OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 11 January 2007 [1]

I — Introduction

1. For some time the Court of Justice has had to settle uncertainties of interpretation which have arisen in relation to patient mobility within the Community and the financing of the cross-border provision of medical services.

2. Now another link is added to the chain with the questions referred for a preliminary ruling pursuant to Article 234 EC by the Diikitiko Protodikio Athinon (Administrative Court of First Instance, Athens), regarding the effect of Article 49 EC on Greek legislation excluding reimbursement of the cost of treatment in private hospitals abroad except in cases concerning children under 14 years of age.

3. Specifically, the issues requiring clarification are whether that exclusion constitutes a restriction on the freedom to provide services, whether it is justified by overriding reasons in the general interest, such as the need to avoid the risk of seriously undermining the financial balance of the national social security system or the maintenance of an adequate medical service open to all, and whether it is proportionate to the objective pursued.

II — Legal framework

A — *Community law*

4. Community action in this sphere involves, according to Article 3(1)(c) EC, 'an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital'. These last three aspects are developed in Title III of Part Three of the Treaty.

1 — Original language: Spanish.

5. In Chapter 3, which is devoted to 'services', the first paragraph of Article 49 lays down the general principle:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

...'

6. That principle is supplemented by the provisions of Article 50 EC:

'Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

"Services" shall in particular include:

(a) activities of an industrial character;

(b) activities of a commercial character;

(c) activities of craftsmen;

(d) activities of the professions.

Without prejudice to the provisions of the chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.'

B — *The Greek legislation*

1. Statutory provisions

7. Article 40(1) of Law No 1316/1983,[2] as amended by Article 39 of Law No 1759/1988,[3] permits hospital treatment

2 — FEK 3 A.
3 — FEK 50 A.

abroad, in the case of exceptionally serious illnesses, for inter alia 'persons insured with social security institutions or services falling within the competence of the Ministry of Health, Welfare and Social Security' (Article 40(1)(c)). Under Article 40(2) such persons must obtain authorisation for the treatment, which is granted following the issue of an opinion by a medical board which, under Article 40(3), assesses the necessity for medical treatment.

8. In accordance with Article 40(4), the manner of, and procedure for, authorising the hospital treatment of the patient and any donor, the use of a person to accompany the patient, the nature and extent of the services, the amount of the expenditure (specifying the amount which may have to be contributed by the insured person) and all other details necessary for application of Article 40 are to be determined by decree of the Minister of Health, Welfare and Social Security.

2. Provisions of secondary legislation

9. The powers granted by the aforementioned legislation served as a basis for Ministerial Decreee F7/ik. 15 of 7 January 1997, [4] which governs the hospital treatment abroad of persons insured under all sickness bodies and branches which, irrespective of their name and legal form, fall within the competence of the Geniki Grammatia Kinonikon Asfaliseon (General Secretariat for Social Security; 'the GGKA').

10. On the same legal basis, Ministerial Decree 35/1385/1999 [5] approved the Rules of the Health Branch of the Organismos Asfaliseos Eleftheron Epangelmation (Insurance Institution for the Liberal Professions; 'the OAEE').

(a) The 1997 Decree

11. Within the field of competence of the GGKA, Article 1 of the 1997 Decree provides that the cost of treatment in other States will be met where 'the insured person:

(a) is suffering from a serious illness which cannot be treated in Greece, either

4 — FEK 22 B.

5 — FEK 1814 B.

because the appropriate scientific resources do not exist or because the particular method of medical diagnosis and treatment that is required is not applied;

(b) is for any reason suffering from a serious illness which cannot be treated sufficiently promptly in Greece and any delay in treatment places his life in danger;

(c) goes abroad as a matter of urgency, without observing the prescribed procedure for prior authorisation from the insurance body concerned, because his case necessitates immediate treatment;

(d) is for any reason temporarily in a foreign country and owing to a violent, unexpected and unavoidable event is suddenly taken ill and treated in a hospital'.

In all these cases a reasoned opinion must first be issued by one of the Special Medical Boards, although in the last two cases a posteriori authorisation is possible.

12. Article 4(6) provides that 'the cost of treatment in private hospitals abroad shall not be paid for, except in situations concerning children'.

