, the Central Office must take into account local conditions and, where appropriate, the scales already in force, for both medical

treatment and hospitalisation, and must negotiate, as far as possible, with the Member States' primary schemes, general agreements aimed at simplifying the procedures applicable to members of the JSIS. Thus, in the present case, when it concluded the 1996 Agreement, the Commission exercised its discretion in order to be able, with the approval of the Luxembourg authorities, cap the fees charged by the latter.

47 In the first place, as regards the alleged difference in treatment between JSIS members and 'other Luxembourg residents', the Parliament considers that JSIS members and CNS members belong to two different social security categories and are not in comparable situations.

48 As regards the judgment of 3 October 2000, *Ferlini* (C-411/98, EU:C:2000:530), relied on by the applicant, the Parliament states that the facts which gave rise to that judgment took place prior to the conclusion of the 1996 Agreement. Accordingly, the Court's answer to the question referred for a preliminary ruling was that the application, on a unilateral basis, by a group of healthcare providers to EU officials of scales of fees for medical and hospital care which were higher than those applicable to residents affiliated to the national social security scheme constituted discrimination on grounds of nationality. However, in the present case, the fees at issue are not applied on a unilateral basis, but on the basis of an agreement negotiated between the Commission and the Luxembourg authorities, in accordance with Article 39 of the Joint Rules.

49 According to the Parliament, even if the increase in the fees at issue, which applies to healthcare services, constitutes discrimination prohibited by the TFEU, it is justified by a legitimate aim. Indeed, it is apparent from the note of the Commissioner for Budget and Human resources of 26 November 2015, that the conclusion of the 1996 Agreement made it possible to cap hospital fees for JSIS members, which prevented the 'current' fees from being increased further.

50 The applicant has therefore not adequately demonstrated that there has been an infringement of the principle of equal treatment.

51 In the second place, as regards the applicant's argument alleging infringement of Articles 12 and 14 of the Protocol and, in particular, his argument that the reason for the difference in the fees at issue is that JSIS members do not pay tax or contributions to the Luxembourg social security system, the Parliament states that the 1996 Agreement contains no such reasoning.

52 The Parliament also states that, admittedly, it is apparent from the note of the Commissioner for Budget and Human resources of 26 November 2015, that, to some extent, the basis for accepting the 1996 Agreement is that the higher fees constitute an equivalent to a public contribution to hospital funding on the part of the Luxembourg authorities. However, the Parliament points out that it is also apparent from that note that the possibility to cap fees was an equally important reason for concluding the 1996 Agreement. Thus, there is nothing to support the applicant's claim that the main purpose of the 1996 Agreement was to compensate for the absence of any contribution from JSIS members to the Luxembourg social security system.

53 Moreover, the Parliament considers that the circumstances of the case which gave rise to the judgment of 10 May 2017, *de Lobkowicz* (C-690/15, EU:C:2017:355), to which the applicant refers, are very different from those of the present case. It is clear from paragraph 48 of that judgment that the infringement of EU law arose from the fact that the real estate income of Mr de Lobkowicz, an EU official covered by the JSIS, was subject to certain levies and contributions which were allocated specifically and directly for the funding of certain branches of the French social security scheme, by which he was not covered. In the present case, given that the 1996 Agreement caps fees for FHL members, it would be inaccurate to compare it to such national legislation.

54 It follows that the infringement of Articles 12 and 14 of the Protocol has not been established by the applicant.

55 As a preliminary point, it should be noted that, under Article 277 TFEU, notwithstanding the expiry of the period laid down in Article 263 TFEU, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Courts of the European Union the inapplicability of that act.

