

The European Health Insurance Card, between Benefits and Limitations

“Another Piece of Europe in Your Pocket”

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Abstract

The European Health Insurance Card was adopted after long and slow procedures, in order to consolidate the internal market. Nowadays, it has become an important piece of the European health policy and of the European identity. The European citizens can have medical benefits in another Member State that the State where they have a medical insurance, benefits that are necessary and in the absence of which, these citizens should end their stay and return to the State of insurance. The medical assistance can be necessary even because of pre-existing or chronic diseases, pregnancy and birth. The European Health Insurance Card cannot be used in case of planned medical assistance. The medical assistance thus received can be free of charge, partially free of charge or not, according to the legislation of each Member State. In contrast to its jurisprudence in the field of planned medical treatments, the European Court of Justice has decided that a partial reimbursement in this case is not contrary to free movement of services.

Keywords: European Health Insurance Card, planned medical treatments, unforeseen medical treatments, necessary medical assistance, free movement of services.

JEL Classification: K32, K33

1. Introduction

The medical care that can be provided in a member state of the European Union to nationals of other member states has a different legal regime in relation to the context in which it is provided. There are two categories of situations arising: medical care provided to patients who move from the state where they are medically insured to another member state in order to receive this care; medical care which became necessary to be offered to persons insured in other member states, during their stay in the host state. This article focuses on the latter case, materialized in the use of the European health insurance card.

The European health insurance card was adopted in order to strengthen the internal market, after slow and long procedures. At present, it has become a component of the health policy of the European Union, as well as of the European identity. The persons holding it can have medical benefits which prove to be necessary for medical reasons during their stay in a member state other than the one in which they are medically insured and in the absence of which the stay should be terminated (*section 1*). Unplanned medical treatments provided to the person insured under the European health insurance card are subject to the legislation of the member state in which they are provided (*section 2*). However, the EU legal regime applicable in the case of planned and unplanned treatments demonstrates, despite the progress made especially as a result of the CJEU case law, significant limitations in an area considered of fundamental importance for the European Union and the member states: human life and health (*section 3*).

2. Regulatory framework

In 1978, the ministers of health from the member states of the European Communities, reunited in the Council, expressed their intention to introduce a European health insurance card and set the task of the Commission to draw up proposals in this regard². But the procedure ceased. In 1986, the Council adopted an optional resolution, based on a recommendation from the Commission, showing that the protection of the health of European citizens and the exercise of their freedom of

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² For a history of procedures for the introduction of the European health insurance card, see Willem Maas, *Another Piece of Europe in Your Pocket* in Colin J. Bennett, David Lyon (eds.), *Playing the Identity Card. Surveillance. Security and Identification in Global Perspective*, Routledge, 2008, p. 290.

movement made it necessary to find means of intervention in case of medical emergencies or other health problems. Ten years later, the European Parliament asked the Commission to initiate the legislative procedure to adopt the European health insurance card for every European citizen. The basis of this request was the report of the Commission for the Environment, Public Health and Consumer Protection in the Parliament³. According to the report, the European health insurance card was intended to protect the rights and interests of European citizens, increase their mobility, avoid dangerous treatments and ensure a high level of protection for human health. The initiative of the Parliament was not continued, and one of the impediments was the protection of personal data in the context of the introduction of cards.

The decision to introduce the European health insurance card was politically made at the European Council in Barcelona in March 2002, and the Commission was tasked with presenting concrete proposals during the following year. The document adopted by the Commission was called “Communication concerning the introduction of a European health insurance card”⁴ and set a three-stage timetable for the card, namely legal and technical preparation, distribution from 2004 and elektronification. The process did not require the adoption of a European legislative act, but the amendment of Regulation 1408/71⁵ by introducing the phrase “medically necessary care” for all categories of insured persons, as well as Regulation 574/72⁶ in the sense of eliminating the formalities for health care, in case of temporary stay. The European health insurance card was introduced in the context of the coordination of national social security systems.

