JUDGMENT OF THE COURT
28 April 1998 *

In Case C-158/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Cour de Cassation (Luxembourg) for a preliminary ruling in the proceedings pending before that court between

Raymond Kohll

and

Union des Caisses de Maladie

on the interpretation of Articles 59 and 60 of the EC Treaty,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm (Rapporteur) and M. Wathelet (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón, Judges,

* Language of the case: French.

Advocate General: G. Tesauro,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Kohll, by Jean Hoss and Patrick Santer, of the Luxembourg Bar,

— Union des Caisses de Maladie, by Albert Rodesch, of the Luxembourg Bar,

— the Luxembourg Government, by Claude Ewen, Social Security Inspector, First Class, in the Ministry of Social Security, acting as Agent,

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Sabine Maaß, Regierungsrätin in that ministry, acting as Agents,

— the Greek Government, by Vasilios Kondolaimos, Assistant Legal Adviser in the State Legal Service, and Stamatina Vodina, specialist technical assistant in the Community Legal Affairs Department, Ministry of Foreign Affairs, acting as Agents,

— the French Government, by Catherine de Salins, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Philippe Martinet, Foreign Affairs Secretary in that directorate, acting as Agents,

— the Austrian Government, by Michael Potacs, of the Federal Chancellor's Office, acting as Agent,

— the United Kingdom Government, by Stephanie Ridley, of the Treasury Solicitor's Department, acting as Agent, and David Pannick QC and Philippa Watson, Barrister,

— the Commission of the European Communities, by Maria Patakia, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Kohll, represented by Jean Hoss and Patrick Santer, the Union des Caisses de Maladie, represented by Albert Rodesch, the Luxembourg Government, represented by Claude Ewen, the Greek Government, represented by Vasilios Kondolaimos, the French Government, represented by Jean-François Dobelle, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent, and Philippe Martinet, the United Kingdom Government, represented by Richard Plender QC and Philippa Watson, and the Commission, represented by Jean-Claude Séché, of its Legal Service, acting as Agent, at the hearing on 15 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 16 September 1997,

gives the following

Judgment

1 By judgment of 25 April 1996, received at the Court on 9 May 1996, the Luxembourg Cour de Cassation (Court of Cassation) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 59 and 60 of that Treaty.

2 Those questions arose in proceedings between Mr Kohll, a Luxembourg national, and the Union des Caisses de Maladie (hereinafter 'UCM'), with which he is insured, concerning a request by a doctor established in Luxembourg for authorisation for his daughter, who is a minor, to receive treatment from an orthodontist established in Trier (Germany).

3 By decision of 7 February 1994 following a negative opinion of the social security medical supervisors, the request was rejected on the grounds that the proposed treatment was not urgent and that it could be provided in Luxembourg. That decision was confirmed on 27 April 1994 by a decision of the UCM board.

4 Mr Kohll appealed against that decision to the Conseil Arbitral des Assurances Sociales (Social Insurance Arbitration Council), arguing that the provisions relied on were contrary to Article 59 of the Treaty. The appeal was dismissed by decision of 6 October 1994.

5 Mr Kohll appealed against the latter decision to the Conseil Supérieur des Assurances Sociales (Higher Social Insurance Council), which by judgment of 17 July 1995 upheld the contested decision on the ground that Article 20 of the Luxembourg Codes des Assurances Sociales (Social Insurance Code) and Articles 25 and 27 of the UCM statutes were consistent with Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (see the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, OJ 1997 L 28, p. 1).

6 It appears from Article 20(1) of the Code des Assurances Sociales, as amended by the Law of 27 July 1992, which entered into force on 1 January 1994, that with the exception of emergency treatment received in the event of illness or accident abroad, insured persons may be treated abroad or approach a treatment centre or

centre providing ancillary facilities abroad only after obtaining the prior authorisation of the competent social security institution.

7 The terms and conditions for granting authorisation are laid down by Articles 25 to 27 of the UCM statutes, in the version which entered into force on 1 January 1995. Article 25 prescribes in particular that authorisation may not be given for services which are not reimbursable under the national rules. Article 26 states that the cost of duly authorised treatment is to be reimbursed in accordance with the tariffs applicable to persons insured under the social security system of the State in which the treatment is provided. Under Article 27, finally, authorisation will be granted only after a medical assessment and on production of a written request from a doctor established in Luxembourg indicating the doctor or hospital centre recommended and the facts and criteria which make it impossible for the treatment in question to be carried out in Luxembourg.