56 It is settled case-law that a plea of illegality raised indirectly under Article 277 TFEU, when challenging in the main proceedings the legality of another measure, is admissible only if there is a link between the contested measure and the provision forming the subject matter of the plea. Since the purpose of Article 277 TFEU is not to enable a party to contest the applicability of any act of general application in support of any action whatsoever, the scope of a plea of illegality must be limited to what is necessary for the outcome of the proceedings (see judgment of 12 June 2015, *Health Food Manufacturers' Association and Others* v *Commission*, T-296/12, EU:T:2015:375, paragraph 170 and the case-law cited). It follows that the general measure claimed to be illegal must be applicable, directly or indirectly, to the issue with which the action is concerned and there must be a direct legal connection between the contested individual decision and the general measure in question (judgments of 15 March 2017, *Fernández González* v *Commission*, T-455/16 P, not published, EU:T:2017:169, paragraph 34, and of 22 November 2017, *von Blumenthal and Others* v *EIB*, T-558/16, not published, EU:T:2017:827, paragraph 71).

57 In that regard, it is settled case-law that Article 277 TFEU must be interpreted sufficiently broadly to enable effective judicial review of the legality of acts of general application adopted by the institutions in favour of persons excluded from direct actions against such acts (see, to that effect, judgments of 26 October 1993, *Reinarz* v *Commission*, T-6/92 and T-52/92, EU:T:1993:89, paragraph 56, and of 21 October 2010, *Agapiou Joséphidès* v *Commission and EACEA*, T-439/08, not published, EU:T:2010:442 paragraph 50). Thus, the scope of Article 277 TFEU must extend to acts of the institutions which were relevant to the adoption of the decision forming the subject matter of the action for annulment (judgments of 4 March 1998, *De Abreu* v *Court of Justice*, T-146/96, EU:T:1998:50, paragraph 27, and of 2 October 2001, *Martinez and Others* v *Parliament*, T-222/99, T-327/99 and T-329/99, EU:T:2001:242, paragraph 135), in the sense that that decision must essentially be based on them (judgment of 12 June 2015, *Health Food Manufacturers' Association and Others* v *Commission*, T-296/12, EU:T:2015:375, paragraph 172), even if such acts did not formally constitute the legal basis of that decision (judgments of 2 October 2001, *Martinez and Others* v *Parliament*, T-222/99, T-327/99 and T-329/99, EU:T:2001:242, paragraph 135; of 20 November 2007, *Ianniello* v *Commission*, T-308/04, EU:T:2007:347, paragraph 33, and of 2 October 2014, *Spraylat* v *ECHA*, T-177/12, EU:T:2014:849, paragraph 25).

58 In the present case, first, as regards the nature of the measure claimed to be illegal, it must be held that that measure was not adopted unilaterally by an institution of the European Union. The 1996 Agreement was concluded by the parties mentioned in paragraph 6 above and was not adopted by the Commission alone, representing the European Union and the EIB. However, the conclusion of the 1996 Agreement is provided for in Article 39(2)(e) of the Joint Rules, to which Article 72 of the Staff Regulations refers. The 1996 Agreement is intended to establish a charging scheme applicable to persons covered by the JSIS and by the EIB's sickness insurance fund. The purpose of the conclusion of the 1996 Agreement is therefore to implement, in the territory of the Grand Duchy of Luxembourg, the procedure for the levying of fees to cover the costs incurred as a result of illness, accident or maternity concerning persons covered by the JSIS and by the EIB's sickness insurance fund, of which the Union must guarantee reimbursement in accordance with the principle of social insurance cover laid down in Article 72 of the Staff Regulations. Thus, concluded in that context, the 1996 Agreement contributes to the implementation of that principle. To that end, the 1996 Agreement gives concrete form to an agreement between the EU institutions, the Grand Duchy of Luxembourg and an association representing the hospitals of that State, relating to the reimbursement of the abovementioned costs incurred as a result of illness, accident or maternity. It may therefore be

considered that, to that extent, the 1996 Agreement is comparable to an act of an EU institution for the purposes of Article 277 TFEU (see, to that effect and by analogy, judgment of 13 June 2017, *Florescu and Others*, C-258/14, EU:C:2017:448, paragraphs 29 to 36).

