PUBLIC SERVICES AND EUROPEAN LAW: LOOKING FOR BOUNDARIES

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1. Introduction

All Member States must, as a matter of Community law, provide for a qualified right to go to another Member State to there receive treatment at the expense of the competent social security system. According to Article 22 of Regulation 1408/71 such a right is conditional upon the prior authorisation of the competent institution.[1] The authorisation cannot be refused when the treatment is amongst the benefits provided for by the State where the individual resides and the treatment cannot be provided within the time "normally necessary" for obtaining the treatment in the State of residence. The Court has found that Article 49 EC imposes upon the Member States obligations going beyond those contained in the Regulation: thus a prior authorisation requirement constitutes a justified barrier (subject to important qualifications) in the case of hospital treatment and a non-justified barrier in the case of non-hospital treatment. The effects of this interpretation are far-reaching: not only do Member States see their obligations under Community law redefined in a way which might have a significant financial impact on their social security systems; but also the reasoning of the Court could be applied to other branches of the public sector, such as education.

This contribution challenges the assumption that the free movement of services provisions can be properly applied to cases in which an individual is seeking reimbursement for treatment received abroad. In order to overcome the textual limitation imposed by the Treaty – the remuneration clause contained in Article 50 EC – the Court has focused on the relationship occurring between the patient and the foreign health provider. The patient pays for treatment abroad, the reasoning goes, and thus the relationship can be qualified as a provision of services for remuneration. The presence of such an economic link is enough, in the eyes of the Court, to trigger Article 49 EC with all the consequences that this implies. However, it is submitted, the Court should have also (if not only) considered the relationship between the claimant and the competent social security institution, since it is in this relationship that the right to reimbursement finds its basis. If such relationship cannot be defined as an "economic" relationship, then Article 49 EC cannot be used to challenge the substantive conditions imposed by national law on the right to reimbursement. In other words, it is

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for national law alone to determine *when* the right to be treated in an institution which is not part of the public system arises. Only once this right is recognised should Article 49 EC become relevant by imposing upon the Member States a duty not to discriminate between (private) domestic providers and foreign providers (whether private or public acting in a semi-private capacity).

We will start by outlining the "traditional" approach given to the remuneration requirement, then consider those cases in which the boundary between public funded services and commercial services has been indirectly eroded. We will then consider the recent case law, its consequences and its hermeneutic shortcomings.

2. Services, discrimination and the public purse

The provisions on freedom to provide services protect not only those who wish to provide their services in another country, but also service recipients. Thus the Member State of origin cannot erect barriers to the recipients' ability to go to another country and there receive a service;[2] and the Member State of destination cannot apply discriminatory rules to foreign recipients.

The fact that service recipients are covered by Article 49 EC raised important issues as to which services should be covered by that provision: would a tourist be able to rely on Article 49 EC as a service recipient in order to claim equal treatment in relation to public services (e.g. general education, health care)? The wording of the Treaty suggests that "non-economic" entities and relationships are, at least to a certain extent, excluded from the scope of application of the free movement provisions. Thus Article 48 EC excludes non-profit making companies from the scope of application of the provisions relating to establishment, and Article 50 EC defines as services those "normally provided for remuneration". It is clear that the remuneration clause was intended to exclude public services form the scope of application of the free movement provisions, which were intended to regulate only economic and commercial activities.[3]

The concept of remuneration has been given a purposive interpretation: thus the Court found that remuneration does not necessarily need to be monetary, but can also be in the form of a *quid pro*

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[1] Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons ad to members of their families moving within the Community, as amended. Consolidated version OJ 1997 L28/1, and http://www.europa.eu.int/eur-lex/en/consleg/pdf/1971/en_1971R1408_do_001.pdf. Hereinafter Regulation 1408/71.

[2] Case 286/82 *Luisi and Carbone* v. *Ministero del Tesoro* [1984] ECR 377.

[3] The Court made clear in case 13/76 *Donà* v. *Mantero* [1976] ECR 1333, para 12 that the practice of sport is subject to Community law only insofar as it constitutes an "economic" activity.

quo.[4] And that in order for a service to fall within the scope of application of the Treaty, the service does not need to be paid for by the recipient:[5] as long as the service is economic (commercial) in nature Article 49 EC applies.[6] However, services of a non-economic nature, such as those provided directly by the State free of charge, or for a charge which does not reflect the cost of the service, had been traditionally excluded from the scope of application of Article 49 EC: in these cases the services are not provided for "remuneration", defined as "consideration for the service in question". In excluding general education from the scope of application of Article 49 EC, the Court relied on two main considerations: first of all, the State in providing education was not engaging in a gainful activity but was rather "fulfilling its duties towards its own population in the social, cultural and educational sphere"; secondly the service was primarily funded by the public purse, rather than by the service recipients.[7] However, it should be noted that in other cases, the nature of the funding proved not to be determinant in assessing whether the non-discrimination obligation applied. The Court has found that European citizens have, in some instances, a right to equal treatment even in cases in which the benefit claimed is entirely paid for by the public purse. These cases did not amend the definition of "service provided for remuneration"; however they made clear that the public nature of the funding was not *in itself* enough to shelter the benefit from the scope of application of the Treaty free movement of services provisions.[8]

In this respect, we can distinguish two different type of cases: those where the Court establishes a connection between the economic service sought and the publicly funded benefit; and the rather anomalous case of *Cowan*. As for the former, in the *Museum Admissions* case the Commission brought proceedings against Spain for maintaining discriminatory museum admission conditions. The Commission did not attempt to challenge the definition of remuneration by arguing that publicly funded museums were to be considered as services within Community law. Rather it argued that there was a link between the reception of services as tourists and museum admission conditions; the discriminatory condition could then be construed as an indirect barrier affecting the tourists' right to free movement. The Court accepted the Commission's reasoning and found that

[4] Case 196/86 *Steymann* v. *Staatssecretaris van Justitie* [1988] ECR 2085.
[5] Case 352/ 85 *Bond van Adverteenders and others* v. *The Netherlands* [1988] ECR 2085, para 16.
[6] Cf case 36/74 *Donà* v. *Montero* above n 3, para 12: and AG Slynn's opinion in 293/83 *Gravier* v. *City of Liège* [1985] ECR 379, esp. 603; and in case 263/86 *Belgium* v. *Humbel* [1988] ECR 5365, esp. 5379.
[7] Case 263/86 *Belgium* v. *Humbel* above n 6, para 18 and 19, emphasis added. See also case C-102/92 *Wirth* v. *Landeshauptstadt Hannover* [1993] ECR I-6447. The lack of remuneration was instrumental to avoiding the difficult questions on the Irish limitation of information concerning abortion in case C-159/90 *SPUC* v. *Grogan* [1991] ECR I-4685.
[8] Of course social advantages have always been available to workers and established persons.

