

JUDGMENT OF THE COURT

28 April 1998 *

In Case C-120/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Conseil Arbitral des Assurances Sociales (Luxembourg) for a preliminary ruling in the proceedings pending before that tribunal between

Nicolas Decker

and

Caisse de Maladie des Employés Privés

on the interpretation of Articles 30 and 36 of the EC Treaty,

THE COURT,

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

* Language of the case: French.

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

after considering the written observations submitted on behalf of:

- Mr Decker, by Andrée Braun and Serge Wagner, of the Luxembourg Bar,
- the Luxembourg Government, by Claude Ewen, Social Security Inspector, First Class, in the Ministry of Social Security, acting as Agent,
- the Belgian Government, by Jan Devadder, Director of Administration in the Ministry of Foreign Affairs, Foreign Trade and Development Cooperation, acting as Agent,
- the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Gereon Thiele, Assessor in that ministry, acting as Agents,
- the Spanish Government, by Alberto Navarro González, Director General of Community Legal and Institutional Coordination, and Gloria Calvo Díaz, Abogado del Estado, acting as Agents,
- the French Government, by Catherine de Salins, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Philippe Martinet, Foreign Affairs Secretary in that directorate, acting as Agents,

- the Netherlands Government, by Adriaan Bos, Legal Adviser, acting as Agent,
- the United Kingdom Government, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and Philippa Watson, Barrister,
- the Commission of the European Communities, by Hendrik van Lier, Legal Adviser, and Jean-Francis Pasquier, a national civil servant seconded to the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Decker, represented by Serge Wagner, the Caisse de Maladie des Employés Privés, represented by Albert Rodesch, of the Luxembourg Bar, the Luxembourg Government, represented by Claude Ewen, the German Government, represented by Ernst Röder, the Spanish Government, represented by Gloria Calvo Díaz, the French Government, represented by Philippe Martinet, the United Kingdom Government, represented by Philippa Watson, and the Commission, represented by Jean-Francis Pasquier, at the hearing on 2 July 1996,

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

gives the following

Judgment

- 1 By decision of 5 April 1995, received at the Court on 7 April 1995, the Conseil Arbitral des Assurances Sociales (Social Insurance Arbitration Council), Luxembourg, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 30 and 36 of that Treaty.

- 2 That question was raised in proceedings between Mr Decker, a Luxembourg national, and the Caisse de Maladie des Employés Privés (hereinafter 'the Fund') concerning a request for reimbursement of the cost of a pair of spectacles with corrective lenses purchased from an optician established in Arlon, Belgium, on a prescription from an ophthalmologist established in Luxembourg.
- 3 By letter of 14 September 1992, the Fund informed Mr Decker that it would not reimburse him the cost of those spectacles, on the ground that they had been purchased abroad without its prior authorisation.
- 4 Mr Decker contested that decision, relying in particular on the Treaty rules on the free movement of goods. Upon hearing his complaint, the Fund maintained its position by decision of its managerial committee of 22 October 1992 and so rejected his claim.
- 5 Mr Decker submitted an application to the Conseil Arbitral des Assurances Sociales, which rejected it by order of 24 August 1993.
- 6 By application of 8 September 1993, Mr Decker appealed against that order to the Conseil Arbitral des Assurances Sociales, which dismissed the appeal by decision of 20 October 1993, on the ground in particular that the matter was connected not with the free movement of goods but with social security law, that is, Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (see the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, OJ 1997 L 28, p. 1).

- 7 Mr Decker appealed to the Cour de Cassation (Court of Cassation). By judgment of 12 January 1995, the contested decision was set aside and the case was remitted to the Conseil Arbitral des Assurances Sociales. By judgment of 5 April 1995, it held that Article 60 of the Code des Assurances Sociales (Social Insurance Code) and Article 58 of the statutes of the Union des Caisses de Maladie des Salariés (hereinafter 'UCM') applied to the dispute.
- 8 Article 60 of the Luxembourg Code des Assurances Sociales, in the version in force at the material time, provided in particular:

'Insured persons shall be entitled to approach the doctor, dentist, pharmacist, hospital or medical auxiliary of their choice.

