OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 10 July 2003 [1]

1. The Verwaltungsgericht Sigmaringen (Administrative Court), Sigmaringen, Germany, an administrative court of first instance, has referred two questions to the Court of Justice for a preliminary ruling on the interpretation of Articles 49 EC and 50 EC.

In particular, the Verwaltungsgericht Sigmaringen seeks to ascertain whether those provisions preclude a national provision on reimbursement of the costs of medical treatment, under which the assumption of expenditure relating to a thermal cure undertaken in another Member State, is made subject to the additional condition that it must be established by a medical report that the cure provided in that Member State offers greater prospects of success

I — The facts

2. Mr Leichtle, the plaintiff in the main proceedings, is an official of the Bundesanstalt für Arbeit (Federal Employment Authority). In February 2000, Mr Leichtle applied for recognition that expenditure incurred in respect of a thermal cure he proposed to undergo in Ischia, Italy, between 29 April and 13 May, was eligible for reimbursement. Mr Leichtle submitted a medical certificate from a specialist which stated that he suffered from polyarthralgia and chronic back pain, that he had exhausted the treatment available in his place of residence, and that, from an orthopaedic and rheumatologicial point of view, he needed to undergo inpatient rehabilitation, such as, in particular, fango baths together with radon treatment, such as those provided, for example, in Ischia.

3. The employment office medical officer responsible for the plaintiff's administrative unit stated that, although the cure was necessary to restore the plaintiff's fitness for work, it did not appear to be essential that he be treated abroad. Subsequently, the medical adviser of the Federal Employment Authority reached the same conclusion, stating that the documents attached did not establish whether the patient had at any time undergone a thermal cure in Germany and that a large number of treatments for similar symptoms were successfully provided at German health spas. On the basis of that opinion, the Federal Employment Authority rejected the application of 29 February 2000.

1 — Original language: Spanish.

4. On 7 March 2000, Mr Leichtle lodged a complaint against that decision. The complaint was rejected on 22 March 2000 on the ground that, under Paragraph 13(3) of the Allgemeine Verwaltungsvorschrift für Beihilfen in Krankheits-, Pflege-, Geburts- und Todesfällen [2] (General Administrative Provision on the reimbursement of expenditure in the event of Sickness, Special treatment, Birth and Death; 'the rules on reimbursements'), the cost of a thermal cure abroad may be reimbursed only if, as well as satisfying other requirements, it is established that it is absolutely necessary that the cure be provided outside Germany in order to have the greatest prospects of success.

5. Mr Leichtle underwent the therapy in Ischia on the dates envisaged. The cost of the medical and thermal treatment came to ITL 463 000 (EUR 239.12), [3] the travelling costs to DEM 639 (EUR 326.72), and the cost of accommodation to DEM 2 200 (EUR 1 124.84). Mr Leichtle has not yet applied for reimbursement of last two amounts because he is still awaiting recognition that they are reimbursable.

2 — In the version published on 10 July 1995 (GMBl., p. 470) and last amended on 20 February 2001 (GMBl., p. 186).

3 — As the national court states in its order, the amount of EUR 154.41 was deemed to be reimbursable, following the application of the corresponding scale to the actual amount.

II — National rules

6. The German rules on sickness insurance for the civil service proceeds from the premiss that civil servants meet the costs incurred in respect of treatment out of their ordinary remuneration, and that reimbursement is intended to supplement the cover which is the responsibility of the individual. As a general rule, civil servants arrange private insurance.

The system permits a free choice of doctors. The relationship between the patient and the doctor or hospital treating him is governed by private law and the civil servant is invoiced directly for the costs. The institution in which the civil servant is employed or the private sickness assurance scheme concerned then refunds the costs, provided that the required conditions are met.

