Fundamental Freedoms Strengthen the Rights of Patients (again)

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Case C-255/09 Commission v Portugal[1]

The Portuguese Republic has failed to fulfil its obligations under Article 49 EC (Article 56 TFEU) by making no provision for reimbursement of non-hospital medical care provided in another Member State which does not involve the use of major and costly equipment exhaustively listed in the national legislation, other than in the circumstances specified in Regulation (EEC) No 1408/71 [...] or, to the extent that Decree-Law No 177/92 allows reimbursement in respect of such care, by making such reimbursement subject to prior authorization (official headnote).

I. Facts

Once again,[2] the Court had to decide whether and under what kind of circumstances national health insurance must replace costs caused by medical care in another Member State. In the present case the European Commission claimed against Portugal (Article 258 TFEU) due to its rules governing the reimbursement of such costs.

In fact, there are only two relevant regulations in Portuguese law covering that case:

One is the (national) Decree-Law No 177/92. This law governs the issue of *highly specialised* medical care abroad which can't be provided in Portugal on account of a lack of technical resources or personnel. According to that, the reimbursement of medical costs assumes a *threefold* prior authorization (Article 2 of the Decree-Law).

The other is the Regulation (EEC) No 1408/71 which – of course – applies for the entire EU. This regulation generally deals with the question of social benefits for EU citizens working in another Member State. Article 22(1) of the regulation provides that employed/self-employed persons are entitled to social benefits if (1.) they meet the conditions of the legislation of the competent state and (2.) are authorised by the competent institution – or the respective care is medically necessary.

There were no more possibilities for Portuguese citizens to get a reimbursement of medical costs incurred abroad. The question to be answered was if this kind of regulation respectively non-regulation violates Article 49 EC.

II. Judgment

The Court (Third Chamber) ruled that the Portuguese Republic has failed to fulfil its obligations under Article 49 EC: Portugal does not make any provision, other than in the circumstances specified in Regulation No 1408/71, for reimbursement in the case of non-hospital medical care provided in another Member State which is not covered by Decree-Law No 177/92.[3] The lack of a general regulation for cost reimbursement (in case of non-hospital medical care) as well as the strict requirements of the Decree-Law No 177/09 including its condition of threefold prior authorization cannot be justified with the *general* argument of maintaining the financial balance of the social security system.

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1 Case C-255/09, *European Commission v. Portuguese Republic*, [2009] (n.y.r.).

2 For previous cases see e.g. C-158/96, *Raymond Kohll v Union des caisses de maladie* [1998], ECR I-01931 (hereafter "Kohll"); C-385/99, *VG Müller-Fauré v Onderlinge Waarborgmaatschapij OZ Zorgverzekeringen UA* [2003], ECRI I-4509 (hereafter "Müller-Fauré"); C-490/09, *Commission v Luxemburg* [2011] (n.y.r.); C-512/08, *Commission v France* [2010] (n.y.r.).

3 Case C-255/09, *supra* note 1, at para 93.

III. Comment

To understand the judgement, it's necessary to know the court's previous decisions concerning this issue. In several rulings the Court has already decided that medical services supplied for consideration fall within the scope of the provisions on the freedom to provide services (Article 56 TFEU).[4] Contrary to the argumentation of some Member States (including Portugal), the Court decided that Article 152(5) EC (Article 168 TFEU) does not exclude the applicability of the basic freedoms. In short, the Court argues that Article 152 EC just governs the issue of medical standards and services in a Member State, but not the problem of cross-border healthcare.[5]

Due to this general decision the main question is, to what extent national health insurances are able to protect themselves from financial risks (caused by medical care abroad) at the expense of their costumers and the freedom to provide services (particularly with regard to the need of a prior authorization). In previous judgments the court answered this question by making a differentiation, based on an assessment of the costs:

1. The requirement of a prior authorization is basically justified if the medical care shall take place in a hospital.[6]
2. The requirement of a prior authorization is basically *not* justified if the medical care shall take place outside a hospital (e.g. in a doctor's office),[7] *unless* it involves the use of major and costly equipment.[8]

Therefore, one issue of the case was already clarified: The lack of a *general* regulation for reimbursement providing "standard" non-hospital medical care (so called: "*non-hospital care other than `major´ not covered by decree-Law No 177/09*"[9]) is definitely contrary to Article 49 EC.[10] Portugal has not even attempted to justify that non-regulation. Unfortunately, the Court does not discuss the view of the Kingdom of Spain (supporter of Portugal), which argued that Article 49 EC does not impose any obligation on the Member States to adopt *positive* implementation measures – after all the European directive should be the legal instrument for imposing such positive implantation measures (Article 52 EC, now Article 59 TFEU).[11] This argument cannot be accepted: Actually, a non-regulation can have the effect of a regulation if the issue is partially regulated (as it is in Portugal). The non-regulation of reimbursement has the same effect like a regulated refusal of reimbursement. Consequently, a non-regulation can be contrary to Article 49 EC, so a positive measure might be inevitable to fulfil the obligations of Article 49 EC.

Finally, one problem remains: Is it possible to justify the need of a prior authorization in case of non-hospital *highly specialised* medical care abroad which does not involve the use of major and costly equipment (so called: "*non-hospital care other than `major´ covered by decree-Law No 177/09*"[12])?