Only the following may provide treatment and services on the territory of the Grand Duchy:

1. doctors, dentists, pharmacists, hospitals, midwives, medical auxiliaries authorised to practise their profession in all or part of the Grand Duchy;
2. foreign doctors consulted in the Grand Duchy with the agreement of the attending doctor and the medical adviser, without prejudice to wider international arrangements.

However, insured persons may obtain treatment abroad only with the consent of their sickness fund, except in the case of initial treatment in the event of accident or illness occurring abroad.

The sickness fund may not refuse consent if the treatment abroad is recommended by the doctor attending the insured person and a medical adviser, or if the treatment needed is not available in the Grand Duchy.'

- 9 Reimbursement of the cost of spectacle frames and corrective lenses was governed at the material time by Article 78 of the UCM statutes and by the collective agreement of 30 June 1975 concluded pursuant to Article 308 *bis* of the Code des Assurances Sociales between the UCM and the professional grouping representing opticians.

- 10 Article 78 of the UCM statutes states:

'The cost of spectacles and other visual aids shall be borne by the sickness fund up to the amounts stated in the tariffs and in accordance with the conditions determined in the agreements or decisions in lieu thereof in accordance with Article 308 *bis* of the Code des Assurances Sociales.'

- 11 Article 2 of the collective agreement of 30 June 1975 provides that, without prejudice to Community and international provisions concerning social security of migrant workers and persons treated as such, spectacles are to be supplied to insured persons, in so far as they are permanently or actually resident in Luxembourg, by opticians who are registered in the Luxembourg register of trades and established in the Grand Duchy.

- 12 Under those provisions, reimbursement was on a flat-rate basis with a ceiling of LFR 1 600 for frames.

- 13 For corrective lenses, the reimbursement tariffs were fixed in Annex A to the collective agreement of 30 June 1975. Under Article 12 of that agreement, the amounts capable of reimbursement for corrective lenses fixed in Annex A were to be adjusted up or down by reference solely to the price lists of the firms Zeiss and American Optical.
- 14 The Code des Assurances Sociales and the UCM statutes were substantially amended in 1992. However, the principle set out in the old Article 60 of the Code des Assurances Sociales, relating to prior authorisation by the sickness fund for all medical treatment abroad, was incorporated in the new Article 20 of the code.
- 15 Article 22 of Regulation No 1408/71 provides in particular:

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

...

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

shall be entitled:

- (i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence in accordance with the provisions of the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided shall be governed, however, by the legislation of the competent State;
- (ii) to cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers. However, by agreement between the competent institution and the institution of the place of stay or residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the provisions of the legislation of the competent State.

2. ...

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

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

...'

- 16 Since it was uncertain whether those national provisions were compatible with Community law, more particularly with Articles 30 and 36 of the Treaty, the Conseil Arbitral des Assurances Sociales stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Is Article 60 of the Luxembourg Code des Assurances Sociales, under which a social security institution of Member State A refuses to reimburse to an insured person, who is a national of Member State A, the cost of spectacles with corrective lenses, prescribed by a doctor established in Member State A but purchased from an optician established in Member State B, on the ground that all medical treatment abroad must be authorised in advance by the above social security institution, compatible with Articles 30 and 36 of the EEC Treaty in so far as it penalises in general the importation by private individuals of medicinal products or, as in this case, spectacles from other Member States?'

- 17 Mr Decker and the Commission submit that national rules under which an insured person is denied reimbursement of the cost of products normally reimbursed, unless prior authorisation has been granted by the insured person's social security institution, constitutes an unjustified barrier to the free movement of goods.

- 18 The Luxembourg, Belgian, French and United Kingdom Governments, on the other hand, submit that rules such as those at issue in the main proceedings do not fall within the scope of Articles 30 and 36 of the Treaty, in that they concern social security. They submit, in the alternative, that those provisions do not in any event preclude such rules from being maintained. The German, Spanish and Netherlands Governments agree with the alternative submission.