(b) The 1999 Decree

13. Article 13(1) of this Decree classifies as hospital care treatment of the patient in public hospitals, and also in private hospitals with which the OAEE has entered into an agreement.

14. Article 15(1) recognises the right of persons insured with the OAEE 'to hospital treatment abroad, following a decision by the Administrator and authorisation by the Special Medical Board, in so far as they satisfy the conditions laid down in each particular case by the ministerial decrees on hospital treatment abroad'. Article 15(2) lists the 'costs reimbursed', which include (Article 15(2)(a)) those incurred in 'public hospitals abroad', and states that 'the costs of treatment in private hospitals abroad shall not be

paid, except where they relate to children under 14 years of age.

III — The facts, the main proceedings and the questions referred for a preliminary ruling

15. Dimitrios Stamatelakis was insured with the Tamio Asfaliseos Emboron (Merchants' Insurance Fund; 'the TAE'). He suffered from cancer of the bladder and was therefore treated, from 18 May to 12 June 1998 and from 16 June to 18 June 1998, in London Bridge Hospital (a private hospital in the United Kingdom), to which he paid GBP 13 600.

16. His action for reimbursement of that sum brought before the Polimeles Protodikio Athinon (Court of First Instance, Athens) was dismissed on 26 April 2000 on the ground that the case fell within the jurisdiction of the administrative courts.

17. After the death of Mr Stamatelakis on 29 August 2000, his widow, as his sole legal heir, claimed reimbursement of the sum from the OAEE, which had replaced the TAE.[6] By Decision St/4135/00 the request was dismissed and, by Decision 392/2/248 of 18 September 2001, the complaint brought against that decision was dismissed, on the ground that reimbursement of the cost of treatment in private hospitals abroad is not permitted.

18. An action was brought before the Diikitiko Protodikio Athinon, which has stayed proceedings in order to refer three questions to the Court of Justice for a preliminary ruling:

'(1) Does a national rule which excludes in all circumstances reimbursement by a domestic insurance body of the cost of treatment of a person insured with it in a private hospital abroad except in cases concerning children under 14 years of age, while on the other hand providing for the possibility of reimbursement of the relevant cost if the treatment in question takes place in a public hospital abroad, following authorisation which is granted provided that the insured person cannot obtain appropriate treatment without undue delay from a

6 — Article 4(1) of Law No 2676/1999 (FEK 1 A) abolished the TAE and transferred its powers to the OAEE.

hospital that has entered into an agreement with his insurance body, constitute a restriction on the principle of freedom to provide services within the Community which is enshrined in Article 49 et seq. of the EC Treaty?

(2) If the answer to the first question is in the affirmative, can that restriction be regarded as dictated by overriding reasons in the general interest, such as in particular the need to avoid the risk of seriously undermining the financial balance of the Greek social security system, or the maintenance of a balanced hospital and medical service open to all?

(3) If the answer to the second question is in the affirmative, can a restriction of this nature be regarded as permissible in the sense that it is not contrary to the principle of proportionality, that is to say that it does not go beyond what is objectively necessary in order to attain the objective at which it is aimed and that the same result cannot be achieved by less restrictive rules?'

IV — The proceedings before the Court of Justice

19. Written observations have been submitted, within the period laid down by Article 23 of the Statute of the Court of Justice, by the Greek and Belgian Governments and by the Commission.

20. At the hearing held on 29 November 2006, the representative of the Greek Government, the representative of the Netherlands Government and the agent of the Commission presented oral argument.

V — Analysis of the questions referred for a preliminary ruling

A — *Preliminary considerations*

21. Before tackling the questions referred by the national court, it is necessary to consider the Community legislation to be applied to

them and the case-law concerning cross-border hospital treatment.

1. Determination of the relevant Community legislation

(a) Article 49 EC and Article 22 of Regulation No 1408/71

22. The Belgian Government requests determination of the provisions of Community law relevant to the main proceedings and suggests, in that regard, the Treaty and 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, [7] citing in particular Article 22 of that regulation, which relates to treatment in another Member State. It relies on paragraphs 30 and 31 of the judgment in *Vanbraekel and Others*, [8] according to which the fact that prior authorisation of treatment abroad is refused on the basis of the criteria laid down in the national legislation, and not according to the criteria set out in Regulation No 1408/71, does not entirely preclude the application of that Community provision.