Regulation no. 1408/71 was repealed by Regulation (EC) no. 883/2004 on the coordination of social security systems⁷, and Regulation no. 574/72 was replaced by Regulation (EC) no. 987/2009 laying down the procedure for implementing Regulation (EC) no. 883/2004 on the coordination of social security systems⁸.

In accordance with *art. 19 par. 1 of Regulation 883/2004*, “an insured person and the members of his/her family staying in a Member State other than the competent Member State shall be entitled to the benefits in kind which become necessary on medical grounds during their stay, taking into account the nature of the benefits and the expected length of the stay. These benefits shall be provided on behalf of the competent institution by the institution of the place of stay, in accordance with the provisions of the legislation it applies, as though the persons concerned were insured under the said legislation”.

In accordance with *art. 25 letter A par. 1, 3 of Regulation 987/2009*, “For the purposes of the application of Article 19 of the basic Regulation, the insured person shall present to the health care provider in the Member State of stay a document issued by the competent institution indicating his entitlement to benefits in kind. If the insured person does not have such a document, the institution of the place of stay, upon request or if otherwise necessary, shall contact the competent institution in order to obtain one (...) The benefits in kind referred to in Article 19(1) of the basic Regulation shall refer to the *benefits in kind* which are provided in the Member State of stay, in accordance with its legislation, and *which become necessary on medical grounds with a view to preventing an insured person from being forced to return, before the end of the planned duration of stay, to the competent Member State to obtain the necessary treatment* (our emphasis)”. To the extent that the insured person personally paid for the medical treatments received, the competent institution in the state in which he

³ The report can be consulted at https://www.europarl.europa.eu/doceo/document/A-4-1996-0091_EN.html (last accessed 10.11. 2022).

⁴ The document is available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52003DC0073:EN:HTML> (last accessed 10.11.2022).

⁵ Council Regulation (EC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (8) (9) (10) (11) [Consolidated version — OJ L 28 of 30.1.1997, p. 1].

⁶ Regulation (EEC) No. 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [Consolidated version — OJ L 28 of 30.1.1997, p. 1].

⁷ The Regulation is available at https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:02004R0883-2013010_8&from=EN (last accessed 20.10.2022).

⁸ The Regulation is available at <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32009R0987&from=PT> (last accessed 20.10.2022).

is medically insured will reimburse the cost of these treatments, under certain conditions. Reimbursement is made at the level of existing costs in the state of residence, and reimbursement of costs within the limits and under the conditions applicable in the state in which the person is insured can only be done with his consent.

In conclusion, the European health insurance card was introduced after a long and slow process. The free medical care that the person receives in the state of stay is necessary, in the sense that in the absence of its provision, the stay should be terminated and the free movement of persons or, as the case may be, the freedom to provide services, would be restricted.

3. Planned medical treatments vs. unplanned medical treatments

The problem of access to medical services and care in the European Union, in the case of nationals of other member states who request this access in the host states, illustrates the inconsistency between the values of the Union and the concrete legal context in which these values can be fulfilled. The huge distance from values, principles, to available legal instruments is all the more difficult to accept as human life and health are considered paramount by both the Union and the member states. If economic conditions can be tolerated in other cases (for example, long-term stay in a host state), their invocation in the case of the right to health must be carefully assessed and solutions must be found to overcome this sort of conditioning.

Related to the current state of European law, the Union has no *legislative* competence in the matter of public health, except for measures that establish high quality and safety standards for 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 medicines and medical devices⁹. A second derogation concerns the possibility of the adoption by the Parliament and the Council of the European Union, according to 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 harmonization of the laws and administrative rules of the member states. Otherwise, *the action of the European Union only complements national policies and encourages cooperation between member states*.

