

The European Patient, between the Values of the European Union, the Public Health Policies of the Member States and the Free Movement of Services

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Abstract

The European citizen who leaves his state of residence to receive medical treatment in another Member State of the Union, is a beneficiary of the free movement of services. Therefore, European citizens should be treated in the host states identically/similarly to the nationals of these states, and the restrictions on mobility, including by the home state, should be analysed from the perspective of the legitimate purpose, necessity and proportionality. But the serious problem of financial resources bars this ideal. For this main reason, European Union law has provided for a system of prior authorisation in the case of patients who want to be treated in other Member States, authorisation on the obtaining of which the reimbursement of the expenses incurred by the patients is conditional. The Court of Justice made this system more flexible for the benefit of patients, but the full reimbursement of medical expenses was recognized only in the case of treatments which have the advantage of not generating a disability. In a Union whose values are human dignity, respect for human rights, social solidarity, the financial impossibility of European citizens with serious diseases of benefiting from effective medical treatments in another Member State, demonstrates the inconsistency of European law with its values.

Keywords: public health, cross-border medical assistance, authorisation, reimbursement of expenses, free movement of services.

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1. Introduction

At the level of the positive (declarative) law of the European Union, health systems represent a central component of the high levels of social protection and sustainable development. Descending to the level of the legislative prerogative, Member States remain responsible for the provision of healthcare to their nationals. The European Union has no legislative competence in the matter of public health, with certain exceptions, and it is limited to supplementing national policies and encouraging cooperation between Member States (*section 1*).

At the level of secondary law, the issue of reimbursement of medical expenses incurred in another Member State was initially addressed in the context of the coordination of national social security legislation, as an indispensable element for the free movement of workers. Subsequently, EU law on social benefits no longer referred to the European worker, but to nationals of the Member States who may not have the status of worker. The secondary law provided for a system of prior authorisation in the case of patients who want to be treated in other Member States, authorisation on the obtaining of which the reimbursement of the expenses incurred by the patients is conditional (*section 2*).

The case law of the Court of Justice of the European Union has constantly intervened in this equation. Some of the principles thus established have been adopted at the level of secondary law. The European citizen who leaves his state of residence to receive medical treatment in another Member State of the European Union, is the beneficiary of a service, which determines the application of the provisions of the treaty on the *free movement of services* regarding himself. Therefore, European citizens should be treated in the host states identically/similarly to the nationals of these states, and the restrictions on mobility, including by the home state, should be analysed from the perspective of the legitimate purpose, necessity and proportionality².

This ideal is barred by the serious problem of financial resources, stressed by the fact that the

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² See Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, Ed. C.H. Beck, Bucharest, 2016, p. 808-825; Cătălin-Silviu Săraru, *European Administrative Space - recent challenges and evolution prospects*, ADJURIS – International Academic Publisher, Bucharest, 2017, p. 110-129.

flows of patients are from less economically developed countries towards those which are effective at all levels, including the medical one. For this main reason, EU law has provided for a system of prior authorisation in the case of patients who wish to be treated in other Member States. The Court of Justice has made this system more flexible for the benefit of patients, but the full reimbursement of medical expenses has been recognized in few cases (*section 3*).

In our opinion, in the absence of full reimbursement, the free movement of services is illusory and formal in the case of patients, and their right to life and health becomes secondary in relation to the economic criterion. In a Union whose values are human dignity, respect for human rights, social solidarity, the financial impossibility of the European citizens with serious diseases of benefiting from effective medical treatments in another Member State, demonstrates the inconsistency of European law with the stated values. Essentially, the purpose of the authorisation system is an economic one, more precisely to avoid burdening the Member States' social security budgets with expenses. However, the Court of Justice has constantly reminded us, for decades, that the health and life of the person takes first place among the values and interests protected by the treaty³. Does it remain just a lonely knight (*section 4*)?