since there is a link between the reception of service as tourists and museum admission conditions,[9] the non-discrimination obligation applied to those advantages.[10]

On the other hand in *Cowan*, the Court seemed to sever the connection between the reception of services and a scheme entirely financed through the public purse.[11] In *Cowan* a British tourist claimed a right to equal treatment in relation to a crime compensation scheme. The scheme was reserved to residents, nationals, and nationals of those States which had a reciprocity agreement with France. The French Government relied, *inter alia*, on the fact that the scheme was paid for by the public purse to support its claim that it did not fall within the scope of the Treaty.
The Court found that, notwithstanding the publicly funded nature of the scheme, France could not exclude Community nationals from it. The Court's reasoning, synthetic as it might be, seems to substantially follow Advocate General Lenz's opinion. The Advocate General found that the crime compensation scheme was an aspect of the State's duty to ensure safety and order in its territory. In establishing a compensation scheme for victims of crime the State was acknowledging its own failure to ensure the individual's safety. Since the State bears this duty towards residents and visitors alike, it could not exclude tourists from the compensation scheme. In the words of the Court, protection from "harm" is a corollary of the freedom to move, and for this reason a tourist is entitled to protection from the risk of assault (and compensation when that risk materialises) on equal terms with nationals, regardless of how the scheme is funded.

These cases highlight that the fact that a benefit is funded by the public purse is not enough in itself for it to be excluded from the reach of Article 49 EC. However, public services which are an expression of social solidarity were excluded from the scope of the Treaty: expressions of solidarity are by definition not "economic".[12] Thus, before the developments which were to occur in the late nineties, we can distinguish two trends: one is the will to exclude "public services" from the scope of the Treaty; the other is to extend the scope of application of the Treaty to those benefits,

[9] Case C-45/93 *Commission* v. *Spain* ("Museum admission") [1994] ECR I-911; see more recently case C-388/01 *Commission* v. *Italy* ("Italian museums"), judgement of 16/01/03, nyr.
[10] The reasoning of the Court in this case mirrors to a certain extent existing case law on benefits related to the provision of services according to which the non-discrimination obligation applies to anything connected, even indirectly, to the ability to pursue the economic activity; see e.g. case 63/86 *Commission* v. *Italy* ("Social Housing") [1988] ECR I-29. In the field of establishment see Case 197/84 *P Steinhauser* v. *City of Biarritz* [1985] ECR 1819.
[11] Case 186/87 *Cowan* v. *Trésor Public* [1989] ECR 195.
[12] This reasoning applies also in other fields of Community law: see in relation to the applicability of Article 81 and 82 EC Joined Cases C-159 and 160/91 *Poucet* v. *Assurances Generales de France (AGF) and Caisse Mutuelle Regionale du Languedoc-Roussillon* and *Pistre* v. *Caisse Autonome Nationale de Compensation de l'Assurance Vieillesse des Artisans* [1993] ECR I-637, and more recently case C-218/00 *Cisal di Battistello Venanzio & C. Sas* v. *Istituto Nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)* [2002] ECR 691; and AG Jacobs' Opinion in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and others* v. *Ichthyol-Gesellschaft Cordes and others*, delivered

regardless of the way they are funded, which are even remotely connected to the reception of an economic service.

3. Towards the eradication of the distinction between public and private services: the case of health services

Although, until the late nineties,Although until the Court accepted that "public services" were not to be considered as falling within Article 49 EC, new developments in the case law suggest that the distinction between services provided for remuneration, and those which are not to be so considered, might have come of age. In a series of cases concerning health care, the Court expanded the scope of Article 49 EC so as to encompass national rules imposing limitations and conditions on patients' ability to gain reimbursement for treatment sought in another Member State.[13] Such limitations and conditions act, in the Court's opinion, as a barrier to the free reception of services and consequently have to be justified according to the principles of necessity and proportionality. We shall analyse these developments in detail, to examine the legal consequences of the Court's new approach.

A. The ruling in *Kohll*

In the cases which we are about to analyse, the national rules under attack fully complied with the provisions of Regulation 1408/71; this notwithstanding, the claimants argued that they fell foul of Article 49 EC. The authorisation requirement, it was argued, constitutes a barrier to the patients' ability to receive services abroad since it makes the reception of services abroad more difficult than the reception of services within the territory of the State of residence. In *Kohll*,[14] the Court held that orthodontic treatment provided for remuneration outside a hospital infrastructure was to be considered a service falling within the scope of Article 49 EC, and consequently found that the authorisation requirement for reimbursement for treatment received abroad was a barrier to the

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22/5/03, case still pending. In relation to Article 43, case C-70/95 *Sodemare Sa and others* v. *Regione Lombardia* [1997] ECR I-3395.

[13] Case C-158/96 *Kohll* v. *Union des Caisses de Maladie* [1998] ECR I-1931; Case C-368/98 *Abdon Vanbreakel and others* v. *Alliance nationale des mutualités chrétiennes* [2001] ECR I-5363; Case C-157/99 *B S M Garaets-Smits v Stichting Ziekenfonds VGZ* and *Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473; Case C-385/99 *Müller Fauré* v.*Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA*, and *van Riet* v. *Onderlinge Waarborgmaatschappi ZAO Zorgverzekeringen*, judgment of 13/05/03, nyr.

[14] Case C-158/96 *Kohll* v. *Union des Caisses de Maladie* above n 13, noted by Giesen, R. 36 (1999) *CMLRev* 841; Cabral, P. "Cross-Border Medical Care in Europe: Bringing Down a First Wall" 24 (1999) *ELRev* 387; Van der Mei, A.P. "Cross-border access to medical care in the European Union – some reflections on the judgments in *Decker* and *Kohll*" 5 (1998) *Masstricht Journal of European and Comparative Law* 277; Fuchs, M. "Free Movement of Services and Social Services: Quo Vadis?" 8 (2002) *ELJ* 536.

freedom to receive services.[15] The fact that the health system in that case provided for reimbursement at a pre-fixed rate rather than treatment in kind, together with the Court's qualification that the treatment had been provided outside any hospital infrastructure, raised doubts as to the scope of application of the ruling. Would the Court's reasoning affect also health systems which provide for benefits in kind and/or treatment provided within a hospital infrastructure? With the insight of subsequent cases it is clear that *Kohll* signals the first step towards exposing public health systems, in whatever way organised, to the Treaty rules on free movement of services.

