OPINION OF ADVOCATE GENERAL COSMAS

delivered on 21 September 1999 *

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* Original language: Greek.

I — Introduction

1. In this reference for a preliminary ruling, under Article 177 of the EC Treaty (now Article 234 EC), the Tribunal d'arrondissement (District Court), Luxembourg (8th Chamber), referred to the Court of Justice a preliminary question on the interpretation, first, of Articles 7 and 48 of the EEC Treaty, [1] Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, [2] as amended by Council Regulation (EEC) No 312/76 of 9 February 1976, [3] and Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as codified and updated by Council Regulation No 2001/83 of 2 June 1983, [4] and, secondly, of Article 85(1) of the EEC Treaty. In particular, the Court of Justice is asked to rule on the compatibility with the prohibition of discrimination between nationals of Member States of the Community and protection of competition of first a national regulatory system and, secondly, a circular of the Union des Caisses de Maladie (hereinafter 'the UCM') and a decision of the Entente des Hôpitaux Luxembourgeois (Luxembourg Hospitals Group, hereinafter 'the EHL'), which result in the application of different fees for medical and hospital care depending on whether the persons concerned are affiliated to the Luxembourg national social security scheme or not, as is the case with Community officials who are affiliated to the Joint Sickness Insurance Scheme common to the Institutions of the European Communities (hereinafter 'the Joint Scheme').

1 — The national court refers to the corresponding articles of the EC Treaty. However, in light of the material time of the facts of the case in the main proceedings, the answer to the request for a preliminary ruling ought to refer to the interpretation of the articles of the EEC Treaty.

2 — OJ, English Special Edition 1968 (II), p. 475.

3 — OJ 1976 L 39, p. 2.

4 — OJ 1983 L 230, p. 6.

II — Legal Background

A — *Community Legal Framework*

(a) Provisions of the Treaty and of the relevant regulations

2. Article 7(1) of the EEC Treaty (subsequently Article 6(1) of the EC Treaty and now, after amendment, Article 12(1) EC) provides:

'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'.

3. Article 48(2) of the EEC Treaty (subsequently Article 48(2) of the EC Treaty and now, after amendment, Article 39(2) EC) provides:

'Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'.

4. Furthermore, Article 7 of Regulation No 1612/68 provides:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.

...'

5. Article 2 of Regulation No 1408/71, as codified and updated by Regulation No 2001/83, provides:

'1. This Regulation shall apply to workers who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as also to the members of their families and their survivors.

...'

6. Furthermore, Article 3(1) of the same regulation provides:

'Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State'.

7. Finally, Article 85(1) of the EEC Treaty (subsequently Article 85(1) of the EC Treaty and now Article 81(1) EC) provides:

'The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

...'

(b) Provisions of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations') and the Joint Rules on sickness and insurance for officials of the European Communities

8. Under Articles 64 and 72 of the Staff Regulations, European officials pay contributions to the Joint Scheme and medical expenses are borne by it. Under Article 72(1) of the Staff Regulations the

spouse of an official is insured against sickness as laid down in that article.

9. The Rules on Sickness Insurance for Officials of the European Communities were adopted having regard, *inter alia*, to the implementation of the above provisions. Under Article 2 of those rules, officials are affiliated to the Joint Scheme. Furthermore, Article 3 thereof provides that spouses of officials are also affiliated subject to certain conditions which, in the material case, Mr Ferlini's wife undoubtedly appears to fulfil.

10. Under Article 72 of the Staff Regulations, Articles 1, 2 and 3 of the Joint Scheme and Title VIII of Annex I thereto, in relation to hospital care provided during confinement, at the material time of the facts of the case in the main proceedings, the fees reimbursed by the Joint Scheme were medical fees for midwifery and anaesthesia, confinement-room costs, physiotherapy and, in addition, all other services directly linked with confinement at the rate of 100% subject to a maximum ceiling. The costs of hospitalisation were reimbursed at the rate of 85% subject to a maximum ceiling.

11. Article 9(2) of the Joint Scheme provides that 'the institutions shall, wherever possible, take steps to negotiate 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'.

12. From the information in the case-file it appears that, at the material time of the facts of the case in the main proceedings, no agreement had been concluded between the Joint Scheme and the EHL, notwithstanding initiatives by the Communities to that end. [5]

B — *National legal framework*

(a) Insurance for illness and maternity for persons affiliated to the national scheme

13. As the order for reference states, the national rules applicable, at the material

5 — According to Mr Ferlini, the European Communities were demanding the same nomenclature of medical treatment, the same scales of contributions and the same fees as those applicable to persons affiliated to the Luxembourg social security scheme. However, professional groups in Luxembourg opposed the above demands, wishing to charge for medical services in proportion to Community officials' incomes, presumed to be high, and the nature of the services provided.

time of the facts of the case in the main proceedings, to persons affiliated to the Luxembourg sickness funds were essentially contained in Articles 308 *bis* to *quater* of the Code des Assurances Sociales (social insurance code). [6]

14. In view of the nature of the social security system sought to be established by the Luxembourg legislature, fees for medical treatment are entirely uniform. They are determined solely according to the nature of the service and do not vary according to the income of the patient or the qualifications of the provider.

15. As regards insurance for illness and maternity, the persons covered are compulsorily insured by sickness funds, which are autonomous public entities with legal personality, subject to Government supervision. The sickness funds are financed mainly by contributions, either direct or indirect.

16. As both Mr Ferlini and the Commission state, the system applicable to maternity services differed from that applied in the case of illness. At the material time of the facts of the case in the main proceedings, the system applicable in the case of illness provided for collective agreements to be concluded between the insurance funds and various categories of service providers, making no distinction between the hospital and non-hospital sectors. These agreements were made binding *erga omnes* by ministerial order, even on providers of services who were not members of the association which had negotiated the agreement. [7] By contrast, the system applicable to maternity insurance was based on a lump-sum pay-

6 — In particular, as the referring court points out, prior to 1925 national social insurance legislation did not allow free choice of a doctor. It recommended but did not require agreements between sickness funds and providers of medical services. Consequently, if such agreements existed, they were purely of a voluntary nature.
The Law of 17 December 1925 laid down general rules governing medical fees but allowed considerable variation of scales (up to three times the basic figure). Since it also fixed the maximum contributions which could be called for by funds from their members, who were thenceforth entitled freely to choose their doctor, agreements were necessary, even though they were still not compulsory. Moreover, the very nature of social insurance required uniform scales for all members in the same professional category.
The Law of 6 September 1933 introduced an Article 308 *bis* in the Code des Assurances Sociales under which, in the absence of an agreement, a joint committee would make a proposal binding on the Government.
Collective agreements and decisions of the joint committees became binding after ratification by the Government.
As from 1951, the benefit of sickness insurance was extended to the entire population. The doctors' Association called for some freedom in determining its scale of fees depending on the patient's income. That claim was acceded to in some measure by the amending Law of 24 April 1954.
By the amending Law of 2 May 1974, the Government imposed a uniform nomenclature and scale of fees for medical treatment, regardless of the income of the insured and the level of qualification of the provider.
Since the passing of that Law, there are four types of rules: collective agreements made binding by ministerial orders, decisions of the Conciliation and Arbitration Committee in the absence of collective agreements, also made binding by ministerial orders, rules agreed on an entirely voluntary basis, and, finally, rules established by regulations or laws.
The medical services which may be the subject of scale fees negotiated collectively or settled by an award of the Joint Committee are in principle only those contained in a nomenclature determined by ministerial order, forming part of the regulations of the Luxembourg sickness funds.
Since the adoption of the budgetary Law of 20 December 1982, the legislature has intervened directly to fix the scale of fees for certain services. The same practice has been followed in every budgetary law since then.

7 — The Commission points out that to date the system has not changed significantly, save for the fact that a distinction is made between the hospital and non-hospital sectors.

ment made by the State. According to Mr Ferlini, that system appeared in fact to be more akin to the system of family allowances than that of sickness insurance.

17. According to the order for reference, under the legislation applicable at the material time of the facts of the case in the main proceedings (laws of 27 June 1983 and 3 July 1975), insured persons were entitled, during confinement, to the services of a midwife, medical assistance, hospitalisation in a maternity hospital or clinic, pharmaceutical products and dietetic products for unweaned children. Those services were covered by a lump sum fixed by Grand-Ducal regulation taking separate account of each service provided.

18. The Grand-Ducal regulation in force at the material time of the facts of the case in the main proceedings was that of 31 December 1974, [8] as amended, determining, pursuant to Articles 6 and 13 of the Code des Assurances Sociales, benefits in kind in the event of illness and maternity. Article 12 thereof fixed the level of the lump sum detailing its various components and their corresponding rates.

19. According to the UCM circular of 1 December 1988, mentioned in the order for reference, concerning apportionment of the components of the flat-rate childbirth charges as from 1 January 1989, [9] in practice the system imposed by the law in force at the material time of the disputed facts and the Grand-Ducal regulation of 31 December 1974 provided for a calculation based on three components, namely medical assistance, maternity costs and dietetic products. [10]

(b) Insurance for illness and maternity for persons not affiliated to the national scheme

20. As the Luxembourg Government and the Commission point out, the rates laid down in Luxembourg for the provision of care to persons falling within the scope of Regulation No 1408/71 are the same as those applicable to persons affiliated to the national scheme. Moreover, persons who fall within the scope of Regulation No 1408/71 are expressly included within the scope of collective agreements in respect of sickness. It must therefore be accepted that, in the case of maternity insurance, the lump sum provided for by the Grand-Ducal regulation of 31 December 1974 should also apply to those persons.

8 — *Mémorial A* No 95 of 31.12.1974, p. 2398.

9 — The text of this circular is annexed to the written observations submitted by Mr Ferlini.

10 — Referring to the UCM circular, Mr Ferlini states that the first of these three components was calculated by agreement between the UCM and the Luxembourg Association of Doctors and Dentists (hereinafter 'the AMMD'), the second and third by agreement between the UCM and the EHL.
Indeed, Mr Ferlini points out that, at the present time, the new legal system has been adapted in line with this practice whereby reference is made to fees fixed by agreement for all components of the lump sum.

21. On the other hand, the abovementioned regulations and collective agreements appear not to have applied to persons not affiliated to the national social security scheme and, subject to legal provisions or regulations or Luxembourg's international obligations, the providers of services had complete freedom in determining fees.