The health care that can be provided in a member state, to nationals of other member states, has a different legal regime in relation to the context in which it is offered. Two categories of situations arise: medical care provided to patients who move from the state in which they are medically insured, to another member state in order to receive this care (*planned medical treatments*); and the medical care that became necessary to be offered to persons insured in other member states, during their stay in the host state (*unplanned medical treatments*). Both categories of situations are regulated by the same European regulations, namely Regulation (EC) no. 883/2004 on the coordination of social security systems and Regulation (EC) no. 987/2009 laying down the procedure for implementing Regulation (EC) no. 883/2004 on the coordination of social security systems.

In the first case, that of travelling for the purpose of obtaining medical benefits in kind, the person must request authorisation from the competent institution of the member state in which he is medically insured. The granting of the authorization is conditional on the identification of the respective treatment among the benefits provided for by the legislation of the member state on the territory of which the person in question is insured. Prior authorisation is granted by law if the medical care cannot be provided on the national territory within a medically reasonable time, assessed on the basis of an objective medical assessment of the patient's state of health, history and probable evolution of the patient's illness, intensity of the patient's pain or nature of the patient's disability at

⁹ See art. 168 of TFEU.

the time the request for authorisation was made or renewed¹⁰.

The reimbursement of the expenses incurred by the patients with the medical treatment 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 that must be reached and cannot constitute a means of arbitrary discrimination or an unjustified obstacle to the free movement of patients¹¹. At the same time, *both the general principles and the specific circumstances of each individual case must be taken into account.* “(...) The answer must be given within a reasonable time, with objectivity and impartiality, which above all implies an assessment of the quality of the available treatment in the state of affiliation in relation to the criteria resulting from international medical science, not just national.”¹²

The states may maintain general conditions, eligibility criteria and regulatory and administrative formalities regarding the reimbursement of the costs of health care 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 their affiliation Member State*¹³.

The Court of Justice decided that Article 22 of Regulation no. 1408/71, interpreted from the perspective of its objective, does not aim to regulate and, therefore, does not prevent in any way the reimbursement by the member states, at the tariffs in force in the competent state, of medical products purchased in another member state, even in the absence of prior authorisation¹⁴.

The European court decided that “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.”¹⁵

Although the case law of the Court of Justice has made the system of prior authorisation more flexible, in principle, the reimbursement of medical expenses incurred in this case is made up to the level of costs that would have been covered if the same health care had been provided in the member state of affiliation. In fact, this rule of European derivative law, with an economic background and purpose, often leads to a partial reimbursement, which restricts not only the freedom to provide services, but also the right to health. The Court of Justice is also trying to open the welcome prospects of a full reimbursement, but this approach is still incipient and limited. In the judgment TS and others¹⁶, the Court decided that *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 than the one recommended in the state of residence, had the benefit of not generating a disability.* The European health insurance card cannot be used for planned medical treatment.

The second type of health care regulated by EU law, is the unplanned one which became necessary during the insured person's legal stay in another member state. The issue of prior authorisation does not arise. The *planned treatment* differs from the medical services that can be

¹⁰ Art. 7 of Directive 2011/24/EU on the application of patients' rights in cross-border healthcare.

¹¹ Art. 8 of the directive.

¹² Claude Blumann, Louis Dubois, *Droit matériel de l'Union Européenne*, 8^e edition, LGDJ, 2019, p. 240. See also Willy Palm, Erin Webb, Cristina Hernández-Quevedo, Giada Scarpetti, Suszy Lessof, Luigi Siciliani, Ewout van Ginneken, „Gaps in coverage and access in the European Union”, *Health Policy*, Volume 125, Issue 3, 2021, pp. 341-350, <https://doi.org/10.1016/j.healthpol.2020.12.011>.

¹³ Par. 37 of the preamble of the directive.

¹⁴ *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>).

¹⁵ *Elchinov*, judgment of 5 October 2010, case C-173/09, ECLI:EU:C:2010:581.