7. The costs involved in taking a thermal cure are of two types: doctors' fees, as referred to in Article 8(2)(1) of the rules on reimbursement, and associated expenditure, such as board and lodging, visitors' tax, and the final medical report, recognised in Article 8(2)(2) to (5). Medical fees are reimbursed without the need for prior authorisation from the sickness fund, regardless of whether the treatment was received in Germany or in another State. Related expenditure is also reimbursed, provided the person concerned first makes application for reimbursement, irrespective of whether treatment is received in Germany or abroad. However, the conditions

which must be met in order for assistance to be granted vary according to the place in which the service is provided and are set out in Article 8(3)(1), if the patient proposes to attend a German health spa, or in Article 13 (3), if the patient chooses to attend a spa abroad.

8. The thermal cure which Mr Leichtle took in Ischia is covered by Article 8 and 13, which provide as follows:

'Article 8: Expenditure incurred in connection with a health cure eligible for assistance

(1) ...

(2) The following expenditure shall satisfy the conditions for the grant of assistance in respect of a health cure:

1. the expenditure provided for in Article 6(1)(1) to (3),

2. expenditure incurred on board and lodging for a maximum of 23 calendar days, including days of travel, up to an amount of DEM 30 per day; ...

3. the expenditure provided for in Article 6(1)(9),

4. expenditure incurred in respect of visitors' tax...,

5. expenditure incurred in connection with the final medical report.

(3) The expenditure referred to in Article 8 (2)(2) to (5) shall be eligible for assistance only if:

1. according to a report drawn up by a medical officer or a medical consultant, the health cure is necessary to restore or maintain fitness for work following serious illness or, in the case of considerable chronic pain, balneo-

therapy or climotherapy treatment is absolutely necessary and cannot be replaced by other forms of treatment offering the same prospects of success, in particular by treatment at the official's place of residence or posting within the meaning of the Bundesumzugskostengesetz (German Federal Law on Removal Costs);

2. the authority responsible for determining the amount of the assistance has first recognised such eligibility. That recognition shall be valid only where treatment is commenced within four months of notification of the decision;

...

(6) For the purposes of this provision, "health cure" shall mean a cure taken under medical supervision, according to a cure plan, and at a health spa listed in the Register of Health Spas; the accommodation must be at the health spa and tied to that location.'

Paragraph 13: Expenditure incurred outside the Federal Republic of Germany which is eligible for assistance

'(1) Expenditure incurred outside the Federal Republic of Germany shall be eligible for assistance only where it constitutes expenditure provided for in Article 6 and 9 to 12 and only in so far as it would have been incurred in the Federal Republic of Germany and eligible for assistance up to the permitted amount had the treatment been taken at the place of residence of the person concerned.

(2) ...

(3) Expenditure referred to in Article 8(2) (2) to (5) which is incurred in respect of a health cure outside the Federal Republic of Germany shall be eligible for assistance, by way of exception, only where:

1. it is established in a report drawn up by a medical officer or medical consultant that the health cure is absolutely necessary outside the Federal Republic of Germany on account of the greatly increased prospects of success, and

2. the health spa is listed in the Register of Health Spas, and

3. the other requirements laid down in Article 8 are met.

Expenditure under Paragraph 8(2)(1) and 8 (2)(3) to (5) shall be eligible for assistance without being restricted to the costs incurred in the Federal Republic of Germany.

(4) ...'

III — The questions referred to the Court

9. In view of the fact that, under the provisions of German law set out above, thermal cures taken in other Member States are subject to special restrictions, by comparison with those taken in Germany, the Verwaltungsgericht Sigmaringen, which is required to adjudicate on the substance of the case, decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Are Articles 49 EC and 50 EC to be interpreted as precluding a rule of national law (in this case, Article 13 (3) of the Allgemeine Verwaltungsvorschrift für Beihilfen in Krankheits-, Pflege-, Geburts- und Todesfällen B — rules on reimbursement) under which the costs of a health cure taken in another Member State are reimbursable only where it is absolutely essential that the cure be taken outside the Federal Republic of Germany because it thus offers greatly increased prospects of success, where that is established in a report drawn up by a medical officer or a medical consultant and where the spa concerned is listed in the Register of Spas?

(2) Are Articles 49 EC and 50 EC to be interpreted as precluding rules of national law (in this case, point 3 in the first sentence of Article 13(3) of the rules on reimbursement, read in conjunction with Article 8(3)(2) thereof) under which advance recognition of a health cure is precluded where the person concerned does not await the conclusion of the application procedure or of any subsequent court proceedings before commencing the cure and where the only matter in dispute is whether those rules are correct not to recognise a health cure taken in another Member State of the European Union as eligible for assistance?