59 Moreover, as regards the question whether the 1996 Agreement constitutes an act of general application, it is sufficient to note that the provisions of the 1996 Agreement which govern the procedure for the charging of fees by Luxembourg healthcare providers to JSIS members are general provisions, since they apply to objectively determined situations and produce legal effects with respect to categories of persons envisaged generally and in the abstract (see, by analogy, judgment of 21 October 2010, *Agapiou Joséphidès* v *Commission and EACEA*, T-439/08, not published, EU:T:2010:442, paragraph 53). It follows that the applicant may invoke the inapplicability of the 1996 Agreement on the basis of Article 277 TFEU.

60 Secondly, as regards the existence of a direct legal connection between the contested individual decision and the 1996 Agreement, which is the general measure in question, it is necessary to determine the legal basis upon which the Settlements Office adopted the contested decision. In that regard, by the contested decision, the Settlements Office requires the reimbursement of 15% of the amount of the second invoice, which was for a total of EUR 5 620.10. As is apparent from paragraph 41 above, the applicant disputes only the second invoice for EUR 5 620.10 which was directly billed to the JSIS. That invoice includes EUR 500 for the audiometric tests and EUR 5 120.10 for nine oxygen therapy sessions at a rate of EUR 568.90 per session. As regards, in particular, the rate of EUR 568.90 per session, it is clear from the file that that rate is set out in 'JSIS Fees 2016', the scale of fees established by the CNS. That scale of fees is revised annually and was adopted on the basis of the 1996 Agreement. It should therefore be considered that there is a direct legal connection between the amount of EUR 5 120.10 stated in the contested decision and the scale of fees established in accordance with the 1996 Agreement.

61 It follows from the foregoing that the plea of illegality raised by the applicant is admissible.

62 Moreover, as regards the question of which provision of the Treaty should apply to the alleged discrimination, it should be borne in mind that the principle of equal treatment is a general principle of EU law, enshrined in Article 20 of the Charter of Fundamental Rights of the European Union ('the Charter'), of which the principle of non-discrimination on grounds of nationality laid down in Article 21(2) of the Charter is a particular expression (see, by analogy, judgment of 5 July 2017, *Fries*, C-190/16, EU:C:2017:513, paragraph 29). The EU institutions are required to comply with that principle as a superior rule of EU law protecting individuals (judgments of 7 October 2015, *Accorinti and Others* v *ECB*, T-79/13, EU:T:2015:756 paragraph 87, and of 24 January 2017, *Nausicaa Anadyomène and Banque d'escompte* v *ECB*, T-749/15, not published, EU:T:2017:21, paragraph 110).

63 According to the explanations on the Charter, Article 21(2) of the Charter 'corresponds to the first paragraph of Article 18 [TFEU] and must be applied in compliance with that [a]rticle'. Moreover, according to Article 52(2) of the Charter, the rights recognised by the Charter for which provision is made in the Treaties are to be exercised under the conditions and within the limits defined by those treaties. It follows that Article 21(2) of the Charter must be construed as having the same scope as the first paragraph of Article 18 TFEU (judgment of 20 November 2017, *Petrov and Others* v *Parliament*, T-452/15, EU:T:2017:822, paragraph 39).

64 The alleged discrimination must therefore be examined in the light of the first paragraph of Article 18 TFEU.

The comparability of the situations

65 It should be borne in mind that, according to settled case-law, the principle of equal treatment on grounds of nationality requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified (see judgment of 14 December 2004 *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 70 and the case-law cited).

66 The comparability of situations must be assessed in the light of the subject matter and purpose of the EU measure which makes the distinction in question (judgment of 1 March 2011, *Association belge des Consommateurs Test-Achats and Others*, C-236/09, EU:C:2011:100, paragraph 29).

67 In that regard, the applicant submits that the Parliament infringed the principle of non-discrimination on grounds of nationality, since, for identical health care provided at the same time with the same medical material, the fees applied to JSIS members are higher than those applied to CNS members.

68 The Parliament, however, states that persons who are not CNS members are in a different situation from Luxembourg residents, as Luxembourg residents are generally members of the CNS scheme. They therefore belong to two different social security categories and are not in comparable situations.