2. Human health from the perspective of European treaties

The constitutive treaties of the European Communities addressed the protection of human health only from the perspective of the free movement of community workers and the exercise of professional freedoms. The Treaty on European Union signed in Maastricht and entered into force on 1 November 1993 marked the change of vision of the Member States regarding public health. The European Community was given the objective of contributing to a high level of human health protection, by encouraging cooperation between the Member States and by supporting their action⁴. Health protection became a component of other Community policies as well. The Treaty of Amsterdam, in force since 1 May 1999, confirmed the fact that the European Union's role in the matter was a subsidiary one and even consolidated this *subsidiarity*. "Community action in the field of public health shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care"⁵.

The Treaty on the Functioning of the European Union signed in Lisbon, in force since 1 December 2009, brought limited changes in this area. The Union has no *legislative* competence in the field of public health, except for measures establishing high standards of quality and safety of organs and substances of human origin, blood and its derivatives; measures in the veterinary and phytosanitary fields, directly aiming at the protection of public health and measures that establish high quality and safety standards for medicinal products and medical devices⁶. A second derogation concerns the possibility of the adoption by the Parliament and the Council of the European Union, in accordance with the ordinary legislative procedure, of some encouraging measures for the purpose of protecting and improving human health, in particular for the purpose of combating cross-border epidemics, measures regarding the supervision of serious cross-border threats to health, the alert in the case of such threats and their combat, as well as measures whose direct objective is to protect public health with regard to tobacco and excessive alcohol consumption, excluding any harmonisation of the laws and administrative rules of the Member States. Otherwise, *the European Union's action only complements national policies and encourages cooperation between Member States*.

The same principle of the subsidiarity of the Union's action was enshrined by the Charter of Fundamental Rights of the EU. Pursuant to art. 35 of the Charter, "everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities".

³ See note 5.

⁴ Art. 129 of the Maastricht Treaty.

⁵ Art. 26 point 5 of the Treaty of Amsterdam.

⁶ See art. 168 of TFEU.

In the clear equation of the treaties, the case law of the Court of Justice of the European Union has constantly intervened. Even though “the harmonization of national laws is excluded as a matter of principle, and the treaty strengthens the competence of states in terms of defining their health policies and medical services”, “The Court has constantly reminded, for decades, that the health and life of the person take the first place among the values and interests protected by the treaty”⁷. However, before analysing the conclusive case law of the Court, we will deal with the relevant secondary law.

3. Secondary law

A first source of secondary law was *Regulation (EEC) no. 1408/71 on the application of social security schemes to employed persons and their families moving within the Community*⁸. According to its preamble, the coordination of national social security legislations is part of the free movement of workers. The Regulation applied to both employed and self-employed workers, student nationals of the Member States, their family members and their survivors. In order to determine the applicable national legislation, the following basic rules were established: “a worker employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State; a person who is self-employed in the territory of one Member State shall be subjected to the legislation of that State even if he resides in the territory of another Member State”⁹.

The Regulation provided for the *need to move* of the worker, student or their family members *to another Member State for treatment appropriate to their condition*. Pursuant to art. 22 par. 1 letter c of the Regulation, such a person was entitled “(i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence in accordance with the provisions of the legislation which it administers, as though he were insured with it (...); (ii) to cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers (...)”. *The right was conditional on the existence of an authorisation to move on the territory of another Member State, in order to benefit from treatment appropriate to his disease*. Pursuant to art. 22 par. 2 of the regulation, the issuance of the authorisation “may not be refused where the treatment in question is among the benefits provided for by the legislation of the Member State on whose territory the person concerned resided and where he cannot be given such treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of the disease”.

Regulation no. 1408/71 was repealed by *Regulation (EC) no. 883/2004 on the coordination of social security systems*¹⁰, after it had been amended several times. The authorisation principle was also taken over by Regulation (EC) no. 883/2004. Unlike the previous regulation which mainly applied to European workers, the new regulation applies to *nationals of the Member States*, stateless persons and refugees who reside in a Member State and who are or have been subject to the legislation of one or more Member States, as well as family members and their descendants¹¹. The rules for coordinating national social security systems are part of the free movement of people (and not just the free movement of workers) and must contribute to improving their living standards and employment conditions. *EU law on social benefits no longer concerns only the European worker, but the nationals of the Member States who may not have the status of worker*.