23. The Court of Justice considered the relationship between the aforementioned provisions when a question was raised by a French court concerning their compatibility. The judgment in *Inizan*, [9] in line with the Opinion I delivered in the case, accepted that the two rules are compatible. [10]

24. As I explain in that Opinion, the two provisions are compatible, even though they govern different cases and the application of each leads to a different result (point 31).

7 — OJ English Special Edition 1971(II), p. 416. Regulation No 1408/71 has been amended frequently. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1) repeals it on entry into force of its implementing regulation, which has not yet been adopted, although the Commission has prepared a proposal (COM(2006) 16 final).

8 — Case C-368/98 [2001] ECR I-5363.

9 — Case C-56/01 [2003] ECR I-12403.

10 — The presence of the two approaches since the judgment in Case C-158/96 *Kohll* [1998] ECR I-1931 has also been noted in academic writings; Jorens, Y., Couchier, M. and Van Overmeiren, F., *Access to Health Care in an Internal Market: Impact for Statutory and Complementary Systems. Background Report to the International Conference, Luxembourg, 8 April 2005*, University of Ghent, 2005, p. 10; Mavridis, P., *La sécurité sociale à l'épreuve de l'intégration européenne — Étude d'une confrontation entre libertés du marché et droits fondamentaux*, Bruylant, Brussels, 2003, p. 135. Simon, A.C., 'La mobilité des patients en droit européen', in Nihoul P. and Simon, A.C., ed, *L'Europe et les soins de santé*, Larcier, Brussels, 2005, p. 164, considers that, until the judgment in *Kohll*, it was impossible to see the wood (patients' rights deriving from the freedom to provide services) for the trees (Article 22 of Regulation No 1408/71).

25. First, 'the personal scope of Article 49 EC differs from that of Article 22 of Regulation No 1408/71, the latter provision being narrower in scope than the former. Article 49 EC applies to all nationals of Member States who are established in the Community, while Article 22 of Regulation No 1408/71 benefits only citizens of the European Union and their families who are insured under one of the statutory social security schemes of the Member States' (point 27).

26. Secondly, 'important distinctions apply to patients depending upon whether they follow the procedure outlined in Article 22 of Regulation No 1408/71 or whether they rely directly on Article 49 EC' (point 28); whereas the regulation 'governs exclusively the relationship between the social security institutions ... , lays down uniform criteria for the conditions on which authorisation may not be refused, and helps to promote the free movement of people insured under statutory social security schemes' (point 29), under the Treaty 'all nationals of Member States ... are entitled to seek reimbursement of medical expenses incurred in another Member State without prior authorisation, in accordance with the scale of the Member State of insurance' (point 30).

27. These same ideas direct my thoughts regarding the legal guidelines for settling the present case.

(b) The provision applicable to the main proceedings

28. The order for reference omits to mention Regulation No 1408/71 but contains details which imply that it might be applied: the fact that Mr Stamatelakis was insured with the TAE and the subsequent claim made to the OAEE.

29. The Greek social security system is characterised by the existence of numerous public bodies responsible for covering the various sectors of the population, according to profession-based criteria. Over time the number of bodies has been reduced, and the functions are centred at the Idrima Kinonikon Asfaliseon (Social Security Institution; 'the IKA') for employed persons and at the OAEE for self-employed persons and persons exercising the liberal professions. [11]

30. The OAEE, a legal person governed by public law which absorbed the TAE, provides compulsory cover for traders, craftsmen, drivers and hotel-keepers. [12] Article 2 of

11 — *Le système hellénique de la sécurité sociale*, Greek Ministry of Labour and Social Security, General Secretariat for Social Security, Athens, 2002, p. 20 et seq. The text may be found at http://www.ggka.gr/france/asfalistikofr_menu.htm.

12 — *Le système hellénique*, op. cit., p. 26.

Regulation No 1408/71 mentions self-employed persons, so it can be imagined that it concerns the persons insured with the OAEE.