69 In the present case, as the Parliament contends, the legal position of EU officials with regard to their social security obligations comes within the scope of EU law by reason of their employment by the European Union (see judgment of 10 May 2017, *de Lobkowicz*, C-690/15, EU:C:2017:355, paragraph 38 and the case-law cited).

70 For that purpose, first, EU officials are subject to the joint social security scheme of the EU institutions, which, pursuant to Article 14 of the Protocol, is laid down by the Parliament and the Council of the European Union acting by means of regulations adopted under the ordinary legislative procedure and after consultation of the other institutions. That protocol has the same legal value as the Treaties (Opinion 2/13 of 18 December 2014, EU:C:2014:2454, paragraph 161, and judgment of 10 May 2017, *de Lobkowicz*, C-690/15, EU:C:2017:355, paragraph 40).

71 The Court has already ruled that, in so far as Article 14 of the Protocol, confers on the EU institutions the power to establish the scheme of social security for their own civil servants, that article must be regarded as meaning that the compulsory affiliation of EU officials to a national social security scheme and the requirement for those officials to contribute to the funding of such a scheme are outside the jurisdiction of the Member States (see, to that effect, judgment of 10 May 2017, *de Lobkowicz*, C-690/15, EU:C:2017:355, paragraph 41).

72 Secondly, the scheme of social benefits, mentioned in Article 14 of the Protocol, was introduced by the Staff Regulations which sets out the rules applicable to EU officials under Title V, which is headed 'Emoluments and social security for officials', and, in particular, in Chapters 2 and 3 thereof, which relate to social security benefits and pensions (judgment of 10 May 2017, *de Lobkowicz*, C-690/15, EU:C:2017:355, paragraphs 36 and 37).

73 Moreover, in so far as the Staff Regulations were established by Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (the Staff Regulations) (OJ 1968 L 56, p. 1), they have all the characteristics listed in Article 288 TFEU, which stipulates that a regulation is to have general application and is to be binding in its entirety and directly applicable in all Member States. It follows that all Member States are also bound by the Staff Regulations (see, to that effect, judgments of 20 October 1981, *Commission* v *Belgium*, 137/80, EU:C:1981:237, paragraphs 7 and 8; of

7 May 1987, *Commission* v *Belgium*, 186/85, EU:C:1987:208, paragraph 21; of 4 December 2003, *Kristiansen*, C-92/02, EU:C:2003:652, paragraph 32; and of 4 February 2015, *Melchior*, C-647/13, EU:C:2015:54, paragraph 22).

74 In that context, the Joint Rules were drawn up by agreement between the institutions of the European Union, in accordance with Article 72(1) of the Staff Regulations.

75 In particular, Article 39(2)(e) of the Joint Rules provides that the Central Office, in liaison with the Settlements Offices, must endeavour to negotiate, wherever possible, with the representatives of the medical profession or the competent authorities, associations and establishments, agreements specifying the rates for both medical treatment and hospitalisation applicable to JSIS members, account being taken of local conditions and, where appropriate, the scales already in force.

76 It follows that the fees applied by Luxembourg healthcare providers to JSIS members are set out in the 1996 Agreement, in accordance with Article 39(2)(e) of the Joint Rules.

77 First, in terms of the methodology used to set those fees, paragraph 1 of the preamble to the 1996 Agreement provides that fees are to be established on the basis of the units of work defined in the CNS-FHL agreement. It is apparent from Article 3 of the 1996 Agreement, and from paragraphs 2 to 5 of the preamble thereto, that the annual fees for those units of work are established on the basis of net cost, as established by the UCM (now the CNS), increased by a correction coefficient of 15%. According to the Parliament, the purpose of the 1996 Agreement is to cap the fees charged by healthcare providers to JSIS members.

