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Rights of Dental Patients in the EU - A Legal Assessment

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ABSTRACT

This contribution presents the legal framework for intra-European mobility of dental patients. After presenting the EU competences in respect of healthcare and a brief look into the various routes of patient mobility, the article sets out the rules for access to dental care, treatment abroad and reimbursement through social security. In addition, we focus on the impact of European Union (EU) law upon national systems in respect of professional insurance, complaints procedures and information mechanisms. In conclusion, we reflect on the development in EU law of an independent set of rights to cross-border dental care and its consequences for financing and reimbursement of care, as well as for national practices in respect of professional liability and insurance.

***KEYWORDS*:** Dental patients; dental tourism; EU law; social security.

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1. INTRODUCTION TO DENTAL TOURISM IN THE EU

Dental tourism - a novel phenomenon, little investigated and under conceptualized - is mostly held to refer to the deliberate linkage of tourism abroad with non-urgent dental care, often cosmetic dental surgery.[1] European integration has, however, also led to other categories of patients who might seek dental care abroad who do not necessarily fall under the above definition of dental tourists. Nationals of one EU Member State residing and insured in another one, might find it cheaper, safer or more comforting to return to their home state for (general) dental care. Another situation governed by European Union (EU) law is dental care that becomes necessary when the insured person happens to be in a Member State other than the one of affiliation.

The practice of travelling abroad for medical care is the by-product of the increasing liberalization and commodification[2] of healthcare coupled with globalization, or regionalization. Whereas travelling abroad for medical care or wellbeing is by no means novel, patients exhibit a form of 'reverse globalization': people often travel from developed to less developed countries due to costs and waiting lists. Concerns about the quality and safety of care arise in such contexts.[1,3,4] In the EU, the financing of medical care abroad is the highest concern voiced to date.

This article presents the legal framework under which patients receive dental care in a EU Member State other than the one where they are insured. We will not limit ourselves to dental tourists in the strict sense of the word. We extend our legal analysis to EU migrants returning home for dental care, and those who, do not plan to, but are in need of dental care while in another Member State. The paper is structured in four chapters. Chapter two introduces the legal framework for patients' mobility in the EU. Chapter three discusses the rules pertaining to patients' rights, including access to dental care, fees and reimbursement under national social security schemes. Chapter four exposes the effects of EU law upon national administrations in respect of professional insurance and liability, and complaints procedures. Chapter five concludes the paper.

2. EUROPE: SHORT HISTORY OF CROSS-BORDER MEDICAL CARE

The EU can only undertake supporting, coordinating and complementary action in order to protect and improve human health (Article 6 Treaty on the Functioning of the EU, hereinafter TFEU).[5] As far as public health is concerned, the Union shall, 'encourage cooperation between the Member States […] and, if necessary, lend support to their action. It shall in particular encourage cooperation between the Member States to improve the complementary nature of their health services in cross-border areas' (Article 168(2) TFEU). The Member States remain responsible for 'management of health services and medical care and the allocation of the resources assigned to them' (Article 168(7) TFEU). Notwithstanding this, at first sight, limited room for EU action, Article 168(1) TFEU forcefully calls for 'a high level of human health protection' in the 'definition and implementation of *all* Union policies and activities' (emphasis added).

EU law has regulated cross-border medical care since 1958 through the mechanism of

social security coordination. This system, currently contained in Regulation 883/2004, covers almost all EU citizens: all nationals of the 27 Member States, who are or have been subject, whether compulsory or on an optional basis, to a general or special social security scheme even if only in respect of one single risk.[6] Member States remain free to define the basket of healthcare to which citizens are entitled and the mechanisms used to finance and deliver that healthcare. In principle, medical care remains territory-bounded, i.e. should be provided in the state of insurance. The Regulation envisages two situations of cross-border care and reimbursement: when medical care becomes necessary during a stay in another Member State, and when the patient travels to another Member State in order to receive treatment there. The latter situation required prior authorisation from the institutions of the state of insurance.