8 Article 22 of Regulation No 1408/71 provides in particular:

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

...

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

shall be entitled:

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

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

2. ...

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

3. The provisions of paragraphs 1 and 2 shall apply by analogy to members of the family of an employed or self-employed person.

...'

9 Mr Kohll appealed against the judgment of the Conseil Supérieur des Assurances Sociales, arguing in particular that it had considered only whether the national rules were consistent with Regulation No 1408/71, and not whether they were consistent with Articles 59 and 60 of the Treaty.

10 Since it considered that that argument raised a question concerning the interpretation of Community law, the Cour de Cassation stayed the proceedings and referred the following two questions to the Court for a preliminary ruling:

'1. Are Articles 59 and 60 of the Treaty establishing the EEC to be interpreted as precluding rules under which reimbursement of the cost of benefits is subject to authorisation by the insured person's social security institution if the benefits are provided in a Member State other than the State in which that person resides?

2. Is the answer to Question 1 any different if the aim of the rules is to maintain a balanced medical and hospital service accessible to everyone in a given region?'

11 By those questions, which should be taken together, the national court essentially asks whether Articles 59 and 60 of the Treaty preclude the application of social security rules such as those at issue in the main proceedings.

12 Mr Kohll submits that Articles 59 and 60 of the Treaty preclude such national rules which make reimbursement, in accordance with the scale of the Member State of insurance, of the cost of dental treatment provided by an orthodontist established in another Member State subject to authorisation by the insured person's social security institution.

13 UCM and the Luxembourg, Greek and United Kingdom Governments contend that those provisions are not applicable, or, in the alternative, do not preclude the rules in question from being maintained. The German, French and Austrian Governments agree with the alternative submission.

14 The Commission submits that the rules constitute a barrier to the freedom to provide services but may be justified, under certain conditions, by overriding reasons relating to the general interest.

15 Having regard to the observations submitted, the questions to be considered concern first the application of the principle of freedom of movement in the field of social security, then the effect of Regulation No 1408/71, and finally the application of the provisions on freedom to provide services.

Application of the fundamental principle of freedom of movement in the field of social security

16 The Luxembourg, Greek and United Kingdom Governments submit that the rules at issue in the main proceedings do not fall within the scope of the Community provisions on freedom to provide services, in that they concern social security, and so should be examined solely from the point of view of Article 22 of Regulation No 1408/71.

17 It must be observed, first of all, that, according to settled case-law, Community law does not detract from the powers of the Member States to organise their social security systems (Case 238/82 *Duphar and Others* v *Netherlands* [1984] ECR 523, paragraph 16, and Case C-70/95 *Sodemare and Others* v *Regione Lombardia* [1997] ECR I-3395, paragraph 27).

18 In the absence of harmonisation at Community level, it is therefore for the legislation of each Member State to determine, first, the conditions concerning the right or duty to be insured with a social security scheme (Case 110/79 *Coonan* v *Insurance Officer* [1980] ECR 1445, paragraph 12, and Case C-349/87 *Paraschi* v *Landesversicherungsanstalt Württemberg* [1991] ECR I-4501, paragraph 15) and, second, the conditions for entitlement to benefits (Joined Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira* v *Bundesanstalt für Arbeit* [1997] ECR I-511, paragraph 36).

19 As the Advocate General observes in points 17 to 25 of his Opinion, the Member States must nevertheless comply with Community law when exercising those powers.

20 The Court has held that the special nature of certain services does not remove them from the ambit of the fundamental principle of freedom of movement (Case 279/80 *Webb* [1981] ECR 3305, paragraph 10).

21 Consequently, the fact that the national rules at issue in the main proceedings fall within the sphere of social security cannot exclude the application of Articles 59 and 60 of the Treaty.

Effect of Regulation No 1408/71

22 UCM and the Luxembourg Government submit that Article 22 of Regulation No 1408/71 lays down the principle that prior authorisation is required for any treatment in another Member State. To challenge the national provisions relating to reimbursement of the cost of services obtained abroad amounts to calling into question the validity of the corresponding provision in Regulation No 1408/71.