78 Secondly, as regards the scale of fees '2016 JSIS Fees' at issue in the present case, it is apparent from the explanations given by the Grand Duchy of Luxembourg and the Commission that that scale constitutes an annex to the 1996 Agreement. In order to establish the fees set out in the scale, the CNS distinguishes between the variable costs, which are established by negotiation between itself and the FHL for each functional entity, and the fixed costs, which the CNS calculates for the purpose of the JSIS. Based on the scale of fees, hospitals charge JSIS members flat rates which take into account those variable and fixed costs. Consequently, as is apparent from paragraphs 69 to 76 above, while the fees applied to nationals covered by the national social security system are established by national social security rules, the fees applied to JSIS members are set out in the scale of fees established by the CNS and annexed to the 1996 Agreement described in paragraph 76 above.

79 However, the two categories of members receive the same medical care. In that regard, the Court has already held that JSIS members were in a situation comparable to that of nationals covered by the national social security system. The Court has pointed out, in particular, that in order to establish the comparability of the situations of CNS members and JSIS members, the fact that the latter do not pay domestic taxes on their treatment or contribute to the national social security scheme is irrelevant, since they are not seeking entitlement to social security benefits under that scheme, but only the application of non-discriminatory fees for medical care (see, to that effect, judgment of 3 October 2000, *Ferlini*, C-411/98, EU:C:2000:530, paragraphs 54 to 56). Accordingly, the Court held in that case that the relevant criterion was the nature of the medical care received by the two categories of members, with the result that the EU official concerned and the members of his family, who were JSIS members, were found to be in a situation comparable to that of nationals affiliated to the national social security scheme.

80 It follows that, for the purposes of the comparability between the situation of JSIS members and that of CNS members in the light of the principle of non-discrimination, the fact that there may be an agreement, such as the 1996 Agreement, cannot as such constitute a decisive criterion. The fact that the facts in the main proceedings which gave rise to the judgment of 3 October 2000, *Ferlini* (C-411/98, EU:C:2000:530) took place during the period prior to the conclusion of the 1996 Agreement, and that the fees at issue in that case had been applied unilaterally by a Member State,

whereas the system of fees at issue in the present case was set out in an agreement concluded between the competent national authorities and the Commission, does not alter the fact that the situation of CNS members is comparable to that of JSIS members when those two categories of members are in receipt of the same healthcare.

81 Therefore, those two situations are comparable in terms of the application of fees for medical care.

The existence of indirect discrimination on grounds of nationality

82 As regards the question whether the application of different tariffs to JSIS members and CNS members constitutes indirect discrimination on grounds of nationality, it must be borne in mind that, unless objectively justified and proportionate to the aim pursued, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect nationals of other Member States more than nationals of the host State, and there is a consequent risk that it will place the former at a particular disadvantage (see, by analogy, judgment of 13 April 2010, *Bressol and Others*, C-73/08, EU:C:2010:181, paragraph 41 and the case-law cited).

83 In the present case, it is common ground that the fees applied to JSIS members, which are set out in the scale of fees adopted on the basis of the 1996 Agreement, are considerably higher than those applied to CNS members. In fact, a CNS member who receives oxygen therapy in a hyperbaric chamber will not be invoiced for the fixed costs associated with that treatment, since those costs are covered by the hospital's overall budget, irrespective of the treatment that member receives. Conversely, a JSIS member in receipt of the same treatment will receive an invoice from the hospital for the amount indicated on the scale of fees, which includes both the variable costs and the fixed costs. Therefore, the 1996 Agreement establishes a charging system whereby a patient who is a JSIS member must bear both the variable costs and the fixed costs associated with that treatment, whereas, in the national health system, members are not invoiced for any costs in association with the same treatment. As a result of that difference in the system, CNS members do not have to pay anything for a session of oxygen therapy treatment in a hyperbaric chamber, whereas JSIS members are charged EUR 568 per session. The amount that the hospital charges to a patient who is a JSIS member is thus considerably higher than the amount applicable for the same treatment to a patient who is a CNS member, and that amount is covered in full by the CNS. It is apparent from the Commission's answer to the questions asked by the General Court that the calculation of the cost of the services is not based on fees which are sufficiently close to the actual costs, or on the actual medical profiles of patients who are JSIS members. It should therefore be found that the applicant has been treated unfavourably compared with CNS members.