31. However, as the Commission points out, there is nothing in the documents before the Court to suggest that the insured person applied for prior authorisation in accordance with Article 22 of Regulation No 1408/71; nor are reasons adduced for his not doing so. Even if he did apply for it, it should be pointed out that, according to the case-law, the provision is intended to allow an insured person, authorised to go for treatment to another Member State, to receive sickness benefits in kind at the expense of the competent institution, in accordance with the legislation of the place in which the treatment is provided, but it does not regulate the reimbursement, at the tariffs in force in the competent State, of the amount paid for that treatment. [13]

32. The doubts entertained by the national court do not stem from an authorisation scheme but from the fact that, with the exception of children under 14 years of age, treatment in private hospitals abroad must be paid for by the patient.

33. Moreover, it was held in *Vanbraekel and Others* that, in some circumstances, an insured person is entitled, pursuant to Article 49 EC, to receive medical treatment in another Member State under terms of cover other than those contained in Article 22 (paragraphs 37 to 53). [14]

34. In view of this, the questions referred by the national court should be studied in the light of Article 49 EC which, let us not forget, represents a unique expression of the principle of equality of treatment.

2. Hospital treatment in the case-law

35. Those who have submitted observations in these proceedings point to the judgments of the Court of Justice on the subject. It is appropriate to recall them in order to understand the questions asked by the Diikitiko Protodikio Athinon.

13 — Case C-466/04 *Acereda Herrera* [2006] ECR I-5341; *Kohll*, paragraph 27; and *Vanbraekel and Others*, paragraph 36.

14 — The judgment in Case C-372/04 *Watts* [2006] ECR I-4325 repeats this view at paragraphs 46 and 47.

36. First of all, the freedom to provide services includes medical care provided for remuneration, [15] both in a hospital environment and outside such an environment; [16] it also includes the freedom, for the recipients of services, to go to another Member State in order to receive the necessary care. [17]

37. In the present case it is established that Mr Stamatelakis paid the United Kingdom hospital directly, and the fact that he subsequently sought reimbursement from the OAEE does not render the provisions of the Treaty irrelevant, [18] since a medical service supplied does not cease to fall within the scope of Article 49 EC because a patient requests reimbursement of the costs paid from a national health insurance body. [19]

38. Community law does not detract from the power of the Member States to organise their social security systems; [20] in the absence of harmonisation at Community level, it is for the legislation of each Member State to determine the conditions for entitlement to benefits, [21] but when exercising that power Member States must comply with Community law, [22] which means that they cannot introduce or maintain in force unjustified restrictions on the exercise of the freedom to provide health services. [23]

39. It is therefore necessary to examine whether the Greek prohibition on reimbursing the cost of treatment received in private hospitals abroad infringes that freedom (the first question referred for a preliminary ruling), whether it is justified (the second question) and whether it is proportionate to the objective pursued (the third question).

40. However, although the case-law takes as the main point of reference the fundamental

15 — Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685, paragraph 18; *Kohll*, paragraph 29; and *Watts*, paragraph 86.

16 — Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 53; Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509, paragraph 38; *Vanbraekel and Others*, paragraph 41; *Inizan*, paragraph 16, and *Watts*, paragraph 86.

17 — Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16, and *Watts*, paragraph 87.

18 — *Smits and Peerbooms*, paragraph 55, and *Müller-Fauré and van Riet* paragraph 39.

19 — *Müller-Fauré and van Riet*, paragraph 103, and *Watts*, paragraphs 89 and 90.

20 — Case 238/82 *Duphar and Others* [1984] ECR 523, paragraph 16; Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 6; Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, paragraph 27; and *Kohll*, paragraph 17.

21 — Joined Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira* [1997] ECR I-511, paragraph 36, and *Kohll*, paragraph 18.

22 — *Smits and Peerbooms*, paragraphs 44 to 46; *Müller-Fauré and van Riet*, paragraph 100; *Inizan*, paragraph 17; and *Watts*, paragraph 92.