Pursuant to art. 20 of the regulation, an insured person who travels to another Member State to receive benefits in kind in case of disease, must request authorisation from the competent institution. The insured person who is authorized by the competent institution to move to another

⁷ Claude Blumann, Louis Dubois, *Droit matériel de l'Union Européenne*, 8^e edition, LGDJ, 2019, p. 234.

⁸ The text of the Regulation is available at <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:01971R1408-20080707&from=PL> (last accessed 20. 10. 2022).

⁹ Art. 13 of the Regulation.

¹⁰ The Regulation is available at <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:02004R0883-20130108&from=EN> (last accessed 20. 10. 2022).

¹¹ See art. 2 of the Regulation.

Member State in order to receive treatment adapted to his condition receives benefits in kind granted, on behalf of the competent authority, by the institution in the place of residence, in accordance with the provisions of the legislation to which it applies, as if he had been insured under the above mentioned legislation. The authorisation is granted if the respective treatment is among the benefits provided for by the legislation of the Member State in whose territory the person in question is resident and if such treatment cannot be granted to him within a period justified from a medical point of view, taking into account his current state of health and the probable course of his disease.

The legislative institutions of the European Union have correlated the existing legal basis under art. 168 TFEU, with art. 114 of the TFEU on the internal market, thus making it possible to adopt *Directive 2011/24/EU on the application of patients' rights in cross-border healthcare*. The directive aims to facilitate access to safe and high-quality cross-border healthcare in the Union, patient mobility and the application of the principles established by the Court of Justice. This also applies to the prescribing, dispensing and supply of medicines and medical devices carried out within a health service. According to its preamble, health systems in the Union are a central component of the Union's high levels of social protection and a component of sustainable development. These are part of services of general interest, and all types of healthcare fall within the scope of the TFEU.

The Member States remain responsible for the provision of healthcare. The medical care thus provided must meet the requirements of safety, high quality and efficiency. The Member States of affiliation should grant patients the right to receive, in another Member State, at least the same benefits as those provided by the legislation of the Member State of affiliation. The costs of such care provided in another Member State should also be reimbursed by the Member State of affiliation up to the level of costs that would have been covered if the same medical care had been provided in the Member State of affiliation, without exceeding the actual costs of the medical care received. The fact that the obligation to reimburse cross-border healthcare is limited to the healthcare that is part of the benefits to which the patient is entitled in the Member State of affiliation does not prevent Member States from reimbursing the cost of cross-border healthcare beyond these limits and even including the costs of accommodation or transport.

The reimbursement of the expenses incurred by patients with medical care received in another Member State may be conditioned by the Member State of affiliation on the existence of a prior authorisation. The prior authorisation system, including the criteria and the application of these criteria, as well as individual decisions to refuse prior authorisation, are limited to what is necessary and proportionate to the objective to be attained and may not constitute a means of arbitrary discrimination or an unjustified obstacle in the way of the free movement of patients¹². At the same time, *both the general principles and the circumstances specific to each individual case must be taken into account. Authorisation must be granted de jure if the patient is entitled to medical care, and this cannot be provided in his territory within a time which is medically reasonable, based on an objective medical assessment of the patient's state of health, history and probable course of the patient's disease, the intensity of the patient's pain or the nature of the patient's disability at the time the application for authorisation was made or renewed*¹³. “(...) The answer must be given within a reasonable time, with objectivity and impartiality, which implies above all an assessment of the quality of the treatment available in the state of affiliation in relation to the criteria resulting from international medical science, and not just national one”¹⁴.