Since the end of the 90s, a line of cases on the basis of the fundamental freedom of movement of services (Article 56 TFEU) has provided a route of patient mobility parallel to that set up by Regulation 883/2004. The consequence of qualifying medical care as a service for the purpose of the Treaty was that patients have the right 'to use services from other Member States without being hindered by restrictive measures imposed by their country or by discriminatory behaviour on the part of public authorities or private operators'.[7] The European Court of Justice (ECJ) has established that healthcare is a service, irrespective of: the form of organization, operation and financing of the health system;[8] the fact that remuneration is not necessarily paid by the one receiving the service;[9] whether it is intra- or extra-mural;[10] the fact that reimbursement of the costs are sought after through social security.[11] In the case of healthcare services in general, restrictions often concern the circumstances in which a Member State may make (on the basis of Regulation 883/2004) reimbursement of the costs subject to prior authorisation. The 'special nature' of medical services does, however, not remove medical services from the field of application of the Treaty.[12] Hence, restrictions on dental patients' freedom of services in a Member State other than the one of insurance cannot be maintained, unless they are justified and proportionate.

In 2011 the ECJ-case law on freedom of movement for patients was codified in Directive 2011/24 (Cross-Border Patients' Rights Directive), which adds new elements in respect of information mechanisms and transparency. Following the case law, the Cross-Border Patients' Rights Directive applies irrespective of the form of organization, delivery and financing method of the national health systems.[13] It is addressed to the Member States who have to transpose it into national law by October 2013. After that date (deviant, c.q. [too] restrictive) national regulation can still be challenged by the EU Commission or by individual patients seeking to enforce their European right to cross-border healthcare.

3. CROSS-BORDER DENTAL CARE

3.1. Dental care becomes necessary during stay abroad

The first situation we will deal with is when a person, insured under the social security scheme of one EU Member State needs[14] dental care during a stay, e.g. as a tourist, in another Member State.[15] As the Patients' Rights Directive is without prejudice to Regulation 883/2004, we are

confronted with the situation that the legislation of the state of stay is applicable in respect of the treatment, while for the purpose of reimbursement the applicable legislation is that of the state of affiliation. Temporary EU residents and visitors receive the same treatment at the same costs as a person insured under the legislation of the state of stay. Therefore, one can receive treatment to which one may not be entitled to according to the legislation of the state of affiliation. Upon return the patient may ask for reimbursement of the costs. If the treatment received abroad does not fall under the benefits to which the patient was entitled to in his/her state of affiliation, the cost of care will not be reimbursed.[16] Otherwise, the costs will be reimbursed according to the rules set out in sub-section 3.3.

3.2. EU migrants and dental tourists

In the second scenario, a person insured under the social security legislation of one Member State travels to another one to receive dental care. We imagine EU migrants travelling to their home state or persons who are genuine dental tourists as defined in the introduction.

3.2.1. Prior authorization required

The first question we need to address from a legal point of view is whether the treatment sought can be subjected to the requirement of prior authorization. In light of the limited situations where prior authorization is permitted, we argue that dental patients are most likely not subject to such a requirement. However, the assessment might be different for hospital dental treatment. A system of prior authorization is allowed only if a) the healthcare is subjected to planning requirements and involving overnight hospital accommodation or cost-intensive equipment; b) the treatment involves health risks for the patient and the population; or c) the healthcare provider gives reason for serious concern in respect of the quality and safety of the care. Authorisation for cross-border care can, on similar grounds, be refused. In addition, if dental care is subject to prior authorization, this may be rejected on grounds of the possibility of receiving the care in the state of affiliation within a medically justified period of time.[17]

Assuming the dental care sought does require prior authorization, and that the conditions for prior authorization are satisfied, this is awarded on the basis of Regulation 883/2004, unless the patient requests otherwise.[18] When authorization is granted on the basis of Regulation 883/2004,[19] the State of stay is to provide the dental care as if the patient was insured under its own legislation. By means of institutional arrangements between the Member States, there is full reimbursement for the cost of treatment.[20]

The far-reaching implications of the prior authorization are fully revealed by the *Keller*[21] case in which a German national resident in Spain and insured therein received authorization to be treated of a malignant tumour in Germany. Following the medical examinations in Germany, the doctors responsible for the case decided that it was vital that Ms. Keller undergoes an immediate surgical operation, which could only be performed in a private clinic in Switzerland. She was transferred to Switzerland where she was operated and then underwent radiotherapy. The institution of the state of stay must treat the authorized person as if she would be

insured under its legislation, therefore, without requiring the approval of the institution of the state of affiliation, the institution of the state of stay is obliged to provide the treatment corresponding to the medical condition. Once the doctors in the state of stay have decided for the patient to be transferred to a third country, the costs of the treatment incurred there must be borne by the institution of the state of stay, under the legislation it administers and under the same conditions as for persons insured under that legislation. However, if the treatment provided in the third state is among the benefits of the state of affiliation, then the institution of the state of affiliation will assume the costs by reimbursing the institution of the state of stay.

