

Reflections from Jean Philippe Lhernould on: “**Legal Framework related to patient mobility and national implementation**”

First of all, I would like to congratulate the author for the amazing work he has achieved. It is, to my knowledge, the first comprehensive study of legal problems related to patients’ mobility within the European Union (EU). In 85 high-quality, dense pages, the author covers the subject thoroughly and, without any doubt, reaches the main goals set by the work package.

The principal quality of the report is to provide the reader and the stakeholders with all the tools to analyse the situation of patient mobility and to propose a new system (in fact, various possible systems) to improve the current “double way” system. Whether one agrees or not with the propositions of the report, the author has analysed all angles of the subject, which will allow stakeholders to have a much better view of the problems encountered.

As the research paper shows very well, there is no obvious solution to the dilemma. In my opinion, and after reading the report, the path which will be chosen must take into account a few important principles:

- When the ECJ decided to apply article 49 ECT to patient mobility, it naturally focused mainly on the relationship between the patient and the care provider (other elements such as social security and public health policies are discussed at the stage of justification). One of the challenges is to reintroduce other matters into the debate, such as social security and national and European public health policies;
- Since there is no ideal scheme, the main goals of the forthcoming reform should be: more transparency, clarity and legal certainty for patients, care providers and for national administrations, as well as a system which manages to balance the interests of all the stakeholders. It implies that the propositions must be evaluated in a global way and not



only in terms of loss of rights for such and such stakeholder. This approach is compatible with the interpretation of article 49 ECT;

- In any case, except if article 49 ECT were modified (unlikely), it will be impossible to predict how the ECJ will react to legal changes. We hope that we will be able to rely on the Luxembourg judges' wisdom to assess the new system in its entirety, as a system which aims to balance all interests. *Watts* seems to be going in this direction. However, a legal reform will not be without risk.

In this context, I would like to draw attention to two of the options that the author has presented (they are not necessarily his personal choice):

1) For “extramural” care, the article 49 ECT procedure should, in my opinion, become the only path for cross border patients to be protected. Article 22 of Regulation 1408/71 maintains an unjustified rigid system. It is true that patients would be deprived of the right to be treated as if they were insured in the state of care, but does it really matter for extramural care, compared to what all stakeholders (including patients) would gain in terms of clarity and transparency? This change could receive the approval of Member states if, at the same time, the right to choose the care provider were restricted to public or contracted providers. It would be a good way to acknowledge the multilateral relationships involved in a socialised care treatment. We are aware that this scheme could be considered as a violation of article 49 ECT. However, we hope the ECJ would appreciate the new system in the light of the interests of all stakeholders (and not only in consideration of the patients' interests), as well as in the light of the new system which would apply to intramural care.

2) For intramural care, article 22 of regulation 1408 should become the only applicable procedure. We think that the recent *Watts* case allows such a conclusion. Patients would indeed lose the right to choose their care provider, but this change could be compensated by the possibility for them to be covered for *certain* benefits which are not provided by the package of their state of affiliation. Such benefits would, of course, be strictly defined. In



addition, application of article 22 would not prevent the *Vanbraeckel* principles (complementary reimbursement by the State of affiliation) from remaining applicable.

We are aware that the proposals our subject to many criticisms. For instance, they do not resolve the problem of the distinction between extra and intramural case. But if our primary goal is to offer stakeholders more clarity and legal certainty, it will be at a cost: the necessity for them to compromise.

More than legal ideas (all options have already been explored), it is a political impetus that is needed. Member states and the European Parliament must be able to set clear goals and stick to them.