23 — According to González Vaqué, L., 'La aplicación del principio fundamental de la libre circulación en el ámbito de la Seguridad Social: la sentencia Decker', *Revista de Derecho Comunitario Europeo*, No 5, Madrid, 1999, p. 129 et seq., the case-law of the Court of Justice contains sufficient arguments to limit any negative consequences it may have in the short or medium term.

freedoms established in the Treaty, there is another aspect which is becoming more and more important in the Community sphere, namely the right of citizens to health care, proclaimed in Article 35 of the Charter of Fundamental Rights of the European Union, [24] since, 'being a fundamental asset, health cannot be considered solely in terms of social expenditure and latent economic difficulties'. [25] This right is perceived as a personal entitlement, unconnected to a person's relationship with social security, [26] and the Court of Justice cannot overlook that aspect.

B — *The existence of a restriction on the freedom to provide services*

41. The Belgian Government and the Commission maintain that the Greek legislation restricts the freedom to provide services because, although it does not prevent people from going to private hospitals in other Member States, it discourages possible users from doing so since, if they are more than 14 years old, they bear the cost of the treatment.

42. Greece, on the other hand, cannot see that there is any obstacle, since its legislation provides for reimbursement only when treatment has been received in a private hospital within its territory which has entered into an agreement. The generalised refusal to bear the costs, without differentiating according to the location of the hospital, means that there can be no objection at Community level.

43. It appears to me that the premiss of this argument is pertinent, but not its development or its conclusion.

44. In asking the questions, the national court has examined the chances of reimbursement according to whether treatment has taken place in public or in private hospitals abroad. That reasoning, used by Belgium and, in part, by the Commission, disregards the link between freedom to provide services and freedom of movement,

24 — OJ 2000 C 364, p. 1. The provision states that 'everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities'; its content is reproduced in Article II-95 of the Treaty establishing a Constitution for Europe (OJ 2004 C 310, p. 1). The Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the health strategy of the European Community (COM(2000) 285 final) begins by observing that 'people attach great priority to their health'.

25 — Opinion of the European Economic and Social Committee on 'Healthcare', approved by the Plenary Session on 16 and 17 July 2003 (OJ 2003 C 234, p. 36).

26 — Cavas Martínez, F., and Sánchez Triguero, C., 'La protección de la salud en la Constitución Europea', *Revista del Ministerio de Trabajo y Asuntos Sociales*, No 57, Madrid, 2005, p. 28.

which allows Article 49 EC to prohibit restrictions imposed on nationals established in another Member State.

45. In connection with the freedom to provide services, there are two territories involved; in the main proceedings these are the territory of Mr Stamatelakis's nationality — Greece — and the territory in which the treatment was provided — the United Kingdom. In order to determine whether there is a restriction of a fundamental freedom, the provisions enacted by the national legislature concerning reimbursement are applied and it is ascertained whether the patient has gone abroad. The situation becomes distorted when, as in the order for reference, only public or private hospitals abroad are taken into account and those in the patient's own country are disregarded. This approach overlooks the journey abroad. According to well-established case-law, Article 49 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State. [27]

46. I therefore suggest that the questions referred for a preliminary ruling should be reformulated, because I agree with the representative of the Hellenic Republic that it is necessary to consider the cases in which Greek nationals might obtain the cost of treatment in private hospitals in Greece and no provision is laid down regarding care received in any kind of hospital abroad. The point on which I disagree is that I consider that the Greek rules are stricter for those who travel to other States in the Community.

47. First, the legislation does not provide for a possible agreement between the private hospital and the public health service abroad, unlike what happens in the national context. Thus, if a person goes to a private hospital in Greece which has entered into an agreement with the health service, he pays nothing; but, if he goes to an identical hospital in another country, he has to pay the bill. The Greek Government's claim that in this case — and also when Form E 112 is used [28] — the

27 — Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 17; *Kohll*, paragraph 33; *Smits and Peerbooms*, paragraph 61; and *Watts*, paragraph 94.