IV — Community legislation

10. The provisions to be interpreted are as follows:

Article 49 EC

'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.

...'

Article 50 EC

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

"Services" shall in particular include:

...

(d) activities of the professions.

...'

V — Procedure before the Court

11. Written observations were presented in these proceedings, within the period prescribed by Article 20 of the Statute of the Court of Justice, by the Government of Spain, the United Kingdom and the Commission.

Since none of the parties sought to present oral argument, the Court decided to dispense with a hearing, in accordance with Article 104(4) of the Rules of Procedure.

VI — Analysis of the questions

A — *The views of the parties who submitted observations*

12. The Spanish Government maintains that balneotherapy is more in the nature of inpatient treatment than in that of outpatient treatment. For that reason, Articles 49 EC and 50 EC do not preclude a national rule that the cost of a thermal cure in another Member State is covered by sickness insurance, provided that it is established in a medical report that that cure offers greater prospects of success.

13. The United Kingdom submits that the rules in issue render the provision of services in another Member State more difficult than in Germany, since the criteria set out in Article 8(3)(1) are more readily satisfied than those set out in Article 13(3). Accordingly, Article 13(3) constitutes a barrier to freedom to provide services. However, the United Kingdom maintains that the requirement of the conditions imposed by the rule for reimbursement of the expenditure relating to a thermal cure taken away from the place of residence is, in principle, necessary and reasonable. It proposes that it is for the national court to determine in each case whether the more stringent criteria which according to the rule in question must be satisfied in order for expenditure incurred abroad to be reimbursed are justified on public-interest grounds.

14. The Commission maintains that a patient such as Mr Leichtle, who fulfils only the condition laid down in Article 8(3) of the German rules on reimbursement, is entitled to payment of medical fees and related expenses if he receives treatment in Germany but not if he travels abroad.

It contends that Articles 49 EC and 50 EC preclude national rules having those characteristics, under which reimbursement of expenses relating to a thermal cure abroad is ruled out in principle and expenditure may be reimbursed only by way of exception, provided that it is established by a medical report that the treatment must be provided outside Germany because there are greater prospects of success.

B — *First question*

15. By the first question, the national court seeks to ascertain whether Articles 49 EC and 50 EC preclude a rule, such as Article 13(3) of the rules on reimbursement, under which reimbursement of expenditure

relating to a thermal cure, and incurred in respect of board and lodging, visitors' tax and a final medical report, is, in the case of treatment carried out in Germany, conditional upon its being established in a medical report that the treatment is necessary, and upon advance recognition of eligibility for assistance being provided by the competent office, but is, in the case of treatment carried out in another Member State, made subject to the additional requirement that a doctor must certify that the cure in the establishment concerned offers greater prospects of success.

16. I proceed from the assumption that treatment which is provided at a health spa, upon the recommendation of a doctor and under medical supervision, must be assimilated to medical activities, which, according to the settled case-law of the Court, [4] fall within the scope of Article 50 EC. [5] The national court is therefore right to seek an interpretation of Articles 49 EC and 50 EC.

17. I note that the conditions governing thermal cures taken abroad, set out in Article 13(1) of the impugned rules, are no more onerous than those applicable to cures taken in one of the treatment centres in Germany. However, the amount eligible for assistance is limited to the amount which would have been reimbursed had the treatment been followed in Germany.

That requirement may undoubtedly deter patients from attending a health spa in another Member State if the fees charged by medical staff there are higher than in Germany, since the restriction means that a patient pays more than if he had not travelled abroad.

18. That constitutes a barrier to freedom to provide services which, to my mind, is justified by the need to control expenditure and to prevent wastage of financial resources. As the Commission states in its written observations, the general principle behind the German insurance scheme is that patients are free to choose the centre at which they receive treatment, from which it follows that patients must bear the difference in cost when they choose a more expensive clinic to receive treatment which has the same therapeutic value. If, on the other hand, the fees of the medical practitioners are lower than in Germany, the

4 — Judgments in Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16; Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 29 and 51; Case C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473, paragraph 53; and Case C-385/99 *Müller-Fauré and Others* [2003] ECR I-4509, paragraph 38.

