JUDGMENT OF THE COURT

19 December 2008*

(Social security – Freedom to provide services – National health insurance systems – Hospital treatment costs incurred in another EEA State – Experimental and test treatment)

In Joined Cases E-11/07 and E-1/08,

REQUESTS to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by *Borgarting lagmannsrett* (Borgarting Court of Appeal) and *Oslo tingrett* (Oslo District Court), Norway, in cases pending before those courts between

Olga Rindal (Case E-11/07);

Therese Slinning, represented by legal guardian Olav Slinning (Case E-1/08)

and

The Norwegian State, represented by the Board of Exemptions and Appeals for Treatment Abroad;

concerning the interpretation of the rules on the free movement of services in the European Economic Area, in particular the interpretation of Articles 36 and 37 of the EEA Agreement, and of Article 22 of Council Regulation (EEC) No 1408/71 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 adapted to the EEA Agreement by Protocol 1 thereto,

* Language of the Request: Norwegian.

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Thorgeir Örlygsson and Henrik Bull, Judges,

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

– Therese Slinning, the Plaintiff in Case E-1/08, represented by Jan Gunnar Ness and Katrine Hellum Øren, advocates, Oslo;

– the Norwegian Government, represented by Ketil Bøe Moen, advocate, Office of the Attorney General (Civil Affairs), acting as Agent;

– the Government of Denmark, represented by Jonas Bering Liisberg, Head of Department, and Bolette Weis Fogh, Deputy Head of Department, Ministry of Foreign Affairs, acting as Agents;

– the Government of Iceland, represented by Sesselja Sigurðardóttir, First Secretary and Legal Officer, Ministry for Foreign Affairs, acting as Agent;

– the Government of the Netherlands, represented by Corinna Wissels, Head of the European Law Division, and Caroline ten Dam, European Law Division, Legal Affairs Department, Ministry of Foreign Affairs, acting as Agents;

– the Government of Poland, represented by Mikolaj Dowgielewicz, Secretary of State, Secretary of the Committee for European Integration, acting as Agent;

– the Government of the United Kingdom, represented by Zoë Bryanston-Cross, European Litigation, Treasury Solicitors, acting as Agent, and Jason Coppel, Barrister;

– the EFTA Surveillance Authority, represented by Ólafur Jóhannes Einarsson, Senior Officer, and Lorna Young, Officer, Department of Legal & Executive Affairs, acting as Agents; and

– the Commission of the European Communities, represented by Viktor Kreuschitz, its Legal Adviser, and Nicola Yerrell, member of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the Appellant in Case E-11/07, represented by Ola J. Strømsmoen, Advokat, the Respondent in Case E-11/07 and the Defendant in Case E-1/08 (i.e. the Norwegian State), represented by Ketil Bøe Moen, the Government of Denmark, represented by Bolette Weis Fogh, the Government of Iceland, represented by Sesselja Sigurðardóttir, the EFTA Surveillance Authority, represented by Ólafur Jóhannes Einarsson, and the Commission of the European

Communities, represented by Nicola Yerrell, at the hearing on 17 September 2008,

gives the following

Judgment

1 By a letter dated 14 December 2007, registered at the Court on 19 December 2007 as Case E-11/07, Borgarting lagmannsrett made a request for an Advisory Opinion in a case pending before it between Olga Rindal and the Norwegian State, represented by the Board of Exemptions and Appeals for Treatment Abroad.

2 By a letter dated 16 January 2008, registered at the Court on 21 January 2008 as Case E-1/08, Oslo tingrett made a request for an Advisory Opinion in a case pending before it between Therese Slinning and the Norwegian State, represented by the Board of Exemptions and Appeals for Treatment Abroad. As of 9 April 2008, the name of the Board is "the Board of Appeals for Treatment Abroad". The Board will hereinafter be referred to as "the Board of Appeals".

3 By a decision of 18 February 2008, the Court, pursuant to Article 39 of the Rules of Procedure and after having received observations from the parties, joined the two cases for the purposes of the written and oral procedures.

4 The Appellant in Case E-11/07 and the Plaintiff in Case E-1/08 both claim from the Norwegian State (the Respondent in Case E-11/07 and the Defendant in Case E-1/08, hereinafter "the Defendant") reimbursement of expenses for medical treatment in another EEA State.

I Legal background

EEA Law

5 Article 36(1) of the Agreement on the European Economic Area (hereinafter "the EEA Agreement" or "EEA") reads as follows:

> *1. Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.*

6 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 (hereinafter

"Regulation 1408/71") is referred to at point 1 of Annex VI to the EEA Agreement. The Regulation is adapted to the EEA Agreement by way of Protocol 1 thereto and the adaptations contained in Annex VI.

7 Article 22, paragraph 1 of Regulation 1408/71 reads as follows:

> *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:*
>
> *(a) (…)*
>
> *(b) (…)*
>
> *(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 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 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 legislation of the competent State.*

8 The second subparagraph of Article 22, paragraph 2 of Regulation 1408/71 reads as follows:

> *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 resided 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.*

National Law

9 The conditions for coverage of expenses for medical treatment abroad in Norway are regulated by Section 2–1 of the Act of 2 July 1999 No 63 on the Rights of Patients (hereinafter the "Patients' Rights Act"), and by Regulation of

1 December 2000 No 1208 on Prioritisation of Health Services and the Right to Health Care from the Specialist Health Service, on the Right to Treatment Abroad and a Board of Exemptions and Appeals, as amended by Regulation of 7 July 2004 No 1121 (hereinafter the "Prioritisation Regulation"). Some amendments to the Patients' Rights Act and to the Prioritisation Regulation took effect in 2004. Those amendments apply only to the facts of Case E-1/08, but according to Borgarting lagmannsrett and the parties, the relevant provisions for Case E-11/07 are identical in substance. Only the amended provisions applying to Case E-1/08 have thus been reproduced.

10 The second, fourth and fifth paragraphs of Section 2–1 of the Patients' Rights Act read as follows:

> *Section 2–1. The right to necessary health care*
>
> *(…)*
>
> *The patient is entitled to receive necessary health care from the specialist health service. This right only applies if the patient can be expected to get the anticipated benefit from the health care, and the costs are reasonable in relation to the effect of the measure. The specialist health service shall, based on medical considerations, set a time limit within which a person with such a right shall receive necessary health care.*
>
> *(…)*
>
> *If the regional health undertaking has not ensured that a patient who is entitled to necessary health care from the specialist health service receives such care within the time limit fixed pursuant to the second paragraph, the patient has the right to receive necessary health care without delay, if necessary from a private service provider or service provider outside the Realm.*
>
> *If the regional health undertaking cannot provide health care to a patient who is entitled to necessary health care, because there are no adequate medical services in the Realm, the patient has the right to receive necessary health care from a service provider outside the Realm within the time limit fixed pursuant to the second paragraph.*
>
> *(…)*

11 The condition concerning anticipated benefit, cf. Section 2–1, second paragraph, of the said Act, is clarified in Section 2, third paragraph, of the Prioritisation Regulation:

> *By anticipated benefit of the health care, it is meant that it is well documented that active medical treatment can improve the patient's life expectancy or quality of life for a certain duration, that the [patient's] state of health can worsen without treatment or that possibilities for treatment would be lost by postponement of the treatment.*

12 According to the Government bill, this is to be understood in the way that entitlement to necessary health care does not include experimental or test treatment.