B. The rulings in *Peerbooms* and *Müller Fauré*

We said above that the Court had previously excluded general education from the scope of the Treaty because such a service was not provided for remuneration, rather being an expression of the State's responsibilities towards its citizens. In *Peerbooms* and *Müller Fauré* the Court significantly amends its interpretation, showing its willingness to bring, at least to a certain extent, publicly provided health care within the scope of Article 49 EC.

In *Peerbooms*,[16] the authorisation requirement provided under Dutch law was attacked by two patients who, having obtained treatment in hospitals situated abroad, were denied reimbursement for the expenses they had incurred. The Dutch health care system is based on providing treatment in kind. Eligible individuals are associated with a sickness fund which enters into agreements with health care providers established in the area where it operates (contracted institutions). Individuals are then entitled to receive treatment free of charge by one of the providers which have stipulated an agreement with their sickness fund. The fund, where necessary, can authorise an insured person to seek treatment in another institution, within or outside the Netherlands, with which the fund has no agreement. The authorisation is granted in cases in which treatment is considered "normal in the professional circles" and is necessary, i.e. not available in a contracted institution without undue delay. It was accepted, for the purpose of the case, that the system was not discriminatory, in that, if

[15] The Court stressed that what was at issue was not the application of Article 22 of Regulation 1408/71 above n 1, since Mr Kohll was not claiming full reimbursement of the expenses he actually incurred abroad (as he would have been entitled were the Regulation applicable) but rather reimbursement of the sum he would have been entitled to had his daughter received treatment in Luxembourg.

[16] Case C-157/99 *Garaets-Smits* and *Peerbooms* above n 13, noted Steyger, E. "National Health Care Systems Under Fire (but not too heavily)" 29 (1999) *LIEI* 97; Van der Mei, A.P. "Cross-border access to medical care in the European Union – some reflections on *Garaets-Smits* and *Peerbooms* and *Vanbraekel*" 9 (2002) *MJ* 189; and extensively analysed by Davies, G. "Welfare as a Service" 29 (2002) *LIEI* 27 and Hatzopoulos, V. "Killing the National Health Systems but Healing the Patients? The European market for health care after the judgement of the ECJ in *Vanbraekel* and *Peerbooms*" 39 (2002) *CMLRev* 683.

it were necessary to have recourse to an external provider the choice would be made without regard to whether the provider was established in the Netherlands or elsewhere.

The first issue for analysis was whether the services in question could be considered as provided for remuneration so as to fall within the scope of application of the Treaty. The Advocate General and the Court disagreed: Advocate General Dámaso Ruiz-Jarabo Colomer, considered that the question was not whether the foreign institutions provided treatment for remuneration, since the applicants in the main proceedings were not complaining about these institutions' behaviour. Rather what was relevant was whether the relationship which linked the patients to their sickness funds could be considered as a service provided for remuneration. The Advocate General found that the relationship between the insured, the sickness funds and the care providers could not be qualified as a provision of services for remuneration. This was because, even though the service need not be paid for by the beneficiary, the insurance funds paid fixed sums to the health care provider rather than reimburse the expenses the latter incurred from time to time. Thus, the distinguishing factor in respect of *Kohll* was that, in that case, the insurance provided reimbursement of medical expenses rather than benefits in kind.

The Court considered both the relationship between the patients and the foreign institutions; and between the patients and their sickness funds. As for the former, since the patients would have to pay for the treatment received abroad, they received a service provided for remuneration. As for the latter, the Court dismissed the argument that the relationship patients/sickness-funds/hospitals was not one of service provision. The service was paid for by the sickness fund and indeed the hospitals providing the services were exercising an economic activity. The fact that payment to the hospitals occurred through flat rates, and that the beneficiaries were not paying, had no bearing on the definition of what is to be considered a service for remuneration. In *Müller Fauré*,[17] the Court went further, merely focusing on the fact that the treatment received abroad had been paid for by the patient. Thus, such treatment had been provided for remuneration and fell within the scope of Article 49 EC. There is no mention in this ruling of the relationship between the patient and the sickness fund, nor of the relationship between sickness funds and heath care providers. The ruling seems thus to apply also to national health systems (usually financed through general taxation) which directly, and without the medium of sickness funds, provide for health care.

[17] Case C-385/99 *Müller Fauré* and *van Riet*, above n 13.

Having found in both cases that the situation fell within the scope of application of Article 49 EC, the Court not surprisingly held that the authorisation requirement constitutes a barrier to the freedom to receive (and provide) services. It then turned to the issue of justification.

1. Prior authorisation as a barrier: imposing substantive requirements

In *Peerbooms* the Court found that, in the case of medical services provided in hospitals, an authorisation is "both necessary and reasonable". Medical services provided in a hospital take place in an infrastructure which requires planning. This notwithstanding, the conditions imposed in order to obtain the authorisation must be justified by the imperative requirements invoked (i.e. must be necessary) and must satisfy the requirement of proportionality. The Court then ventured upon a substantive assessment of the conditions imposed by the Dutch legislation, stressing, at the same time, that it is for the Member States to determine which benefits are provided for under the national social security system.

In *Müller Fauré*, the Court elaborated on the *Peerbooms* ruling. It clarified that there is a distinction between medical services provided for in a hospital, and non-hospital medical services (i.e. those provided by a specialist). In the case of the former, the Court substantially upheld its reasoning in *Peerbooms*. However, in its assessment of the compatibility of the conditions according to which authorisation is granted it added an important proviso. In *Müller Fauré* one of the arguments of contention related to what is to be considered as "undue delay" which, according to national rules, would be grounds for granting authorisation to receive treatment abroad. The Court made clear that the existence of waiting lists alone could not justify a refusal of prior authorisation, since in such case the refusal would be based on purely economic reasons, which cannot justify a limitation of one of the freedoms granted by the Treaty.

As for non-hospital treatments, the Court found that the requirement of prior authorisation could not be justified since the lack of prior authorisation had not been demonstrated to "seriously undermine the financial balance" of the social security system. This was true, even though the Court recognised that the removal of such authorisation "adversely affects the ways in which health care expenditure may be controlled" in the competent State. Further, the prior authorisation requirement cannot be justified even in those cases, such as the Dutch one, in which the sickness fund entered into agreements with professionals and paid fixed amounts rather than for the cost of each visit. The patient seeking treatment abroad is thus entitled to reimbursement, albeit only at the tariffs provided for domestic treatment (rather than for all expenses incurred, as would be the case under the

Regulation). In Member States which did not have such tariff schemes in place, they would have to be set up.