¹⁶ TS and others, judgment of 6 October 2021, case C-538/19.

received by the insured person, based on the European health insurance card, the latter being *unplanned medical treatments* provided to the insured person in the member state where this person has travelled for, let's say, touristic or educational reasons and which prove medically *necessary* so that he is not obliged, before the end of the stipulated period of his stay, to join the competent member state in order to receive the necessary treatment there. The benefits granted can be caused including by chronic or pre-existing diseases, as well as in connection with pregnancy and childbirth. Unplanned medical treatment covers “an indefinite number of cases in which the state of health of the insured person makes hospital treatment necessary, during a temporary stay in another Member State, because of circumstances – relating, inter alia, to the urgency of the situation, the seriousness of the illness or the accident, or even the fact that a return to the Member State of affiliation is ruled out for medical reasons – which, objectively, leave no alternative but to provide the insured person with hospital treatment in an establishment in the Member State of stay”¹⁷.

Although in this case we do not have a consistent case law of the Court of Justice, for an identity of situation we will retain its reasoning from the judgment *Kohll v. Caisse de maladie des employés privés*, according to which *the legal norms of derivative law regarding unplanned, but necessary medical treatments must be interpreted in the spirit of European treaties*¹⁸. In another judgment, the Court decided that “the applicability of Article 22 of Regulation No. 1408/71 does not mean that Article 49 EC cannot apply at the same time. The fact that national legislation may be in conformity with Regulation No 1408/71 does not have the effect of removing that legislation from the scope of the provisions of the EC Treaty”¹⁹.

Secondly, unplanned medical treatment also falls within the domain of free movement of services²⁰. Therefore, European citizens in the above situation must be treated in the host states identically/similarly to the nationals of these states, and the restrictions brought, including by the state of origin, must be analyzed from the perspective of the legitimate purpose, necessity and proportionality. The medical services provided in the EU member states, based on the card, are those stipulated by the legislation of each member state.

The health care received for unplanned medical treatment in the country of stay may be free of charge, partially free of charge or not. “With regard to an insured person whose travel to another Member State is for reasons relating to tourism or education, for example, and not to any inadequacy in the health service to which he is affiliated, the rules of the Treaty on freedom of movement offer no guarantee that all hospital treatment services which may have to be provided to him unexpectedly in the Member State of stay will be neutral in terms of cost. Given the disparities between one Member State and another in matters of social security cover and the fact that the objective of Regulation No. 1408/71 is to coordinate the national laws but not to harmonise them, the conditions attached to a hospital stay in another Member State may, according to the circumstances, be to the insured person's advantage or disadvantage (see, by analogy, Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829, paragraphs 50 to 52; Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 55; and Case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 76)”²¹. *Therefore, even in the case of unplanned medical treatment, the reimbursement may not be full. The Court of Justice decided that a partial refund in the analyzed hypothesis is not contrary to the rules of the treaty that regulate the free movement of services*²².

¹⁷ Judgment of 15 June 2010, Commission/Spain, C-211/08, point 64.

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 Judgment of 15 June 2010, Commission/Spain, cit. supra, point 45.

²⁰ “The freedom to provide services encompasses the freedom of an insured person established in a Member State to travel – as a tourist or student, for example – to another Member State for a temporary stay and to receive hospital care there from a provider established in the latter Member State, where the need for such care during that stay arises because of his state of health” (Judgment of 15 June 2010, Commission/Spain, cit. supra, point. 52).

²¹ Judgment of 15 June 2010, Commission/Spain, C-211/08, point 61.

²² “The fact of imposing on a Member State the obligation to guarantee to persons insured under the national system that the competent institution will provide complementary reimbursement whenever the level of cover applicable in the Member State of stay in respect of the unscheduled hospital treatment in question proves to be lower than applicable under its own legislation would ultimately undermine the very fabric of the system which Regulation No. 1408/71 sought to establish. In every case concerning such treatment,

4. Another piece of Europe in your pocket

At the level of positive (declarative) law of the Union, health systems represent a central component of high levels of social protection and sustainable development. Descending to the level of legislative prerogative, member states remain responsible for the provision of health care to their nationals. The European Union does not have legislative competence in the matter of public health, with certain exceptions, but is limited to supplementing national policies and encouraging cooperation between member states.

