

Free movement of health services and professionals

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Brussels, 11 December 2008

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Forms of free movement of services

1. Freedom to provide services (**temporarily**)

a. Consumer/ patient goes to a provider abroad (= *patient mobility*)

b. Provider provides temporarily care in other MS

c. Service moves (e.g. *telemedicine*)



2. Provider establishes **permanently** abroad



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Free movement: a double dynamic

1. Positive integration:

Harmonisation at EU level (= Secondary legislation)

2. Negative integration:

Deregulation: remove unjustified restrictions

- Direct application of Treaty rules
- Important role of the European Court of Justice
- Not politically negotiated
- Objective is economic, not social



Secondary legislation

- Directive 2005/36/36 : Recognition of health professionals' qualifications
- Based on Treaty Article 47(3)
- Minimum training requirements and mutual recognition of diploma's



Free movement of services

- **No restriction** of the free movement

Unless:

- **Necessary** : general interest objective

- **Proportional**:

- Suitable for securing the attainment of the objective
- Can not go beyond what is necessary to attain the objective



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Restriction?

From

- Direct (or indirect) discriminatory measures

to

- Measures that apply without distinction to domestic providers and providers from abroad

but

“which hinder or render less attractive the exercise of the fundamental freedoms”



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“Restriction”: consequence

- *Temporary provision:*
 - no double regulatory burden
 - mutual recognition, country of origin rules
- *Permanent establishment:*
 - challenges the very existence of regulatory measures
 - even without specific cross border element
 - providers can challenge regulation if it hinders their access to or exercise of the activity
 - **almost any regulation in healthcare is a potential restriction**

Potential restrictions

- Access to and exercise of care activity
- Quantitative and qualitative restrictions
 - Ownership rules; territorial planning; legal form (not for profit); authorisation for outpatient clinic; minimum staff levels; registration requirement...
 - Cf. Services Directive (Bolkestein), art.15



Infringement proceedings

- pharmacies (*7MS*)
- biomedical analyses laboratories (*FR*)



Justification: Public interest objective?

- Protection of public health
 - Need for a balanced supply
- Financial sustainability of the social protection system
 - Planning, prevent overcapacity
 - Prior authorisation
 - Ambulatory care: not justified
 - Hospital care: can be justified



Justification: Proportional?

Can not exceed what is necessary to attain the objective

- *temporary provision: Mutual trust*
 - quality standards: hospitals?
 - conditional
 - in the absence of UE level framework
 - other measures? Authorisation scheme
- *permanent establishment*
 - **least restrictive measure**



European Court of Justice

- opticians only 1 shop
 - *not proportional*; (2005, Greece)
- quota system for psycho-therapists based on established rights
 - *necessity not proved* (2007 Germany)
- prohibition on television publicity for aesthetical surgery
 - *not justified to protect public health* (2008: Italy)
- authorisation to set up a private outpatient clinic
 - *conclusions A.G.: necessary* (2008: Austria).



Justification

- High burden of proof for regulating authorities:
 - all particular circumstances for each individual case, for an individual provider
 - provide evidence of what would happen without the restriction
- General proportionality test for applying regulation to providers from abroad



Conclusions

- Threshold for application of the Free Movement rules is low
- High burden of proof for health regulators
- Creeping application
- Legal uncertainty; deregulatory effect
- Fragmentation in systems, choice versus solidarity?