As previously stated, the need of a prior authorization is regarded as a restriction on the freedom to provide services (Article 49 EC). That's nothing new. However, the argumentation of the Advocate General Trstenjak in this regard should be mentioned. Trstenjak was of the opinion that there is not only a restriction but even discrimination, because a prior authorization is only needed when the medical care takes place abroad, whereas the same medical care in Portugal does not have to be authorised.[13] This, of course, would have the effect of stricter requirements on the justification of the prior authorization. Usually discrimination cannot be justified by an overriding reason of general interest, like the financial balance of the social security system. Once again, however, the Court just ignored an important argument. Maybe the Third Chamber didn't want to make a general decision when it's not indispensable.

In addition, Regulation (EEC) No 1408/71 doesn't change anything.[14] First of all the regulation – as part of the secondary EU law – had to be consistent with the Treaty. Furthermore Regulation (EEC) No 1408/71 only provides that employed/self-employed persons are entitled to benefits if they meet the con-

4 *Ibid.*, see para 46.

5 Case C-255/09, *supra* note 1, at para 49–51, referring to case C-490/09 *Commission v Luxemburg*.

6 Case C-385/99, Müller-Fauré, *supra* note 2.

7 Case C-385/99, Müller-Fauré, *supra* note 2.

8 This exception has been made in Case C-512/08, *supra* note 2.

9 Case C-255/09, *supra* note 1, at para 90 (headline).

10 Case C-255/09, *supra* note 1, at para 90 to 92.

11 Case C-255/09, *supra* note 1, at para 40.

12 Case C-255/09, *supra* note 1, at para 60 (headline).

13 Opinion of Advocate General Trstenjak in Case C-255/09, *supra* note 1, at para 94.

14 Case C-255/09, *supra* note 1, at para 70; already decided in Case C-158/96, Kohll, *supra* note 2, at paras 25 to 27.

ditions of the legislation of the State *in which the services are provided*. In reverse Regulation (EEC) No 1408/71 does not govern the reimbursement of costs by the *Member state of affiliation* caused by medical care in another Member State.[15] As a result, it cannot be gathered the legitimacy of prior authorization in Decree-Law No 177/92 from the legitimacy of prior authorization in the Regulation (EEC) No 1408/71.[16]

Principally, the Court focused the problem of a justification by overriding reason of general interest. There were three of them to be discussed: "The financial balance of the (national) social security system", "[the control of the] quality of healthcare services provided abroad" and the "essential features of the SNS (Serviço Nacional de Saúde – Portugal's national health system)":

In Case C-158/96 ("Kohll") the Court has already decided that the requirement of prior authorization cannot be justified on grounds connected to the *quality of healthcare* services provided abroad, as there were several coordinating or harmonising directives which ensure high standards in European healthcare.[17] Furthermore, Decree-Law No 177/92 does not even include a regulation for ensuring the quality of service.

In Case C-385/99 ("Müller-Faurè") the Court has already decided that *essential features* of a national health service cannot justify the general requirement of a prior authorization, because there are other possibilities for Member States to safe the essential features of their national health system.[18]

So actually, the only new issue the Court had to decide was the question if the requirement of a prior authorization in case of *non-hospital highly specialised* medical care abroad can be justified by the *financial balance* of the social security system. In short: Is this a case of the exception the Court made in Case C-512/08 (Commission v France: non-hospital medical care involving the use of major and costly equipment)? The Court denies and argues in a very practical way:

First of all the Court declares that Portugal failed to proof its contention that a regulation without prior authorization will seriously undermine the financial balance of the SNS. This is quite remarkable, as the question is posed what a Member State is obliged to do to meet the requirements. Unfortunately, the Court keeps us guessing and (maybe) creates more action.

However, the Court works with a presumption. It argues that "care is generally provided near to the place where the patient resides, in a cultural environment which is familiar to him and which allows him to build up a relationship of trust with the doctor treating him."[19] This (single) argument of the court might be true for big countries like Spain or France, but it's doubtful whether it works in cases of small countries where more people (proportional to the entire population) can easily visit the neighbouring state to seek medical care.

Altogether, the judgment of the ECJ is not surprising. Most of the respective problems have already been solved. The ECJ only confirms and specifies its previous decisions. In short, the Court corrected its correction made in Case C-512/08 (Commission v France). The conclusion of the judgment is correct and the Court's ambition to get more legal certainty must be appreciated. And, of course, the Court may use arguments of previous actions even if it's not the same kind of action,[20] as the value of arguments is independent of the action's nature. However, the way of argumentation respectively *non*-argumentation poses some problems and the Court runs the risk of losing the legal certainty by arguing in that way.

15 Case C-158/96, Kohll, *supra* note 2, at para 25 to 27.

16 Case C-158/96, Kohll, *supra* note 2, at para 25 to 27.

17 Case C-255/09, *supra* note 1, at para, 80 to 83, referring to Case C-158/96, Kohll, *supra* note 2 at para 45 to 50.

18 Case C-255/09, *supra* note 1, at para 84 to 89, referring to case C-385/99, Müller-Fauré, *supra* note 2, at paras 105 to 107.

19 Case C-255/09, *supra* note 1, at para 77, referring to case C-385/99, Müller-Fauré, *supra* note 2, at para 96.

20 Different view by Republic of Portugal in case C-255/09, *supra* note 1, at para 36.