13 However, according to the answers of the Defendant to written questions asked by the Court, the specialist health service may also offer test or experimental treatment to patients, provided that the treatment complies with the standards of sound professional practice. These standards call for an assessment which takes into account factors such as medical experience, the specialist doctor's own level of competence in relation to the treatment in question, the state of health of the patient, the availability of alternative treatments and the level of risks involved.

II Facts and procedure

The Rindal case (Case E-11/07)

14 The Plaintiff in Case E-11/07, Olga Rindal, was diagnosed with whiplash after having suffered an automobile accident in 1987. Starting in 1989, severe back pain also began to afflict her. As of 1 April 1999, she has been drawing a 100% disability pension. In spite of different forms of treatment, including surgery in May 1999, her back pain did not go away. In 2000, the final specialist report on her condition concluded that further surgical treatment was not indicated, given the high risk which theoretically possible surgery would entail for this patient. Therefore, no further surgery was offered to Ms Rindal. Instead, she continued to receive treatment which she already had received without satisfying results over time.

15 In March 2001, Ms Rindal was referred by her attending physician to the private clinic of Dr. Montazem in Germany, where she received surgical treatment in July and September 2001. The operations consisted of fixation of the neck and stabilisation of the lower back through the use of titanium plates. Ms Rindal feels that both operations have improved her state of health.

16 On 28 August 2002, the Board of Appeals upheld a decision by the National Insurance Administration to reject her application for coverage of the expenses for the operations, concerning a sum of NOK 316 814 in total. The decisive argument was that medical competence existed in Norway to examine and treat this type of neck and back injuries, and therefore the conditions for coverage of treatment abroad were not found to be fulfilled.

17 Ms Rindal filed a lawsuit before Oslo tingrett alleging *inter alia* that the decision was contrary to EEA law. In its judgment from 17 February 2006, that court ruled in favour of the Norwegian State. It agreed with the findings made by the Board of Appeals and stated, *inter alia*, that while immobilisation of the neck was an operation which was also performed to a relatively large degree in Norway, it was not performed on the basis of Ms Rindal's indications. Oslo tingrett also rejected Ms Rindal's submission that the decision was contrary to

EEA law. With regard to the neck operation, it stated, in particular, that there was scant documentation and that the method could not be considered to be the norm in international medical circles applied in relation to the indications which Ms Rindal had. With regard to the back operation, Oslo tingrett found that Ms Rindal was not entitled to a new operation in Norway at the relevant point of time, and that therefore there was no entitlement to coverage of expenses related to the operation abroad.

18 Ms Rindal appealed that judgment to Borgarting lagmannsrett. On 19 February 2007, that court decided to request an Advisory Opinion from the Court. By letter of 14 December 2007, it referred the following questions:

> *1. Is it compatible with Articles 36 and 37 of the EEA Agreement and Article 22 of Council Regulation (EEC) No 1408/71 to refuse coverage of expenses for treatment abroad which according to international medicine must be considered experimental or test treatment, when there is no entitlement to such treatment in the home State?*
>
> *2. Is it of significance for the answer to Question No 1 that the method of treatment itself is internationally recognised and documented, but where this only applies to other medical indications than those which the patient in question has?*
>
> *3. Is it compatible with Articles 36 and 37 of the EEA Agreement to refuse coverage of expenses for hospital treatment abroad if the patient in the home State can receive an offer of adequate medical treatment assessed according to accepted international methods within a medically justifiable time limit?*
>
> *Is it of significance for the answer to Question No 3 whether coverage of such expenses may be refused even if the treatment abroad is considered as possibly more advanced than the treatment in the home State?*
>
> *4. Is it of significance for the answers to the questions above whether*
>
> *a) the home State as a matter of fact does not offer the treatment received abroad?*
>
> *b) the patient as a matter of fact has not been offered the treatment in question in the home State even if the treatment is offered there?*
>
> *c) the patient has been assessed in the home State, but has not been given the offer of further surgical treatment because the patient is not considered to get documented benefit from the treatment?*
>
> *d) the treatment given abroad actually resulted in an improvement of the specific patient's state of health?*

The Slinning case (Case E-1/08)

19 The Plaintiff in Case E-1/08, Therese Slinning, sustained a serious brain injury in a traffic accident in March 2002. Early on, it was presumed that she would not survive, and therefore in the beginning it was not considered appropriate to offer her rehabilitation at a specialised hospital.

20 From September 2002 to May 2004, Ms Slinning lived mostly in a nursing home mainly equipped for elderly people. In October 2003, she stayed for four weeks as an in-patient in Sunnaas hospital, which is Norway's largest specialised hospital in the field of rehabilitation and physical medicine. This stay was mostly for the purpose of assessment of Ms Slinning's further treatment arrangements. In May 2004, she moved to Stigenga Living and Rehabilitation Centre. The parties before the national court hold different views on the character and scope of the treatment Ms Slinning has received in Norway, especially whether she has received proper rehabilitation treatment.

21 From 15 March 2005 to 9 May 2005, Ms Slinning underwent treatment at Hammel Neurocenter in Denmark, for which she paid DKK 390 000. At the time of the treatment, the rehabilitation arrangement at Hammel was not on offer in Norway. According to the written observations of the Government of Denmark, all patients in Denmark have a right to be referred to this rehabilitation service, provided that they meet the indication criteria. In the course of 2006–2007, efforts were made to establish several elements of the Danish treatment as test treatment in Norway.

22 Ms Slinning's application for coverage of her expenses at Hammel Neurocenter from December 2004 was rejected by the Office for Hospital Treatment at Ullevål University Hospital by a decision of 15 March 2005. On appeal, the rejection was upheld by the Board of Appeals on 28 September 2005. The Board of Appeals based its decision on two sets of grounds. Firstly, it stated that there was adequate treatment for Ms Slinning available in Norway, even though it considered the treatment offered at Hammel Neurocenter to be more comprehensive and intensive than that offered at Sunnaas Hospital. The Board found that the treatment available in Norway ought, as a main rule, to be utilised even if a possibly more advanced treatment had been developed abroad. Secondly, the treatment at Hammel was considered to be experimental/test treatment and not scientifically documented. According to the assessment of the Board of Appeals, the right to treatment abroad did not encompass experimental or test treatment.