2. A first assessment of the Court's ruling

These rulings signal a revolution: in *Peerbooms* the Court found that the existence of economic elements in the relationship between funds and contracted hospitals was enough to catapult the situation into the scope of application of Article 49 EC. In *Müller Fauré* the Court simply focused on the fact that the patients had to pay for their treatment, and thus *that* treatment had been provided for remuneration. The fact that the Court focused only on the relationship between individual and health care provider abroad suggests that, not surprisingly, the new approach to "remuneration" applies also to NHS-type systems, where there is no provision of services between the hospital and an insurance fund.[18]

Further, the Court's assessment of the justification of the prior authorisation regime was substantive – affecting the nature of the right to seek treatment abroad as granted by national law. It can be debated whether the super-imposition of criteria which to a certain extent extend this right as defined by national law is consistent with the Court's repeated statement that Community law cannot have the effect of extending the benefits recognised by domestic social security schemes. After all, to transform a qualified right to seek non-hospital treatment abroad into an unqualified right to reimbursement, albeit at national tariffs, seems to considerably extend the benefits granted by national law. This is especially the case having regard to the fact that even the Court recognised that such a change might have financial implications, although these financial implications were deemed not important enough to justify maintaining the authorisation requirement. But even in the case of hospital treatment the rulings, by qualifying existing conditions on the right to seek treatment abroad, impact on the substance of the right. If before the right to seek treatment abroad arose only in given (and stricter) circumstances, now it is more easily gained. Take for instance the fact that the existence of reasonable waiting lists cannot be invoked to justify a denial of prior authorisation for treatment abroad; or that international medical science must be taken into account; or that in order to decide whether a treatment is sufficiently tested regard must be had also to whether the treatment is covered by the social security schemes of other Member States. In other words, the effect of the two rulings might be seen also as extending the benefits existing in national law: Mr Peerbooms was not eligible in Holland for the treatment he sought. As a result of the Court's substantive assessment of the conditions imposed on the prior authorisation requirement,

Mr Peerbooms gained that right (a good thing no doubt but still an extension of the benefits granted by national law). Ms Van Riet (the other claimant in *Müller Fauré*) did not have the right to go abroad to receive the arthroscopy. As a consequence of the application of Article 49 EC she now has.

The situation post-*Müller Fauré* suggests that the distinction between public and private services has evaporated in the heat of the moment. However, it is submitted, the distinction should be maintained both to avoid considerable practical problems which would arise from such an expansion of the scope of the Treaty; and because of the very wording of the Treaty, which cannot be judicially amended. Those issues will be looked at in turn, and a different approach, capable of incorporating some, but not all, of the *dicta* of the Court will be suggested.

4. Practical consequences of the new approach: health care

The rulings of the Court, sometimes extremely confused in their reasoning, seem to determine the following situation. In the case of hospital treatment, prior authorisation is in principle justified. However, close judicial scrutiny of the conditions under which such authorisation is granted will ensure that the patient's situation is assessed having regard to her individual circumstances. Further, the authorisation cannot be denied simply on the grounds that there are no urgent medical reasons (i.e. life-threatening situation) to justify "jumping the queue". Whether this pronouncement is sound, it is difficult to say. Whilst in an ideal word no patient should be left suffering only because her condition is not life-threatening, the Court's ruling might have the effect of diverting resources from structural improvements, aimed at reducing waiting lists, to funding treatment abroad.

As for the amount to be refunded, the ruling does not provide any guidance. However, since the system of prior authorisation is to be maintained in the case of hospital treatment, and since prior authorisation grants the right under Regulation 1408/71 (as implemented by national law) to benefits in kind in the host institution (or to full reimbursement), it seems that the patient receiving treatment in a hospital abroad has the right, if she fulfils the conditions for prior authorisation as re-interpreted by the Court, to full reimbursement. The relationship between Article 22 Regulation 1408/71 and Article 49 EC remains however unclear: the Court has not re-interpreted the conditions provided for by the Regulation, but only those provided for by national law implementing the Regulation. The right to full reimbursement arises in this case by the combined application of

[18] Davies, G. above n. 16, writing before the ruling in *Müller Fauré*, argued that NHS-type systems would be excluded

national implementing legislation and Article 49 EC, not by the Regulation. Thus, in the future, there is going to be little advantage for the patient to rely on the Regulation, since the same result can be achieved by relying on the less burdensome conditions set out by the Court in its interpretation of Article 49 EC. Indeed, following the ruling in *Vanbraekel*, Article 49 EC grants a right to be reimbursed according to the tariffs in place in the Member State where the patient is insured if those are higher than the tariffs in place in the Member State where the patient has received treatment.[19] On the other hand Article 22 Regulation 1408/71 grants the right to benefits in kind as calculated by the system where treatment is provided. Thus, if the tariffs are higher in the State of treatment, the patient might have an interest in relying on Article 22; otherwise the patient is better off relying directly on Article 49 EC.

In the case of non-hospital treatment the situation is different: prior authorisation is in this case not justified, and the patient is free to go and receive treatment abroad. However, the competent insurance fund (or NHS) is under an obligation to reimburse the cost of the treatment only within the limits of the cover provided. The relationship between this part of the ruling and Regulation 1408/71 is not clear: Advocate General Dámaso Ruiz-Jarabo Colomer has suggested that the system provided for by the Regulation is not inconsistent with Article 49 EC, but rather that it runs parallel to it.[20] Thus, if the patient obtains prior authorisation for non-hospital treatment, she will be entitled to full reimbursement rather than reimbursement at the tariffs of the competent Member State. The impact of Article 49 EC is then to add to, rather than to challenge the validity of, Regulation 1408/71.[21]

A problem which will need to be addressed in the future is how non-hospital treatment is defined. After all, it is not uncommon for specialists to operate within a hospital infrastructure. It is likely that the Court will adopt a substantive rather than a formal approach, and thus look at the nature of the treatment (for instance whether treatment requires hospitalisation or not; whether it needs to be administered under medical surveillance etc). This said, the boundaries between the two situations

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from Article 49 EC because of the absence of any market aspect.

[19] Case C-368/98 *Vanbreakel* above n 13.

[20] Opinion in case C-56/01 *Patricia Inizan* v. *Caisse primaire d'assurance maladie des Hauts de Seine*, delivered 21/01/03, nyr, case still pending. On the fact that an expansion of the possibility of seeking health care abroad should be widened through legislation rather than judicial interpretation see R. Cornelissen "The Principle of Territoriality and the Community Regulations on Social Security" 33 (1996) *CMLRev* 439, at 466.