84 Moreover, it is not disputed that the fees applied to JSIS members are higher than those applied to CNS members solely on the basis that the former are not covered by the national social security scheme.

85 In that regard, it should be noted that the vast majority of Luxembourg nationals residing in Luxembourg are members of the CNS. By contrast, the vast majority of JSIS members, although in receipt of health care provided in Luxembourg, are nationals of other Member States (see, by analogy, judgment of 3 October 2000, *Ferlini*, C-411/98, EU:C:2000:530, paragraph 58).

86 It should be noted that the scheme established by the 1996 Agreement, which provides that the JSIS is to contribute to the overall budget of Luxembourg hospitals through the invoicing procedure, has put in place, to that end, an invoicing system whereby JSIS members are charged both for the fixed costs and the variable costs associated with the hospital service in question, whereas CNS members are charged only for the variable costs, which are covered in full by the CNS. The effect of such a scheme is to allow Luxembourg hospital care providers to apply higher fees to JSIS members than to CNS members. By establishing that scheme, the Commission has therefore allowed a difference in

treatment on grounds of nationality, which places JSIS members at a disadvantage. Such a difference in treatment constitutes indirect discrimination on grounds of nationality unless it is objectively justified and proportionate to the aim pursued.

87 Such a finding is not called into question by the Parliament's argument that the judgment of 3 October 2000, *Ferlini* (C-411/98, EU:C:2000:530), is not relevant to the outcome of the present case. According to the Parliament, in the case which gave rise to that judgment, the fact that a group of healthcare providers unilaterally charged higher fees for the care provided to JSIS members than for the care provided to residents affiliated to the national security system constituted discrimination on grounds of nationality, whereas in the present case, the fees are set out in the scale of fees adopted on the basis of the 1996 Agreement negotiated between inter alia, the Luxembourg authorities and the Commission, in accordance with Article 39(2)(e) of the Joint Rules.

88 In that regard, it should be noted that, in paragraphs 48 to 50 of the judgment of 3 October 2000, *Ferlini* (C-411/98, EU:C:2000:530), the Court stated that the fees in question did not come under the national legislation, or the rules adopted in the form of collective agreements, on social security, but were fixed unilaterally by all the Luxembourg hospitals within the Luxembourg Hospitals Group. The Court, drawing from its previous case-law, therefore held that the first paragraph of Article 18 TFEU also applied in cases where a group or organisation such as the Luxembourg Hospitals Group exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the TFEU. Thus, that clarification was intended to show that a unilateral practice of a health service provider fell within the scope of Article 18 TFEU.

89 However, the fact that, in the present case, it was an agreement such as the 1996 Agreement which gave rise to the difference in treatment, and not the unilateral application by a hospital care service provider of fees for care provided to JSIS members, cannot call into question the application of the principle of non-discrimination on grounds of nationality. Indeed, as is apparent from paragraphs 55 to 64 above, Article 18 TFEU, which lays down that principle, is binding not only on the Member States, but also on the EU institutions, with the result that conclusion of an agreement such as the 1996 Agreement cannot have the effect of releasing the EU institutions from their obligations under that principle.

90 Similarly, as the Parliament contends, the Commission may, in accordance with Article 39(2)(e) of the Joint Rules, negotiate and conclude an agreement with the national authorities so that fees may be capped. The fact remains that, in exercising that power, the Commission is required to comply with the principle of non-discrimination on grounds of nationality, with the result that it may not introduce a difference in treatment which places JSIS members at a disadvantage compared with members of a national social security system, unless that difference in treatment is objectively justified and proportionate to the aim pursued.

The existence of a justification for indirect discrimination on grounds of nationality

91 The Parliament considers that, even if the difference in treatment between JSIS members and CNS members constitutes discrimination prohibited by the Treaty, the increased fees at issue are justified by a legitimate aim. In that regard, it refers, in paragraphs 14 and 15 of its statement in defence, to the note of the Commissioner for Budget and Human resources of 26 November 2015, according to which the conclusion of the 1996 Agreement made it possible to cap hospital fees for JSIS members, which prevented the 'existing' fees from being increased further.