5 — I diverge from that view where the treatment is covered by sickness insurance which provides only benefits in kind, as I made clear in my Opinion in *Geraets-Smits and Peerbooms*. See, in particular, points 35 to 49 of that Opinion, where I examined in detail the characteristics of the compulsory sickness insurance scheme in the Netherlands, pointing out that the healthcare benefits in kind provided to insured persons under that scheme lack the element of remuneration and, as such, cannot be regarded as a service within the meaning of the Treaty.

amount eligible for reimbursement should be adjusted accordingly in order to prevent the unjust enrichment of patients.

19. I conclude from the foregoing that Articles 49 EC and 50 EC do not preclude a rule of national law such as that contained in Article 13(1) of the German rules on reimbursement.

20. Article 13(3) sets out the circumstances in which assistance is granted, exceptionally, towards expenditure incurred in connection with a thermal cure taken abroad. In addition to the requirements set out in Article 8 concerning treatment carried out in Germany (it must be established in a medical report that the treatment is necessary and the competent office must recognise in advance that the expenditure is eligible for assistance), two additional conditions must be met: first, that there must be a medical certificate establishing that treatment abroad offers greater prospects of success; and, second, that the health spa must be included in the register of recognised centres specialising in such cures.

It is appropriate to analyse the advance recognition of expenses separately from the requirement that the treatment abroad be necessary, since they are the two conditions which are liable to deter patients from attending health spas in other Member States and which, therefore, are capable of constituting a barrier to freedom to provide services.

21. The obligation to apply to the competent office for recognition that expenses are eligible for assistance, before commencing treatment, is equivalent to the obligation placed on an insured person to obtain prior authorisation to seek treatment from a doctor or a hospital not contracted to the sickness insurance schemes of certain Member States. It is also similar to the obligation set out in Article 22(1)(c) of Regulation No 1408/71. [6]

22. The Court has held that for a social security institution of a Member State to make reimbursement of the costs incurred in another Member State subject to prior authorisation is a barrier to freedom to provide services, [7] since, although it does not deprive patients of the possibility of attending a health spa in another Member State, it forces them to initiate an administrative procedure which has an uncertain

6 — Regulation (EEC) 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 amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

7 — Judgments in Case C-120/95 *Decker* [1998] ECR I-1831, paragraph 36, and *Kohll*, paragraph 35.

outcome, as authorisation may be refused.

23. When considering the possible justifications for a barrier of such magnitude, the Court has disregarded the characteristics of the sickness insurance scheme concerned and has not distinguished between schemes which provide benefits in kind and those which provide reimbursement, instead focusing solely on whether treatment is carried out in a hospital or in a practitioner's surgery. [8]

To my mind, a thermal cure capable of being financed in part under the German rules which I am examining is comparable to inpatient treatment, not only because it is carried out under medical supervision, in accordance with a treatment plan and at a recognised health spa, but also because Article 8(6) provides that the accommodation must be at the health spa and that both establishments be connected.

24. The Court has held that treatment provided in a hospital takes place within an infrastructure with, undoubtedly, certain very distinct characteristics, since the geographical distribution of hospitals, the mode of their organisation and the equipment with which they are provided, and even the nature of the medical services which they are able to offer, are all matters for which planning must be possible. It is also important to bear in mind the growing importance of natural medicine, and the prevailing socio-cultural tendencies at any given time, which may give rise to certain 'trends'. For example, the nineteenth century saw a significant increase in the number of health spas, whose popularity extended to all walks of life, [9] to the extent that it has been labelled the century of spa diplomacy. [10]

25. As the Commission points out, thermal treatment centres are places which are predefined by their natural features, and their number and geographical location cannot be altered. People have always taken advantage of the therapeutic qualities of certain waters. Many spas contain archaeological remains which bear witness to their use by the Romans and a number of medieval civilisations. With the advent of Christianity, some spas were regarded as

8 — See the judgments in *Decker*, *Kohll*, *Geraets-Smits and Peerbooms*, and *Müller-Fauré and Others*.