23 Ms Slinning filed a lawsuit against the State represented by the Board of Appeals. On 30 April 2007, Oslo tingrett decided to request an Advisory Opinion from the Court. By letter of 16 January 2008, it referred the following questions:

1. Is it compatible with Articles 36 and 37 of the EEA Agreement and Article 22 of Council Regulation (EEC) No 1408/71 to refuse coverage of expenses for treatment abroad which according to international medicine must be considered experimental or test treatment, when there is no entitlement to such treatment in the home State?

2. Is it of significance for the answer to Question No 1 that the method of treatment in question must be considered to be implemented in the home State or the home State is considering its implementation in the future?

3. Is it compatible with Articles 36 and 37 of the EEA Agreement to refuse coverage of expenses for hospital treatment abroad if the patient in the home State can receive an offer of adequate medical treatment assessed according to accepted international methods within a medically justifiable time limit?

Is it of significance for the answer to this question that

a) coverage of such expenses may be refused even if the treatment abroad is considered as possibly more advanced than the treatment in the home State?

b) the patient, having decided to receive treatment abroad rather than an adequate treatment in the home State, does not get coverage for the costs of treatment abroad to the same extent as the treatment offered in the home State would have cost?

4. Is it of significance for the answers to the questions above whether

a) the patient in question, within a medically justifiable time limit, as a matter of fact has not been offered a treatment in the home State which can be considered adequate treatment?

b) the treatment given abroad actually led to an improvement of the specific patient's state of health?

III Findings of the Court

The first and second question: the condition that the treatment is not considered experimental or test treatment

24 With the first question, the referring courts ask whether it is compatible with Articles 36 and 37 of the EEA Agreement and Article 22 of Regulation 1408/71 to refuse coverage of expenses for treatment abroad which according to international medicine must be considered experimental or test treatment, when there is no entitlement to such treatment in the home State.

25 Furthermore, the referring court in Case E-11/07 queries with its second question whether it is of significance for the answer to the first question that the method of treatment itself is internationally recognised and documented, but where this only applies to other medical indications than those which the patient in question has.

26 The referring court in Case E-1/08 asks with its second question whether it is of significance for the answer to the first question that the method of treatment at issue must be considered to be implemented in the home State or the home State is considering its implementation in the future.

27 The Court considers it appropriate to treat these questions together and will use the term "recognised treatment" for treatment which is internationally recognised and documented.

Arguments submitted to the Court

28 Ms Rindal submits that it is contrary to EEA law to refuse coverage of expenses for treatment abroad which according to international medicine must be considered as experimental or test treatment, as long as the home State offers the same treatment with coverage of expenses pursuant to the home State's ordinary conditions for medical treatment. She argues that it makes no difference whether patients have a right to a specific treatment under domestic law or whether it is left to the discretion of the health authorities which treatment to offer. Further, Ms Rindal claims that the treatment which she received could not be considered as experimental, and that it was performed in Norway on several occasions from 2001 to 2005 on whiplash patients.

29 Ms Slinning submits that the requirement under Norwegian law that the health care be provided according to accepted methods must be construed as meaning methods that are recognised in international medical science. Ms Slinning points out that the treatment received at Hammel is covered by the public insurance in Denmark. She claims that it is implemented in Norway, that Norwegian medical practitioners recognise and support it and that the differences between the methods used at Sunnaas Hospital and the methods used at Hammel are quantitative rather than qualitative. It is argued that the refusal based on the consideration that the treatment given in Denmark was experimental does entail preferential treatment for domestic health undertakings when the same treatment is actually provided in the home State.

30 The Defendant argues that even though experimental or test treatment may be offered under certain circumstances, there is no entitlement to such treatment in the home State. To the Defendant, it follows that a refusal of coverage of the treatment abroad does not constitute a restriction on the freedom to provide services under Article 36 EEA. It is argued that the exclusion of experimental and test treatment from the definition of necessary health care is based on non-discriminatory, objective criteria which are known in advance, and that there is a procedural system of administrative and judicial review securing legal certainty. It is recalled that the assessment of a treatment as sufficiently tried and tested is undertaken with regard to international medicine, as required by the ECJ in Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473 (hereinafter "*Smits and Peerbooms*"). The Defendant contends that mere recognition by international medicine neither implies a right to treatment according to Norwegian legislation, nor does it fulfil the criteria set out in *Smits and Peerbooms.*

31 With regard to the second question in Case E-11/07, the Defendant submits that it is not the treatment as such which has to be considered in order to assess whether a method of treatment is internationally recognised and documented, but its application on the relevant category of patients.

32 Concerning the second question in Case E-1/08, the Defendant finds that it makes no difference whether a method of treatment is implemented in the home State, or is being considered for implementation, as long as it still constitutes experimental or test treatment. To infer an obligation to cover experimental or test treatment abroad from the fact that it is offered in the home State when there are accessible resources and, for instance, a need for research and development in the field, would entail a risk that expenses for treatments which eventually may never be recognised in international medicine would have to be covered. That would further entail a risk that necessary research and testing would never be initiated due to ethical and financial concerns that the State must cover corresponding non-recognised treatment in all EEA States.

33 The Government of Denmark submits that it is for the EEA States to decide what medical services they offer to their citizens, that EEA law cannot require an EEA State to extend the list of medical services it offers, and accordingly, that the fact that a medical treatment is covered by the systems of other countries is irrelevant. The fact that a State offers an experimental or test treatment does not in itself entail that it is actually covered by the home State's insurance scheme and that all citizens with similar needs obtain a right to such treatment, as the treatment may be undertaken only in relation to a limited number of patients, and may be stopped at any time due to medical, budgetary or other reasons.

34 The Government of Iceland submits that it is compatible with EEA law to refuse coverage of expenses for treatment abroad which according to international medicine must be considered experimental or test treatment, where there is no entitlement to such treatment in the home State. If, however, there were to be an entitlement to an experimental treatment in the home State, so that it would be eligible for cost participation of the State, it would not be justifiable to reject such an application for cost coverage in another EEA State on that ground alone.

35 The Government of the Netherlands emphasises that it is for each EEA State to determine the conditions for entitlement to benefits. The decisive point is that the basket of benefits must be drawn up on the basis of objective, non-discriminatory and verifiable criteria. The condition that a treatment be sufficiently tried and tested by international medical science satisfies these requirements.

36 The Government of Poland argues that no obligation of an EEA State to extend the catalogue of medical services covered by its public health insurance system can be inferred from EEA law, and that it is insignificant whether or not a given service is financed from public resources in another EEA State. It is pointed out that the ECJ has consistently recognised this principle and the importance of promoting the financial stability of health insurance systems, as long as the list of

services excluded is based on unbiased criteria, i.e. without differentiation depending on the origin of services.