States may maintain general conditions, eligibility criteria and regulatory and administrative formalities regarding the reimbursement of the costs of healthcare provided in another Member State, on condition that they are applied in *an objective, transparent and non-discriminatory manner, are known in advance, are based primarily on medical circumstances and do not impose additional burdens on patients seeking healthcare in another Member State compared to patients treated in the Member State of their affiliation*¹⁵.

¹² Art. 8 of the Directive.

¹³ Art. 7 of the Directive.

¹⁴ Claude Blumann, Louis Dubois, *op. cit.*, p. 240.

¹⁵ Par. 37 of the Directive preamble.

4. Case law

As shown in the preamble of Directive 2011/24/EU, patient flows between Member States are limited, as the vast majority of patients receive healthcare in their own country. However, in certain cases, patients want to benefit from certain types of healthcare in another Member State, either because it is more efficient or the treatment methods that are offered are different from those existing in the Member State of affiliation¹⁶. If they can bear the cost of the medical care provided in another Member State, the situation is significantly simplified. The legal regime of the free movement of services gives them access to the same treatment as patients who are nationals of the host state. The situation becomes extremely complicated when patients do not have such resources. In the case of his authorisation, too, by the competent institution of the state of affiliation, the patient must initially bear the medical expenses, and the reimbursement is made at the level of the cost of treatment in the state of affiliation, which may be much lower. Where such authorisation was not granted, although in principle the state of affiliation could only be obliged to compensate the patient up to the level of the costs that would have been covered if the same medical care had been granted in the Member State of affiliation, according to secondary law, the analysis also leads to the evaluation of the case law of the Court of Justice.

The legal thinking which was the basis of this case law developed starting from the quality of the patient, a European citizen who leaves his state of residence, to receive medical treatment in another Member State, of being a beneficiary of a service, which entails the application of the provisions of the treaty regarding the *free movement of services* (56-62 of the Treaty on the functioning of the European Union). As early as 1984, the Court of Justice ruled that “the freedom to provide services includes the freedom, for the recipients of services to go to another Member State in order to receive a service there, without being obstructed by restrictions, even in relation to payments and that tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services”¹⁷. In the case of the fundamental freedoms of the internal market, the authorisation system is perceived as a restriction, being subject to the test of necessity and proportionality. *As a consequence, the reimbursement of medical expenses must be analysed both from the perspective of the rules that specifically govern it, and from the perspective of the free movement of services, and all these rules must be applied in the sense given to them by the preliminary decisions of the CJEU.*

The next stage in the Court's case law was the examination and *relativization of the principle of prior authorisation*. In the decision *Kohll v. Caisse de maladie des employés privés*, the European court decided that “Article 22(1) of Regulation No 1408/71 is intended to allow an insured person, authorised by the competent institution to go to another Member State to receive there treatment appropriate to his condition, to receive sickness benefits in kind, on account of the competent institution but in accordance with the provisions of the legislation of the State in which the services are provided, in particular where the need for the transfer arises because of the state of health of the person concerned, without that person incurring additional expenditure. On the other hand, Article 22 of Regulation No 1408/71, interpreted in the light of its purpose, is not intended to regulate and hence does not in any way prevent the reimbursement by Member States, at the tariffs in force in the competent State, of the cost of medical products purchased in another Member State, even without prior authorisation”¹⁸.

It should be emphasized that the exclusion of any reimbursement is illegal¹⁹, including in a

¹⁶ Par. 39 of the Directive preamble.

¹⁷ *Luisi and Carbone*, judgment of 31 January 1984, joined cases 286/82 and 26/83, point 16 (available at <http://ier.gov.ro/wp-content/uploads/rezumat-cjue/61982J0286.pdf>). See also *Grogan*, judgment of 4 October 1991, case C-159/90 (available at <http://ier.gov.ro/wp-content/uploads/rezumat-cjue/61990J0159.pdf>).

¹⁸ *Kohll v. Caisse de maladie des employés privés*, judgment of 28 April 1998, case C-158/96, points 28, 29 (available at <http://ier.gov.ro/wp-content/uploads/rezumat-cjue/61995J0120.pdf>).