3.2.2. No prior authorization required

In most cases patients seeking dental care abroad will not require prior authorization. Under these circumstances, treatment shall be provided in accordance with the legislation of the state of treatment, its standards and guidelines on quality and safety, while, however, having to comply with Union legislation in respect of safety standards.[22] The state of treatment is under the obligation to treat all patients equitably on the basis of their healthcare needs rather than on the basis of their Member State of affiliation.[23] Patients from other Member States can, therefore, not be discriminated on grounds of nationality, including in respect of scales of fees. If care providers under national law set their own prices, these prices must thus apply irrespective of the nationality of the care receivers.[24]

3.3. Reimbursement of costs of dental care abroad

When prior authorization is not/cannot be granted under Regulation 883/2004, the reimbursement of dental costs follows the rules below. If the dental care received abroad does not fall under the benefits to which the insured person is entitled to in the state of affiliation, the costs are born on a private basis. EU law will then not provide a legal basis for claims of reimbursement.

The general principle is that dental care received in another Member State must be reimbursed only if the patient would have been entitled to it in the state of affiliation. The EU-prescribed level of reimbursement is limited to the one that would have been assumed had the treatment been received in the state of affiliation. Member States may, however, unilaterally decide to provide for the more favourable reimbursement of the full costs even if that would exceed the costs in the state of affiliation. Also, they are free to reimburse other costs, such as travel or accommodation, in accordance with national legislation, which should in any case not discriminate between national and non-national EU healthcare providers.

4. INFORMATION, COMPLAINTS PROCEDURES, LIABILITY AND PROFESSIONAL INSURANCE

The state of treatment bears responsibilities in respect of information, ensuring the existence of complaints procedures, systems of professional liability insurance, protection of personal data, and the provision of medical records.[25] The duty of information includes information about: national standards and guidelines of quality and safety; relevant information that enables patients to make informed choices, such as treatment options, availability, quality and safety of healthcare; invoices

and information on prices; and authorisation or registration status, insurance cover or other means of personal or collective protection with regard to professional liability.

Member States must set up national contact points for cross-border health care, to consult with patients' organizations, healthcare providers and insurance alike. In addition to the information mentioned above, contact points should be able to provide information regarding healthcare providers, including information regarding providers' restrictions on their practice, as well as information on patients' rights, complaints procedures and mechanisms for seeking remedies, according to the legislation of that Member State. In addition they must make available information regarding the legal and administrative options available to settle disputes, including in the event of harm arising from cross-border healthcare. Moreover, all this information should be easily accessible, including to people with disabilities, and available in electronic form.[26] The use of language in communications with the patient is not affected, but Member States may use languages other than their official one(s).

The state of affiliation is under the obligation to provide patients with information regarding cross-border healthcare, to offer medical follow-up, if necessary, and finally to ensure that patients have access to their medical records.[27]

Whereas some Member States might already have in place such mechanisms, it is expected that the obligations imposed by the Directive will lead to significant transformations of the national health systems.[28] The benefits of these changes will inevitably spill over to national patients, and to those who purchase dental care through private insurance.

5. CONCLUSIONS

Within the European Union, dental patients can always travel to other Member States to have care provided to them. Whether that care will be reimbursed is dependent on the type and/or urgency of dental care looked for/provided elsewhere in the EU. Presently most non-urgent dental care is not commonly covered by national statutory insurance, therefore EU citizens will often not be able to avail themselves successfully of the reimbursement rights conferred by EU law. In that respect they will only differ from EU citizens looking for dental care outside the Union in as far as they must receive equal treatment with those insured in the state of treatment.

By the end of 2013 EU Member States should have introduced all changes in respect of national contact points, complaints procedures, systems of professional liability insurance, protection of data and continuity of care. Otherwise we can expect a new series of cases in front of the Court of Justice of the EU seeking to redress the problems of national implementation and give full effect to the right to cross-border healthcare.

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