28 — It is apparent from Commission Decision 94/604/EC (Decision No 153 of the Administrative Commission of the European Communities on Social Security for Migrant Workers of 7 October 1993 on the model forms necessary for the application of Regulations Nos 1408/71 and 574/72 (E 001, E 103 to E 127)) (OJ 1994 L 244, p. 22) that Form E 112 is required for application of Article 22(1)(c)(i) of Regulation No 1408/71. According to the judgment in Case C-145/03 *Keller* [2005] ECR I-2529, Forms E 111 and E 112 are intended 'to assure the institution of the Member State of stay and the doctors authorised by that institution that the holders of those forms are entitled to receive in that Member State, during the period specified in the form, treatment whose cost will be borne by the competent institution' (paragraph 49).

patient does not bear the cost, is unfounded, because the 1997 and 1999 Decrees exclude reimbursement, except for children under 14 years of age. [29]

48. Secondly, there is an exception to the refusal to reimburse sums paid to private Greek hospitals which have not entered into an agreement, since the insuring body pays for emergency treatment if certain formalities are observed. [30] However, no such exception is made when the emergency occurs abroad and it is objectively impossible to have recourse to the public health service of the country in which the patient finds himself. [31]

49. The first question referred for a preliminary ruling should therefore be answered in the affirmative, not because provision is made for reimbursement of the cost of hospital treatment in public hospitals abroad, but not in private hospitals abroad, but because the exclusion of the latter, except in the case of children under 14 years of age, is more unconditional than when the service is provided in Greece in similar circumstances, thus limiting the opportunities for private hospitals in other States to treat Greek patients.

C — *Justification for the restriction*

50. Having established that there is a restriction on a fundamental freedom, it is necessary to decide whether it is justified.

51. The Court of Justice has recognised that certain overriding reasons in the general interest may justify a barrier to the freedom to provide hospital services, such as the risk of seriously undermining a social security system's financial balance, [32] the objective of maintaining a high quality balanced medical and hospital service open to all [33] or the maintenance of treatment capacity or medical competence on national territory. [34]

29 — The agent of the Greek Government, in reply to the questions I put to him at the hearing, explained that his country's assumption of the cost was 'a practice' linked to acceptance of Form E 112. That line of argument has to be rejected in the present case, since it does not detract from the wording of the written rules and Form E 112 has not been used on this occasion. He also stated that he did not know whether the Greek social security had entered into any agreement with private hospitals in other Member States.

30 — This is clear from the web pages of the OAEE (http://www.oaee.gr/English/diafora/oaee.htm) and the IKA (http://www.ika.gr/fr/home.cfm) and it was confirmed by Greece's representative at the hearing.

31 — Desdentado Bonete, A. and Desdentado Daroca, E., 'El reintegro de los gastos de la asistencia sanitaria prestada por servicios ajenos a la seguridad social', *Revista del Ministerio de Trabajo y Asuntos Sociales*, No 44, Madrid, 2003, p. 28.

32 — *Kohll*, paragraph 41; *Smits and Peerbooms*, paragraph 72; *Müller-Fauré and van Riet*, paragraph 73; and *Watts*, paragraph 103.

33 — *Kohll*, paragraph 50; *Smits and Peerbooms*, paragraph 73; *Müller-Fauré and van Riet*, paragraph 67; and *Watts*, paragraph 104.

34 — *Kohll*, paragraph 51; *Smits and Peerbooms*, paragraph 74; *Müller-Fauré and van Riet*, paragraph 67; and *Watts*, paragraph 105.

52. Specifically, it has acknowledged that the number of hospitals, their geographical distribution, the way in which they are organised and the facilities with which they are provided, and the nature of the medical services which they are able to offer are all matters for which it must be possible to plan in such a way as to meet a variety of concerns, including those of ensuring that there is sufficient and permanent access to a range of high-quality hospital treatment, or of controlling costs and preventing any wastage of resources, principally financial resources, which are not unlimited, whatever the mode of funding applied. [35] It has added that, if patients were at liberty to use the services of any kind of hospital, including hospitals with which their health insurance fund had no agreement, the planning work would be jeopardised. [36]

53. In the present case, the grounds stated provide the national court and many of those who submitted observations in these preliminary reference proceedings with an excuse to steer the argument towards the alternative of public or private health provision. This should be avoided since, as I have indicated in previous points, it is not at the root of the restriction on the Community fundamental freedom; moreover, in that debate circumstances of various kinds apply, especially non-legal circumstances.

54. In the sphere of private hospital care — either in Greece or in another Member State — the exclusion of services provided by contracted private hospitals in other countries or of emergency treatment is difficult to reconcile with the above justifications when the costs are reimbursed only if they are incurred at a hospital in the country or if the emergency occurs in national territory.

