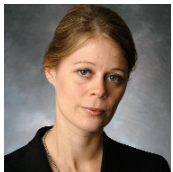


# Cross border access to healthcare services within the European Union



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## Abstract

This article focuses on the issue of “medical tourism” and the extent to which patients resident in EU member states have a legally enforceable right to access healthcare services in other EU member states which are paid for by such patients’ home member states. The article explains the various relevant legislation and explores the tensions within it and also focuses on various recent cases which have discussed whether prior authorization systems in relation to cross border medical treatment are justifiable in the objective public interest. The article also looks at the most recent developments in the case law concerning EU based national health services.

Do patients resident in European Union (“EU”) Member States have legally enforceable rights to access healthcare services in other Member States which are paid for by their home States? Recent cases have shown that when “medical tourists” move between Member States especially to access healthcare services in other Member States, national prior authorisation systems regarding such treatment can be deemed to breach relevant EU legislation, where the grounds on which authorisation is refused and the restrictions created on freedom to provide and receive services within the EU which are created cannot be justified in the objective public interest. Member States’ national authorities can, therefore, sometimes find themselves legally obliged to reimburse their citizens for costs of treatment obtained in other Member States.

## Relevant legislation

A patient’s legal right to access healthcare services within the EU is essentially a matter of national law, however EU legislation and case law are also relevant.

Regulation 1408/71/EEC (as amended) (the “Regulations”) suggests that cross-border medical treatment is provided at the discretion of the national authorities’ in a patient’s home State, however, Articles 49 and 50 of the EC Treaty (the “Treaty Provisions”), which prohibit restrictions on freedom to provide and receive services throughout the EU<sup>1</sup>, suggest patients have enforceable rights to access cross border healthcare services. Although health related services are not specifically mentioned in the definition of “services”, the definition is widely drafted<sup>2</sup>. When medical tourists move between Member States especially to access healthcare services in other Member States the directly effective Treaty Provisions apply, creating tension with the Regulations.

The Regulations provide (among other things) that EU citizens may obtain treatment in other Member States at their home State’s expense, subject to prior authorization.

Patients only have a right to prior authorization where: (i) the relevant treatment is provided by their home States; and (ii) they cannot be treated within the time normally necessary for obtaining such treatment in their home States taking into account their current state of health and the probable course of their disease.

The restrictions on freedom to provide and receive services prohibited by the Treaty Provisions include anything making services provision between Member States more difficult than supplying services in one Member State. Restrictions can include prior authorisation rules under the Regulations, which are only permissible if they can be justified in the objective public interest, as seen in the case law concerning challenges to refusals by Member States to authorise cross-border treatment under the Regulations.

## Kohll<sup>3</sup>

This case confirmed the right to publicly funded cross-border healthcare services and concerned a reimbursement based social insurance scheme. Mr Kohll, from Luxembourg, challenged his social security fund’s refusal to authorize his daughter’s dental treatment in Germany despite her doctor’s recommendations. Only one Luxembourg orthodontist could provide the treatment and it would have taken much longer.

The ECJ held that the fundamental principle of freedom of movement still applies to services of a special nature and that the healthcare services in this case (orthodontic services provided for remuneration by an orthodontist in another Member State “outside of any hospital infrastructure”) were “services” under the Treaty Provisions. The rules that freedom to provide services should not be restricted applied even though the relevant national rules related to social security (an area supposedly within Member States’ discretion). This case established that Community law does not detract from Member States’ powers to organize their

own social security systems, but they must also comply with Community law.

The ECJ confirmed that the Regulations allow insured people authorized by their home States to receive treatment in other States on account of their home States in accordance with the host state's legislation, (especially where the need for transfer arises due to the patient's state of health), without the patient incurring additional expenditure. National prior authorization rules regarding reimbursement of dental treatment costs provided in other Member States can deter patients from approaching medical services providers in other States, therefore restricting freedom to provide and receive services.

#### **Vanbraekel<sup>4</sup>**

This case concerned a Belgian national insured under the Belgian social insurance system with a sickness fund, seeking surgery in France for knee disease, who requested authorization for this treatment. Authorization was refused, however the patient obtained the treatment and sought reimbursement.