22. Thus, in the absence of an agreement between the Joint Scheme and the EHL, the latter unilaterally fixed the fees for hospital care to be applied as from 1 January 1989 to persons not affiliated to the national social security scheme, including Community officials, who were affiliated to the Joint Scheme.

III — Facts

23. Mr Ferlini is an official of the Commission of the European Communities employed in Luxembourg. However, the order for reference does not state whether Mr Ferlini and his wife are nationals of a Member State of the Community. [11]

24. Given that Mr Ferlini is an official of the European Communities, both he and his wife are affiliated to the Joint Scheme.

25. Between 17 and 24 January 1989, the appellant's wife stayed at the Centre Hospitalier de Luxembourg (hereinafter 'CHL') in connection with her confinement. The order for reference notes that CHL is a public establishment.

26. On 24 February 1989, CHL submitted its invoice to the appellant in an amount of LUF 73 460.

27. Mr Ferlini challenged a conditional payment order issued against him on 22 April 1993 requiring him to pay the abovementioned amount to CHL.

11 — The observations submitted by Mr Ferlini state that he is an Italian national.

28. By judgment of 24 June 1994, the Tribunal de Paix (Magistrates' Court), Luxembourg, sitting as a civil court, declared the action unfounded and ordered Mr Ferlini to pay CHL the abovementioned sum, together with interest at the legally prescribed rate.

29. On 5 October 1994, Mr Ferlini appealed against that judgment.

30. As indicated in the order for reference, the appellant maintains that the amount charged by CHL is calculated, partly, on the basis of the scale fees fixed by the EHL and applicable as from 1 January 1989 to persons and organisations not affiliated to the national social security scheme, and of the scale fees applicable to persons affiliated to sickness funds as set out in the UCM circular of 1 December 1988. However, those fees exceeded by a considerable margin those charged to persons affiliated to the national social security scheme and were discriminatory.

31. In support of his appeal, Mr Ferlini contends that the fixing of hospital scale fees by the CHL infringes the principle of equal treatment. The appellant also maintains that the system of fixing hospital scale fees to be applied to Community officials, based on an agreement between Luxembourg hospitals within the framework of the EHL, contravenes Article 85(1) of the Treaty.

32. In the alternative, the appellant considers that the sum claimed is excessive and disproportionate in the light of the services provided.

33. The respondent, CHL, contends that the appeal should be rejected and the judgment of the lower court upheld and is seeking legal costs. The CHL contends essentially that the situation of Community officials is not comparable to that of persons affiliated to the national social security scheme. The former do not pay taxes or make contributions to national insurance schemes and have higher incomes while, at the material time of the facts of the case in the main proceedings, the Joint Scheme had not concluded any agreement with the EHL. Finally, the CHL maintains that the conditions laid down in Article 85 of the Treaty are not fulfilled in this case.

IV — The question referred for a preliminary ruling

34. According to the national court, Article 48 of the Treaty and Regulations

Nos 1408/71 and 1612/68 concern only Community nationals who take up employment in another Member State, or become subject to social security arrangements governed by the laws of that State. However, inasmuch as it is precisely because of their duties that Community officials reside in a Member State other than their own, they should not be placed in a less favourable situation than any other employee who is a national of a Member State. On the contrary, they should enjoy all the advantages flowing from Community law for nationals of Member States with respect to freedom of movement of persons, freedom of establishment and social security.

35. The referring court also considered that the questions raised by the appellant and the objections made by the respondent could not be resolved without an interpretation of the principles governing competition law, in particular Member States' powers to organise their own social security systems, the particular status of undertakings and related services and the effect on the common market.

36. Having regard to the above considerations, the Tribunal d'arrondissement, Luxembourg (8th Chamber) decided to refer the following question for a preliminary ruling to the Court of Justice:

'Having regard to the principle of non-prohibition between nationals of Member States of the European Union, enshrined in Articles 6 and 48 of the EC Treaty and, in connection with freedom of movement for workers within the Community, in Regulation No 1612/68 of the Council of 15 October 1968 concerning freedom of movement for workers within the Community, as amended by Council Regulation No 312/76 of 9 February 1976 and, in social security matters, in Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families residing in the Community, as amended and updated by Council Regulation No 2001/83 of 2 June 1983 and;

Having regard to Article 85(1) of the EEC Treaty which prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market;

Are the Grand-Ducal Regulation of 31 December 1974 (*Mémorial A*, No 95 of 31 December 1974, p. 2398), as amended, whose purpose is to determine, pursuant to Articles 6 and 13 of the Code des Assurances Sociales, benefits in kind in the event of sickness and childbirth, the scales of hospital fees as from 1 January 1989 which are to apply to persons and bodies not affiliated to the national social security scheme, and the UCM circular of 1 December 1988 on the apportionment of the components of flat-rate childbirth charges as from 1 January 1989 and the practices of the EHL, whereby it applies to persons and bodies not affiliated to the national social security scheme and to officials of the European Communities affiliated to the Joint Sickness Insurance Scheme uniform scales of fees for medical and hospital expenses which are higher than those applied to residents affiliated to the national social security scheme, compatible with Community law?'

V — Answer to the question referred for a preliminary ruling

37. By the question submitted for a preliminary ruling by the Tribunal d'arrondissement, Luxembourg (8th Chamber), the Court is asked to form a view on the prohibition of discrimination on grounds of nationality (B) and on the protection of competition (C) with regard to the fixing in a Member State of medical and hospital fees for maternity care provided for persons not affiliated to the national social security scheme, including Community officials who, because of their duties, work and reside in that State, but are affiliated to the Joint Scheme. I will consider these two questions after first making a few brief comments on the formulation of the question for a preliminary ruling (A).

A — *Formulation of the question referred for a preliminary ruling*

38. Given the formulation of the question for a preliminary ruling, I would point out that under Article 177 of the EC Treaty (now Article 234 EC), the Court does not rule on the interpretation or the validity of national provisions, or on their compatibility with the provisions of Community law, but may provide the national court with all the guidance as to interpretation necessary to enable it to form a view itself on whether a provision of domestic law is or is not compatible with Community rules. [12]

39. Accordingly, the question referred by the national court must be regarded as raising the issue whether Articles 7 and 48 of the EEC Treaty and the provisions of Regulations No 1612/68 and No 1408/71 should be interpreted as precluding

12 — See, for instance, Case 27/74 *Demag* [1974] ECR 1037, paragraph 8, Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 6, Case 22/80 *Boussac* [1980] ECR 3427, paragraph 5 and Case C-69/88 *Krantz* [1990] ECR I-583, paragraph 7.

national rules and practices of associations of persons providing medical and hospital services for maternity care from permitting uniformly higher fees to be charged for those services to persons and organisations not affiliated to the national social security scheme, including Community officials affiliated to the Joint Scheme, than those charged to residents affiliated to the national social security scheme.

B — *Prohibition of discrimination on the ground of nationality*

40. The prohibition of discrimination on the ground of nationality is a corollary of the principle of equal treatment for nationals of Member States of the Community — now citizens of the Union — and an expression of the general principle of equality, which is a fundamental concept of Community law.

41. That prohibition, which takes specific shape in many Community law provisions, does not negate in general terms the existence of distinctions, which may consist in the application of different rules to similar situations or the application of the same rule to different situations. [13] What is prohibited is in fact arbitrary discrimination which can be identified by an examination as to its objective justification. [14]

42. The Court has consistently held that prohibition of discrimination on the ground of nationality includes not only direct discrimination, but also indirect or covert discrimination which, even if not based directly on the prohibited criterion of nationality, is based on other criteria which produce results identical or, at least, similar to those brought about when nationality is used as the criterion. [15] At this point, it should be noted that, in the present case, the contested discrimination is a typical example of indirect discrimination based on nationality. The application of the criterion of affiliation to the national social security scheme, on which the differences in the scales of medical and hospital fees are

13 — On the difference between formal and substantive discrimination see, for instance, Case 13/63 *Italy* v *Commission* [1963] ECR 165, particularly paragraph 4a.

14 — As regards Article 7 of the EEC Treaty, see, for instance, Case C-398/92 *Mund & Fester* [1994] ECR I-467, paragraph 17. As regards Article 48 of the Treaty and Article 7 of Regulation No 1612/68, see, for instance, Case C-57/96 *Meints* [1997] ECR I-6689, paragraph 45.

15 — See, for instance, Cases C-419/92 *Scholz* [1994] ECR I-505, paragraph 7 and C-35/97 *Commission* v *France* [1998] ECR I-5325, paragraph 37.

based, constitutes a covert application of the criterion of nationality, inasmuch as the majority of persons affiliated to the national scheme, as the Commission points out, are Luxembourg nationals, while the overwhelming majority of those not affiliated to that scheme, particularly Community officials, are nationals of other Member States. [16]

43. Following those preliminary remarks, I consider that, in view of the different provisions of Community law requiring interpretation by the Court, the following questions should be dealt with sequentially. Initially, in order to judge whether, in the present case, there is discrimination on the ground of nationality in breach of Community law (d), the legal basis of the prohibition on that kind of discrimination must be defined and the specific conditions governing the application of this principle examined in light of the material facts of the case in the main proceedings (a). Next, certain observations will be made as to whether, in the present case, those conditions are fulfilled and, more specifically, as to the existence of different treatment in similar situations in the context of the material facts of the case in the main proceedings and of the provisions Luxembourg law (b). Finally, it must be considered whether this different treatment is objectively justified or not (c).

16 — See, for instance, *Meints* (cited above, footnote 14), paragraphs 45 and 46. Moreover, as the Commission points out, the fact that nationals of other Member States may be included in the favoured category or that Luxembourg nationals may be included in the disadvantaged category does not preclude the existence of indirect discrimination. See, for instance, Case 20/85 *Roviello* [1988] ECR 2805, paragraph 16.

(a) Legal basis of the prohibition on discrimination on the ground of nationality

(aa) Application of Regulation No 1408/71

44. The Court has consistently held that 'a person has the status of employed person within the meaning of Regulation No 1408/71 where he is covered, even if in respect of a single risk, compulsorily or on an optional basis, by a general or special social security scheme mentioned in Article 1(a) of Regulation No 1408/71, irrespective of the existence of an employment relationship.' [17]

45. It appears that Community officials, like Mr Ferlini, even though they are insured in a private scheme such as the Joint Scheme, cannot be regarded as employed persons within the meaning of the above definition.

