

Health care services

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Case description (1)



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Case description (2)

- You are on holiday in Greece
- Suddenly, you suffer from acute appendicitis
- You have to be hospitalized and you have to undergo surgery
- Surgery went fine, but back home you receive a huge bill from your insurance company with the message that medical treatment in another country without prior authorization is not reimbursed
- Do you have to pay?

Another case description



<http://www.alpineclassic.org>

- In the past years you have enjoyed life and the gifts of nature
- As a result you weigh a bit too much (okay, a lot)
- You want to have sleeve gastrectomy, which removes 2/3 of your stomach; your doctor (GP) agrees
- In the Netherlands, there is a long waiting list for this kind of surgery (obesity surgery) and not a lot of (public or private) hospitals that perform this type of obesity surgery
- So you go to Germany
- The hospital of your choice refuses you as a patient because there is no urgency for the treatment; you can wait your turn in the NL

A last case description

- Your Bulgarian aunt has crooked teeth.
- You invite her here, so she can have braces placed
- This work will be done by the Orthocenter The Hague
- When you read the terms of the insurance policy of your aunt, you notice that only costs of orthodontics in Bulgaria and Hungary are reimbursed

Not in the cases

- GP's that want to practice in other MS
- Surgeons that want to take on employment in another MS
- Purchase of medicines or medical devices (free movement of goods)
- Requirements for the establishment of private clinics

→ Today: right of access to health care services or patient mobility (which mostly comes down to insurance troubles)

Treaty provisions (1)

- Title XIV (public health), art. 168 TFEU gives the legal basis for the Union to act
 - It does not confer rights upon individuals
- ➔ free movement of services (right to receive services)

Treaty provisions (2)

SERVICES

Article 56 (ex Article 49 TEC)

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

Treaty provisions (3)

Article 62
(ex Article 55 TEC)

The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.

Article 52
(ex Article 46 TEC)

1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.
2. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions.

Regulation (EEC) 1408/71

- ... on the application of social security schemes of employed persons, self-employed persons and family members
- Workers and self-employed!!!! Not tourists, students, retired persons etc.
- System of prior authorization of the insurance company
- Entitled to benefits-in-kind or reimbursement of the costs
- Authorization may not be refused when the treatment falls within the terms of the insurance policy and national treatment cannot be expected within reasonable time

Case Kohll (1998)

- Kohll (Luxembourg) wanted treatment for his daughter from a German orthodontist
 - Prior authorization required to get the costs reimbursed when the treatment is in another MS (not for treatment in the MS of origin)
 - Kohll asked for the costs that would be reimbursed when the treatment would be in Luxembourg, not for the extra costs
 - No authorization because no urgency and treatment could be provided in Luxembourg
- Preliminary proceedings

ECJ (1)

- EU law does not detract from the powers of the Member States to organize their social security systems
- Member States must nevertheless comply with EU law when exercising those powers
- Rules relating to social security schemes can be assessed in the light of the free movement principles
- This kind of extramural care constitutes a 'service'
- System of prior authorization to get the costs for treatment in another MS reimbursed, constitutes a restriction

ECJ (2)

- Undermining the financial balance of the social security system is an overriding general interest that is caught by the public health exception
- However, reimbursement of the national tariff would not undermine this balance

Case Smits / Peerbooms (2001)

- Dutch Ziekenfondswet: benefits in kind, instead of reimbursement
- Health care by contracted providers
- System of prior authorization for treatment by non-contracted providers
- Criteria:
 - It is an insured treatment
 - Treatment must be considered normal and not experimental by Dutch peers
 - Treatment is necessary and cannot be provided by contracted providers without undue delay

Case Smits / Peerbooms (2)

- Smits suffered from Parkinson's disease and underwent (multidisciplinary) experimental treatment in Germany
- Peerbooms was in a coma and underwent experimental therapy (neurostimulation) in Austria
- Authorization was refused by the insurance company

ECJ (1)

- Scheme of benefits in kind also falls within the ambit of the free movement of services, although payment is not made by the service recipient
- Contracted hospitals are mostly established in the NL
- System of prior authorization is a restriction
- It can be justified:
 - Hospitals require a special infrastructure (location, equipment, personnel etc) that has to be carefully planned in order not to waste public money
 - Prior authorization if you step outside this infrastructure seems reasonable and necessary

ECJ (2)

- However, criterion that the treatment must be considered normal and not experimental by Dutch peers, is not allowed; regard must be had to international scientific data and opinions
- Authorization can be refused if the same or equally effective treatment can be obtained without undue delay from a contracted provider
- All circumstances, including the medical history of the patient, must be taken into account

Case Müller-Fauré/Van Riet (2003)

- Müller-Fauré (Dutch) underwent extramural dental treatment in Germany
- She went to Germany because she lacked confidence in Dutch dental practitioners
- She asked for reimbursement of the costs
- Refused because she had no prior authorization, was entitled to benefits in kind and not reimbursement of costs and could have received the treatment in the NL

Case Müller-Fauré/Van Riet (2)