37 The Government of the United Kingdom submits that the general exclusion of test and experimental treatment from cost coverage does not constitute a restriction pursuant to Articles 36 and 37 EEA, given that this exclusion is non-discriminatory and applies to treatment abroad in the same way as to treatment at home. Even if a restriction were to be found to exist, it could be justified by objectives such as avoiding the danger of undermining the financial balance of the social security system, providing a balanced medical and hospital service and maintaining treatment capacity and medical competence on national territory.

38 The EFTA Surveillance Authority (hereinafter "ESA") submits that an EEA State is free to refuse coverage of experimental treatment as part of its social security system, and that EEA law will not require it to reimburse costs for such treatment simply because it is received abroad. However, when determining whether to reimburse a particular experimental treatment, an EEA State must comply with the requirements of objectivity and include international medical science in the assessment.

39 The Commission argues that it is not in principle incompatible with EEA law for an EEA State to exclude certain products or types of medical or hospital treatment from reimbursement under its social security scheme, as long as the criteria used for determining the treatments covered by the national system are objective, non-discriminatory and known in advance, thereby avoiding any arbitrary exercise of discretion. It is added that in order to ensure compliance with EEA law, the notion of experimental treatment must not be interpreted as including treatments which are sufficiently tried and tested by international medical science.

Findings of the Court

40 The first and second questions from the referring courts are both based on two premises. The first premise is that according to international medicine, the treatments in question must be considered experimental or test treatment. This premise is in dispute between the parties. The second premise is that under Norwegian law, there is no entitlement to such experimental or test treatment. In this regard, the Court notes that Section 2–1 of the Patients' Rights Act and Section 2 of the Prioritisation Regulation accord patients within the Norwegian social security system the right to "necessary health care", provided that the patient can be expected to get the anticipated benefit from it. It is undisputed that this right, as commonly understood, does not entail a right to treatment which according to international medicine must be considered experimental or test treatment, but only a right to recognised treatment.

41 The first question refers both to Articles 36 and 37 EEA and to Article 22 of Regulation 1408/71. However, it is not clear whether authorisation was sought under Article 22 of the Regulation and, in any case, it seems that such

authorisation was neither granted nor refused before either the Appellant or the Plaintiff went to another EEA State to receive the treatment in question. Against this background, the Court finds it appropriate that the issue raised in the first question be assessed only under Articles 36 and 37 EEA. The Court nevertheless observes that, as the Regulation entails coordination rather than harmonisation of social security systems, Article 22 would allow an EEA State to deny prior authorisation to receive treatment abroad which according to international medicine must be considered experimental or test treatment, in cases where Article 36 EEA, in accordance with the Court's findings below, would allow the State to refuse coverage of expenses for such treatment.

42 Medical services provided for consideration fall within the scope of the provisions on the freedom to provide services, cf. *inter alia* Case C-372/04 *Watts* [2006] ECR I-4325 (hereinafter "*Watts*"), at paragraphs 86–87. This also applies to experimental and test treatment. Consequently, it needs to be assessed whether a right to coverage may follow from Articles 36 and 37 EEA.

43 EEA law does not detract from the power of the EEA States to organise their social security systems. In the absence of harmonisation at EEA level, it is for the legislature of each EEA State to determine the conditions on which social security benefits are granted. However, when exercising that power, the EEA States must comply with EEA law, in particular with the provisions on the freedom to provide services. Those provisions prohibit the EEA States from introducing or maintaining unjustified restrictions on the exercise of that freedom in the healthcare sector, see, for comparison, *Smits and Peerbooms*, at paragraphs 44 to 46 and *Watts*, at paragraph 92.

44 Article 36 EEA precludes the application of any national rules which have the effect of making the provision of services between EEA States more difficult than the provision of services purely within an EEA State (cf. *Smits and Peerbooms*, at paragraph 61 and *Watts*, at paragraph 94). This applies not only to rules which regulate the right to seek treatment abroad as such, but also to rules on reimbursement from national social security systems of costs for treatment provided abroad (see in that respect *Smits and Peerbooms*, at paragraphs 60–69).

45 It is not clear from the case files to which extent the Norwegian rules on the right to reimbursement of costs for treatment abroad function as a system for prior authorisation. Such a system would represent an additional burden compared to the procedures for obtaining treatment in Norway. During the oral hearing, the Defendant maintained that prior authorisation is required only when a recognised treatment is available for the patient in Norway but cannot be offered to the patient within a medically justifiable time limit. Patients for whom no recognised treatment is available in Norway may go straight to a hospital of their own choosing abroad, without any formal need to have the lack of available treatment in Norway established in advance, and then submit an application for reimbursement of the costs for treatment afterwards.

46 It is for the national courts to establish whether the Norwegian system functions in the way described, and whether the cases at hand concern situations in which no recognised treatment for the patients existed in Norway. If this is found to be the case, the Court cannot see any extra burden resulting from the fact that treatment took place abroad. In that situation, the Court can see no restriction on the free movement of services when patients are refused reimbursement of costs for treatment abroad, according to rules which apply in the same way to treatment in Norway in excluding experimental and test treatment from coverage.

47 In this context, the Court notes, however, that it has been established during the proceedings that the Norwegian specialist health service may not only offer recognised treatments but also experimental or test treatments in the form of research projects or, exceptionally, on a case by case basis. Any system which makes it more difficult to obtain reimbursement from the national social security system of costs for such treatment abroad than to obtain the treatment free of charge from domestic hospitals forming part of the national social security system, constitutes a restriction on the free movement of services. However, the Court notes that no restriction follows from the mere fact that guidelines regarding the circumstances under which such treatment may be provided are based on standards of sound professional practice, cf. paragraph 13 above.

48 In order to ensure that the rules and standards mentioned at paragraphs 46 and 47 above are indeed applied in a way which does not discriminate against suppliers of medical services established in other EEA States, the rules and standards must be based on objective, non-discriminatory criteria, see for comparison Case 238/82 *Duphar* [1984] ECR 523, at paragraph 20–21. Furthermore, the criteria must be known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that this discretion is not used arbitrarily. Such an administrative scheme must likewise be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time. Further, refusals to grant authorisation must be capable of being challenged in judicial or quasi-judicial proceedings (see, for comparison, *Smits and Peerbooms*, at paragraph 90 and *Watts*, at paragraphs 115–116).

49 It must be borne in mind that experimental and test treatment by its nature touches upon the limits of existing knowledge. Consequently, guidelines regarding the circumstances under which such treatment may be provided which are based on standards of sound professional practice must be considered sufficient to satisfy the requirement that the criteria for treatment must be known in advance.