46. As Advocate General Lenz characteristically pointed out in his Opinion on the *Schmid* case, [18] 'the concept of an employed person [must] be defined with

17 — See Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 36.

18 — See Case C-310/91 [1993] ECR I-3011.

the objectives and substantive scope of the regulation in mind'. [19] In other words, the definition of employed person is essentially dependent on the context in which that regulation is applied.

47. Thus, although Regulation No 1408/71, which was adopted on the basis of Article 51 of the EEC Treaty, is connected with the establishment of free movement for workers, its basic aim is nevertheless to coordinate different national legislation on social benefits in order to ensure that free movement of workers does not result in workers who exercise this freedom being placed in a less favourable position than workers engaged in activities within a single Member State.

48. In the present case, as the Commission points out in its observations, the general conditions governing the application of Regulation No 1408/71 are not fulfilled because this is not a matter involving the coordination of national social security schemes, but of providing care within a single Member State and applying different fees for those services to a category of persons which essentially includes workers who are nationals of other Member States.

19 — Paragraph 44.

Consequently, there are no grounds for classifying Mr Ferlini as an employed person within the meaning of Regulation No 1408/71.

49. In connection with the impossibility of classifying Mr Ferlini as an 'employed person' within the meaning of Regulation No 1408/71 regard must also be had to the ground of non-application of that regulation under Article 2(1) thereof, which is directly relevant to the present case. Under that provision, Regulation No 1408/71 'shall apply to workers who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as also to the members of their families and their survivors'. In the present case, Mr Ferlini, being an official of the Commission of the European Communities, is affiliated to the Joint Scheme. Consequently, and as would appear to be borne out by the case-file, neither Mr Ferlini nor his spouse are affiliated to the national social security scheme, as required by Article 2(1) of Regulation No 1408/71.

50. In view of the above, neither Mr Ferlini nor his spouse fall within the scope *ratione*

personae of Regulation No 1408/71.[20] However, since in Community law the concept of worker does not admit of one meaning only, but varies according to the sector in which it is applied,[21] Mr Ferlini and his spouse are not precluded from falling within the scope *ratione personae* of other rules of Community law such as Article 48 of the EEC Treaty or Regulation No 1612/68.

(ab) Application of Article 48 of the EEC Treaty and Regulation No 1612/68

51. If regard is had to the Court's case-law concerning nationals of Member States of the Community who are, in general terms, officials of international organisations,[22] Community officials, such as Mr Ferlini, must *a fortiori* be deemed to retain their status as workers which enables them and members of their family to come within the scope *ratione personae* of Article 48 of the EEC Treaty and of Regulation No 1612/68.

52. However, a question may arise as to whether the treatment of Mr and Mrs Ferlini comes within the scope *ratione materiae* of the Community rules in question.[23] In particular, it must be examined whether the imposition of higher charges for medical and hospital maternity care than in the case of persons affiliated to the national social security scheme concerns 'conditions of work and employment' within the meaning of Article 48(2) of the EEC Treaty and Article 7(1) of Regulation No 1612/68 or 'social advantages' within the meaning of Article 7(2) of the same regulation.

53. The term 'conditions of work and employment', used in the above provisions, appears to include matters directly inherent in the employment contract, such as remuneration, dismissal, the calculation of seniority, reinstatement or re-employment. In this respect, it is significant that the Court, in order to decide whether a system

20 — In this respect, it is worth noting that Article 16(3) of Regulation No 1408/71 provides, especially for auxiliary staff in the European Communities, the possibility of choosing between certain national social security schemes. It follows indirectly from the above limitation on the possibility of this choice that the regulation itself accepts that permanent Community officials are not affiliated to national systems and, consequently, do not fall within its scope.
According to the Luxembourg Government, the Joint Scheme, which is based on the rights of Community officials under the Staff Regulations, does not fall within the scope of application of Regulation No 1408/71 to the extent to which it provides a level of protection at least equal to the coordination measures introduced pursuant to Article 51 of the EEC Treaty.

21 — See *Martínez Sala* (cited above, footnote 17), paragraph 31.

22 — See, for example, Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR 723 where the Court held that 'a national of a Member State who in another Member State occupies a post governed by a special statute under international law, such as for example a post at the European Space Agency, must be regarded as a worker within the meaning of Article 48(1) and (2) of the Treaty, and is therefore entitled, as are the members of his family, to the rights and privileges prescribed in those provisions and in Regulation No 1612/68 of the Council' (paragraph 15). See also *Schmid* (cited above, footnote 18), paragraph 20.

23 — As regards the different question of the direct horizontal effect of Article 48, see below, paragraph 77 of this Opinion.

guaranteeing the payment of old-age and survivors' pension insurance contributions while the worker is on military service amounted to 'conditions of employment and work', examined whether such payment constituted *a statutory or contractual obligation on the employer.* [24]

54. In the present case, I am of the opinion that the imposition of higher fees for medical and hospital maternity care does not fall within the concept of 'conditions of employment and work'. As the Commission points out, despite the fact that the imposition of those fees may place a burden on the net income of persons not affiliated to the Luxembourg national social security scheme, since it is likely that they have to pay more as their insurance bodies are unable to cover the totality of the fees charged, those fees are none the less linked only indirectly and hypothetically to 'conditions of employment and work' and, in particular, to the remuneration of those workers. The contrary position would, in effect, lead to the simplistic view that any method of setting fees for products and services which entails extra expenditure, as in the case of expenditure for medical and hospital maternity care, must be regarded as having an effect on workers' contractually or legally fixed remuneration.

24 — See Case C-315/94 *De Vos* [1996] ECR I-1417, paragraph 18.

55. Since the level of fees for medical and hospital maternity care does not appear to be subsumed within the 'conditions of employment and work', it falls to examine whether determination of those fees is in the nature of a 'social advantage' within the meaning of Article 7(2) of Regulation No 1612/68. Social advantages have been consistently defined as 'all those which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community'. [25]

56. According to the Commission, in light of the above definition, it is not impossible for a guaranteed level of fees for medical services, which in accordance with the logic of the Luxembourg system, corresponds to the real costs of the services in question, to be regarded as constituting a social advantage which should be provided to all workers in Luxembourg.

57. According to Mr Ferlini, the lump-sum payment for childbirth made by the Lux-

25 — See, for instance, Cases 65/81 *Reina* [1982] ECR 33, paragraph 12, 249/83 *Hoeckx* [1985] ECR 973, paragraph 20, 157/84 *Frascogna* [1985] ECR 1739, paragraph 30, and *Schmid* (cited above, footnote 18), paragraph 18 and *Meints* (cited above, footnote 14), paragraph 39.

embourg State incontestably constitutes a 'social advantage' inasmuch as it is essentially no different from the maternity allowance which has been held by the Court to be a social advantage.[26] Determination of the fees for services covered by the lump-sum payment constitutes an essential element of that amount which should be paid to all persons who enjoy the right to freedom of movement in Luxembourg. In practice, Community officials do not appear to receive the advantage of the lump-sum payment, but that question was not raised in the main proceedings. None the less, Mr Ferlini contends that reliance on its nature as a social advantage is possible, at least, in order to claim equality in respect of the fees fixed for medical and hospital maternity care.

58. Both the Commission, which refers to a right to reasonable fees corresponding to real costs, and Mr Ferlini, who refers to the lump-sum payment for childbirth, attempt to give positive content to the right to equal treatment in respect of the fees for the services concerned so that the definition of this right as an 'social advantage' is consistent with the Court's case-law which has defined as 'social advantages' services principally being positive in content.[27] However, the information provided in the order for reference does not make it absolutely clear that, at the material time of the facts of the case in the main proceedings, the fees applied to persons affiliated to the national social security scheme corresponded to the cost of services, while the fees applied to persons not affiliated, and particularly to Community officials, did not correspond to that cost, or that the lump-sum payment for childbirth or, *a fortiori*, the fees for those services were of the same nature as a maternity allowance. It is for the national court, which has an in-depth knowledge of the national law and of the material facts of the case in the main proceedings, to inquire into the correctness of the above arguments.

59. However, I consider that the disputed determination of fees for medical and hospital maternity care can be regarded as falling within the scope *ratione materiae* of the principle of equal treatment enshrined in Article 7 of Regulation No 1612/68, without its being necessary to seek a service or advantage of positive content. It is sufficient to reason *a majori ad minus*. If equal treatment is held to apply in respect

26 — See Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817.

27 — Thus, for instance, Case 15/69 *Ugliola* [1969] ECR 363 concerning protection from the unfavourable consequences arising out of absence through obligations for military service, Case 44/72 *Marsman* [1972] ECR 1243 concerning protection measures against dismissal, Case 152/73 *Sotgiu* [1974] ECR 153 concerning 'the separation allowance' made to workers separated from their home, Case 32/75 *Cristini* [1975] ECR 1085 concerning fares reduction cards issued by a national railway authority, Case 237/83 *Prodest* [1984] ECR 3153 concerning the right to retain affiliation to the general social security scheme of the Member State where the undertaking is established and Case 137/84 *Mutsch* [1985] ECR 2681 concerning the possibility for a worker to use his mother tongue in court proceedings in the Member State where he is resident.

of 'social advantages', it must be regarded as applying to any regulatory arrangements which, even if they do not strictly constitute an advantage of positive content, concern the social situation of workers — irrespective of whether they are linked to a specific contract of employment — and are generally applicable to national workers primarily because of their objective status as workers or purely and simply by virtue of the fact of that they reside on the national territory, and the extension of those arrangements to workers who are nationals of other Member States therefore seems apt to facilitate their freedom of movement within the Community. It is clear that the practice of fixing fees for medical and hospital maternity care comes within the terms of the above definition in every respect.