- Van Riet suffered from pain in the wrist
- When it got severe she had arthroscopie followed by surgery, all performed in Belgium and prescribed by her GP because in Belgium this could be performed much sooner than in the NL
- Partly intramural, partly extramural
- She asked for reimbursement of the costs
- Refused because she did not have authorization and she could have had the treatment in the NL within a reasonable time

ECJ (1)

- The Ziekenfondswet as such does not restrict individuals to go to another MS to receive medical treatment
- Insurance companies contract with national care providers and in general not with providers in another MS
- Prior authorization is required when medical treatment is performed by non-contracted care providers
- Authorization is only granted when there is a medical necessity (adequate treatment cannot be provided by a contracted provider within a reasonable period)
- Prior authorization in order to get costs reimbursed constitutes therefore a restriction to the freedom to receive health care services

ECJ (2)

- Intramural care:
 - The number of hospitals, their geographical distribution, the way in which they are organized and the facilities with which they are provided, and even the nature of the medical services which they are able to offer, are all matters for which planning must be possible
 - Planning seeks to achieve the aim of ensuring that there is sufficient and permanent accessibility to a balanced range of high-quality hospital treatment in the State concerned and assists in meeting a desire to control costs and to prevent, as far as possible, any wastage of financial, technical and human resources
 - In those circumstances, prior authorization to get costs reimbursed appears to be a measure which is both necessary and reasonable

ECJ (3)

- Authorisation may be refused on the ground of lack of medical necessity only if treatment which is the same or equally effective for the patient can be obtained without undue delay from a contracted care provider
- Existence of a reasonable waiting period for treatment by a contracted care provider is not sufficient to refuse authorization
- Regard must be had to all the circumstances of each specific case

ECJ (4)

- Extramural care:
 - No indication that the removal of the requirement of prior authorization for this type of care would seriously jeopardize the financial balance of the social security system
 - No indication that this will cause an outflow of patients
 - Only reimbursement of the amount that would have been spent in NL

Justifications for prior authorization for intramural care

- Public health:
 - Maintain a balanced hospital and medical service open to all
 - Maintain treatment capacity or medical competence on national territory
 - Control expenditure for and the planning of health services
 - Maintain the financial balance of the social security system

Provided it is suitable, necessary and proportionate!

Succeeding case law

- No extra requirements for granting authorisation for health care in another MS (*Leichtle*)
- Also costs of health care in a third country must be reimbursed if, according to the consulted medical expert, the only suitable and available treatment is provided in that country (*Keller*)

Directive 2011/24/EU: patients mobility

- Application of patients' rights in cross-border health care
- Proposal: July 2008, after consultation of MS and interested parties
- Ordinary procedure
- Heavily debated and amended numerous times
- Adopted on 9 March 2011
- Transposition date: 25 October 2013

Scope

- “This Directive shall apply to the provision of healthcare to patients, regardless of how it is organized, delivered and financed”
- Not:
 - Long-term care to assist people in daily tasks (e.g. *Thuiszorg*)
 - Allocation of and access to organs for the purpose of organ transplants
 - Public vaccination programmes against infectious diseases

Justified restrictions

- Restrictions aimed at ensuring sufficient and permanent access to healthcare within the territory of the MS, can be justified on grounds of overriding general interest, such as planning requirements relating to
 - the aim of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the MS concerned
 - the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources,
- Suitable, necessary and proportionate
- Non-discrimination principle applies to
 - Access to health care providers (professionals, institutions, etc.)
 - Tariffs and fees

Reimbursement

- Costs of cross-border health care shall be reimbursed
- Conditions:
 - Treatment is covered by the insurance policy
 - Maximum is the amount that would have been spent on domestic treatment or the actual costs (whichever is lowest)
- Restrictions to reimbursement only when justified on grounds relating to the protection of public health or other overriding reasons of general interest

Prior authorization

- Not allowed, unless it is healthcare which
 1. is made subject to planning requirements relating to the object of ensuring sufficient and permanent access to a balanced range of high-quality treatment in the MS concerned or to the wish to control costs and avoid, as far as possible, any waste of financial, technical and human resources and
 - involves overnight hospital accommodation of the patient in question for at least one night; or
 - requires use of highly specialized and cost-intensive medical infrastructure or medical equipment
 2. involves treatments presenting a particular risk for the patient or the population
 3. could give rise to rise serious and specific concerns about quality and safety

Refusal of prior authorization

- Limited grounds, such as
 - treatment is available in the MS within a medically justifiable period, taking into account the current state of health and the probable course of the illness of each patient concerned
 - the patient will, according to a clinical evaluation, be exposed with reasonable certainty to a patient-safety risk

Summary

1. Access to health care services in another MS
 - ✓ Restrictions only justified on grounds of overriding reasons of general interest
 - ✓ Suitable, necessary and proportionate
 - ✓ Non-discriminatory
2. Reimbursement of costs of those services
 - ✓ Either costs of national treatment or actual costs
 - ✓ No prior authorisation unless [3 situations]
 - ✓ Prior authorisation can only be refused for [4 reasons]