9 — Chekhov set the moving love affair in his short story La Señora del perrito ('The Lady with the Dog') (Spanish translation by Juan López-Morrillas, Alianza Editorial, Madrid, 1984, p. 169 et seq.) in the Ukrainian health spa of Yalta on the Crimea peninsula, near the Black Sea.

10 — In the nineteenth century, every politician had his favourite health spa. Bismarck went to Ems; Cavour frequented the spa at Plombières, where in 1858 he met Napoleon III to agree aid to Sardinia in its fight against Austria and the conditions for the reorganisation of Italy into a federation; Napoleon III himself used the spa at Villefranche, while his wife, the Empress Eugénie de Montijo, took the waters at Vichy; Ferdinand VII and his third wife, María Amalia de Sajonia, had treatment at the thermal centre of Solán de Cabras in the Spanish province of Cuenca, convinced that the waters there would help to produce an heir to the throne; Cánovas del Castillo, a liberal-conservative who was prime-minister of Spain on a number of occasions with effect from 1874, would regularly relax at the Basque thermal centre of Santa Águeda, where he was assassinated by an Italian anarchist in 1897.

sacred. [11] At first, there was no scientific basis for their curative effects and purely empirical criteria prevailed. [12] Later, analysis was undertaken of the specific properties of the waters, which are the result of a combination of physicochemical elements and other circumstances connected with geographical location and environmental factors, highlighting the constant development of climotherapy. [13]

Accordingly, it is not appropriate to conclude that the requirement of advance recognition that the costs are reimbursable is justified on the ground that it seeks to ensure that there is sufficient and permanent access to a balanced range of thermal cures on German territory. [14]

26. The requirement that a patient must obtain prior authorisation in order to receive reimbursement of costs associated with a thermal cure in another Member State also arises from a desire to control costs in order to prevent any wastage of financial, technical and human resources. From that perspective, the requirement is a measure which is both necessary and reasonable, in the light of the legitimate concern of the sickness insurance scheme responsible for providing the assistance that it should not be required to finance every cure which an insured person decides to undergo, but only those which are approved beforehand. [15]

27. The second condition deterring patients from attending health spas in other Member States is that they must provide a medical report establishing that, in view of the greater prospects of success, it is essential that the thermal treatment be provided abroad; in other words, where the therapeutic advantages offered by thermal cure centres in Germany are equivalent to those offered by the establishment of the country which the patient proposes to visit, reimbursement is refused. Given the close link between the medical services provided as part of a thermal cure and the associated costs, a refusal to grant reimbursement of costs, which significantly exceed the medical fees, has the effect, in most cases, that

11 — However, King Alfonso VII of Castille (1106-1157) ordered the destruction of many of the spas in his kingdom because he regarded them as dens of iniquity.

12 — According to tradition, the spa of Solán de Cabras was discovered in the sixteenth century when a shepherd noticed his sheep, which were sick with mange, wallowing in water from which they later emerged cured; in the eighteenth century, Pedro López de Lerena, minister of royal finances to Charles III, built the bathing centre and hotel. Legend has it that the Galician health spa of La Toja was opened after a dying donkey was abandoned on the then uninhabited island of that name, only to return a few days later completely cured.

13 — Haas, E.M., *La salud y las estaciones*, Spanish translation by Rafael Lassaletta, Editorial Etaf, Madrid, 1982, particularly pp. 24, 242 and 243.

14 — Judgment in *Geraets-Smits and Peerbooms*, paragraphs 76 and 78.

15 — Ibid., paragraphs 79 and 80.

the person concerned decided not to travel to a health spa abroad.