60. If it is accepted that the material facts of the case in the main proceedings fall within the scope of Article 7(2) of Regulation No 1612/68, a final question should be raised. According to the Court's recent case-law, if national legislation falling within the scope of Article 48 of the Treaty and Article 7(2) of Regulation No 1612/68 prevents or deters nationals of a Member State from leaving their country with a view to exercising their right to freedom of movement, it is regarded as contravening Article 48 of the Treaty without its being necessary to examine whether there is a case of indirect discrimination on grounds of nationality. [28] On the basis of this ruling, it appears that preventing or deterring workers from exercising their right to freedom of movement differs from the existence of indirect discrimination on the ground of nationality in the context of the same right. In particular, it appears that preventing or deterring freedom of movement is broader in scope than discrimination on the ground of nationality and is based on the mere probability that it exists. [29]

61. However, in the present case, it is not easy to contend that, other than establishing indirect discrimination on the ground of nationality, the application in a Member State of maternity care fees higher than those applied to persons affiliated to that Member State's social security scheme would generally prevent or deter a national of another Member State from working, especially as a Community official, in the first Member State. I reach this conclusion taking into account the exceptional, reasonably foreseeable and limited nature of maternity care expenses and having regard to the fact that insurance cover against maternity expenses is widely available in the various Member States in which the Joint Scheme is available. On the other hand, if in a Member State, such as, in the present case, Luxembourg, the scale of fees were shown to be generally discriminating in like manner in the case of all — or a significant number of — medical and hospital services, it could indeed be argued that

28 — See Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 41.

29 — See *Terhoeve* (cited above, footnote 28), paragraph 40.

that would be likely to deter a national of a Member State from leaving the Member State of residence in order to work as a Community official in the Member State concerned.

(ac) Application of Article 7 of the EEC Treaty

62. Article 7 of the EEC Treaty, by virtue of which 'within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited', may be independently applied only to situations governed by Community law for which the Treaty lays down no specific prohibition of discrimination. [30]

63. Inasmuch as the principle of non-discrimination on the ground of nationality is specifically referred to in Article 48 of the Treaty, it must therefore be accepted that, in the present case, there is no ground for applying Article 7 of the Treaty unless Article 48 and Regulation No 1612/68 are not applicable. On the basis of the above analyses, the question of the application of Article 7 of the Treaty may therefore arise should the Court decide either that Mr Ferlini is not a worker within the meaning of Article 48 and Regulation No 1612/68, or that the discrimination at issue does not fall within the scope *ratione materiae* of those provisions, that is to say that it concerns neither 'conditions of employment and work' nor 'social advantages'.

64. In such a case, it will be necessary to consider whether the material facts of the case in the main proceedings come within the scope of the Treaty, which is a precondition of the application of the principle of the prohibition of discrimination as laid down in Article 7 of the EEC Treaty.

65. At this juncture, it should be stressed that the Court appears to accept a substantively broad interpretation of this condition, recognising that the Treaty's scope encompasses situations which, while not linked directly to the fundamental freedoms laid down by Community law, have an indirect effect on the exercise of those freedoms. [31] In other words, the definition of the Treaty's scope, within the meaning of Article 7, is a dynamic process allowing a range of matters not alien to Community law or which are governed, albeit in part,

30 — See, for instance, Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraph 13 and Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 19. As regards the so-called subsidiary character of Article 6 of the EC Treaty (now Article 12 EC), see also the conclusions of Advocate General La Pergola (paragraph 10 et seq.) in Case C-43/95 *Data Delecta and Forsberg* [1996] ECR I-4661.

31 — See, for instance, *Data Delecta and Forsberg* (cited above, footnote 30), at paragraphs 14 and 15, concerning national legal provisions that fall within the scope of the Treaty's application on account of their effect, albeit indirect, on intra-Community trade in goods and services.

by Community law to be gradually integrated into the Treaty's scope. [32]

66. With particular regard to Community officials, in the *Forcheri* judgment which, like the present case, concerned the position of a European Community official's wife, [33] the Court accepted at the outset that 'the legal position of officials of the Community in the Member State in which they are employed comes within the scope of the Treaty on a dual basis by reason of their post with the Community and because they must enjoy all the benefits flowing from Community law for the nationals of Member States in relation to freedom of movement, freedom of establishment and social security'. [34] Likewise, in the same judgment, the Court, in examining the more specific question of whether the payment by a Community official's wife who is not a national of the Member State in which she is established with her husband of an enrolment fee falls within the scope of the Treaty and is consistent with Community law, the Court held that 'if a Member State organises educational courses relating in particular to vocational training, to require of a national of another Member State lawfully established in the first Member State an enrolment fee which is not required of its own nationals in order to take part in such courses, constitutes discrimination by reason of nationality, which is prohibited by Article 7 of the Treaty'. [35]

67. In that judgment, which preceded *Echternach and Moritz* (footnote 22) and *Schmid* (footnote 18), the Court decided to base its judgment on Article 7 of the EEC Treaty, tacitly considering that a Community official and national of a Member State of the Community is not a worker within the meaning of Article 48 of the Treaty and Regulation No 1612/68, but accepting that he cannot be refused the rights recognised by those Community rules. Thus, the question arose as to the determination of those persons who, without being workers within the above meaning, might come within the scope of the Treaty. The Court resolved that question by relying on application of the criterion that the person concerned had to be the 'national of another Member State lawfully established in the first Member State'. Indeed, while it appears from the grounds of the judgment that Mr Forcheri's wife derived her right to equal treatment as the spouse of a Community official, which guaranteed her lawful establishment in the Member State concerned, the operative part of the Court's judgment seems to refer generally to the condition of lawful establishment, irrespective of the special case of spouses of Community officials. This has led commentators of the judgment to speak of the new perspective opened up for Community law by the Court; in other words, once a Community national, even if

32 — On the subject of vocational training, see, for instance, Case 293/83 *Gravier* [1985] ECR 593 and Case 24/86 *Blaizot* [1988] ECR 379.

33 — There was no doubt that that Mr Forcheri's wife was an Italian national.

34 — Case 152/82 [1983] ECR 2323, paragraph 9.

35 — Paragraph 18.

not a worker within the meaning of Article 48 and Regulation No 1612/68, has become lawfully established in the territory of a Member State, he would benefit from equal treatment in respect of all matters falling within the Treaty's scope. [36]

68. On this point, it should be noted that this perspective, which was opened up in 1983 in the Court's case-law, has been reaffirmed in Article 8 (now, after amendment, Article 17 EC) and Article 8a (now, after amendment, Article 17 EC) of the EC Treaty. [37] As the Court has recently held, 'Article 8(2) of the Treaty attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in Article 6 of the Treaty, not to suffer discrimination on grounds of nationality within the scope *ratione materiae* of the Treaty. It follows that a citizen of the European Union, such as the appellant in the main proceedings, who is lawfully resident in the territory of the host Member State, can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law ...'. [38] The similarity between the above interpretation of Articles 8 and 8a of the EC Treaty and the *Forcheri* ruling is more than obvious. Accordingly, although the above articles could not be applied at the material time of the facts of the case in the main proceedings, this interpretation may throw some light on the meaning and significance of the *Forcheri* ruling.

69. Applying this case-law to the present case, it must be accepted that, in so far as Mr Ferlini's wife was a national of a Member State of the Community — a fact which it is for the national court to verify — and lawfully established in Luxembourg as the wife of a Community official who worked there, she should not be discriminated against on the ground of nationality, which is prohibited by Article 7 of the Treaty in all cases falling within its scope. It is clear that the scale fees for medical and hospital care relate to services which, as the Commission points out in its observations, indubitably were and remain within the scope of the Treaty, [39] without its being necessary to establish a link with

36 — See Starkle, G., 'Extension du principe de non-discrimination en droit communautaire au ressortissent d'un État membre licitement installé dans un autre État membre' [observations on the *Forcheri* judgment, cited above], *Cahiers de droit européen*, 1984, p. 672 et seq. Also, according to Advocate General Darmon, in the *Forcheri* judgment, 'the Court apparently recognises the right of all Community nationals, regardless of whether or not they are employed by a Community institution, to enjoy "all the benefits flowing from Community law", in particular in relation to freedom of movement for workers' (see conclusions of *Echternach and Moritz* cited above, footnote 22), paragraph 24.

37 — Article 8 provides that:
'1. Citizenship of the Union is hereby established.
Every person holding the nationality of a Member State shall be a citizen of the Union.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby'.
Moreover, pursuant to Article 8a(1), 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'.

38 — See *Martínez Sala*, cited above, footnote 17, paragraphs 62 and 63.

39 — On the subject of medical services, the Commission refers to Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377 where it was held that 'tourists, persons receiving medical treatment ... are to be regarded as recipients of services' (paragraph 16).

'conditions of employment and work' or 'social advantages', as is the case where Article 48 of the Treaty and Regulation No 1612/68 apply. [40]

70. Mr Ferlini's wife is independently entitled to the abovementioned right. In any event, she is entitled to that right on the basis of her status as the spouse of a Community official, who is a national of a Member State of the Community — which it is also for the national court to verify — and whose legal position, as stated above, comes within the scope of the Treaty and who, with his family, must enjoy all the benefits flowing from Community law for the nationals of Member States in relation to freedom of movement, freedom of establishment and social security.

71. The final, but no less important, question to be examined in the context of the interpretation of Article 7 of the EEC Treaty is the possibility of that article being applied not only in the case of discrimination arising from the action of the Community institutions or Member States, but also in the case of discrimination arising in the case of relationships between individuals. In the light of the material facts of the case in the main proceedings, the above question arises where discrimination is attributable to the activities of legal persons governed by private law, that is to say, where discrimination is held to be attributable to the CHL, the EHL or the UCM and the persons in question are deemed to be legal persons governed by private law. On that point, it should be noted that, apart from simply mentioning the fact that the CHL is a public body, the order for reference does not contain sufficient information on which any judgment as to the public or private character of those persons can be based. It is therefore for the national court, which is conversant with the national law, to clarify this point.

72. I consider that, despite the serious reservations expressed from time to time in academic writings, [41] the development of the Court's case-law allows, in the present case, an affirmative reply to be given to the question whether Article 7 may have what is generally referred to as 'horizontal direct effect'.

73. That answer can be based on the fact that action of legal persons governed by

40 — See above, paragraph 52 et seq. of this Opinion.

41 — The principal arguments underpinning these reservations were as follows: (a) the general economy of the Treaty is based on obligations incumbent on the Member States, except in very few situations where the Treaty explicitly places obligations on individuals, principally on undertakings, for reasons of protecting competition; (b) other provisions of the Treaty that were vaguely formulated, such as Article 48(2), did not have horizontal direct effect; (c) responsibility for ensuring that the obligations arising from the Treaty are respected lies primarily with the Commission which can only bring before the Court an act attributable to a Member State. On this subject, see Durand, C.-F., 'Les Principes', in *Commentaire Mégret. Le droit de la CEE*, Vol. 1, *Préambule. Principes. Libre circulation des marchandises*, Éditions de l'Université de Bruxelles, Études européenes, 2nd edition, 1992, p. 60.

private law, which is incompatible with Community law inasmuch as it entails discrimination on the ground of nationality, is attributable to the Member State itself.