50 In *Smits and Peerbooms*, the ECJ had to assess a condition that the proposed treatment be regarded as normal in the professional circles concerned. It held that only an interpretation on the basis of what is sufficiently tried and tested by international medical science can be regarded as satisfying the requirements that the decision must be objective and independent of where the providers of treatment are established, see *Smits and Peerbooms*, at paragraphs 94–97. For the

same reason, standards of sound professional practice as applied to experimental and test treatment must also be based on international medical science.

51 The ECJ held furthermore in *Smits and Peerbooms* at paragraph 98 that where a Member State decides that medical or hospital treatment must be sufficiently tried and tested before its costs will be assumed under the national social security system, the authorities called on to make this assessment must take into consideration all the relevant information available, including, in particular, existing scientific literature and studies, the authorised opinions of specialists and the fact that the proposed treatment is covered or not covered by the sickness insurance system of the EEA State in which the treatment is provided. However, contrary to what is submitted by the Plaintiff in Case E-1/08, the fact that a treatment is covered by the sickness insurance system of the EEA State in which it is provided, or that authorised specialists support that the treatment be provided to the patient, does not in and of itself entail that national authorities are precluded from considering the treatment to be experimental or test treatment according to international medicine.

52 It is for the national court to assess whether the conditions for obtaining treatment covered by the social security system, be it in domestic hospitals or abroad, conform to these criteria. If so, the conditions as such are compatible with Articles 36 and 37 EEA.

53 Whether or not a treatment must be regarded as experimental or test treatment with respect to a certain medical condition is a matter of fact which, if in dispute, must be established before the national courts. In that regard, it is of no significance that the method of treatment itself is internationally recognised and documented, where this only applies to other medical indications than those which the patient in question has (cf. the second question in case E-11/07).

54 If the national courts find that a recognised treatment was available in Norway in the cases at hand, and a right to reimbursement for the treatment abroad would therefore depend on having fulfilled administrative procedures which would not apply had the patients received treatment in Norway, those procedures would make the provision of services between EEA States more difficult than the provision of services purely within an EEA State. Such administrative procedures would constitute a restriction on the free movement of services. This is so even if the conditions for obtaining prior authorisation are the same as for receiving treatment free of charge at Norwegian hospitals.

55 The aim of ensuring sufficient and permanent access to a balanced range of high-quality hospital treatment in the State concerned, and the desire to control costs and prevent wastage of financial, technical and human resources, are aims which may justify restrictions on the free movement of hospital services (see, for comparison, *Smits and Peerbooms*, at paragraphs 78–80 and Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509 (hereinafter "*Müller-Fauré and van Riet*"), at paragraphs 77–81). The objective of maintaining a balanced medical and hospital service open to all is inextricably linked to the way in which

the social security system is financed and to the control of expenditure. Thus, the risk of seriously undermining the financial balance of the social security system may also constitute an overriding general-interest reason capable of justifying a restriction on the free movement of services in so far as it could have consequences for the overall level of public-health protection.

56 Since assuming the costs of one isolated case of treatment, carried out in another EEA State, can never make any significant impact on the financing of the social security system in the home State, an overall approach must be adopted in relation to the consequences of freedom to provide health-related services (see, for comparison, *Müller-Fauré and van Riet*, at paragraphs 71–74).

57 The ECJ, in *Smits and Peerbooms*, at paragraph 80, and *Müller-Fauré and van Riet*, at paragraph 81, came to the conclusion that a system of prior authorisation for reimbursement of costs of recognised treatment abroad would appear to be a necessary and reasonable way of attaining the aims mentioned at paragraph 55 above.

58 These considerations are also relevant with regard to experimental and test treatment when provided as described at paragraph 47 above, should the national courts come to the conclusion that it is indeed more difficult to obtain reimbursement of costs for such treatment abroad than to obtain the treatment free of charge from domestic hospitals. It may have negative consequences for the achievement of the above-mentioned aims, if the fact that the costs for such treatment in domestic hospitals are borne as part of the social security system would mean that any patient who had not been offered such treatment could then seek out such treatment abroad and get the costs reimbursed. Even if that specific experimental or test treatment was also carried out in the patient's home State, a right for patients, who had not been selected for the experiment or test, to receive the treatment abroad and get reimbursed may lead to a reluctance in providing experimental and test treatment and thus seriously undermine medical research.

59 As a consequence of this, and in relation to the second question in Case E-1/08, it must be held that it cannot matter that the method of treatment must be considered to be implemented in a home State which only provides it in the form of research projects or, exceptionally, on a case by case basis. Nor can it matter that the home State is considering its implementation in the future.

60 In so far as there is a restriction on the free movement of services in the form of a requirement of prior authorisation for reimbursement of costs for treatment abroad, it is necessary to assess whether the conditions for obtaining reimbursement may be justified (see, for comparison, *Smits and Peerbooms*, at paragraphs 82 and 97). However, it follows from what is stated at paragraph 43 above that EEA law cannot in principle have the effect of requiring an EEA State to extend the range of medical services paid for by its social insurance system. Consequently, also in this regard, conditions which satisfy the requirements set out at paragraphs 48–51 above are compatible with EEA law. The fact that a particular type of medical treatment is covered or not covered by the sickness

insurance schemes of other EEA States is irrelevant in this regard (compare *Smits and Peerbooms*, at paragraph 87).

61 Based on the above, the answer to the first and second questions in Cases E-11/07 and E-1/08 is that it may be compatible with Articles 36 and 37 of the EEA Agreement to refuse coverage of expenses for treatment abroad which according to international medicine must be considered experimental or test treatment, when there is no entitlement to such treatment in the home State. Firstly, that will be the case if the system for reimbursement of costs for treatment abroad does not place a heavier burden on those who receive treatment abroad than on those who receive treatment in hospitals forming part of the social security system of the home State. Secondly, it will be the case if any such heavier burden only results from necessary and reasonable means being employed to attain aims which may justify restrictions on the free movement of hospital services.

62 Further, the answer to the second question in Case E-11/07 must be that it is without significance for the answer to the first question that the method of treatment itself is internationally recognised and documented for other medical indications than those which the patient in question has.

63 Finally, the answer to the second question in Case E-1/08 must be that it is without significance for the answer to the first question that the method of treatment in question must be considered to be implemented in a home State which only provides it in the form of research projects or, exceptionally, on a case by case basis. Nor does it matter that the home State is considering its implementation in the future.

