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Patient Mobility in European Union: Health Spas in Ischia, Italy

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Abstract In a new case on patients seeking medical services abroad, the Leichtle case, the European Court of Justice (ECJ) confirmed its previous rulings on patient mobility. According to the Court, patients in the European Union have a (conditional) right to receive health care abroad, whereas the sickness fund should reimburse the costs of treatment and travel expenditures. As such, the Court has strengthened patient mobility in the European Union, based on the free movement principles. Now, it is up to the European Commission to develop a communal strategy aimed at further strengthening patients' rights in the Union.

According to the public health provision of the European Community (EC) treaty (Article 152 EC), the Community has supranational competence to run a public health policy of disease prevention and health promotion; other health care services such as the provision and financing of medical care fall within the exclusive jurisdiction of national governments.

At the same time, however, the treaty regulates the free movement of persons and services that entitle citizens to the health care system in another member state. The main conditions for reimbursement of cross-border include (medical) necessity and prior authorization by the patient's insurer/national authority in case of non-emergency care. These conditions are based on the free movement principles in conjunction with coordination regulation 1408/71 (1,2).

Based on this Regulation, member state authorities are authorized to define the conditions for entitlement and the reimbursement rate.

Although Regulation 1408/71 aims to coordinate the different social security systems in the member states, including social health insurance, the free movement of patients remains problematic. A major problem countries face with cross border health care is how to regulate and finance this type of care (3). Some member states fear an influx of patients from those member states lacking facilities and/or providing lower-quality care. Rulings from the Court of Justice simplifying cross border health care have only strengthened this fear. In the Court's jurisprudence, we can observe a growing number of cases questioning the conditions for health care abroad, notably the legitimacy of pre-authorization in view of internal market principles. In the Leichtle case, as being discussed hereafter, the Court aims to clarify the applicable rules.

The Facts

Ludwig Leichtle, a German civil servant of the *Bundesanstalt für Arbeit* (Federal Labour Office), asked his insurer to cover the costs of travel, since he was planning a trip to Ischia (Italy) for medical reasons. In the Italian spa town, he would undergo a thermal cure, recommended by his physician. When the Anstalt refused to pay the additional costs, Leichtle filed a suit in which the Court should confirm that the expenditure associated

with health care should be reimbursed. According to the Anstalt, the expenditure referred are reimbursable only when the health care outside Germany is absolutely necessary and established in a report drawn by a medical officer. If not, the complete opening up of access to European spas would endanger the financial equilibrium of German health care establishments. In support of his action, Mr Leichtle claimed that the required report infringes the free movement of services-principle.

Court Procedure

In the following preliminary ruling, the European Court of Justice has been asked whether European law precludes rules of member states such as those at issue, under which the reimbursement of expenditures incurred on board, lodging, travel, and visitor's tax are conditional to prior approval by a medical officer and the spa concerned is listed in the German "Register of Health Spas."

The Court explains that it has settled case law that health services, including spas, fall within the scope of Article 50 of the Treaty (free movement of services), irrespective of the way these services are funded (by sickness fund premia or national budget). Moreover, it concludes that due to the absence of harmonization in this field, Community law recognizes member states' autonomy to organize (and finance) their health care system, including the definition of entitlements. Nonetheless, in doing so, member states should comply with Community law. Accordingly, the Court refers to previous cases in which it dealt with prior authorization concerning health care abroad (e.g., Smits/Peerbooms; MüllerFauré/Van Riet; Van der Duin Van Wegberg-van Brederode).

In principle, the free movement provisions prohibit member states to make reimbursement of medical costs incurred in another member state subject to prior authorization, since it deters or prevents insured persons from visiting health providers in another member state. However, authorization of treatment can be justified for reasons of general interest, namely maintenance of the financial balance of the social security scheme and protection of public health, which includes the need to guarantee the quality of medical services and the aim of providing a balanced medical and hospital service open to everyone (4). That is particularly the case when hospital care (intramural care) is concerned. An outflow of in-patient health care may seriously threaten both member states' financial balance and the availability of health care and medical skills. This is, however, different with respect to extramural care, since it is less susceptible to disruption (financial imbalance) than inpatient health care. Therefore, prior authorization is not allowed for extramural care. But where outflow from domestic extramural care reaches a level that has deleterious effects on the social insurance scheme, prior authorization is justified (5).

In this particular case, however, the question raised did not concern so much the approval and reimbursement of the expenditures of the health care, but the rules concerning the reimbursement of other expenditures related to the treatment abroad (travel, lodging, etc.). Since the conditions (increased prospects of success, and the report written by a medical officer) were different from those applicable to treatment in Germany, Germany could deter the insured from approaching health care providers abroad, ergo, hindering free movement.