74. In the context of regulatory arrangements governing employment relations, the Court has accepted such reasoning, considering that the action of legal persons governed by private law is of a quasi regulatory nature which assimilates it to action taken by the State itself. Accordingly, in regard to Articles 7 and 48 of the EEC Treaty, the Court has held that 'Articles 7, 48 and 59 have in common the prohibition, in their respective spheres of application, of any discrimination on grounds of nationality ...'.[42] More specifically, as regards Article 48 of the EEC Treaty (subsequently Article 48 of the EC Treaty and now Article 39 EC), the Court has also held that 'the abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law ... It has also observed that working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons. Accordingly, if the scope of Article 48 of the Treaty were confined to acts of public authority there would be a risk of creating inequality in its application'.[43]

75. However, if, in the present case, the discrimination were deemed to be attributable to the decisions and practices of the UCM and the EHL, the above case-law of the Court could not be applied nor could it be accepted that Article 7 of the EEC Treaty was applicable in the present case on the ground that, irrespective of the public or private character of the above legal persons, the general intention of their action is the collective regulation of social security in Luxembourg. It is true that, as indicated in the order for reference and the observations of the parties, those legal persons actively participate in collective negotiations in relation to the setting of fees for medical and hospital care and therefore, in the context of social security, play a role similar to that of trade union and employers' representatives engaged in the regulation of employment relations through collective agreements. Thus, viewed from the standpoint of their general responsibilities, those persons are regulatory agents in the social security sector which, in a general sense, lends to their action a quasi regulatory character. Nevertheless, in the main proceedings, the EHL's practice of setting fees for medical and hospital maternity care for persons not affiliated to the national social security scheme does not amount to collective regulation of social security because, on the one hand, that practice is

42 — See Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraphs 16 and 17. See also Case 13/76 *Donà* v *Montero* [1976] ECR 1333, paragraph 17 et seq.

43 — See Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 83 and 84.

unilateral not collective and, on the other, it concerns persons not affiliated to the national social security scheme.[44] In light of these two factors, the EHL's action, which is disputed in the main proceedings, cannot substantively be regarded as action by the State itself.

76. However, I consider that the above conclusion does not preclude the possibility of attributing responsibility to the Member State for discrimination on the ground of nationality arising out of the action of legal persons governed by private law.

77. Indeed, in the present case, the origin of discrimination on the ground of nationality appears to be the national legal framework (Articles 6, 13 and 308 *bis* et seq. of the Code des Assurances Sociales) which provided the possibility of regulating by collective agreement fees for medical and hospital care and the adoption of the Grand-Ducal Regulation of 31 December 1974 which defined the services in kind in the case of confinement. It is precisely in regard to the interpretation of that legal and regulatory framework, which is clearly attributable to the Member State, that there is a failure to extend to nationals of other Member States of the Community not affiliated to the national social security scheme the fees applied to persons affiliated to that scheme. This legal and regulatory framework, without directly setting higher fees for the former category of persons, appears to allow the competent bodies to set such fees. In other words, discrimination begins at the level of the legal and regulatory framework not as a result of positive action, but as a result of a failure to protect a category of persons or, at least, of acquiescence in the fact that different treatment may be accorded to them. Consequently, if the conduct of the legal persons who provide hospital care and set fees for that care amounts to discrimination on the ground of nationality, that is primarily due to the fact that the above legal and regulatory framework affords them the possibility of applying such discriminatory treatment.

78. In this respect, the Court has accepted that the fact that abstention by a Member State from taking action or, as the case may be, failure to adopt adequate measures to prevent obstacles to Community freedoms guaranteed within the single market without internal frontiers, obstacles caused particularly by actions of private individuals on its territory, may have consequences equally as serious as those of a positive act aimed at obstructing those freedoms. To this end, the Member States themselves have an obligation not only to abstain from adopting measures or engaging in conduct liable to constitute an obstacle to the fundamental freedoms, but also, when read with Article 5 of the EEC Treaty (subsequently Article 5 of the EC Treaty and now Article 10 EC), to take all

44 — See also below, paragraphs 113 to 115 of this Opinion.

necessary and appropriate measures to ensure that these freedoms are respected on their territory. [45]

79. In view of the fact that discrimination resulting from action taken by private individuals on its territory can thus be attributed to a Member State, there is no doubt that not only Article 48 of the EEC Treaty and Article 7 of Regulation No 1612/68, but also Article 7 of the EEC Treaty, particularly where the obligations arising from this article are defined and clear, may be applied to relationships between those individuals. Accordingly, it is by no means paradoxical that, in regard to Article 119 of the EEC Treaty (subsequently Article 119 of the EC Treaty; Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), it is henceforth accepted that, since that article has overriding effect, the prohibition on discrimination between male and female workers applies not only to public authorities, but also to all contracts which collectively regulate paid work, including contracts between individuals. [46] That being the case, it is indeed difficult to imagine that, while an employment contract between individuals must, pursuant to Article 119 of the EEC Treaty, comply with the principle of equal pay for male and female workers, in the case of a contract for the provision of medical and hospital care, it would be possible not to comply with the principle of equal treatment between nationals of the Member States of the Community, pursuant to Article 7 of the EEC Treaty. Consequently, even if that discrimination on the ground of nationality were deemed to be attributable to the exercise of discretion by an individual hospital, such as the CHL, or the application by that hospital of a decision based on an agreement between hospitals, such as the EHL, and those persons were held to be legal persons governed by private law, Article 7 of the EEC Treaty would still have to be held to be applicable.

(ad) Conclusion concerning the choice of legal basis

80. In light of the foregoing, I therefore propose that, as regards the legal basis of the prohibition on discrimination on the ground of nationality, the Court should declare that the national court should apply Article 7(2) of Regulation No 1612/68 to the material facts of the case in the main proceedings. If, notwithstanding, the Court should rule that those facts do not come within the scope *ratione materiae* of that regulation, then it is entirely open to it to rule that Article 7 of the EEC Treaty is applicable.

(b) Different treatment of similar cases

81. In light of the material facts of the case in the main proceedings, it is proper that

45 — See Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraphs 30 to 32, which specifically relates to free movement of goods.

46 — See, for instance, Case C-400/93 *Royal Copenhagen* [1995] ECR I-1275, paragraph 45.

certain comments should be made regarding, on the one hand, the existence and, more specifically, the scope of discriminatory treatment (ba) and, on the other hand, on the similarity of cases treated differently (bb).

(ba) Scope of the different treatment

82. In the order for reference, the national court gives no details as to which components of hospital care expenses for childbirth are treated differently, in terms of the fees applied, with respect to those persons affiliated to the national social security scheme and those not affiliated to it. The only relevant figures in the order for reference pertaining to fees are contained in the outline of the appellant's claims,[47] but in no case is there any precise indication as to the rules, agreements or decisions on the basis of which each of the aforementioned fees was set. The only information to be gleaned from the order for reference and, more specifically, from the formulation of the question for a preliminary ruling which is capable of affording to the Court guidance in giving its reply is the fact that from all the provisions existing in Luxembourg at the time of the material facts of the case in the main proceedings it emerges that, in respect of persons and organisations not affiliated to the national social security scheme and European Community officials affiliated to the Joint Scheme, fees for medical and hospital maternity care were applied at a uniformly higher rate than those applied to residents affiliated to the national social security scheme.

83. However, it is worth noting that, as Mr Ferlini contends and as the documents appended to his pleadings appear to show, on the basis of the fees applied in practice, the different treatment relates only to certain hospital services and, in particular, to general childbirth expenses which were regulated by the unilateral decision of the EHL in respect of persons not affiliated to the national scheme. According to Mr Ferlini, for certain other services not including childbirth and hospitalisation expenses, the EHL had decided, again unilaterally, to apply to persons not affiliated to the national social security scheme the uniform fees contractually agreed on 31 December 1974 between the UCM and the EHL in relation to expenses covered by the lump sum for childbirth payable to those persons affiliated to the Luxembourg insurance funds. Furthermore, according to Mr Ferlini, the above contract was probably adopted having regard to the contract concluded between the UCM and the AMMD.

84. In any case, it is not for the Court, but for the national court, which is conversant with the national law and the material facts of the case in the main proceedings, to

47 — As the national court points out, 'Thus, when Mrs Ferlini was hospitalised, the lump sum reimbursed by the Luxembourg sickness fund was LUF 36 854, that is to say LUF 4 645 for medical assistance, LUF 29 949 for childbirth expenses and LUF 2 260 for dietetic products, whilst the appellant and the Joint Scheme had to pay LUF 59 306 for the same services, representing an increase of 71.43% over the national scale'.

determine the scope of different treatment and the details of the procedure resulting in such treatment.

85. However, it is worth noting that, if the Court considers that the different treatment and, with it, the resulting discrimination, is attributable to the legal and regulatory framework of the Grand Duchy of Luxembourg, [48] then there is no particular point in clarifying the precise basis of the fees charged, or of the decisions, agreements or practices pursuant to the above legal and regulatory framework on which such discrimination is based. Discrimination is established where there is the possibility of according different treatment contrary to Community law, which is the case in respect of the abovementioned legal and regulatory framework, irrespective of whether those applying that framework decide, for whatever reason, to avail themselves of that possibility at a given time, or not to do so.

(bb) Similarity of cases treated differently

86. In light of the material facts of the case in the main proceedings, the question arises as to whether the two categories of persons, in other words, those affiliated to the national social security scheme in Luxembourg on the one hand, and, on the other, those not affiliated to it, including Community officials affiliated to the Joint Scheme, are in a similar position, such that the application of different fees for hospital maternity care to each of those categories constitutes discrimination. I consider that the answer to the above question should be affirmative, despite the arguments adduced by the Luxembourg Government and the CHL, the respondent in the main proceedings.

87. First, the fact that the two categories of persons are affiliated to different legal social security schemes cannot justify the contention that these are two cases which should be treated differently under Community law in respect of fees for medical and hospital maternity care. Notwithstanding their respective autonomy neither the Luxembourg national social security scheme nor the Joint Scheme can infringe the principles and rules which govern Community law. As the Court has held, even if, '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 ... and, second, the conditions for entitlement to benefits ... the Member States must nevertheless comply with Community law when exercising those powers'. [49] Moreover, it would be difficult to view discrimination in respect of

48 — See above, paragraph 77 of this Opinion.