92 In that regard, as has been pointed out in paragraph 82 above, a difference in the treatment of comparable situations, such as that established by the 1996 Agreement, constitutes indirect discrimination on grounds of nationality, which is prohibited unless it is objectively justified.

93 In order to be justified, the measure concerned must be appropriate for securing the attainment of the legitimate aim it pursues and must not go beyond what is necessary to attain it (see judgment of 13 April 2010, *Bressol and Others*, C-73/08, EU:C:2010:181, paragraph 48 and the case-law cited).

94 As regards social security, the Court has already held that the objective of preventing the risk of serious harm to the financial balance of the social security system of a Member State could constitute a legitimate aim (see, to that effect, judgment of 10 March 2009, *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 47 and the case-law cited). It may be considered that, by analogy, the same legitimate aim may be applied to the European Union's social security system, namely the JSIS. Therefore, the objective invoked by the Parliament of reducing the expenditure of the JSIS, referred to in the 1996 Agreement, could, theoretically, constitute a legitimate aim.

95 However, first, it is for the authorities, where they adopt a measure derogating from a principle enshrined by European Union law, to show in each individual case that that measure is appropriate for ensuring attainment of the aim pursued and does not go beyond what is necessary to attain it. The reasons invoked by an institution by way of justification must thus be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that institution and precise evidence enabling its arguments to be substantiated. Such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to the balance of the social security system (see, to that effect and by analogy, judgment of 21 January 2016, *Commission* v *Cyprus*, C-515/14, EU:C:2016:30, paragraph 54).

96 It must be noted that, in the present case, such an analysis is lacking. Indeed, in its statement in defence, the Parliament merely made some general statements in that regard, without providing any specific evidence to support its argument that the 1996 Agreement at issue is justified by the 'legitimate aim' of 'capping hospital fees for JSIS members'.

97 Secondly, it is true that reducing the expenditure of the JSIS could, in principle, constitute a legitimate aim, as is apparent from paragraph 94 above. However, the fact remains that capping the fees at issue, as is provided for in the 1996 Agreement, and, in particular, setting rates that are considerably higher than those which apply to CNS members in receipt of the same healthcare, cannot constitute an appropriate and proportionate measure for the attainment of the aim pursued.

98 Moreover, and in any event, it has not been argued before the Court, in the present case, that the scheme established by the 1996 Agreement pursues the aim of preventing the risk of serious harm to the financial balance of the Luxembourg social security system. It follows that, in the present case, there is no 'legitimate aim' that justifies the difference in treatment, established by the scale of fees annexed to the 1996 Agreement, between the persons covered by the two schemes for the reimbursement of medical costs.

99 It follows from the foregoing that the first plea in law must be upheld. It is therefore necessary, without there being any need to examine the second plea in law raised by the applicant, to uphold the plea of illegality of the 1996 Agreement and, consequently, to annul the contested decision, since it uses the scale of fees applied by the Settlements Office, as is apparent from the scheme established by the 1996 Agreement.

Costs

100 Under Article 134(1) 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 Parliament has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the applicant.

101 In accordance with Article 138(3) of the Rules of Procedure, the intervener must bear its own costs.

On those grounds,

THE GENERAL COURT (Ninth Chamber),

hereby:

1. **Annuls the decision of the Luxembourg Settlements Office for the Joint Sickness Insurance Scheme, as evidenced by payment slip No 244 of 25 January 2017, making Mr Francis Wattiau liable for the sum of EUR 843.01, corresponding to 15% of the medical bill of 30 May 2016;**

2. **Orders the European Parliament to bear its own costs and those incurred by Mr Wattiau;**

3. **Orders the Association des seniors de la fonction publique européenne (SFPE) to bear its own costs.**

Gervasoni Madise da Silva Passos

Delivered in open court in Luxembourg on 30 April 2019.

[Signatures]