The national court obtained an expert report stating that the patient's condition necessitated treatment abroad. The ECJ held that the principle that freedom to provide services must not be restricted applies to both hospital and non-hospital care, thus going further than *Kohll*.

The ECJ also held that, where a home State has refused to authorize an insured person to obtain treatment in another State and such refusal is unfounded, the patient will be entitled to reimbursement of the amount the host state would have borne if authorization had been properly granted, so the sickness fund would be obliged to reimburse the patient's treatment costs.

Interestingly, the treatment costs were lower if reimbursement was calculated under the French (rather than Belgian) legislation. The ECJ held that if a person has a lower level of cover when treatment is received in another Member State than in the home State, this restricts freedom to provide services. Where the amount of the treatment is less in the host State than the home State the sickness insurance fund must grant additional reimbursement covering the difference to the patient.

#### **Geraets-Smits and Peerbooms<sup>5</sup>**

This case established that the principles of *Kohll* and *Vanbraekel* also apply to social insurance systems based on benefits in kind not reimbursement.

Reimbursement for treatment carried out in Member States other than the patient's home State (the Netherlands) without prior authorisation was refused in these cases as the conditions for granting prior authorization were not fulfilled, namely that the treatment had to be: (i) in accordance with what is normal in the professional circles concerned; and (ii) a "medical necessity".

The ECJ held that the Treaty Provisions did apply even though these patients paid the healthcare providers directly and then sought reimbursement from a sickness insurance scheme providing benefits in kind not reimbursement.

These were still services under the Treaty Provisions and the two conditions to the granting of prior authorization under the Dutch sickness fund rules were restrictions on freedom to provide services.

The ECJ considered various possible public interest reasons would justify such restrictions, including: (i) the risk of significantly undermining the financial balance of social security systems; (ii) the need to maintain a balanced medical and hospital service available to all; and (iii) the need to maintain medical capacity and professional competence to safeguard the population's health. The prior authorization conditions were judged, in principle, permissible. Prior authorization conditions can only be justified, however, if they fulfil the objective public interest criteria.

The ECJ decided that the first condition could only be justified where "professional circles" means that the treatment is sufficiently tried and tested by international medical science. The Dutch rules referred only to Netherlands' professional circles, so could not be justified.

The ECJ also concluded that the second condition applies whether the relevant healthcare provider is situated within or outside the Netherlands and could only be justified where "medical necessity" means that authorization may only be refused if "the same or equally effective treatment" cannot be given "without undue delay" from a contracted healthcare provider. In deciding this, national authorities must consider the patient's medical condition when authorization is requested and his medical history.

#### **Müller-Fauré and van Riet<sup>6</sup>**

In this case, the ECJ confirmed its rulings in *Geraets-Smits* and *Peerbooms*. The Court considered that the risk of undermining a social security system's financial balance could justify restricting the freedom to provide services and also distinguished between hospital and non-hospital treatment for the first time.

Regarding non-hospital treatment, it was decided that removing prior authorization requirements would not risk seriously weakening a social security system's financial balance. Therefore national prior authorization systems regarding non-hospital care by non-contracted providers in host States would not be permitted, even where national legislation establishes a benefits in kind not a reimbursement system. Regarding hospital treatment however, the ECJ decided that if insured patients were able to use any hospitals where their sickness insurance funds had no agreements (wherever these were situated) all hospital planning could be jeopardized. This meant national prior authorization systems regarding hospital care were, in principle, permitted.

The ECJ also decided that the "without undue delay" consideration must be based on a more personal assessment of an individual's medical condition than previously. Refusal to grant prior authorization solely because of waiting lists for the relevant treatment within a patient's home State could not justify restricting freedom to provide services as the argument that these are necessary is purely economic and cannot justify restricting fundamental EU freedoms.

**Watts<sup>7,8</sup>**

The relevant cases have mostly concerned national public health insurance systems comprising social insurance schemes providing reimbursement or benefits in kind, not national health services. The Watts case, however, concerned the UK's NHS and the UK Court of Appeal referred various questions to the ECJ.

The Advocate-General's opinion in Watts was published on 15 December 2005. If the ECJ follows this opinion, the implications, particularly for Member States with national health services, could be significant.