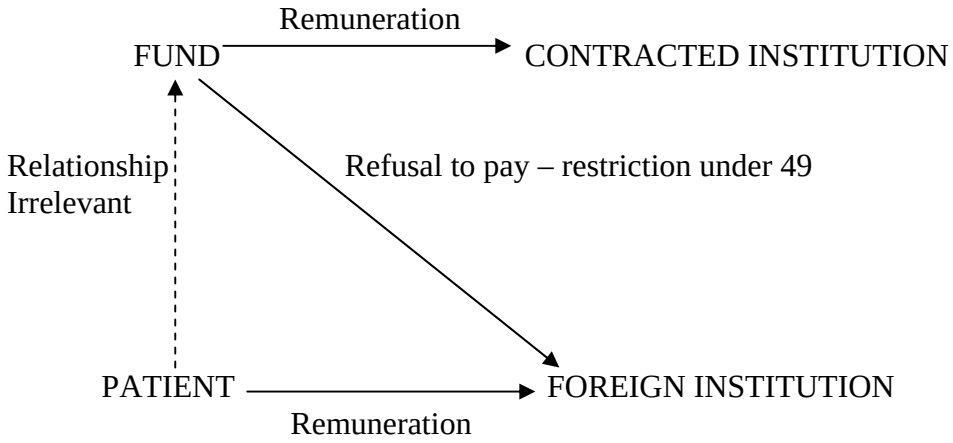
[21] This new situation seems to be similar to what is happening as a consequence of the direct effect of Article 18, which has been interpreted as expanding rather than challenge the residency directives. See Dougan, M. and Spaventa, E. "Educating Rudy and the (non-)English Patient: a Double Bill on Residency Rights under Article 18 EC" 28 (2003) *ELRev* October issue.

might still be confused: how would treatment which is sometimes administered within a hospital infrastructure and sometime administered in a doctor's surgery be qualified?

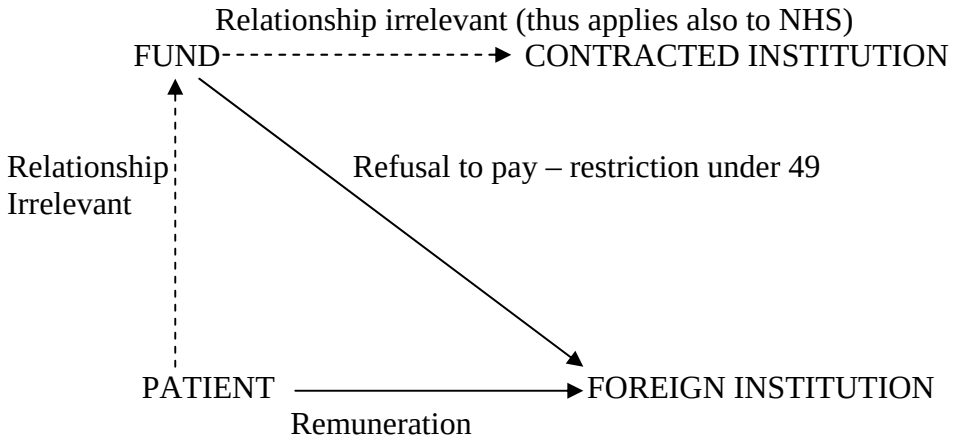
5. Broader consequences of the new approach

Having considered the rulings and their consequences in detail it is now time to turn our attention to the broader consequences of the Court's interpretation, and to an analysis of the validity of the hermeneutic approach it adopted. We could visualise the rulings of the Court, and its consequences, in the following way:

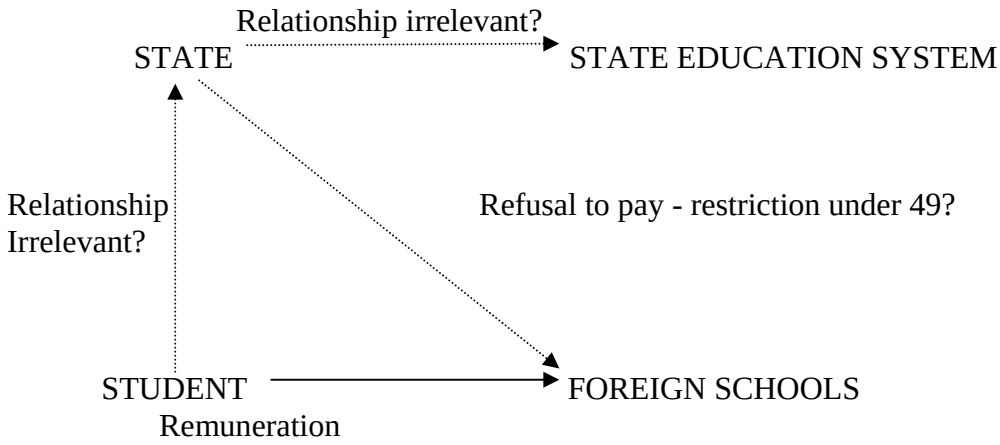
1. RULING IN PEERBOOMS



2. RULING IN MÜLLER FAURÉ



3. CONSEQUENCES



As said above, in *Peerbooms* (fig. 1), the Court found that the fact that there was an economic link between the fund and the contracted institution, together with the fact that the treatment received abroad had been provided for remuneration, was enough to bring the situation within the scope of Article 49 EC. Therefore, the prior authorisation requirement was qualified as a barrier which needed to be justified according to the imperative requirements. In *Müller Fauré* (fig. 2), the Court focused exclusively on the relationship between patient and foreign provider: since that relationship was one of provision of services for remuneration the situation fell within the scope of application of Article 49 EC and again the prior authorisation requirement needed justification. In both cases the Court found that the relationship between the patient and the fund was not relevant to its assessment; further in *Müller Fauré*, the Court, in order to extend its reasoning to NHS-type systems, also disregarded the link between fund and contracted institutions. This approach has far-reaching consequences not only for national health systems, but also for other fields where the State directly provides public services. Take general education (fig. 3). In *Wirth* the Court excluded that a Member State could be obliged to provide a scholarship for studying abroad when it provided a scholarship for taking up education within its territory.[22] The Court made clear that since (public) education was not a service provided for remuneration, the Treaty rules did not apply. However, if the ruling in *Müller Fauré* were to be applied analogically, then the State's refusal to contribute to the expenses for education received in another Member State would have to be qualified as a barrier to the students' ability to receive services abroad. The student going abroad would in fact be receiving a service for remuneration: since Article 49 EC is triggered regardless of the relationship between State and individual, then the territorial limitation imposed on the enjoyment of a scholarship for general education should be construed as a barrier. Furthermore, were we to take the unqualified statements in *Müller Fauré* literally, the State could be guilty of erecting a barrier also by not providing for the possibility for students to seek their general education abroad at the expense of the State of origin. After all, the Court made clear that the Member States might be under a duty to set up a tariff scheme so as to calculate the reimbursement to which individuals are entitled when seeking non-hospital treatment abroad. Would a pupil wishing to be educated in a public or private institution abroad have the right to demand from the State a financial contribution equal to that which the State would have borne had she taken advantage of the State's own education system? Yet, it would be peculiar if national rules which did not leave any choice to the beneficiaries as to where the service can be obtained, and which did not recognise any right to seek education save in public institutions, were to be construed as a barrier to the free movement of services. If this result is to be avoided, whilst also ensuring a coherency of framework in the