Although initially it constituted the motivation for the introduction of unplanned medical treatment, via the freedom of movement of the internal market, the economic factor is also a source of considerable limitations and conditions. The economic factor is joined by the legal factor, relating to the absence of the regulatory competence of the Union and to its action, limited to the coordination of the social insurance systems of the member states.

The presence of the European health insurance card in the pockets of European citizens is certainly welcome. At a symbolic level, the card is a piece of European identity materialized in a document similar to an identity card, which meets, in the same pocket, for the citizens of the member states of the euro zone, the euro currency. At a concrete level, the card (actually European legislation, since medical care can be received even in its absence by insured persons) guarantees access to unplanned, but necessary medical treatment for the person during a stay in the member states of the European Union, even though he is affiliated to a different social health insurance system from his state of origin/residence.

The shortcomings are also found in the reimbursement system. It is hard to believe that a person suffering from chronic diseases requiring regular medical assistance, free of charge in the health insurance system to which he is affiliated, will go on a stay in a member state where such assistance does not benefit from gratuity. We wonder how the European identity will perceive a European citizen, an insured person, who undergoes a necessary and urgent medical intervention during the stay in another member state, after which he receives the notification of its payment due to the same lack of gratuity. “We have therefore described EHIC as ‘a prime example of an EU social policy designed to bring Europeans together through the development of market citizenship, that is, the enhancement of free movement rights stemming from the Single Market’. The establishment of the internal market, however, is not a goal in itself. It also entails a very concrete social promise. According to Article 3 of the Treaty of the European Union (TEU), which outlines the EU’s principal aims and objectives, the internal market ‘shall promote economic, social and territorial cohesion, and solidarity among Member States’ ”²³.

What is worrying is not so much the current *status-quo* of EU law, but the fact that there is a lack of concern for addressing these obvious and problematic limitations to guarantee an actual right to the protection of human health. Although the health and life of the person rank first among the values and interests protected by the European treaties²⁴, the economic limitations do not seem to bother, and the fears of encumbering the national budgets with expenses related to the health of European citizens are considered natural and implacable justifications of these limitations, without a thorough assessment. Those concerned with and worrying about this inconsistency of European law with regard to its values can hopefully only follow the case law of the Court of Justice...

the competent institution of the Member State of affiliation would be systematically exposed to the highest financial burden, whether through the application, in accordance with Article 22(1)(a) of that regulation, of the legislation of a Member State of stay under which the level of cover is higher than that provided for under its own or through the application of its own legislation in the contrary situation” (Judgment of 15 June 2010, Commission/Spain, C-211/08, point 79).

²³ Sabina Stan, Roland Erne, *Bringing society back into our understanding of European cross-border care*, Journal of European Social Policy, Volume 31, Issue 4, p. 433; Stan, S., Erne, R., & Gannon, S. „Bringing EU citizens together or pulling them apart? The European Health Insurance Card, east–west mobility and the failed promise of European social integration” *Journal of European Social Policy*, 31(4) 2021, pp. 409-423. <https://doi.org/10.1177/0958928720974188>. For specific detail see Tambor M, Klich J, Domagała A. „Financing Healthcare in Central and Eastern European Countries: How Far Are We from Universal Health Coverage?” *Int J Environ Res Public Health*. 2021 Feb 3;18(4):13-82. doi: 10.3390/ijerph18041382.

²⁴ Claude Blumann, Louis Dubois, *Droit matériel de l'Union Européenne*, 8^e edition, LGDJ, 2019, p. 234.

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