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

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

- 20 The Luxembourg, Belgian, French and United Kingdom Governments submit, primarily, that the rules at issue in the main proceedings, which concern reimbursement of the cost of treatment, do not fall within the scope of Article 30 of the Treaty, in that they concern a particular branch of social security.
- 21 It must be observed, first of all, that, according to settled case-law, Community law does not detract from the powers of the Member States to organise their social security systems (Case 238/82 *Duphar and Others v Netherlands* [1984] ECR 523, paragraph 16, and Case C-70/95 *Sodemare and Others v Regione Lombardia* [1997] ECR I-3395, paragraph 27).
- 22 In the absence of harmonisation at Community level, it is therefore for the legislation of each Member State to determine, first, the conditions concerning the right or duty to be insured with a social security scheme (Case 110/79 *Coonan v Insurance Officer* [1980] ECR 1445, paragraph 12, and Case C-349/87 *Paraschi v Landesversicherungsanstalt Württemberg* [1991] ECR I-4501, paragraph 15) and, second, the conditions for entitlement to benefits (Joined Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira v Bundesanstalt für Arbeit* [1997] ECR I-511, paragraph 36).

- 23 As the Advocate General observes in points 17 to 25 of his Opinion, the Member States must nevertheless comply with Community law when exercising those powers.
- 24 The Court has held that measures adopted by Member States in social security matters which may affect the marketing of medical products and indirectly influence the possibilities of importing those products are subject to the Treaty rules on the free movement of goods (see *Duphar and Others*, cited above, paragraph 18).
- 25 Consequently, the fact that the national rules at issue in the main proceedings fall within the sphere of social security cannot exclude the application of Article 30 of the Treaty.

Effect of Regulation No 1408/71

- 26 The Luxembourg Government submits that Article 22 of Regulation No 1408/71 lays down the principle that prior authorisation is required for any treatment in another Member State. In that Government's view, to challenge the national provisions relating to reimbursement of the cost of benefits obtained abroad amounts to calling into question the validity of the corresponding provision in Regulation No 1408/71.
- 27 It must be stated that the fact that a national measure may be consistent with a provision of secondary legislation, in this case Article 22 of Regulation No 1408/71, does not have the effect of removing that measure from the scope of the provisions of the Treaty.

- 28 Moreover, as the Advocate General observes in points 55 and 57 of his Opinion, Article 22(1) of Regulation No 1408/71 is intended to allow an insured person, authorised by the competent institution to go to another Member State to receive there treatment appropriate to his condition, to receive sickness benefits in kind, on account of the competent institution but in accordance with the provisions of the legislation of the State in which the services are provided, in particular where the need for the transfer arises because of the state of health of the person concerned, without that person incurring additional expenditure.
- 29 On the other hand, Article 22 of Regulation No 1408/71, interpreted in the light of its purpose, is not intended to regulate and hence does not in any way prevent the reimbursement by Member States, at the tariffs in force in the competent State, of the cost of medical products purchased in another Member State, even without prior authorisation.
- 30 Consequently, the Court must examine the compatibility of national rules such as those at issue in the main proceedings with the Treaty provisions on the free movement of goods.

Application of the provisions on the free movement of goods

- 31 It is necessary to examine whether rules such as those at issue in the main proceedings are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5).

- 32 Mr Decker and the Commission submit that a system under which reimbursement of the cost of medical products, in accordance with the conditions laid down by the State of insurance, is subject to prior authorisation by the competent institution of that State where the products are supplied in another Member State constitutes a restriction on the free movement of goods within the meaning of Article 30 of the Treaty.
- 33 The Member States which have submitted observations argue essentially that rules such as those at issue do not have the purpose or effect of restricting trade flows, but merely lay down the conditions for the reimbursement of medical expenses. Such rules do not have the effect of prohibiting the import of spectacles, nor do they have any direct influence on the possibility of purchasing them outside the national territory. They do not prohibit Luxembourg opticians from importing spectacles and corrective lenses from other Member States, processing them and selling them.
- 34 It must be observed that the rules at issue encourage persons insured under the Luxembourg social security scheme to purchase their spectacles from, and have them assembled by, opticians established in Luxembourg rather than in other Member States.
- 35 While the national rules at issue in the main proceedings do not deprive insured persons of the possibility of purchasing medical products in another Member State, they do nevertheless make reimbursement of the costs incurred in that Member State subject to prior authorisation, and deny such reimbursement to insured persons who have not obtained that authorisation. Costs incurred in the State of insurance are not, however, subject to that authorisation.