[22] C-102/92 *Wirth* above n 7.

interpretation of Article 49 EC, then a different, more rigorous approach, needs to be taken in defining the right of individuals accruing from the combined application of national and Community law. This point will be elaborated in detail below. For the time being a question needs to be raised. Would the Court have been as willing to extensively interpret Article 49 EC had national rules, and Regulation 1408/71, not provided for a right to be treated abroad in given circumstances? [23]

6. Public services and remuneration: challenging the Court's approach

The right to seek treatment abroad is recognised by national social security systems as part of the State's duty to provide effective health care: it is when, for whatever reason, the State cannot "directly" fulfil its duty towards a patient in need of treatment, that national law provides for an obligation upon the competent institution to meet its duties by alternative means, i.e. by paying for health care in a private institution or in another Member State.[24] When an individual seeks care outside the State system, she is enforcing her right to receive adequate and effective health care by demanding that the State discharges one of the primary responsibilities it bears towards its citizens. Had the State not accepted an obligation to provide health care in the first place, the citizen would have no claim. In other words, had the State not provided health care, either directly or indirectly, there would be no discussion about the State's duty to reimburse treatment received in another Member State. However in providing health care, the State is not providing a service for remuneration. Since it is the State's duty to provide health care that vests the right upon individuals to demand reimbursement of expenses incurred for treatment in another Member State, it is conceptually questionable that the Court should dismiss in *Peerbooms*, and not even consider in *Müller Fauré*, the contention that the service provided by the State was in fact not a service provided for consideration but a manifestation of social solidarity.

We will now turn to consider in detail the various relationships which arise in the (public) provision of health care, distinguishing the three main systems (compulsory insurance, NHS, reimbursement systems),[25] to argue that when the individual is seeking reimbursement for health treatment received abroad, she is relying on a right granted by national law which arises by virtue of the

[23] These cases might illustrate another aspect of the "leverage principle", i.e. the use of secondary legislation to expand the scope of Treaty provisions, described by Treumer, S. and Werlauff, E. "The Leverage Principle: Secondary Community Law as a Lever for the Development of Primary Community Law" 28 (2003) *ELRev* 124.

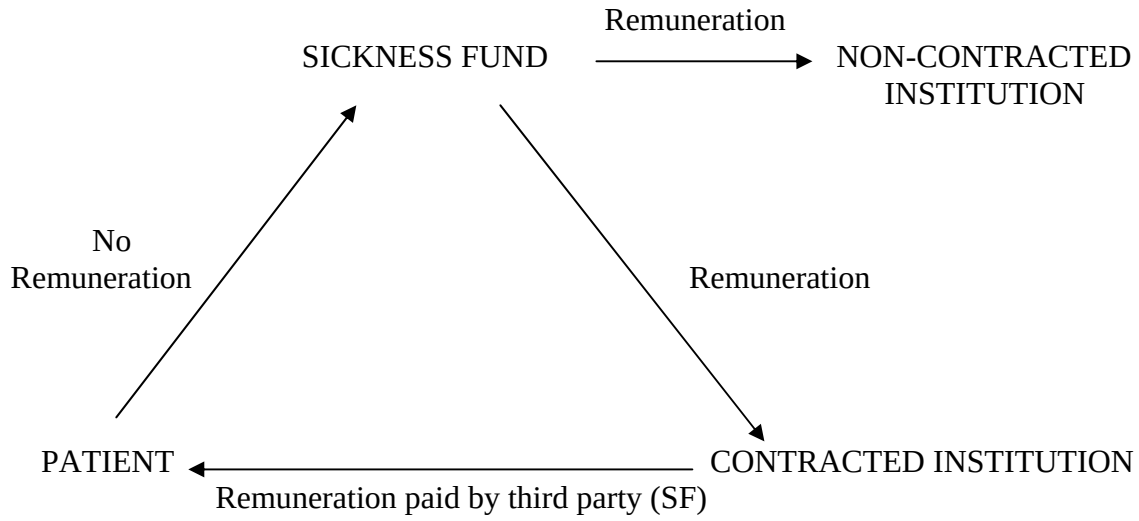
[24] Of course this right is also recognised by Regulation 1408/71above n 1. However the very recognition of such right in the Regulation is an expression of the State's duty that once a given treatment is covered by the social security system, then such treatment must be effective.

[25] Different systems might operate conjunctively. So for instance there could be a reimbursement system for non-hospital care and a direct provision of services in relation to hospital treatments.

State's responsibilities in the field of health care. The relationship between State and individual is in this case not an economic relationship and thus Article 49 EC cannot be construed as challenging the substantive conditions on the right to seek health care abroad. It can merely serve to ensure that once such a right is granted by national law, it should be granted without any discrimination as to the location of the health provider.

A. Compulsory insurance systems

The health system in the Netherlands is organised through a system of compulsory insurance, whereby residents are ensured with a sickness fund. The fund then enters into agreements with health providers which provide treatment free of charge to those affiliated with it.[26] Thus, there is a triangular relationship patient/fund/hospital.



