

The ECJ case law on cross-border aspects of health services

Vassilis G. Hatzopoulos

Ass. Professor at the Democritus University of Thrace

Vis. Professor at the College of Europe, Bruges

Attorney-at-Law, Member of the Athens Bar



Introduction: Legal Basis

Intro

Art. 49 EC

Exceptions

Health Systems

Authorisation

Technical Q

Harmonisation

- Primary legislation
 - Art. 152 (ex. 129) EC: only residual competences
 - Art. 39, 42, 49 EC: free movement
- Secondary legislation
 - Directives on professional qualifications of the medical professions
 - Reg. 1408/71
 - Art. 22 +36 for workers
 - Art 31 for pensioners





Is healthcare a service under Art. 49 EC?

Intro

Art. 49 EC

Exceptions

Health Systems

Authorisation

Technical Q

Harmonisation

- The special nature ... does not remove them from the ambit of the fundamental principle of free movement
- What is Remuneration?
 - In triangular situations
 - In cases where no economic relation





Exceptions to the application of Article 49 EC

Intro

Art. 49 EC

Exceptions

Health Systems

Authorisation

Technical Q

Harmonisation



➤ Excluding the application of the Treaty rules

➤ Solidarity

- Activity falling within the social function of the State
- Set up and closely controlled by the State
- In a way that does not affect the market

➤ Article 86(2)

➤ Creating exceptions to the Treaty rules

- Fiscal coherence of SS systems
- Medical and hospital capacity

Political
considerati
on

Economic
considerati
ons





Are national systems affected in the same way?

Intro

Art. 49 EC

Exceptions

Health Systems

Authorisation

Technical Q

Harmonisation

- The characteristics of the national healthcare system do not affect the application of the Treaty rules
- BUT
 - Exceptions to Art. 49 EC
 - “Solidarity” more likely to apply to NHSs
 - Fiscal coherence and hospital/medical capacity more easily affected in NHSs
 - Competition rules more unlikely to apply to NHSs
 - State aid rules more unlikely to apply to NHS (?)
 - Public procurement rules more likely to apply to NHS





Authorisation to go abroad?

Intro

Art. 49 EC

Exceptions

Health Systems

Authorisation

Technical Q

Harmonisation

	Reg. 1408/71 art.22	Art. 49 EC
Personal Scope	Workers & pensioners ++ Reg. 859/2003	All legally residing within the EU
Material Scope	All treatments (incl. hospital)	Non-Hospital treatment
Level of Reimbursement	Host State (if > from home State)	Home State
Out of Pocket – reimbursement	Depending on the System of Host State	Always





Authorisation to go abroad?

Intro

Art. 49 EC

Exceptions

Health Systems

Authorisation

Technical Q

Harmonisation

	Reg. 1408/71 art.22	Art. 49 EC
Access to other MS treatment	Host MS may not discriminate or refuse access to patient (<i>Pierik II</i>)	
Cost of treatment	Host MS may not charge different tariffs depending on the status of the patient (C-411/98 <i>Ferlini</i> [2000] ECR I-8081)	
Material Scope (kind of treatment)	The Home State determines which treatments it will reimburse	
Discretion	Home State may not refuse if same/equivalent treatment may not be offered without 'undue delay'	





Technical Questions

Intro

Art. 49 EC

Exceptions

Health Systems

Authorisation

Technical Q

Harmonisation



- What comes within a “hospital infrastructure”?
 - What treatments need “hospital infrastructure”
 - What part of the infrastructure does qualify as “hospital”
- What expenses can the patient claim?
- How is the “cost” of treatment to be calculated when delivered “for free” within a pure NHS?
- How is “undue delay” for waiting lists to be appreciated?





Is further harmonisation necessary?

Intro

Art. 49 EC

Exceptions

Health Systems

Authorisation

Technical Q

Harmonisation

- Recognition of qualifications for health professionals?
- Medical practices – consumer protection?
- Hospital/outpatient treatments?
- Organisation of hospital capacity at the regional/supranational level
- Closer cooperation between social security authorities