Expenditures related to board and lodging can be considered as an integral part of the health care itself. After all, just as hospital treatment may involve a stay in hospital, a health care administered for therapeutic purposes may well, by its nature, involve admission at a spa. Although travel costs and visitor's tax are not medical in character, they are, according to the Court, inextricably linked to the care itself since the patient is required to travel and stay at the spa in Ischia. Consequently, the conditions for these expenditures have to be tested according to the previously accepted general-interest reason. Additionally, this means that the measure taken should be necessary and that its objective cannot be reached by an alternative, less invasive measure under the same conditions (proportionality test).

The Bundesanstalt claimed that the absence of the disputed conditions would seriously harm the financial equilibrium of the German social security system if it is not accompanied by an analysis of the appropriateness and proportionality of the restrictive measure. Since the Anstalt could not support that claim with well-founded arguments, the Court did not accept the general-interest reason as justification for restricting the free movement of patients. As a consequence, Mr

Leichtle was compensated for the additional expenditures of the health spa.

Discussion

The provisions in the European Community (EC) treaty relating to mobility and portability of rights are based on free market principles, and originally, were not intended to cover medical care (6,7). However, since the Decker and Kohll rulings, it is now settled that health care services fall within the scope of the EC treaty (8,9). Further rulings have confirmed and extended the right of patients looking for health care abroad. Now, it is settled case law that a patient who wishes to be treated abroad in a non-contracted hospital requires prior authorization from his or her sickness fund. In that case, authorization can be justified for reasons of general interest. This is, however, different when the insurer has contracted the foreign hospital. Then, prior authorization is not required due to contractual arrangements concerning the provided services, applicable tariffs, etc. This is the outcome of the Smits/Peerbooms case (4). Hospital admission is therefore a crucial condition. Generally, hospital stay is interpreted as requiring 24 hours admission in a health care institution.

In case a patient searches for non-hospital care to which he is entitled, prior authorization from the sickness fund is not needed. Patients are thus free to visit a physician in another member state and should be reimbursed up to the level of reimbursement of their own system (Müller-Fauré/Van Riet case). A problem occurs when, during a non-hospital treatment (or day admission), in case of complications, hospital admission is required. The question raised is who will cover the costs of hospital admission. Among sickness funds in the Netherlands, it is common practice that since the patient did not ask for prior authorization, he or she will be fully responsible for the expenditures of hospital admission and/or treatment. In a way, absence of approval can have serious financial risks for patients.

Although Müller-Fauré was considered the latest in a line of cross-border care cases, the Leichtle ruling further explained the meaning of Community rules with respect to hospital-related expenditures in another member state (travel and accommodation). In principle, member states are prohibited to formulate additional, more strict, conditions for hospital-related expenditures which are not required for hospital admission in the homeland. Such a national measure may hinder the free movement of patients and, without a justified reason of public interest, it is not allowed.

What has become clear so far is that, apart from strengthening the patient's right to access to health care abroad, these rulings also affect national decision-making on the allocation of health care, including the purchase of health care services by social security institutions. First of all, the Court's jurisprudence imposed a revision of national rules removing unjustified barriers to (the reimbursement of) health care abroad. Furthermore, national rules that restrict contracting to health institutions in the member state exclusively are forbidden. However, the condition that a treatment should be provided by an institution listed in a so-called Registration of Health Spas does not necessarily hinder access to spa services in another member state, since the rationale of such a measure is to ensure that sickness funds can check the "seriousness" of services provided by health spas, in and outside the country (10). Nonetheless, the registration requirement may still have a potential hindering effect, which depends on the objectivity of the conditions for registration. Finally, the definition of the health plan entitlements, as well as the amount of reimbursement granted, remains the prerogative of the member states themselves. This is caused by the absence of harmonizing competences at Community level in the field of social security.

Last year, the European Commission has responded to its limited competences in the field of health care, by starting a "high level process of reflection on patient mobility and health care developments" (11). The result was the publication of two complementary Communications. In the first, the Commission supported member states in developing high-quality, accessible and sustainable health care services (12). The second communication sets out an "e-Health action plan" for using information and communication technologies to help improve access, quality, and effectiveness for health services across the Union (13). Together with additional measures such as the (draft) Directive on Services in the Internal Market, harmonizing patients' rights and improvement of the European health professions strategy covering training, recruitment, and working conditions, this reflect-

ion process is an important step towards a European health care policy.

Conclusion

By its rulings on health care services abroad, the European Court of Justice has facilitated and strengthened patient mobility in the European Union. As such, the Court deals with the nexus of the European free movement principles and the member states' responsibility to guarantee the sustainability of national health systems. Although the Court does not question the exclusive competences of member states in providing public services, it does not provide carte blanche. National governments should respect the economic principles of community law and may introduce certain barriers to free movement of hospital services, only conditionally and when absolutely necessary for reasons of public interest.

The European Commission has responded to these rulings by setting the first steps towards a communal strategy aimed at strengthening the rights of patients in the EU. Unmistakably, such a strategy will further affect the organization and financing of members states' health care system since it touches highly sensitive issues, such as difference in high-quality care and different level of resources invested in health care.

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