Third question: the condition that the treatment abroad be necessary

64 With their third question, the referring courts ask whether it is compatible with Articles 36 and 37 of the EEA Agreement to refuse coverage of expenses for hospital treatment abroad if the patient can receive, in the home State, an offer of adequate medical treatment assessed according to accepted international methods within a medically justifiable time limit. The national courts ask in particular whether coverage of such expenses may be refused even if the treatment abroad is considered as possibly more advanced than the treatment in the home State (third question, second paragraph in Case E-11/07, third question, litra a in Case E-1/08). Further, by its third question, litra b in Case E-1/08, the referring court wants to know whether it is of significance for the answer to the third question that the patient, having decided to receive treatment abroad rather than an adequate treatment in the home State, does not get coverage of the costs for the treatment abroad to the same extent as the treatment offered in the home State would have cost. The question must be seen against the background that the treatment which Ms Slinning received at Hammel apparently was more costly than the alternative treatment on offer in Norway.

Arguments submitted to the Court

65 Ms Slinning submits that Articles 36 and 37 EEA preclude a provision which entails that, as a main rule, use shall be made of treatment offered in the home State as long as it is adequate according to accepted international methods. Ms Slinning claims that the Defendant has not demonstrated the existence of overriding reasons of public interest for such a condition. It is argued that the Defendant has neither shown that overcapacity in Norwegian rehabilitation hospitals is a problem, nor that a large number of head trauma patients would seek treatment in other EEA States and thereby jeopardise the public health services. It is added that this reasoning applies *a fortiori* if the treatment abroad is considered to be more advanced than the treatment in the home State.

66 Ms Rindal submits that the home State may only refuse coverage of treatment abroad if the patient is, within a justifiable time limit, offered treatment in the home State which is equally advanced and gives the same effect as the treatment abroad. Ms Rindal adds that the treatment abroad is more advanced if it gives a better prognosis for an improvement of the patient's medical condition compared to the treatment at home.

67 The Defendant, the Government of Poland, the Government of the United Kingdom, ESA and the Commission submit that a national rule which excludes a right to treatment abroad if adequate treatment can be offered within a medically justifiable time limit in the home State is compatible with EEA law, even if the treatment abroad is more advanced.

68 The Defendant argues that it is for the EEA States to determine the conditions for entitlement to benefits from their national social security scheme, irrespective of whether the medical treatment in question is awarded in other States. It follows from this that if the specific form of treatment is not available in the home State, there is no obligation to cover this treatment abroad, as this would amount to forcing the home State to expand the medical services covered by its national system. This view is essentially shared by the Government of Poland and by ESA.

69 The Defendant further argues that if there were to be a restriction, it would be justified by legitimate objectives of public interest, in particular to maintain and develop a balanced health service open to all parts of the population with sufficient medical competence and experience.

70 The Government of the United Kingdom considers that a presumption in favour of domestic treatment, even if the treatment abroad is more advanced, constitutes an obstacle to the free movement of services. Such a restriction may, however, be justified on grounds relating to the financial balance of the social security system, the maintenance of a balanced medical and hospital system open to all and the maintenance of treatment capacity and medical competence on national territory.

71 The Government of Iceland argues that a national rule which requires a patient to make use of available medical competence in the home State can be considered a restriction on the free movement of services. It is submitted, however, that the requirement can be justified by the need to maintain and further develop a balanced health service with sufficient medical competence and experience, provided that the treatment available in the home State can be considered as equally effective.

72 The Commission essentially expresses views similar to those of the Icelandic Government. At the oral hearing, the Commission considered it to be not entirely clear whether treatment in the home State could be given priority over treatment abroad which is more effective, having regard to the legitimate objective of the Contracting Parties to maintain a balanced national hospital service.

Findings of the Court

73 The referring courts do not specify whether or not the third question builds on the premise that the treatments received abroad must be considered as recognised treatments for the afflictions in question.

74 In its answers to the first two questions, the Court has already dealt with the application of Articles 36 and 37 EEA to a situation where the treatments received abroad are experimental or test treatment, and a recognised treatment exists in Norway but cannot be offered to the patient in question within a medically justifiable time limit, cf. paragraphs 46 and 48 *et seq*. In relation to the third question, it only remains to point out that the reason for starting an experiment or test is usually the assumption that the treatment may be more advanced than the recognised treatment. Consequently, the possibility that the experimental or test treatment may be more advanced than the alternative recognised treatment cannot alter the conclusions arrived at in relation to the first two questions.

75 In the following, the Court will base its answers on the premise that the treatments in question are recognised treatments. The questions from the referring courts make it necessary to distinguish between two situations. Firstly, it may be that the treatment received abroad is not more advanced than the treatment offered in the home State. In that case, it would seem that the purpose of going abroad would be to get treatment faster than would be the case in the home State. Secondly, it may be that the treatment abroad is, or is possibly, more advanced than the treatment on offer in the home State. If so, the purpose of going abroad would rather seem to be to receive a treatment which is more advanced than the treatment that the patient otherwise would have received.

76 National rules which make a right for patients to receive coverage of expenses for hospital treatment abroad subject to the condition that the treatment to which the patients are entitled has not been provided in the home State within a medically justifiable time limit, by their very nature apply only to patients wishing to go abroad, placing an additional burden on them compared to those

who receive their treatment in the home State. Thus, such rules constitute a restriction on the free movement of services, cf. paragraph 44 above, and need to be justified as necessary and reasonable for attaining objectives of overriding public interest.

77 In the following, the Court will first address the situation where the treatment received abroad is not more advanced than the treatment offered in the home State.

78 In a situation where the demand for hospital treatment is constantly rising and the supply is necessarily limited by budgetary constraints, national authorities are entitled, if they consider it necessary, to institute a system of waiting lists in order to manage the supply of treatment and to set priorities on the basis of the available resources and capacities. If patients could seek treatment abroad, at the expense of the social security system of the home State, in a situation where the treatment is available in the home State within a medically justifiable time limit, and thus simply because the treatment is available more quickly abroad, the resulting patient migration would be liable to put at risk the home State's planning and rationalisation efforts in the healthcare sector so as to avoid the problems of hospital overcapacity, imbalance in the supply of hospital medical care and logistical and financial wastage (see, for comparison, *Watts*, at paragraphs 67 and 71).

79 In *Müller-Fauré and van Riet*, at paragraph 92, the ECJ stated that a refusal to grant prior authorisation which is based not on fear of wastage resulting from hospital overcapacity but solely on the ground that there are waiting lists on national territory for the hospital treatment concerned, without account being taken of the specific circumstances attaching to the patient's medical condition, cannot amount to a properly justified restriction on the freedom to provide services. Consequently, refusal of prior authorisation cannot be based exclusively on the existence of waiting lists in the home State, without taking account of the specific circumstances of the patient's medical condition, see for comparison *Watts* at paragraph 63.