49 — See Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 18 and 19.

fees for medical and hospital maternity care as being concerned with the organisation of the social security system as defined above. Likewise, the fact that Article 9(2) of the rules of the Joint Scheme provides that 'the institutions shall, wherever possible, take steps to negotiate with the representatives of the medical profession and/or the competent authorities, associations and establishments agreements specifying the rates applicable 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', does not mean that, in the context of the above agreements, those institutions are able to breach fundamental Community law and, more specifically, the principle of prohibition of discrimination on the ground of nationality and between workers who are Community nationals.

88. Moreover, the argument that Community officials do not need to rely on the rules of Community law in order to move freely within the territory of the Member States of the Community because they enjoy the rights conferred on them by the Protocol on the Privileges and Immunities of the European Communities is not persuasive. Those rights are conferred in the interest of the Communities to enable them to accomplish their mission, [50] they refer as a rule to the treatment accorded to diplomatic missions [51] and they do not have the scope and force of the rights conferred by Community law on Community nationals — now citizens of the Union. Consequently, while the above argument would probably apply to Community officials who are not nationals of any Member State, [52] it would not apply to officials who are nationals of a Member State. As demonstrated in the abovementioned cases *Echternach and Moritz* (footnote 22), *Schmid* (footnote 18) and *Forcheri* (footnote 33), Community officials continue to have the status of worker under Article 48 of the EEC Treaty and to enjoy all the benefits conferred by Community law, irrespective of the specific nature of their employment. To circumscribe their legal position by reference to the rights conferred on them by the Protocol on the Privileges and Immunities of the European Communities would therefore constitute a breach of Community law and their rights under it.

89. Secondly, the fact that, at the time of the material facts of the case in the main proceedings, no agreement had been concluded between the Joint Scheme and the EHL, while such agreements existed with the UCM, does not appear to be relevant in regard to the existence of discrimination between similar cases. As the Commission and Mr Ferlini point out, the present case concerns fees for services not arising out of contract, but in relation to all the childbirth services provided for by the legal and regulatory provisions. In any case, it should be noted that, in view of their mandatory nature within the framework of the Luxembourg system, the abovementioned

50 — See Article 18 of the Protocol.

51 — See Article 6 of the Protocol.

52 — A non-national of a Member State may be appointed as a Community official subject to an exception as provided for in Article 28(*a*) of the Staff Regulations.

agreements essentially constitute a uniform type of regulation by the State and differ substantially from private-law contracts which reflect the contractual freedom of service providers.

90. Thirdly, I am not persuaded by the arguments that persons not affiliated to the Luxembourg health system have, on the one hand, high incomes and high levels of cover and reimbursement under their insurance system and, on the other hand, neither pay Luxembourg taxes nor make contributions to the national social security scheme.

91. In the first place, according to the order for reference, the fees charged for medical services under the Luxembourg social security system are uniform. They are fixed exclusively by reference to the nature of the service provided and do not vary according to the patient's income or the qualifications of the service provider.

92. Moreover, as to the fact that persons not affiliated to the national social security scheme do not pay taxes, the Court has ruled, in relation to the specific situation of a Community official and his family, that 'although under the second paragraph of Article 13 of the Protocol on the Privileges and Immunities of the European Communities he is exempt from national taxes on salaries, wages and emoluments paid by the Communities, he is liable on the other hand, under the first paragraph of the same article, to a tax for the benefit of the Communities on salaries, wages and emoluments from which the host Member State, as a Member of the Communities, benefits indirectly. The fact that he does not pay a tax on his salary to the national treasury is therefore not a valid reason for differentiating the case of the official and his family from that of the migrant worker whose income is liable to taxation by the State in which he resides'. [53]

93. Furthermore, different treatment of the two categories of persons cannot be justified by the argument that Community officials and, generally, persons not affiliated to the national social security scheme do not make contributions to it. In the first place, as already noted, fees are calculated in the Luxembourg system by reference to the nature and cost of the service and not in accordance with the contribution made. Secondly, maternity care expenses are covered directly by the State and not the insurance funds; in the latter case the non-payment of insurance contributions could possibly be of significance.

94. As the Commission correctly states, if the above argument were accepted, especially in conjunction with the assertion of the CHL, the respondent in the main proceedings, that the fees applied to Com-

53 — See *Forcheri* (cited above, footnote 34), paragraph 19.

munity officials correspond to the actual cost of the services provided, this would imply that the fees applied to persons affiliated to the national scheme are below cost — a fact which, in any case, it is for the national court to clarify — and that nationals of other Member States could be asked to make an additional payment since they do not pay taxes and contributions in Luxembourg. However, such an arrangement would be contrary to the Community principle of freedom of movement of persons, which guarantees to the nationals of other Member States the same rights as nationals of the host State, even if that entails additional costs for the Member State where those nationals do not pay taxes or contributions. [54]

95. Finally, as the Commission correctly points out, whilst all the foregoing arguments concerning the financial situation of Community officials and the fact that they pay neither taxes nor contributions could possibly be used in an attempt to justify the Luxembourg insurance funds in not covering or reimbursing medical expenses, on no account do those arguments appear appropriate merely in order to justify increased healthcare fees.

54 — See Cases 186/87 *Cowan* [1989] ECR 195, paragraphs 15 to 17, and C-45/93 *Commission* v *Spain* [1994] ECR I-911 concerning the right of tourists, who are nationals of a Member State of the Community, to enter another Member State and receive services there under the same conditions applicable to nationals of that State who are permanently resident there.

(c) Objective justification for different treatment

96. Different treatment in respect of medical and hospital fees, to which persons not affiliated to the Luxembourg national social security scheme are subject, does not appear to be objectively justified. This factor, *inter alia*, reveals that such different treatment is contrary to Community law. [55]

97. Apart from the fact that they are not invoked by either the CHL or the Luxembourg Government, none of the exceptions provided for in Article 48(3) of the EEC Treaty, not even that concerning public health, appear to be applicable in the present case. As the Commission rightly points out, nobody could reasonably imagine that public health is dependent on fixing different fees for medical services in respect of persons affiliated to the national scheme, on the one hand, and Community officials, on the other, or actually that the application of the same fees constitutes a threat to public health.

98. Since the different treatment at issue is concerned with a purely economic problem, it could possibly be argued that it comes within the terms of the ruling in

55 — See, for instance, *Memmi* (cited above, footnote 14), paragraph 45.

Decker, [56] in which it was held that 'aims of a purely economic nature cannot justify a barrier to the fundamental principle of the free movement of goods. 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.'

99. Apart from the fact that nobody is alleging or adducing evidence of 'a risk of serious damage to the financial balance of the social security system' of Luxembourg, such a risk does not appear actually to exist.

100. It should be borne in mind that neither the Luxembourg State nor the Luxembourg insurance funds cover medical and hospital maternity care expenses for persons not affiliated to the national scheme and, more specifically, Community officials, whilst in the case of persons who are affiliated those expenses are covered by the State and not by the insurance funds. Consequently, despite the perhaps considerable number of Community officials who live in Luxembourg, medical and hospital maternity care provided for those officials does not appear to place a particular burden on that State's social security system.

101. If it were shown that the fees applied to persons affiliated to the national scheme are lower than the cost of the services provided, it could possibly be argued that the application of those fees to Community officials, who are not affiliated to the national scheme, would place a burden on the State budget allocated to financing medical and hospital maternity care. However, as already pointed out, on the one hand, such an arrangement is not contrary to the spirit of protecting the free movement of persons within the Community [57] and, on the other hand, the objection cannot be raised that Community officials have to pay more for the same services because they do not pay income tax to the Luxembourg State. [58]

102. In the final analysis, there is nothing to support the view that, owing to their incomes which may be comparatively high and the fact that their insurance fund provides levels of cover and reimbursement which may be comparatively high, Community officials and their insurance organisation are obliged to finance the Luxembourg national social security scheme.

(d) Conclusion on the prohibition of discrimination on the ground of nationality

103. Having regard to the foregoing observations, I therefore consider that Article 7(2) of Regulation No 1612/68 precludes the application to nationals of

56 — See Case C-120/95 [1998] ECR I-1831, paragraph 39.

57 — See above, paragraph 94 of this Opinion.

58 — See above, paragraph 92 of this Opinion.

Member States, who work in the territory of another Member State such as, in the present case, Luxembourg, but are not affiliated to the national social security scheme of that State, which category includes European Community officials who are affiliated to the Joint Scheme, fees for medical and hospital maternity care higher than those applied to residents in that State who are affiliated to the national social security scheme.

104. As the Commission also points out, as a consequence of the foregoing, 'the members of the group placed at a disadvantage must be treated in the same way and made subject to the same arrangements as the other persons concerned, arrangements which, for want of the correct application of Community law, remain the only valid point of reference'. [59]

C — *Protection of competition*

105. In the present case, the possible infringement of Article 85(1) of the EEC Treaty relates mainly to the fact that a group of hospitals, in this case the EHL, applies to persons and organisations not affiliated to the national social security scheme, which category includes European Community officials who are affiliated to the Joint Scheme, fees for hospital maternity care higher than those applied to persons affiliated to the national social security scheme.

106. However, it is worth noting at the outset that the above infringement, if it is established, may be attributed to the Member State itself whose legal and regulatory framework permits such infringements. [60] As the Court has ruled, although, read in isolation, Article 85 of the Treaty relates only to the conduct of undertakings and does not cover measures adopted by Member States by legislation or regulation, it is equally true that this article, read in conjunction with Article 5 of the Treaty, requires the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. Such is the case where a Member State requires or favours the adoption of agreements contrary to Article 85, or reinforces their effects or deprives its own legislation of its official character delegating to private traders responsibility for taking economic decisions affecting the economic sphere. [61]

107. In order to decide therefore whether, in the present case, there is a prohibited

59 — See *Terhoeve* (cited above, footnote 28), paragraph 57.

60 — See above, paragraph 77 of this Opinion.