28. The Court found that a very similar requirement under Netherlands legislation was justified under Article 49 EC, provided that the condition was interpreted as meaning that prior authorisation may be refused only where the treatment sought is available in the country on the ground that the same or equally effective treatment is available without undue delay at a national establishment. The Court considered that such a condition assured the financial stability of the sickness insurance system. [16]

29. To my mind, that justification is not valid in the present case, where the disputed measure treats situations differently according to the place where the service is provided. The reimbursable amount of the costs associated with a cure taken abroad has not been limited by the measure, contrary to the position with regard to the medical fees, and it might therefore be concluded that patients who prove that they need to travel abroad have an advantage by comparison with those who remain in Germany and receive assistance calculated on a flat-rate basis. However, the fact is that assistance in respect of such expenditure is granted exceptionally, whereas, if the cure is carried out in Germany, it is granted as a general rule.

30. As they are costs closely connected with to a cure, Article 13(3)(1) introduces discrimination based on where the service is provided, by granting assistance for the various heads, on a flat-rate basis, if the treatment is given in Germany, but refusing assistance where it is provided in another Member State unless an additional condition is met.

31. Article 46 EC, to which Article 55 EC refers, does not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health. Throughout these proceedings, however, no convincing argument has been advanced to justify the discriminatory measure on public health grounds. In any event, that aim would be assured by the requirement that the health spa be listed in the register of recognised thermal treatment centres.

32. It is well-known that, according to the case-law of the Court, Article 49 EC precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of

16 — Ibid., paragraphs 103 and 105.

services purely within one Member State, [17] save where it is objectively justified. [18]

33. It is not possible to justify such difference in treatment by arguing that there is a need to control costs on the part of the sickness insurance system, if the amounts paid to individuals are the same regardless of the State in which the cure is taken, since the Court has held that reimbursement of the costs of medical treatment provided in other Member States in accordance with the tariff of the State of insurance has no significant effect on the financing of the social security system. [19]

34. Finally, I should like to point out that, in accordance with Article 8(6) and 13(3)(2) of the German rules on reimbursement, the requirement that the health treatment centre must be listed in the register of recognised centres specialising in such treatment applies equally to cures taken in German health spas and those taken in health spas abroad. The Assistance Provisions do not, therefore, provide for difference in treatment on account of origin, nor do they make the provision of services between Member States more difficult than the provision of services purely within one Member State. On the contrary, assistance in respect of expenditure associated with a cure at an unrecognised centre in another Member State may be refused, but it appears to be appropriate that the competent office, which administers sickness insurance, should have the authority to verify the authenticity of the health spas whose treatments it funds by way of sums paid out to insured persons.

35. For the reasons set out above, I consider that Articles 49 EC and 50 EC preclude a rule of national law, such as Article 13(3)(1) of the German rules on reimbursement, under which the reimbursement of expenditure associated with a thermal cure, and incurred in respect of board and lodging, visitors' tax and a final medical report, is, in the case of treatment in Germany, conditional upon its being established in a medical report that the treatment is necessary, and upon prior recognition of eligibility for assistance by the competent office, but is, in the case of treatment in another Member State, made subject to the additional requirement that a doctor must certify that the cure in that establishment offers greater prospects of success.

C — *Second question*

36. In the event that the Court should answer the first question in the affirmative,

17 — Judgments in Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 17, and *Kohll*, paragraph 33.

18 — Judgment in *Kohll*, paragraph 33.

19 — Ibid., paragraph 42.

the effect of which would be to disapply Paragraph 13(3)(1), the Verwaltungsgericht Sigmaringen asks whether Articles 49 EC and 50 EC preclude a rule of national law under which reimbursement of expenditure associated with a health cure in another Member State is refused if the person concerned does not wait until that expenditure has been recognised as eligible for assistance, in an administrative procedure or in court proceedings, before commencing treatment.

37. The Spanish Government considers that this question should be answered in the negative, while the United Kingdom has not submitted observations on this question. The Commission maintains that the answer should be in the affirmative.

38. In my analysis of the first question, I pointed out that the obligation to apply to the competent office for recognition that related expenditure is reimbursable betaking taking a health cure, whether in Germany or abroad, is a reasonable measure which is justified by the need to prevent wastage of financial resources. Accordingly, Articles 49 EC and 50 EC do not preclude a refusal to reimburse such expenditure to persons who fail to apply for recognition or who do not wait until their application has been dealt with in the administrative procedure before commencing treatment.