The opinion states that Article 49 must be interpreted as meaning that, in principle, persons ordinarily resident in Member States operating national health services are entitled to receive hospital treatment in another Member State at the expense of that national health service. This does not mean that all residents of such Member States have unrestricted rights to travel to other Member States to obtain hospital treatment paid for by their home States – such entitlement may be subjected to prior authorization requirements. These requirements are only permissible if based on: (a) objective, non-discriminatory and transparent criteria; (b) in the context of an easily accessible procedural system capable of ensuring that authorization requests are dealt with objectively and impartially within a reasonable time; and (c) refusals can be challenged in judicial or quasi-judicial proceedings.

It was also held that considerations relating to managing waiting lists can only justify refusal to receive hospital treatment in another Member State if they are managed to take sufficient account of patients' individual medical needs and do not prevent treatment in other States in urgent cases. Furthermore, where conditions to authorization attempt to guarantee the financial stability of the national health system, purely budgetary or economic considerations cannot justify refusal.

It was also held that in determining whether treatment is available "without undue delay", regard may be had to waiting times and the clinical priority accorded to the treatment by the NHS, only if this is based on concrete indications relating to the patient's condition at the time of assessment, as well as his medical history and the probable course of the disease.

It was also held that Article 49 does not allow budgetary considerations to be taken separately into account in determining whether a Member State is obliged to refund hospital treatment costs provided in another State, except where it is demonstrated that compliance with this obligation more generally would threaten the national health care system's financial balance. Regarding decisions refusing

authorisation under the Regulations<sup>9</sup>, budgetary considerations cannot be taken into account.

**New developments**

The 2004 proposal for a new EU Services Directive originally promised to clarify the conditions under which patients can exercise the rights recognised by the case law. The Directive was intended to complement the Regulations, but did not create new patient rights.

The proposed Directive effectively provided that the freedom to provide and receive services includes a right for patients to receive non-hospital care in other Member States without prior authorisation and to obtain reimbursement from their home States. Regarding hospital care, prior authorization schemes remained justifiable.

The proposed Directive distinguished more definitively between hospital and non-hospital care, required Member States to abolish prior authorization schemes for non-hospital care and clarified that the level of costs to be reimbursed is limited to what would have been assumed if the treatment was provided in the patient's home State (even where treatment costs in another State are much higher, meaning patients bear the difference). It also clarified that the conditions under which certain treatments may be provided in a patient's home State remain applicable.

Following the European Parliament's vote on 15 February 2006 on the proposed Directive, these proposals appear to have been postponed as public and private healthcare services were excluded from the Directive's scope. The case law regarding patient mobility may now be addressed in the framework of the Regulations and/or within separate secondary legislation.

**Conclusions**

The recent cases have attacked prior authorization regimes which prevent medical tourism to a certain extent, concluding that such regimes can restrict freedom to provide services, which is only justifiable in certain circumstances. Some national rules may be unlawful under directly effective EU legislation and may require adjustment. Generally, however, Member States largely retain the discretion to decide on the nature and extent of their citizens' access to medical treatment under their public national health systems. The effect on Member States' discretion to limit the extent and organisation of their national health systems seems likely to be limited as restrictions created by prior authorization systems regarding hospital care may be justifiable to protect "objective public interests" provided certain criteria are complied with. □

**References**

<sup>1</sup> Article 49 EC.

<sup>2</sup> Article 50 EC.

<sup>3</sup> *Case C-158/96 Kohl v Union des Caisses de Maladie* [1998] ECR I-1931.

<sup>4</sup> *Case 368/98 Abdon Vanbraekel and Others v Alliance nationale des mutualités chrétiennes* [2001] ECR I-5363

<sup>5</sup> *Case C-157/99 Geraets-Smits v Stichting Ziekenfonds VGZ and Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473.

<sup>6</sup> *Case C-385/99 Müller-Fauré v Onderlinge Waarborgmaatschappij OZ*

*Zorgverzekeringen UA and van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-4509

<sup>7</sup> *R (on the application of Yvonne Watts) v Bedford Primary Care Trust and Secretary of State for Health* [2003] EWHC 2228 (Admin), 1 October 2003

<sup>8</sup> *Case C-372/04 The Queen on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* OJ C 273 06.11.2004 p.15

<sup>9</sup> Article 22(2) of Regulation 1408/71/EEC (as amended).