- 36 Such rules must be categorised as a barrier to the free movement of goods, since they encourage insured persons to purchase those products in Luxembourg rather than in other Member States, and are thus liable to curb the import of spectacles assembled in those States (see Case 18/84 *Commission v France* [1985] ECR 1339, paragraph 16).
- 37 The Luxembourg Government submits, however, that the free movement of goods is not absolute and that the rules at issue, the purpose of which is the control of the health expenditure which must necessarily be taken into consideration, are justified on that basis.
- 38 Mr Decker, on the other hand, claims that if his purchase were reimbursed, the financial burden on the Fund's budget would be the same, as it reimburses only a flat-rate sum for both frames and corrective lenses sold by an optician. Since that flat rate is fixed independently of the costs actually incurred, there is no objective reason why the Fund should refuse reimbursement if the purchase is made from an optician established in another Member State. The rules at issue therefore cannot be justified by the need to control health expenditure.
- 39 It must be recalled 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.

- 40 But, as the Luxembourg Government acknowledged in reply to a question from the Court, it is clear that reimbursement at a flat rate of the cost of spectacles and corrective lenses purchased in other Member States has no effect on the financing or balance of the social security system.
- 41 The Belgian, German and Netherlands Governments have also submitted that the right of insured persons to have access to quality treatment constitutes a justification for the rules at issue, on the ground of the protection of public health, as provided for by Article 36 of the Treaty. The Belgian Government adds that spectacles must be supplied by persons authorised by law to pursue the profession. If they are supplied in another Member State, supervision to ensure that this has been carried out properly is seriously called into question, or even impossible.
- 42 It must be observed that the conditions for taking up and pursuing regulated professions have been the subject of Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC (OJ 1992 L 209, p. 25) and Commission Directive 95/43/EC of 20 July 1995 (OJ 1995 L 184, p. 21), which amended Annexes C and D to Directive 92/51.
- 43 This means that the purchase of a pair of spectacles from an optician established in another Member State provides guarantees equivalent to those afforded on the sale of a pair of spectacles by an optician established in the national territory (see, with reference to the purchase of medicinal products in another Member State, Case 215/87 *Schumacher v Hauptzollamt Frankfurt am Main-Ost* [1989] ECR 617, paragraph 20, and Case C-62/90 *Commission v Germany* [1992] ECR I-2575, paragraph 18).

- 44 Furthermore, in the present case the spectacles were purchased on a prescription from an ophthalmologist, which guarantees the protection of public health.
- 45 It follows that rules such as those applicable in the main proceedings are not justified on grounds of public health in order to ensure the quality of medical products supplied in other Member States.
- 46 In those circumstances, the answer must be that Articles 30 and 36 of the Treaty preclude national rules under which a social security institution of a Member State refuses to reimburse to an insured person on a flat-rate basis the cost of a pair of spectacles with corrective lenses purchased from an optician established in another Member State, on the ground that prior authorisation is required for the purchase of any medical product abroad.

Costs

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

On those grounds,

THE COURT

in answer to the question referred to it by the Conseil Arbitral des Assurances Sociales by decision of 5 April 1995, hereby rules:

Articles 30 and 36 of the EC Treaty preclude national rules under which a social security institution of a Member State refuses to reimburse to an insured person on a flat-rate basis the cost of a pair of spectacles with corrective lenses purchased from an optician established in another Member State, on the ground that prior authorisation is required for the purchase of any medical product abroad.

Rodríguez Iglesias

Gulmann

Ragnemalm

Mancini

Moitinho de Almeida

Kapteyn

Murray

Edward

Puissochet

Hirsch

Jann

Delivered in open court in Luxembourg on 28 April 1998.

R. Grass

G. C. Rodriguez Iglesias

Registrar

President