55. The financial consequences and medical cover are the same in both situations. Let me gave as an example a Greek citizen who suffers an accident and, because he is seriously injured, is taken, unconscious, by the ambulance to the nearest hospital, which turns out to be private. I can imagine the patient's bewilderment when he learns that, if the mishap had occurred in Greece, he would have been exempt from paying for treatment provided that the hospital had entered into an agreement or he needed treatment urgently, whereas, if it occurs elsewhere, he has to pay, unless he is under 14 years of age and the conditions for reimbursement are satisfied.

56. The reasons put forward yield to the freedom of contracted private hospitals abroad to provide services and to the right to health.

35 — *Smits and Peerbooms*, paragraphs 76 to 80; *Müller-Fauré and van Riet*, paragraphs 77 to 80; and *Watts*, paragraphs 108 and 109.

36 — *Smits and Peerbooms*, paragraph 81, and *Watts*, paragraph 111.

57. Moreover, several aspects of the Greek legislation contradict those reasons. Thus, it is difficult to understand that the exclusion of contracted private hospitals abroad should be based on the lack of control by the Greek authorities over the quality of their services, since it is for the authorities of the country in which they are situated to monitor them; [37] many other activities could be rejected for the same reason, undermining the foundations of the Community. The Court of Justice has held that, for the purposes of freedom to provide services, doctors established in other Member States offer professional guarantees equivalent [38] to those afforded by doctors established on national territory; [39] this principle may be extended to the hospitals, of which doctors constitute the main professional element.

58. Nor can I find any explanation for paying for the treatment of children under 14 years of age in private hospitals abroad, since, if the Greek Government's claim that this covering of costs reflects the intention of protecting a vulnerable category of people is accepted, I do not know why it does not encompass other categories also requiring special protection, such as the elderly, the disabled and pregnant women. [40] Moreover, in relation to children, the objection that it is impossible to evaluate the services is not raised.

59. There is therefore no valid justification for restricting the freedom to provide health services in private hospitals in other Community countries more rigorously than in similar hospitals on national territory. The second question referred for a preliminary ruling should therefore be answered in the negative.

D — *The proportionality of the rule*

60. Proportionality suggests balance and harmony between the objective pursued and the measures adopted to attain it, but, when there is not sufficient justification for that objective, as in the present case, it is pointless analysing its relation to the meas-

37 — At the hearing, the representative of the Netherlands suggested that their level should be verified by means of a statement from the competent services in the relevant country but, for private hospitals with which an agreement exists, I believe that the guarantee is inherent in the fact that it has concluded the agreement with the public health authority.

38 — However, Molière, in his comedy *Le Médecin malgré lui*, puts these words in the mouth of Valère: 'We are trying to find a clever man, a different doctor, capable of bringing relief to our master's daughter, struck down by an illness which has suddenly deprived her of the power of speech. Several doctors have exhausted all their knowledge with her, but sometimes there are people with wonderful secrets, special medicines, who often achieve what the others could not; that is what we are looking for' (Complete Works, col. La Pléiade, Gallimard, Paris, 1971, Act I, Scene IV, p. 231) (free translation).

39 — *Keller*, paragraph 52, and *Kohll*, paragraph 48.

40 — At the hearing, the representative of the Greek Government was unable to give objective reasons for payment being restricted to the treatment of children.

ures. The referring court was therefore right to formulate this question in the alternative.

61. However, in case the Court of Justice should find a reason to protect the restriction, I shall consider proportionality briefly.

62. I think that, leaving aside the position of children, the example given in the above section illustrates the excessive nature of the outright ban on reimbursement of the cost of treatment in private hospitals in other Member States, both in respect of hospitals which have entered into agreements with the public health authorities or bodies and in cases in which a patient's life is in danger.

63. There are other measures which are less restrictive and more in keeping with the Community freedom. Given the approach suggested for the questions referred for a preliminary ruling, it would be sufficient to eliminate the differences in the regulation of payment for treatment in private hospitals abroad.

64. Therefore, the third question referred for a preliminary ruling should also be answered in the negative.

E — *Corollary and alternative*

65. It may be inferred from the foregoing considerations that national legislation infringes Article 49 EC if it allows patients to recover the cost of treatment provided in private hospitals on national territory, if these have entered into an agreement or in the case of an emergency, whereas, except in the case of children under 14 years of age, it prohibits reimbursement if the treatment is provided in private hospitals abroad, because the freedom to provide services and citizens' right to health care are unjustifiably and disproportionately restricted.