61 — See, for instance, Cases C-2/91 *Meng* [1993] ECR I-5751, paragraph 14 and C-70/95 *Sodemare and Others* [1997] ECR I-3395, paragraph 41.

agreement or a decision by associations of undertakings or a concerted practice within the meaning of Article 85(1) of the EEC Treaty (f), I shall examine below whether the conditions in that connection are satisfied and, more specifically, whether there is an undertaking or an association of undertakings (a), an agreement between undertakings, a decision by an association of undertakings or a concerted practice (b), which has as its object or effect the prevention, restriction or distortion of competition within the common market (c) and which may affect trade between Member States (d) to an appreciable extent (e).

(a) Existence of an undertaking and association of undertakings

108. Article 85(1) deals with agreements between undertakings, decisions by associations of undertakings and concerted practices. Accordingly, the first issue to be examined is whether hospitals are undertakings and whether a group of hospitals, like the EHL, constitutes an association of undertakings within the meaning of the provision in question.

109. The Court has ruled that the concept of an undertaking 'encompasses every entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed'. [62]

110. In my opinion, there is no doubt that, in their relations with persons not affiliated to the national social security scheme and, in particular, with Community officials, relations which are directly relevant to the present case, Luxembourg hospitals, regardless of their public or private character, constitute undertakings within the meaning of the provision in question.

111. The CHL and other Luxembourg hospitals are engaged in economic activities to the extent that they provide services — in the present case, maternity care services — for payment. [63] I consider that, having regard to the broad interpretation given in the Court's case-law to the concept of economic activity and, in consequence, to the term 'undertaking', the objection cannot be raised that professional activities, such as those exercised by the medical profession which are governed by particular rules of ethics and for the fixing of fees, are not in principle of a commercial nature and cannot, on those grounds alone, constitute economic activity subject to the competition rules. [64] That is even more so the case when, as I shall explain below, the

62 — See, for instance, Cases C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21 and Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 17.

63 — On the concept of economic activity, see Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36.

64 — See *Commentaire J. Mégret. Le droit de la CE.* 4. Concurrence; Waelbroeck, M., and Frignani, A., Études européennes, collection dirigée par l'Institut d'Études européennes, 2nd edition, 1997, pp. 37–38.

actual connection of the scope of the activity in question with the contested agreement between undertakings, decision of an association of undertakings or concerted practice does not justify reliance on those grounds which, at first sight, effectively attribute special characteristics to activities involving the provision of medical and hospital care.

112. Moreover, in principle it is irrelevant whether a hospital is public or private, although the fact that a hospital is public could, under certain conditions which will be explained below, raise doubts as to its status as an undertaking.

113. As the Commission correctly points out, it cannot be maintained that, in their relations with persons not affiliated to the national social security scheme, hospitals, even if deemed public, carry on an activity within the scope of the social security services. Since the hospitals themselves rely on the fact that Community officials do not come within the scope of the above services, their relations with those officials, although they concern medical and hospital care, cannot but be deemed economic in principle and alien to every concept of national solidarity in the context of social security. Consequently, there are no grounds for applying the judgment cited above in *Poucet and Pistre* in which the Court held that 'sickness funds, and the organisations involved in the management of the public social security system, fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid are statutory benefits bearing no relation to the amount of the contributions. Accordingly, that activity is not an economic activity and, therefore, the organisations to which it is entrusted are not undertakings within the meaning of Articles 85 and 86 of the Treaty'. [65] Furthermore, in the present case, the agreement in question concerns only hospitals and not sickness funds or insurance organisations. Also, as the facts on which the preliminary question are based indicate, the EHL, being a group of hospitals, can fix the level of charges for services provided to persons not affiliated to the national social security scheme and can do so unilaterally, without concluding any prior agreement with the insurance bodies concerned.

114. On the latter point, which is also the point at issue in connection with the possible infringement of the competition rules, it should be noted, as the Court has held, 'in competition law, the term "undertaking" must be understood as designating an economic unit for the purpose of the subject-matter of the agreement'. [66] In other words, in each case, the term 'undertaking' must be understood in a functional sense, having regard to the activity which is connected to the subject-matter of the specific agreement between undertakings, the decision by associations of undertakings or the concerted practice.

65 — *Poucet and Pistre* (cited above, footnote 62), paragraphs 18 and 19.

66 — On this point, see Case 170/83 *Hydrotherm Gerätebau* [1984] ECR 2999, paragraph 11.

115. In the present case, this functional approach to the question militates in favour of the view that the relationship between hospitals and persons not affiliated to the national social security scheme is a private-sector economic relationship and, even with respect to public hospitals, defeats any suggestion of the exercise of public authority privileges, or of serving the public interest or protecting public health. Indeed, as I have pointed out in a preceding paragraph, it would be extremely difficult to maintain that higher fees are imposed unilaterally on persons not affiliated to the national social security scheme on grounds of pubic interest or in order to protect public health.

116. Once hospitals may be deemed undertakings, in regard to their relations with persons not affiliated to the national social security scheme, it appears that their group, in the present case the EHL, may constitute an association of undertakings in the context of the above relations. However, since the order for reference gives no detailed account of the rules governing the EHL's organisation and operation, the Court is not in a position to consider the matters adverted to principally by Mr Ferlini according to which the EHL constitutes a non-profit-making association with legal personality and should be deemed to constitute an association of undertakings within the meaning of Article 85(1). It is for the national court, which is conversant with the national law, to form a view as to those matters and to apply the criteria established in the Court's case-law as to existence of 'an association of undertakings'. [67] In any event, the national court may, if it sees fit, submit to the Court in that connection a question for a preliminary ruling. However, it should be pointed out that clarification of the question as to whether 'an association of undertakings' does or does not exist may be rendered superfluous in light of the following observations concerning the existence of an agreement between undertakings, a decision by an association of undertakings or a concerted practice.

(b) Existence of an agreement between undertakings, a decision by an association of undertakings or a concerted practice

117. As the Commission points out, the preliminary question referred to the Court

67 — It should be noted that it is accepted that 'an association of undertakings' exists if there is a coordinated body, even if it has no legal personality (on this point, see *Commentaire J. Mégret*, op. cit., pp.133–134). Also, the Court has ruled that it is irrelevant whether the association is or is not profit-making (see Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* [1980] ECR 3125, paragraph 88).
Moreover, it is worth noting that, in connection with the existence of 'an association of undertakings', the Court has frequently reiterated the idea of direct or immediate representation of undertakings' interests in a given sector and has established the conditions under which members of certain committees, responsible for setting the tariffs applicable to all the undertakings engaged in a given activity, may not be regarded as representatives of the industrial undertakings concerned. Under the Court's case-law, those conditions are: (a) the members of the boards in question (tariff boards) must not be bound by orders or instructions from the undertakings or associations that propose them for appointment; the boards cannot be regarded as meetings of representatives of undertakings in the sector concerned; the members of the boards can accordingly be regarded as independent experts; and (b) the members of these tariff boards are obliged by law to set tariffs having regard not only to the exclusive interests of the undertakings or associations of undertakings in the sector which appointed them, but also to the general interest and the interests of undertakings in other sectors or users of these services. See, for instance, Cases C-185/91 *Reiff* [1993] ECR I-5801, C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517, C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883 and Joined Cases C-140/94 to C-142/94 *DIP and Others* [1995] ECR I-3257.

appears to be based on the assumption, if not the certainty, that an agreement exists between the Luxembourg hospitals to apply uniform maternity care fees to persons and organisations not affiliated to the national social security scheme and to European Community officials, who are affiliated to the Joint Scheme. This agreement appears to include the practice whereby the EHL fixes the fees for hospital care applicable as from 1 January 1989 to persons and bodies not affiliated to the national social security scheme. Those fees appear to have been respected by the hospitals belonging to the EHL, including the CHL.

118. Since Article 85(1) of the Treaty refers to the three possible forms of cooperation (an agreement between undertakings, a decision by an association of undertakings or a concerted practice), the precise distinction between them does not appear of major significance in answering the preliminary question before the Court. However, in light of the foregoing, the present case would appear in all probability to involve a decision by an association of undertakings, though the existence of an agreement between undertakings or a mere concerted practice cannot of course be ruled out. In any case, it is once again for the national court, which is more conversant with the legal aspects and material facts of the case in the main proceedings, to make the appropriate determination in applying the conclusions of the Court's case-law and possibly referring to the Court, if necessary, a new question for a preliminary ruling in connection with that determination.

(c) Prevention, restriction or distortion of competition

119. Article 85(1) prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which have *as their object or effect* the prevention, restriction or distortion of competition.

120. Moreover, 'as the Court has consistently held, it is unnecessary to consider the actual effects of an agreement if it is apparent that it has the object of preventing, restricting or distorting competition. The same principle applies to a decision of an association of undertakings'. [68]

121. Furthermore, a horizontal agreement, a concerted practice or a decision by an association of undertakings in the same sector to set uniform scale fees for services provided constitutes, as both the Commission and Mr Ferlini state, a classic example of an agreement which has as its object the prevention of competition in the relevant market for services. For that reason, Article 85(1)(a) expressly prohibits any infringements of the rules of free competition

68 — See Case 45/85 *Verband der Sachversicherer* [1987] ECR 405, paragraph 39.

which directly or indirectly 'fix purchase or selling prices' for goods or services. [69]

122. In the present case, there appears to be no room for doubt that fixing uniform fees for hospital maternity care for persons and organisations not affiliated to the Luxembourg national social security scheme falls within the scope of the prohibition on all agreements between undertakings, all decisions by associations of undertakings and any concerted practice which have as their object the prevention of competition in relation to the provision of the abovementioned services.

(d) Effect on intra-Community trade

123. It is worth remembering that, as the Court has consistently held, Article 85(1) of the Treaty does not stipulate that agreements caught by this provision must have affected intra-Community trade, which in the majority of cases is difficult to prove to the requisite legal standard, but requires it to be established that those agreements are likely to have such an effect. [70] Likewise, it has been consistently held that 'in order that an agreement, decision or concerted practice may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States such as to give rise to the fear that the realisation of a single market between Member States might be impeded'. [71]

124. Moreover, it has been consistently held that 'the fact that a price-fixing agreement of the type in question only covers the marketing of products in a single Member State does not rule out the possibility that trade between Member States may be affected. In fact, a restrictive agreement extending over the whole of the territory of the Member State is by its very nature liable to have the effect of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting domestic production. In that connection, it is important to identify the means available to the parties to a restrictive agreement to ensure that customers

69 — See Case 243/83 *Binon* [1985] ECR 2015, paragraph 44 and *Verband der Sachversicherer* (cited above, footnote 68), paragraph 41.