The relationship between the fund and the contracted hospitals is, as held by the Court in *Peerbooms*, one of service provision for remuneration. In this respect the fact that remuneration is calculated according to fixed amounts rather than on a time-to-time basis is irrelevant. The remuneration still reflects the costs incurred by the institutions.[27] Since this relationship can be qualified as provision of services for the purposes of the Treaty, the funds cannot discriminate on grounds of the nationality of the health provider (i.e. their place of incorporation); and can discriminate on grounds of where the health provider is situated only if such distinction can be

[26] This model applies in the same way even if the State is contracting out health care without the medium of a sickness find and financing the scheme through general taxation rather than *ad hoc* contribution.

objectively justified (e.g. because of the need to ensure geographical proximity between potential patients and hospitals or the need to ensure that hospitals are evenly spread across the national territory). Further, if the fund decides to avail itself of the services of non-contracted institutions, it cannot discriminate between domestic and foreign providers, since the relationship between funds and non-contracted hospitals is also one of services for remuneration.[28] Once the fund decides to "contract out" health care provision, then, all things being equal (such as costs), it cannot prefer providers established in the national territory.

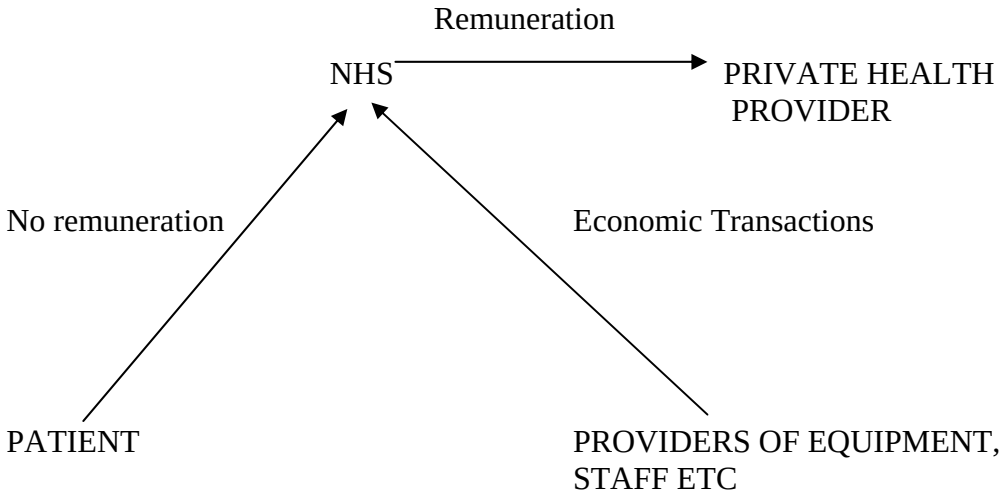
The relationship between hospital and patient can also be qualified as one of service provision: the service is paid for by a third party (as was the case in *Bond van Adverteenders*)[29], but is provided for remuneration. In this case, the exclusion of non-insured people from the benefit of free treatment can be easily explained since insured and non-insured people are not in the same situation (and for this reason a contracted institution would not be under a duty to provide treatment to other non-insured European citizens).

The relationship between the (insured) patient and the sickness fund is not however one of service provision. This is for two main reasons. First, because some individuals, such as those with low or no income, are included in the scheme even though they do not make any contribution to it. Secondly, because the amount to be contributed is not assessed having regard to the individual risk of the insured, but rather having regard to other factors, such as income. Thus, the relationship is not one of *actuarial* solidarity (which would be evidence of a relevant economic element) but of *social* solidarity. This is further demonstrated by the fact that, as recognised by the Court, the patients have no choice over which benefits are covered by the compulsory insurance scheme, nor have they any choice over the institutions which provide them.

[27] For a detail account of how costs are calculated in the Dutch system see AG Dámaso Ruiz-Jarabo Colomer's Opinion in case C-157/99 *Garaets-Smits* and *Peerbooms* above n 13, para 44 and 45.
[28] This regardless of the application of the public procurement directives (Directive 92/50 relating to the co-ordination of procedures for the award of public service contracts (1992) OJ L 209/1; Directive 93/36 relating to the co-ordination of procedures for the award of public supply contracts (1993) OJ L 199/1 as amended; Council Directive 93/38 relating to the co-ordination of the procurement procedures of entities operating in the water, energy, transport and telecommunications sector (1993) OJ L 199/84).
[29] Case 352/ 85 *Bond van Adverteenders* above n 5.

B. The State as a provider of health care: the NHS systems

In some Member States the health system is centrally organised, and the State directly and without intermediaries provides health care free of charge (or charging amounts significantly below costs) to its residents.

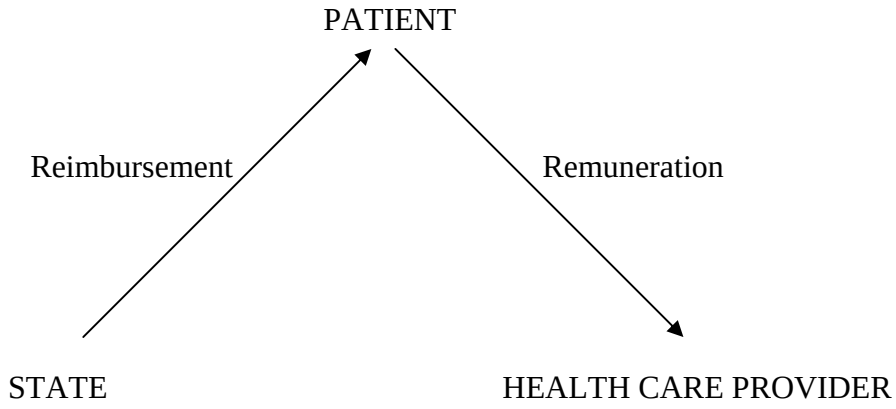


In these cases it is even more difficult to qualify the relationship between patient and NHS as one of service provision for remuneration: the health care is provided free of charge to all those entitled to it, and the system is financed through general taxation. This obviously does not exclude that the NHS might enter into an "economic" relationship with commercial operators, for instance when it buys equipment. In those cases, of course, the NHS is under an obligation not to discriminate between suppliers on grounds of their nationality. Similarly when the NHS "contracts out" health care, i.e. agrees to pay for private health care when it cannot directly meet the needs of the patient, the relationship between NHS and private health provider is properly qualified as one of services for remuneration. Thus, as in the case of systems organised through compulsory insurance, the NHS cannot discriminate on grounds of the nationality of the private health provider, nor, all things being equal, on grounds of the location of the provider. In other words, once the NHS recognises the patient's right to be treated by a private provider at its expense, it cannot discriminate between health providers. However the relationship between patient and NHS remains a non-economic relationship which should be excluded from the scope of the Treaty. For this reason Community law cannot determine the conditions under which the right to be treated by a private health provider materialises: it can only insist that, once this right materialises under the provisions of national law, then, since there is a service provided for remuneration, the non-discrimination principle applies.