66. In this Opinion I have stated that the infringement of Community law does not stem from the fact that the Greek rules deny reimbursement of the cost of treatment in private hospitals abroad and allow it, subject to certain conditions, in public hospitals abroad. Nevertheless, in case the Court of Justice, following the argument put forward by the Diikitiko Protodikio Athinon, concentrates on the different arrangements for hospital costs incurred outside Greece, it is appropriate to add a few more observations.

67. First, the mobility of patients in the Community is one of the aspects of the general debate on health care which most concerns the institutions and the Member States, [41] in view of the fact that there are insufficient budgetary, material and human resources to achieve complete liberalisation. [42] The Court of Justice has only to ensure compliance with the law, without trying to replace the will of the legislature. [43]

68. Secondly, there is no doubt that the Greek rules discourage people insured with public bodies from entering private hospitals in other States, so they therefore restrict the freedom to provide services, if the situation is considered without taking account of the position within Greece.

69. Thirdly, the restriction is designed, as is apparent from the information supplied by Greece, to guarantee the viability of the social security system.

70. Finally, the measures, although justifiable, are disproportionate, since, with the sole exception of children, they provide for no derogation, such as those in respect of treatment in public hospitals abroad, even though this is subject to authorisation; nor do they lay down scales for reimbursement. The absolute terms of the prohibition are not appropriate to the objective pursued, because there are measures which are less restrictive and more in keeping with the fundamental freedom and, I repeat, with the right to health care.

71. Therefore, from this perspective, a national rule which excludes in all circum-

41 — In point 80 of the Opinion I delivered in *Smits and Peerbooms*, I refer to the 'practice of clinico-social tourism, whereby patients, usually of sound financial means, seek better medical treatment abroad', and cite the example of the German writer Thomas Mann who accompanied his sick wife to a sanatorium in Davos, Switzerland, where he conceived *Der Zauberberg* (The Magic Mountain), 'which centres around the fraught search for ideal health care'.

42 — Advocate General Geelhoed, in points 19 to 24 of his Opinion in *Watts*, refers to the tensions which arise from the existence of compartmentalised national systems of health care and health insurance and from the way in which these operate in the context of an internal market common to 25 Member States. He describes the factors which give rise to those tensions, which include the stimulation of 'patient mobility'. Nevertheless, the diversity of those systems does not prevent them from sharing 'common principles of solidarity, equity and universality' (Conclusions of the Council and of the Representatives of the Member States meeting in the Council of 19 July 2002 on patient mobility and health care developments in the European Union (OJ 2002 C 183, p.1)). In academic writings, there is no shortage of voices warning that the influence which the fundamental freedoms have on social protection puts solidarity at risk (Mossialos, E., McKee, M., Palm, W., Kart, B., and Marhold, F., 'L'influence de la législation de l'UE sur la nature des systèmes de soins de santé dans l'Union européenne', *Revue belge de sécurité sociale*, 2002, pp. 895 to 897).

43 — In September 2006, the Commission launched a public consultation regarding Community action on health services in order to bring forward specific proposals during 2007 (http://ec.europa.eu/health/ph_overview/co_operation/mobility/patient_mobility_en.htm).

stances reimbursement by a national body of the cost of treatment of a person insured with it in a private hospital abroad, except in cases concerning children under 14 years of age, constitutes a restriction on the freedom to provide services enshrined in Article 49 EC which, while justifiable, goes beyond what is necessary for achieving its objective.

VI — Conclusion

72. In the light of the foregoing considerations, I suggest that the Court's reply to the questions referred to it by the Diikitiko Protodikio Athinon should be as follows:

A national rule which prohibits reimbursement by an insurance body of the cost of treatment of a person insured with it in a private hospital abroad except in cases concerning children under 14 years of age, but allows reimbursement if the treatment has been provided in a private hospital on national territory, if it has entered into an agreement or in the case of an emergency, constitutes an unjustified and disproportionate restriction on the freedom to provide services enshrined in Article 49 EC.