70 — See, for instance, Cases 123/83 *BNIC* v *Clair* [1985] ECR 391, paragraph 22 and C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 19.

71 — See, for instance, *Ferriere Nord* v *Commission* (cited above, footnote 70), paragraph 20, Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4515, paragraph 18 and *Van Landewyck* (cited above, footnote 67), paragraph 170.

remain loyal, the relative importance of the agreement on the market concerned and the economic context in which it exists'. [72]

125. In the present case, the effect on intra-Community trade may result from the fact that the imposition of higher charges for hospital maternity care may, in all probability, lead those not affiliated to the Luxembourg national scheme to seek treatment outside Luxembourg. In other words, the contested decision of the EHL to fix higher charges for those not affiliated to the national scheme and for Community officials employed in Luxembourg and affiliated to the Joint Scheme, may deflect from its anticipated course the commercial activities consisting in the provision of hospital care in the case of maternity on the appropriate market.

126. Although it is for the national court, which is more conversant with the national law and the material facts of the case in the main proceedings, to examine in detail the legal and factual parameters on the basis of which the above effect on intra-Community trade is likely to be established, it is worth pointing out certain matters which, in light of the criteria established in the case-law, could militate in favour of the conclusion in question.

127. First, the practice of fixing higher fees for hospital maternity care, which apply throughout the whole territory and in all the hospitals of a Member State may in general terms, by its very nature, have the effect of further partitioning the national market, thereby preventing the economic interpenetration which the Treaty is designed to bring about. The fact that the present case concerns the Luxembourg State and, principally, Community officials who work there, militates significantly in favour of the above probability. On account of Luxembourg's small geographical size and its proximity to three other Member States (Belgium, France and Germany), it may be considered highly likely that a large number of Community officials who work in Luxembourg will seek hospital treatment in the neighbouring Member States, and also highly likely that Community officials who work in those neighbouring States will avoid receiving treatment in Luxembourg hospitals because of the high fees charged there. Moreover, the possibility cannot be discounted that, as Mr Ferlini points out in his observations, hospitals in neighbouring States will attempt to adjust their fees in line with the high fees set by the EHL or that, as the Commission notes, organisations with which those not affiliated to the national social security scheme are insured, will conclude preferential agreements with hospitals or clinics located in another Member State.

72 — See Case 73/74 *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission* [1975] ECR 1491, paragraphs 24–26.
It is worth noting that in other judgments the Court appears to use a more absolute formula, stating simply that 'an agreement extending over the whole territory of a Member State has by its very nature the effect of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about'. See, for instance, Cases 8/72 *Vereniging van Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 29 and 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 22.

128. Secondly, the nature of the services for hospital maternity care at issue makes the abovementioned possibility even more likely. [73] The fact that the progress of a pregnancy can be foreseen usually means that the place of confinement can be arranged in advance. Moreover, it should be noted that because the distances between Belgian, French, German and Luxembourg hospitals are similar, the choice of hospital can be made on the basis of the price of the services provided, even in relatively exceptional circumstances.

129. At this point it should be noted that the national court may find that the foregoing probable restrictions on intra-Community trade have not yet been found to exist in practice, particularly to the appreciable extent required by case-law, [74] because the higher fees for hospital maternity care applied mainly to Community officials are to a very large extent covered by the Joint Scheme, which reduces the importance Community officials attach to the level of fees in question when choosing a hospital. Nevertheless, a possible finding to that effect should not lead to the conclusion that there is no effect on intra-Community trade within the meaning of the provisions of Community law. On the one hand, it should be remembered that the likelihood of such an effect is sufficient and that it need not already have occurred. On the other hand, the fact that the Joint Scheme covers the higher fees is an external factor liable to change, and preventing the abovementioned effect from actually making itself felt, a factor which is not of such a nature as to prevent in general terms the practice of fixing higher fees at issue from affecting, by its nature, intra-Community trade. [75] Accordingly, if the practice of fixing fees is deemed to be discriminatory on the ground of nationality and contrary to Community law, it is highly likely that the Joint Scheme will cease to cover those higher fees which, if the Luxembourg hospitals maintain those fees, will in practice demonstrate their effect on intra-Community trade.

(e) The appreciable extent of the restriction on competition and its effect on intra-Community trade

130. To fall within the scope of the prohibition laid down in Article 85, an agree-

73 — However, as the Commission points out, if the higher uniform fees at issue apply to all hospital care and not just to the costs of maternity expenses (see above, paragraph 83 of this Opinion), that will have to be taken into account in assessing the overall probable effect on intra-Community trade.

74 — See below, paragraph 130 et seq.

75 — It is worth noting that, in Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 60, the Court held, in connection with agreements that by their nature can have an effect on intra-Community trade, that 'the mere fact that at a certain time traders applying for admission to a distribution network or who have already been admitted are not engaged in intra-Community trade cannot suffice to exclude the possibility that restrictions on their freedom of action imposed by the manufacturer may impede intra-Community trade, *since the situation may change from one year to another in terms of alterations in the conditions or composition of the market both in the common market as a whole and in the individual national markets*' (emphasis added).

ment between undertakings, a decision by an association of undertakings or a concerted practice must be capable of having an appreciable effect on trade between Member States and on competition. [76] On this point, the Court has ruled that 'the effect which an agreement might have on trade between Member States is to be appraised in particular by reference to the position and the importance of the parties on the market for the products concerned ... Thus, even an agreement imposing absolute territorial protection may escape the prohibition laid down in Article 85 if it affects the market only insignificantly, regard being had to the weak position of the persons concerned on the market in the products in question'. [77]

131. In the present case, it is for the national court, which is more conversant with the legal and factual parameters of the case in the main proceedings, to assess whether intra-Community trade is appreciably affected by the EHL's decision, having regard to the position which Luxembourg hospitals occupy in the relevant market. However, it is first necessary to determine the relevant market.

132. As regards its subject-matter, the relevant market appears to be the provision of hospital maternity care to persons working in Luxembourg who are not affiliated to that State's national social security scheme. The market for the services in question appears in fact to be relatively independent because, as the Commission points out, it differs from the corresponding market for the supply of services to persons affiliated to the national scheme in which the scale of fees has been fixed uniformly either by regulation or under collective agreements compulsory for all. Moreover, from the point of view of demand, in other words from the point of view of those persons affiliated to the national social security scheme who need hospital maternity care, the services in question cannot be substituted by other services, which renders the relevant market even more independent.

133. From the geographical point of view, it appears to be more difficult to define the relevant market. Its definition depends on the place of residence of persons working in Luxembourg who are not affiliated to the

76 — See Case 22/71 *Béguelin* [1971] ECR 949, paragraph 16.

77 — See Case C-306/96 *Javico* [1998] ECR I-1983, paragraph 17.
It is worth noting that the Commission, attempting to fix a specific limit for agreements of minor importance which are not covered by the provisions of Article 85(1), considered that agreements of this kind are horizontal agreements when the market share of the participating companies does not exceed 5% of the common market to which these agreements apply or when the total turnover of these companies in a financial year does not exceed ECU 200 million (see Commission Communication of 3 September 1986 on agreements of minor importance which do not fall under Article 85(1) of the Treaty establishing the European Economic Community, OJ 1986 C 231, p. 2). However, as the Commission itself points out in its observations, in a recent communication it appears not to exclude cases where, even if the market shares are restricted, that is to say below the abovementioned limits, the prohibition laid down in Article 85(1) may apply to certain categories of agreements such as price-fixing agreements (see the Communication concerning agreements of minor importance which do not fall within the meaning of Article 85(1) of the Treaty establishing the European Community, OJ 1997 C 372, p. 13).

national social security scheme and who, for the most part, appear to be Community officials. In particular, consideration must be given to the geographical size of the place where the hospitals providing maternity care are situated and, given the nature of those services, their location at an appropriate distance from the place where the recipients of the above services reside. It could be argued that, in general terms, on the basis of the above criteria, a relevant market is defined geographically as extending, in the material case, throughout the whole territory of Luxembourg and into the relevant part of the neighbouring States' territory.

134. On the basis of the foregoing considerations, it is for the national court to determine whether, within the abovementioned geographically defined market, the market share of the hospitals belonging to the EHL concerned with providing the abovementioned services to persons working in Luxembourg who are not affiliated to the national social security scheme is significant or not.

(f) Conclusion on the protection of competition

135. On the basis of the foregoing considerations, I consider that Article 85(1) of the EEC Treaty should be interpreted as meaning that it prohibits a decision by an association of hospitals, such as EHL's decision in the present case, fixing for nationals of Member States who work in the territory of another Member State such as, in this case, the Grand Duchy of Luxembourg, but who are not affiliated to the national social security scheme of that State, including European Community officials affiliated to the SIS, fees for hospital maternity care higher than those applicable to residents of that State who are affiliated to the national social security scheme, if the national court considers that the abovementioned decision is capable of having an appreciable effect on intra-Community trade. [78]

78 — In the context of the present case, there is no need to consider whether such a decision by an association of hospitals may be exempt by virtue of Article 85(3) of the EEC Treaty (subsequently Article 85 EC and now Article 81 EC). The Commission alone is competent to grant such exemptions and there is nothing in the case-file to suggest that that exclusive competence has been exercised or that, consequently, the Court has exercised its power of review.

VI — Conclusion

136. I propose that the Court give the following answer to the question referred to it for a preliminary ruling by the Tribunal d'arrondissement, Luxembourg (8th Chamber):

(1) Article 7(2) of Regulation No 1612/68 precludes the application to nationals of Member States who work in the territory of another Member State such as, in the present case, Luxembourg, but are not affiliated to the national social security scheme of that State, including European Community officials affiliated to the Joint Scheme, of fees for medical and hospital maternity care higher than those applicable to residents of that State who are affiliated to the national social security scheme.

(2) Article 85(1) of the EEC Treaty must be interpreted as meaning that it prohibits a decision by an association of hospitals such as, in the present case, the decision by the EHL fixing for nationals of Member States who work in the territory of another Member State such as, in this case, Luxembourg, but are not affiliated to the national social security scheme of that State, including European Community officials affiliated to the Joint Scheme, fees for maternity hospital care higher than those applicable to residents of that State who are affiliated to the national social security scheme, if it is judged that the above decision is capable of having an appreciable effect on intra-Community trade.