¹⁹ “Article 49 EC precludes legislation of a Member State, such as that at issue in the main proceedings, which excludes all reimbursement by a national social security institution of the costs occasioned by treatment of persons insured with it in private hospitals

system based on prior authorisation, if such authorisation has not been obtained. Most commonly, the affiliated institution will reimburse the cost that would have been covered if the same medical care had been provided on its territory. One of the important decisions in the field is the one rendered in the *Elchinov* case²⁰. On this occasion, the Court decided that “Articles 49 EC and 22 of Regulation (EEC) No. 1408/71, as amended and updated by Council Regulation (EC) No. 118/97, as amended by Regulation (EC) No. 1992/2006, preclude a rule of a Member State which is interpreted as excluding, in all cases, payment for treatment given in another Member State without prior authorisation. Thus, although European Union law does not preclude, in principle, a system of prior authorisation, it is nevertheless necessary that the conditions attached to the grant of such authorisation must be justified in the light of the imperatives seeking to ensure that there is sufficient and permanent access to a balanced range of high-quality hospital treatment in the State concerned, to control costs and to prevent, as far as possible, any wastage of financial, technical and human resources. On the other hand, it is necessary that these conditions do not exceed what is objectively necessary for that purpose and that the same result cannot be achieved by less restrictive rules. Such a system must, in addition, be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities’ discretion, so that it is not used arbitrarily. A national rule excluding, in all cases, payment for hospital treatment given in another Member State without prior authorisation deprives the insured person who, for reasons relating to his state of health or to the need to receive urgent treatment in a hospital, was prevented from applying for such authorisation or was not able to wait for the answer of the competent institution, of reimbursement from that institution in respect of such treatment, even though all other conditions for such reimbursement to be made are met. Reimbursement in respect of such treatment is not likely to compromise achievement of the objectives of hospital planning, nor seriously to undermine the financial balance of the social security system. It does not affect the maintenance of a balanced hospital service accessible to all, or that of treatment capacity and medical competence on national territory. Consequently, such legislation is not justified by such imperatives and, in any event, does not satisfy the requirement of proportionality. Thus, it constitutes an unjustified restriction on the freedom to provide services (see points 43-47 and 51 and operative part 2)”.

The Court of Justice has identified two situations in which the insured person, even in the absence of an authorisation issued before the start of the scheduled treatments in the Member State of residence, has the right to obtain reimbursement of an amount equivalent to that which would have been taken into account normally by the affiliation institution if the insured person had had such authorisation. In the first case, the insured person has the right to obtain such reimbursement when, after facing *a refusal from the competent institution following an application for authorisation, the unfounded character of such refusal was subsequently established, either by the competent institution itself, or through a court decision*²¹. In the second case, the insured person has the right to obtain direct reimbursement by the competent institution of an amount equivalent to that which should normally have been borne by the latter in the event that this person had had such authorisation when, *for reasons related to his state of health or the need to receive emergency treatments in a hospital, he was prevented from requesting such an authorisation or could not wait for the decision of the competent institution regarding the request for authorisation*²².

The medical treatments received in a Member State other than the one in which the insured person resides, as a result of his simple wish, for the reason that, in his opinion, these treatments are *more effective* or treatments with the same degree of efficiency are not available in the Member State of residence within a reasonable period from a medical point of view, fall within the notion of “scheduled treatments”, and prior authorisation must be issued for them. Reimbursement will be made at the level of the costs provided by the legislation of the Member State of affiliation for the respective

in another Member State, except those relating to treatment provided to children under 14 years of age, ” (*Stamatelaki*, judgment of 19 April 2007, case C-444/05).

²⁰ *Elchinov*, judgment of 5 October 2010, case C-173/09, ECLI:EU:C:2010:581.

²¹ CJEU, Judgment of 12 July 2001, *Vanbraekel and Others*, C-368/98.