23 In the proceedings before the Court, Mr Kohll submitted that he sought reimbursement by UCM of the amount he would have been entitled to if the treatment had been carried out by the only specialist established in Luxembourg at the material time.

24 On that point, UCM considers that the principle that a person is subject to one social security tariff only would indeed be complied with if the Luxembourg tariff were applied, but claims that Regulation No 1408/71 would compel it to reimburse expenditure according to the tariffs in force in the State in which the service was provided.

25 It must be stated that the fact that a national measure may be consistent with a provision of secondary legislation, in this case Article 22 of Regulation No 1408/71, does not have the effect of removing that measure from the scope of the provisions of the Treaty.

26 Moreover, as the Advocate General observes in points 55 and 57 of his Opinion, Article 22(1) of Regulation No 1408/71 is intended to allow an insured person, authorised by the competent institution to go to another Member State to receive there treatment appropriate to his condition, to receive sickness benefits in kind, on account of the competent institution but in accordance with the provisions of the legislation of the State in which the services are provided, in particular where the need for the transfer arises because of the state of health of the person concerned, without that person incurring additional expenditure.

27 On the other hand, Article 22 of Regulation No 1408/71, interpreted in the light of its purpose, is not intended to regulate and hence does not in any way prevent the reimbursement by Member States, at the tariffs in force in the competent State, of costs incurred in connection with treatment provided in another Member State, even without prior authorisation.

28 Consequently, the Court must examine the compatibility of national rules such as those at issue in the main proceedings with the Treaty provisions on freedom to provide services.

Application of the provisions on freedom to provide services

29 The dispute before the national court concerns treatment provided by an orthodontist established in another Member State, outside any hospital infrastructure. That service, provided for remuneration, must be regarded as a service within the meaning of Article 60 of the Treaty, which expressly refers to activities of the professions.

30 It must therefore be examined whether rules such as those at issue in the main proceedings constitute a restriction on freedom to provide services, and if so, whether they may be objectively justified.

Restrictive effects of the rules at issue

31 Mr Kohll and the Commission submit that the fact that reimbursement of the cost of medical services, in accordance with the legislation of the State of insurance, is subject to prior authorisation by the institution of that State where the services are provided in another Member State constitutes a restriction on freedom to provide services within the meaning of Articles 59 and 60 of the Treaty.

32 The Member States which have submitted observations consider, on the contrary, that the rules at issue do not have as their purpose or effect to restrict freedom to provide services, but merely lay down the conditions for the reimbursement of medical expenses.

33 It should be noted that, according to the Court's case-law, Article 59 of the Treaty precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 17).

34 While the national rules at issue in the main proceedings do not deprive insured persons of the possibility of approaching a provider of services established in another Member State, they do nevertheless make reimbursement of the costs incurred in that Member State subject to prior authorisation, and deny such reimbursement to insured persons who have not obtained that authorisation. Costs incurred in the State of insurance are not, however, subject to that authorisation.

35 Consequently, such rules deter insured persons from approaching providers of medical services established in another Member State and constitute, for them and their patients, a barrier to freedom to provide services (see Joined Cases 286/82 and 26/83 *Luisi and Carbone* v *Ministero del Tesoro* [1984] ECR 377, paragraph 16, and Case C-204/90 *Bachmann* v *Belgium* [1992] ECR I-249, paragraph 31).

36 The Court must therefore examine whether a measure of the kind at issue in this case may be objectively justified.

Justification of the rules at issue

37 UCM and the Governments of the Member States which have submitted observations submit that freedom to provide services is not absolute and that reasons connected with the control of health expenditure must be taken into consideration. The requirement of prior authorisation constitutes the only effective and least restrictive means of controlling expenditure on health and balancing the budget of the social security system.

38 According to UCM, the Luxembourg Government and the Commission, the risk of upsetting the financial balance of the social security scheme, which aims to ensure a balanced medical and hospital service available to all its insured, constitutes an overriding reason in the general interest capable of justifying restrictions on freedom to provide services.

39 The Commission adds that the refusal of the national authorities to grant prior authorisation must be justified by a genuine and actual risk of upsetting the financial balance of the social security scheme.

40 On the latter point, Mr Kohll submits that the financial burden on the budget of the Luxembourg social security institution is the same whether he approaches a Luxembourg orthodontist or one established in another Member State, since he asked for medical expenses to be reimbursed at the rate applied in Luxembourg. The rules at issue therefore cannot be justified by the need to control health expenditure.