39. The difficulty arises when, as in this case, recognition is refused in breach of Community law on freedom to provide services, and the patient must bring court proceedings in which it may be held that, under national law, the lack of advance recognition is a defect which is incapable of being remedied.

I agree with the Commission's approach to this issue for a number of reasons: first, because as the individual concerned is seeking to restore or improve his health, the requirement that he must wait for the conclusion of a judicial process before he can commence the cure amounts, at the very least, to delaying his recovery unnecessarily; second, because if an action has been brought against the refusal to provide assistance on the ground that the cure is to be carried out in another Member State, a patient who does not wish, or who is unable, to wait will be obliged to be treated in Germany, not availing himself of the opportunity offered by Community law; third, because, if it were possible to claim that the lack of advance recognition of the eligibility for assistance of the expenses is a defect which is incapable of being remedied in the case of someone like Mr Leichtle, who travelled to another Member State to receive treatment and who brought proceedings for the subsequent reimbursement of those expenses, the principle of freedom to provide services would be rendered meaningless.

In fact, the application of Article 13(3)(3), in conjunction with Article 8(3)(2), of the German Assistance Provisions would have the effect that patients who have travelled to another Member State to take a health cure, overcoming the barrier to freedom to provide services erected by Article 13(3)(1), were deprived of the right to be treated in the same way as people who, because they took the cure in Germany, experienced no difficulty in obtaining *advance* recognition of the eligibility for assistance of the expenditure associated with that cure and, consequently, in receiving reimbursement.

Moreover, the referring court proposed a reply to that effect in section two, point three of the order for reference.

40. There is also recent case-law on the interpretation of certain provisions of Regulation No 1408/71 which, by analogy, is capable of shedding light on this issue.

41. In *Vanbraekel and Others*, [20] the Court clarified the applicability of Article 22 of Regulation No 1408/71 to a dispute in which a patient had requested prior authorisation for hospital treatment in another Member State and the national court had set aside the refusal to grant authorisation.

The Court of Justice held that where the competent institution does not grant the request of a person insured under the social security system for authorisation on the basis of Article 22(1)(c) of Regulation No 1408/71, and it is subsequently established, either by the competent institution itself or by a court decision, that that refusal was unfounded, that person is entitled to be reimbursed by an amount equivalent to that which he would have received if authorisation had been granted in the first place. [21]

42. I therefore consider that Articles 49 EC and 50 EC preclude a rule of national law, such as Article 13(3)(3), in conjunction with Article 8(3)(2), of the German Assistance Provisions, under which reimbursement of expenditure associated with a health cure taken in another Member State is refused if the person concerned does not wait to obtain recognition of the eligibility for assistance of that expenditure, in court proceedings, before commencing treatment.

20 — Judgment in Case C-368/98 [2001] ECR I-5363, paragraph 34.

21 — See, for example, the judgment in Case C-326/00 *Ioannidis* [2003] ECR I-1703, paragraph 61.

VII — Conclusion

43. In the light of the foregoing considerations, I propose that the Court of Justice should give the following replies to the questions referred for a preliminary ruling by the Verwaltungsgericht Sigmaringen:

(1) Articles 49 EC and 50 EC preclude a rule of national law, such as Article 13 (3)(1) of the German rules on reimbursement, under which the reimbursement of expenditure associated with a thermal cure, and incurred in respect of board and lodging, visitors' tax and a final medical report, is, in the case of treatment in Germany, conditional upon its being established in a medical report that the treatment is necessary, and upon prior recognition of eligibility for assistance by the competent office, but is, in the case of treatment in another Member State, made subject to the additional requirement that a doctor must certify that the cure in that establishment offers greater prospects of success.

(2) Articles 49 EC and 50 EC preclude a national provision such as point 3 of the first sentence of Article 13(3) of the same rules, read in conjunction with Article 8(3)(2) thereof under which reimbursement of expenditure associated with a health cure taken in another Member State is precluded if the person concerned does not wait to obtain recognition of the eligibility for assistance of that expenditure in court proceedings, before commencing treatment.