²² CJEU, Judgment of 23 September 2020, *Vas Megyei Kormányhivatal (Cross-border healthcare)*, C-777/18.

treatments.

The Romanian courts notified the Court of Justice of the European Union, with preliminary references, and the Court's decisions reiterated the Elchinov case law. By the Order of the Court of Justice of 11 July 2013, pronounced in case C-430/12, *Luca*, the reference for a preliminary ruling formulated by the Bacău Court of Appeal was answered in the following terms: "Where a refusal to reimburse, solely on the grounds of the lack of prior authorisation, hospital treatment provided in another Member State and paid for by the insured person is, taking account of the particular circumstances, unfounded, the said treatment must be reimbursed to the insured person in question by the competent institution up to the amount determined by the legislation of that Member State. If this amount is lower than that which would have resulted from the application of the legislation in force in the Member State of residence of the insured person in the event of hospitalization in the latter state, the competent institution must also grant an additional reimbursement corresponding to the difference between these two amounts, within the limit of the costs actually incurred".

By the Decision of the Court of Justice of 9 October 2014, pronounced in the *Petru*²³ case, the reference for a preliminary ruling was answered in the sense that the *authorisation cannot be refused when the hospital treatment in question cannot be granted in due time in the Member State of residence of the socially insured person due to the lack of medicines and medical supplies of first necessity*. This impossibility must be assessed at the level of all the hospitals in this Member State capable of providing the respective treatment and in relation to the time interval in which the latter can be obtained in due time.

According to a recent decision of the Court of Justice, *the insured person has the right to the full reimbursement of the costs of the treatment he received in a Member State other than the one of residence, although he did not obtain prior authorisation, on the grounds that the treatment received, unlike the one recommended in the state of residence, had the benefit of not generating a disability*²⁴. In March 2013, the claimant in the main proceedings had been diagnosed with tongue cancer and was prescribed surgical treatment consisting of the surgical removal of two-thirds of his tongue. He travelled to Vienna in April 2013; the diagnosis was confirmed, but another medical treatment was proposed, with the same effectiveness and which had the advantage of not causing a disability. The competent authorities in Romania informed him that if he chose to be treated in Austria without obtaining prior authorisation, the costs of the treatment granted to him there would not be reimbursed in full, in application of Regulation no. 883/2004, but according to Romanian tariffs, in application of article 8 of the annex to Order no. 729/2009. Despite all this, the applicant chose to be treated in Austria and subsequently requested the competent national court to reimburse the costs related to this treatment, without having presented a medical opinion establishing the fact that he could not be treated in Romania. On 14 November 2016, the said institution reimbursed the heirs of ZY, following his death, the total amount of 38,370.70 Romanian lei (RON) (approximately 8,240 euros), corresponding to the costs of the medical examinations and treatment that the interested person had received in Austria, calculated, in application of article 8 of the annex to Order no. 729/2009, depending on the tariffs applied within the Romanian public health insurance system.

ZY's heirs filed an action with the Tribunal of Constanța for reimbursement, in accordance with Regulation no. 883/2004, of the total costs related to the medical treatment granted to him in Austria. By judgment of 24 October 2018, this court rejected the action, finding that, in the absence of a request for prior authorisation, the costs of medical treatments granted to ZY in a Member State other than the one of residence could not be reimbursed under this regulation. The claimants filed an appeal before the Constanța Court of Appeal, a court that referred the case to the EU Court of Justice on a preliminary basis. On this occasion, the Court decided that "an insured person who has received, in a Member State other than that of his residence, treatment listed among the benefits provided for by the legislation of the Member State of residence, is entitled to full reimbursement of the costs of this treatment, under the conditions provided for in that regulation, where that person has not been

²³ *Petru*, judgment of 9 October 2014, case C-268/13.

²⁴ *TS and Others*, judgment of 6 October 2021, case C-538/19.

able to obtain authorisation from the competent institution, in accordance with Article 20(1) of that regulation, on the ground that, although the diagnosis and the need for urgent treatment had been confirmed by a doctor covered by the sickness insurance scheme of the Member State of his residence, that doctor had prescribed a treatment different from that which the person had chosen in accordance with a second medical opinion issued by a doctor from another Member State, which treatment, unlike the first, did not cause disability”.