This also means that the NHS is under no obligation to provide health services to other European citizens under the same conditions as it does its insured.

C. Reimbursement systems

Finally, the situation of those systems which provide for reimbursement rather than benefits in kind should be considered. In these systems, the State provides for reimbursement (usually at pre-fixed rates) of health expenses incurred by its citizens/residents. Such was the situation in *Kohll*.



In this case the relationship between patient and health care provider is clearly one of service provided for remuneration. Since the State is indirectly "contracting out" health care (through reimbursement) it cannot discriminate amongst providers. It is only if there is an imperative requirement of public interest, that the State will be able to limit or impose conditions on the patients' choice of a foreign provider. Again, however, Community law cannot impose any requirement that benefits be included in the scheme: it is for national law to determine which treatments are covered by the social security system.

7. A limited application of Article 49 EC to (public) health systems

It is submitted that in both *Peerbooms* and *Müller Fauré* the relevant relationship was that between patients and funds. The patients were relying on the duties the funds borne towards them – duties which cannot be defined as arising from an economic relationship – in order to obtain reimbursement of expenses for treatment abroad. In other words, what the claimants were enforcing was their right to effective health care as protected by national law. The expectation to be treated in an effective and timely manner does not arise from the economic relationship linking the individual to the State. Rather, it reflects the notion that effective health care is a fundamental right of the

citizen, a fundamental right which is an expression of that link of solidarity, of the allocation of mutual responsibilities between State and individuals, which is at the core of the notion of national welfare states. It is only once, and to the extent to which, this right is recognised by national law, that Article 49 EC can come into play. It is only when national law recognises a right to be treated "outside" the pre-organised structure that Article 49 EC becomes of relevance. However, the conditions according to which such right, if granted at all, materialises are a matter for national law alone. As recognised by the Court, it is a matter for national law to determine which benefits patients are entitled to; and it is a matter for national law to provide that in given circumstances such benefits can be extended. However, once national law recognises the right to be treated in a non-contracted institution, then the State, as when it chooses the institutions with which to enter into agreements, cannot discriminate on grounds of nationality. This is not because the relationship between State and patient has changed (that relationship is still not one of service-provision for remuneration); but because when the State "buys" services, it cannot discriminate, lacking an objective reason, between domestic and foreign providers. The same reasoning applies also to NHS systems. As for remuneration systems, this reasoning applies only in relation to the fact that Community law cannot extend the benefits covered by the social security system. As to the rest, since the State "contracts out" the services, once the social security system covers a given treatment, it cannot limit the patients' choice as to where to receive that treatment.

Some of the criteria imposed by the Court are consistent with this interpretation: for instance the requirement that once the right to seek treatment in a non-contracted institution is recognised, such right cannot be subject to discriminatory criteria; the criteria must be set so as not to leave any possibility for abuse; and the criteria must be judicially reviewable. However, it is submitted, there is no basis in the Treaty free movement of services provisions to go beyond this and to impose substantive criteria on *when,* if at all, the right to seek treatment in a non-contracted institution should be recognised. Otherwise, the effect of the Court's case law would be to extend the benefits recognised by national law, something that the Court expressly held to be not required by Community law.

This interpretation would also solve the problems arising in relation to the impact of Article 49 EC on other public services, such as education. Thus, since the relationship between student and State cannot be considered as one of service provision, the State would be under no obligation to provide that the right to education can be enjoyed on the same basis in another Member State. However, if the State were to recognise a right to public funding, either by granting monetary benefits or by

granting tax benefits, to those students who decided to avail themselves of education in private schools, then the same benefits should be available to students receiving their education abroad.[30]

8. Concluding remarks

In this paper I attempted to cast some doubts over the hermeneutic soundness of recent case law. Thus, I suggested that the Court's reasoning in *Peerbooms* and *Müller Fauré* is unconvincing and that the presence of an economic element somewhere in the chain should not be considered enough to trigger Article 49 EC. Instead, regard should be had to the relevant relationship: only when this is an "economic" relationship should the Treaty provisions apply. Further, since the relationship between patient and State is not one of service provision, Community law cannot be construed as determining the conditions under which the right to be treated by non-contracted institutions or non-NHS hospitals materialises. That is exclusively a matter for national law. However, once this right materialises, and the State agrees to "contract out" health care, the non-discrimination obligation applies: thus the State cannot, lacking an objective reason, discriminate between domestic and foreign health providers. This interpretation is only partially consistent with the Court's ruling. However, it has the advantage of contributing to a more coherent framework by both ensuring that the express Treaty requirement that services be provided for remuneration is respected; and ensuring that the same interpretation can be given for all public services, and in particular education.

As for non-hospital treatment, the same reasoning should apply: if the Member State "contracts out" specialist consultancies, then there is no reason why it should discriminate between domestic and foreign specialists. In this case, prior authorisation is an unjustified restriction. However, when consultancy is provided within the NHS, or within the same framework as that provided for hospitals in the case of compulsory insurance, then the service should not be considered as provided for remuneration and Article 49 EC should not challenge the conditions imposed by national law on the right to seek treatment outside the public sector.

The Court ventured onto a very different path when it delivered its rulings. One cannot but wonder whether, especially in *Peerbooms*, concerns over the patients' right to effective health care, and a willingness to ensure a just result, did not affect the Court's approach. Effective health care is a

[30] In the same sense Davies above n 17.

fundamental right: however, it is questionable whether such a right can be linked to the right to receive *economic* services.

The health cases are not the only ones where the interpretation of Article 49 EC seems tinted by the desire to ensure that European citizens see their fundamental rights effectively protected.[31] And it is difficult to criticise the end result of these cases. But, in preliminary rulings, the role of the European Court of Justice is to guide national courts as to the correct interpretation of the Treaties, not to ensure that (perceived) injustices are avoided. The Court now has two choices. If it wishes to ensure fundamental rights, then it should choose a stronger hermeneutic basis than Article 49 EC. The provisions on citizenship, read together with the EU Charter of Fundamental Rights, or the general principles of Community law, might do the trick. Or, if it persists in an extensive interpretation of economic rights as an instrument to enforce fundamental rights, then it should provide clearer a hermeneutic basis to justify its interpretation. Otherwise it will end up casting considerable doubts as to the legitimacy of its own actions.

[31] See case C-60/00 *M Carpenter* v. *Secretary of State for the Home department* [2002] ECR I-6279, and E. Spaventa "From *Gebhard* to *Carpenter*: Towards a (non-economic) European Constitution" forthcoming in the *CMLRev.*