80 Ms Slinning has asserted that there is no evidence that overcapacity in Norwegian rehabilitation hospitals is a problem, nor that a large number of head trauma patients would seek to obtain treatment in other EEA States and thereby jeopardise the public health services. The Court notes, however, that if patients could get reimbursement for treatment abroad which they in any case would have received in their home State within a medically justifiable time limit, which has been set after having taken account of the patients' specific condition, this would be liable to put at risk the home State's overall planning and rationalisation efforts in the healthcare sector, even if there is no overcapacity with regard to the treatment in question. This is so because all planning necessarily must be based on certain assumptions as to the total resources and capacities available, and with regard to the allocation of those resources and capacities within the system as a whole. Even in fields where there is no overcapacity, an unfettered right to get reimbursement for treatment abroad which has been sought simply to get

treatment more quickly than necessitated by the medical condition of the patient, would drain resources away from other fields, as there would be a need to allocate funds to pay for more treatments, within a given period, than medically necessary.

81 Next, the Court will address the third question from the referring courts under the assumption that the treatment abroad is, or is possibly, more advanced than the treatment on offer in the home State.

82 As pointed out at paragraph 60, EEA law cannot in principle have the effect of requiring an EEA State to extend the range of medical services paid for by its social security system. It follows that, even when striving for a high-quality health system, EEA States may decide that, given the need to prioritise within the overall resources available, certain treatments cannot be offered under the national health system, provided that the exclusion of these treatments complies with the requirements of EEA law as set out at paragraph 48 above.

83 However, where no such limitations apply and a patient, under the social security system of his or her home State, fulfils the criteria for entitlement to treatment, prioritisation of home State treatment, such as in the case at hand, cannot be justified unless the home State itself can provide treatment which is the same or equally effective for the patient as the treatment abroad within a medically justifiable time limit, compare *Smits and Peerbooms*, at paragraphs 103–104. Conversely, if the home State offers the same or equally effective treatment, and provides it within a medically justifiable time limit, the home State may justify prioritising its own offer of treatment.

84 In this regard, it cannot be decisive that the treatment abroad is considered as "possibly" more advanced, i.e. as a treatment that may (or may not) be more effective than the treatment provided by the home State. When it is established according to international medicine that the treatment abroad is indeed more effective, the State may no longer justify prioritising its own offer of treatment.

85 The answers to the third question, both paragraphs, in Case E-11/07 and to the first paragraph and the second paragraph, litra a, of the third question in Case E-1/08 are that it may be compatible with Articles 36 and 37 EEA to refuse coverage of expenses for hospital treatment abroad if the patient in the home State can receive an offer of adequate treatment, in the sense of being equally effective treatment, assessed according to accepted international methods within a medically justifiable time limit.

86 Next, the Court will consider the third question, litra b, in Case E-1/08. The Court notes, firstly, that any reimbursement for treatment received abroad based on general principles of free movement is limited to the costs for the treatment which the patient would have received in the home State, see for comparison *Müller-Fauré and van Riet*, at paragraph 98. Secondly, it follows from what has been held above that if reimbursement for hospital treatment in another EEA State was lawfully refused because adequate treatment could have been obtained

in the patient's home State within a medically justifiable time limit, the home State is under no obligation to cover any costs for the treatment which the patient received in another EEA State.

87 Consequently, the answer to the third question, litra b, in Case E-1/08 must be that it is without significance that the patient, having decided to receive treatment abroad rather than an adequate treatment in the home State, does not get coverage for the costs of treatment abroad to the same extent as the treatment offered in the home State would have cost.

The fourth question in Case E-11/07 and Case E-1/08: general

88 With the fourth question, litra a to d, in Case E-11/07 and the fourth question, litra a and b, in Case E-1/08, the referring courts ask whether several factual circumstances are of significance for the answers to "the questions above". Based on the context of the questions, the Court understands the reference to "the questions above" as a reference to the first question and to the third question, first paragraph, in Case E-11/07 and Case E-1/08.

The fourth question, litra a, in Case E-11/07: treatment not on offer in the home State

89 The fourth question, litra a, in Case E-11/07 concerns whether it is of significance that the home State as a matter of fact does not offer the treatment received abroad. The Court understands the question to refer to a situation where this treatment is not offered to anyone in the home State.

90 It follows from the answer to the first question above, and the premises upon which that question is based, namely that the treatment in question is experimental or test treatment and that there is no entitlement to such treatment in the home State, that it is without significance for the answer to that question that this treatment is not offered in the home State.

91 In relation to the third question, first paragraph, the Court further understands the fourth question, litra a, to refer to a situation where the home State, while not offering the treatment received abroad, nevertheless offers a different recognised treatment which is considered as adequate for the patient in question, and that treatment is offered within a medically justifiable time limit. In that case, it follows from the answer to the third question above that it is without significance for the answer to that question that the treatment received abroad is not offered in the home State. This is so even if the treatment received abroad is a recognised treatment.

92 Accordingly, the answer to fourth question, litra a, must be that it is without significance for the answers to the first question and the third question, first paragraph, that the home State as a matter of fact does not offer the treatment received abroad.

93 With regard to a situation where the home State offers neither the treatment received abroad, nor a different recognised treatment which is adequate for the patient in question, the Court refers to its answer below to the fourth question, litra a, in Case E-1/08.

The fourth question, litra b, in Case E-11/07: the patient in fact not being offered existing treatment

94 The fourth question, litra b, in Case E-11/07 concerns whether it is of significance that the patient as a matter of fact has not been offered the treatment in question in the home State even if the treatment is offered there. The Court understands the underlying premise in this question to be that, unlike the situation in the fourth question, litra c, below, the patient has not been assessed in the home State for the treatment in question.

95 It follows from the answer to the first question above, and the premises upon which that question is based, that it is without significance for the answer to the first question that the patient was not assessed in the home State with regard to the experimental or test treatment which she received abroad. Furthermore, it also follows from the answer to the third question that it is without significance for the answer to that question that the patient was not assessed in the home State with regard to the treatment received abroad, when the home State in fact offered her a different recognised treatment within a medically justifiable time limit, and that treatment is equally effective for the patient. This is so even if the treatment received abroad is a recognised treatment.

96 Accordingly, the answer to the fourth question, litra b, must be that it is without significance for the answers to the first question and to the third question, first paragraph, that the patient as a matter of fact has not been offered the treatment at issue in the home State, because the patient was never assessed for that treatment, even if the treatment is offered there.

The fourth question, litra c, in Case E-11/07: individual refusal of treatment in the home State

97 The fourth question, litra c, in Case E-11/07 concerns whether it is of significance that the patient has been assessed in the home State, but has not been given the offer of further surgical treatment because the patient is not considered to get documented benefit from the treatment.

98 Such a refusal to provide a specific form of treatment, based on medical considerations prevailing in the individual case, can not have any bearing on whether it is compatible with Articles 36 and 37 of the EEA Agreement to refuse coverage of expenses for treatment abroad, which according to international medicine must be considered experimental or test treatment, when there is no entitlement to such treatment in the home State. Nor can this have any bearing on whether it is compatible with Articles 36 and 37 of the EEA Agreement to refuse coverage of expenses for hospital treatment abroad if the patient in the home

State can receive an offer of adequate medical treatment assessed according to accepted international methods within a medically justifiable time limit.