The Court thus opened up the possibility of full reimbursement, even in the absence of prior authorisation. The full reimbursement is limited, however, to the treatments that are among the benefits provided by the legislation of the Member State of residence²⁵ and which do not generate a disability, in relation to the treatment recommended in the state of residence.

5. Plea for the concrete analysis of authorisation requests and full reimbursement

In a Union whose values are human dignity, respect for human rights, social solidarity, the financial impossibility of European citizens with serious illnesses of benefiting from effective medical treatments in another Member State, demonstrates the inconsistency of European law with the stated values. In essence, the purpose of the authorisation system is an economic one, more precisely to avoid burdening the Member States' social security budgets with expenses. However, these costs may not have such drastic consequences, as the number of patients seeking treatment in another Member State is small and often limited to serious and/or life-threatening illnesses. Reimbursement of expenses is in any case conditional on prior authorisation, and in this procedure, authorisation may be denied to patients with common illnesses or who require usual medical treatment that can be provided by the hospitals of the Member State of affiliation.

The situation becomes extremely complicated if patients do not have financial resources. Including in the case of authorisation by the competent institution of the state of affiliation, the patient must initially bear the medical expenses, and the reimbursement is made at the level of the cost of treatment in the state of affiliation, which may be much lower.

A first problem concerns *the way in which the system of prior authorisation is applied and the control carried out by the courts*. Reimbursement of medical expenses must be analysed both from the perspective of the rules that specifically regulate it, and from the perspective of the free movement of services, and all these rules must be applied in the sense given to them by the preliminary decisions of the CJEU. Frequently, the free movement of services is left out of the analysis although, paradoxically, it offers greater support to the European patient. Secondly, the preamble of the European normative acts that regulate the prior authorisation goes unnoticed, and the legal provisions are applied restrictively. In the administrative procedure for issuing the authorisation and in the judicial procedure for the control of administrative acts, *both the general principles and the circumstances specific to each individual case must be taken into account*. Authorisation must be granted as a matter of law if the patient is entitled to healthcare, and this cannot be granted in the territory of the state of affiliation within a time that is medically reasonable, based on an *objective medical assessment* of the state of health of the patient, *the history and likely course of the patient's disease, the intensity of the patient's pain or the nature of the patient's disability at the time the application for authorisation was made or renewed*²⁶.

European law itself places serious limits ... on the right to life. A condition for granting prior authorisation, also present in the Court's judgments, is that *a treatment is included among the benefits provided by the legislation of the Member State of residence*. However, the need for full reimbursement or even direct payment of medical treatment is all the more necessary in cases where the treatments are not provided for by the legislation of the Member State of residence. Therefore the patient needs even more to benefit from medical care in another Member State, as there is no adequate, effective treatment in his state of residence. Most likely, patients in such a situation suffer

²⁵ The condition is stated in the content of art. 20 of Regulation no.883/2004.

²⁶ Art. 7 of Directive 2011/24/EU on the application of patients' rights in cross-border healthcare.

from very serious or rare diseases. Secondly, the Court of Justice has imposed full reimbursement where the patient is practically forced to seek treatment in another Member State because the treatment available in his state of affiliation generates a disability. There are situations in which the existing treatment in another Member State is preferable not only because it does not generate a disability, but for the simple reason that it is more efficient. In this case, as we saw in the case law section, the reimbursement will be made at the level of the existing costs in the state of affiliation for the respective treatment, even in the absence of prior authorisation.

In our opinion, in the absence of full reimbursement, the free movement of services is illusory and formal in the case of patients, and their right to life and health becomes secondary in relation to the economic criterion. At least for the time being, we cannot ignore the hypocrisy of affirming some noble legal values, in the absence of precise regulations enabling their materialization.

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