41 It must be recalled that aims of a purely economic nature cannot justify a barrier to the fundamental principle of freedom to provide services (see, to that effect, Case C-398/95 *SETTG* v *Ypourgos Ergasias* [1997] ECR I-3091, paragraph 23). However, it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier of that kind.

42 But, contrary to the submissions of UCM and the Luxembourg Government, it is clear that reimbursement of the costs of dental treatment provided in other Member States in accordance with the tariff of the State of insurance has no significant effect on the financing of the social security system.

43 The Luxembourg Government also relies on grounds based on the protection of public health, arguing, first, that the rules at issue are necessary to guarantee the quality of medical services, which in the case of persons going to another Member State can be ascertained only at the time of the request for authorisation, and, second, that the Luxembourg sickness insurance system aims to provide a balanced medical and hospital service open to all insured persons.

44 Mr Kohll submits, on the other hand, that there is no scientific reason to conclude that treatment provided in Luxembourg is more effective, now that the pursuit of the medical professions is the subject of mutual recognition between Member States. He further submits that the reference to a balanced medical and hospital sector open to all must above all be categorised as an economic aim intended to protect UCM's financial resources.

45 It should be noted, first of all, that under Articles 56 and 66 of the EC Treaty Member States may limit freedom to provide services on grounds of public health.

46 However, that does not permit them to exclude the public health sector, as a sector of economic activity and from the point of view of freedom to provide services, from the application of the fundamental principle of freedom of movement (see Case 131/85 *Gül* v *Regierungspräsident Düsseldorf* [1986] ECR 1573, paragraph 17).

47 The conditions for taking up and pursuing the profession of doctor and dentist have been the subject of several coordinating or harmonising directives (see Council Directive 78/686/EEC of 25 July 1978 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (OJ 1978 L 233, p. 1); Council Directive 78/687/EEC of 25 July 1978 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of the activities of dental practitioners (OJ 1978 L 233, p. 10); and Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications (OJ 1993 L 165, p. 1)).

48 It follows that doctors and dentists established in other Member States must be afforded all guarantees equivalent to those accorded to doctors and dentists established on national territory, for the purposes of freedom to provide services.

49 Consequently, rules such as those applicable in the main proceedings cannot be justified on grounds of public health in order to protect the quality of medical services provided in other Member States.

50 As to the objective of maintaining a balanced medical and hospital service open to all, that objective, although intrinsically linked to the method of financing the social security system, may also fall within the derogations on grounds of public health under Article 56 of the Treaty, in so far as it contributes to the attainment of a high level of health protection.

51 Article 56 of the Treaty permits Member States to restrict the freedom to provide medical and hospital services in so far as the maintenance of a treatment facility or medical service on national territory is essential for the public health and even the survival of the population (see, with respect to public security within the meaning of Article 36 of the Treaty, Case 72/83 *Campus Oil* v *Minister for Industry and Energy* [1984] ECR 2727, paragraphs 33 to 36).

52 However, neither UCM nor the Governments of the Member States which have submitted observations have shown that the rules at issue were necessary to provide a balanced medical and hospital service accessible to all. None of those who have submitted observations has argued that the rules were indispensable for the maintenance of an essential treatment facility or medical service on national territory.

53 The conclusion must therefore be drawn that the rules at issue in the main proceedings are not justified on grounds of public health.

54 In those circumstances, the answer must be that Articles 59 and 60 of the Treaty preclude national rules under which reimbursement, in accordance with the scale of the State of insurance, of the cost of dental treatment provided by an orthodontist established in another Member State is subject to authorisation by the insured person's social security institution.

Costs

55 The costs incurred by the Luxembourg, German, Greek, French, Austrian and United Kingdom Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Luxembourg Cour de Cassation by judgment of 25 April 1996, hereby rules:

Articles 59 and 60 of the EC Treaty preclude national rules under which reimbursement, in accordance with the scale of the State of insurance, of the cost of dental treatment provided by an orthodontist established in another Member State is subject to authorisation by the insured person's social security institution.

Rodríguez Iglesias Gulmann Ragnemalm

Wathelet Mancini

Moitinho de Almeida Kapteyn Murray

Edward Puissochet

Hirsch Jann Sevón

Delivered in open court in Luxembourg on 28 April 1998.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President