99 Accordingly, the answer to the fourth question, litra c, must be that it is without significance for the answers to the first question and to the third question, first paragraph, that the patient has been assessed in the home State, but has not been given the offer of further surgical treatment because the patient is not considered to get documented benefit from the treatment.

The fourth question, litra a, in Case E-1/08: no offer of adequate treatment in the home State

100 The fourth question, litra a, in Case E-1/08 concerns whether it is of significance that the patient in question, within a medically justifiable time limit, as a matter of fact has not been offered a treatment in the home State which can be considered adequate treatment.

101 It follows from the answer to the first question above, and the premises upon which it is based, that this is without significance for the answer to that question. To the extent the third question concerns experimental or test treatment abroad, the same applies with regard to the first paragraph of that question.

102 However, as far as the third question, first paragraph, applies to recognised treatment, it seems that the fourth question, litra a, relates to two situations which must be distinguished. Firstly, it may be that the treatment at issue is actually offered as an entitlement under the social security system in the home State, but the home State has not been able to offer it to the patient within a medically justifiable time limit. Secondly, the situation may be that the home State has decided, for reasons relating for instance to lack of resources within the national social security system, not to offer any equivalent treatment to this group of patients.

103 With regard to the first situation, it follows from paragraph 83 above that if the home State has not been able, within a medically justifiable time limit, to honour an obligation under the rules of its own social security law to provide adequate treatment to the patient in question in one of its own hospitals, it would constitute an unjustified restriction on the free movement of services to refuse to cover such treatment abroad.

104 As far as the second situation is concerned, the Court notes that the fourth question, litra a, would be of a hypothetical nature in relation to a national health system which in all cases offers its patients an adequate recognised medical treatment assessed according to international methods within a medically justifiable time limit, if need be abroad. Whether this is the case in Norway is, however, for the national court to assess.

105 If the national court finds that the Norwegian system is not such as to render the fourth question, litra a, hypothetical, the Court adds the following. As pointed out

at paragraph 82 above, EEA law cannot in principle have the effect of requiring an EEA State to extend the range of treatments paid for by its social security system. Consequently, an EEA State may decide that certain treatments, despite being recognised, cannot be offered under the national system, provided that the exclusion of these treatments complies with the requirements of EEA law as set out in paragraph 48 above. This must be so even if the home State has no adequate alternative to the more advanced treatment on offer abroad.

106 Consequently, the answer to the fourth question, litra a, in case E-1/08 is that it may be of significance to the answer to the third question, first paragraph, that the patient, within a medically justifiable time limit, as a matter of fact has not been offered an adequate treatment in the home State. This is so when the home State refuses to cover expenses for treatment abroad in a situation where it has not been able, within a medically justifiable time limit, to honour an obligation under its own social security law to provide such treatment to the patient in one of its own hospitals.

The fourth question, litra d in Case E-11/07 and litra b in Case E-1/08: improvement of state of health

107 With the fourth question, litra d in Case E-11/07 and litra b in Case E-1/08, the referring courts ask whether it is of significance that the treatment given abroad actually resulted in an improvement of the specific patient's state of health.

108 The fact that a treatment given in a concrete case was successful does not mean that the treatment cannot any longer be considered as experimental or test treatment. Even if the successful treatment was a recognised treatment, this does not mean that a State cannot give priority to other recognised treatments which are adequate for the patient in question, and which the State can provide within a medically justifiable time limit. Nor does this prevent the State from deciding, given the need to prioritise within the overall resources available, that it is unable to offer this treatment, although there may be no equivalent alternative.

109 Accordingly, the answer to the fourth question, litra d in Case E-11/07 and litra b in Case E-1/08, must be that it is without significance for the answers to the first question and to the third question, first paragraph, that the treatment given abroad actually resulted in an improvement of the specific patient's state of health.

IV Costs

110 The costs incurred by the Governments of Denmark, Iceland, the Netherlands, Poland and the United Kingdom, the EFTA Surveillance Authority and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before Borgarting lagmannsrett and Oslo tingrett, any decision on costs for the parties to those proceedings is a matter for those courts.

On those grounds,

THE COURT,

in answer to the questions referred to it by *Borgarting lagmannsrett* and *Oslo tingrett* hereby gives the following Advisory Opinion:

1. **It may be compatible with Articles 36 and 37 of the EEA Agreement to refuse coverage of expenses for treatment abroad which according to international medicine must be considered experimental or test treatment when there is no entitlement to such treatment in the home State. Firstly, that will be the case if the system for reimbursement of costs for treatment abroad does not place a heavier burden on those who receive treatment abroad than on those who receive treatment in hospitals forming part of the social security system of the home State. Secondly, it will be the case if any such heavier burden only results from necessary and reasonable means being employed to attain aims which may legitimately justify restrictions on the free movement of hospital services.**

2. **It is without significance that the method of treatment itself is internationally recognised and documented for other medical indications than those which the patient in question has.**

   It is without significance for the answer to the first question that the method of treatment in question must be considered to be implemented in a home State which only provides it in the form of research projects or, exceptionally, on a case by case basis. Nor does it matter that the home State is considering its implementation in the future.

3. **It may be compatible with Articles 36 and 37 EEA to refuse coverage of expenses for hospital treatment abroad if the patient in the home State can receive an offer of adequate medical treatment assessed according to accepted international methods within a justifiable time limit.**

   It is without significance for the answer to the third question that the patient, having decided to receive treatment abroad rather than an adequate treatment in the home State, does not get coverage for the costs of treatment abroad to the same extent as the adequate treatment offered in the home State would have cost.

4. It is without significance for the answers to the first question and to the third question, first paragraph, that

- **the home State as a matter of fact does not offer the treatment received abroad;**

- **the patient as a matter of fact has not been offered the treatment in question in the home State, because the patient was never assessed for that treatment, even if the treatment is offered there;**

- **the patient has been assessed in the home State, but has not been given the offer of further surgical treatment because the patient is not considered to get documented benefit from the treatment;**

- **the treatment given abroad actually resulted in an improvement of the specific patient's state of health.**

However, it may be of significance to the third question, first paragraph, that the patient in question, within a medically justifiable time limit, as a matter of fact has not been offered an adequate treatment in the home State. This is so when the home State refuses to cover treatment abroad in a situation where it has not been able, within a medically justifiable time limit, to honour an obligation under its own social security law to provide the treatment to the patient in one of its own hospitals.

Carl Baudenbacher Thorgeir Örlygsson Henrik Bull

Delivered in open court in Luxembourg on 19 December 2008.

Skúli Magnússon
Registrar

Carl Baudenbacher
President