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Cross border health care: essay on the ruling of the Court of Justice of the Communities: 15th of June 2010, c-211/08

1. The de facto hypothesis and the national rules of application

In the following paper, various aspects of the law relating to cross-border health care assistance on the part of community institutions will be analysed. Those institutions seek better regulation among health care systems as a consequence of traffic between both patients and professionals[2]. The ruling that is stated in the text is a continuation of a series of statements that have culminated in the approval of the Directive on Cross-Border Health Care of the 19th of June 2010, which to a great extent are included in the thesis maintained by the tribunal.

The failure of that statement shows that given that the intention of the European Union is to coordinate national laws on social insurance, not harmonization, when providing unplanned hospital care in a member state other than that of membership, The latter State is not required to reimburse the patient expenses that are charged to the same, in the State in which assistance has been dispensed. That is, there is no right of reimbursement of expenses that must in any case be borne by patients depending on the level of coverage in force in the member state in which hospitalization occurs.

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[2] ALVAREZ GONZALEZ, E.M., „The right to Sanitary Cross-border Assistance „, *Law and Health*, volume 18, I number 2, July – December, pg. 21.

The statement of the Court of Justice of the European Union is published on the occasion of an appeal lodged against Spain on behalf of the European Commission. Concretely, following a suit filed with the commission by a French citizen residing in Spain and affiliated with the Spanish Social Security System who must pay certain expenses to Spain if he/she is hospitalized during a stay in France. Subsequently, the citizen requests the reimbursement of expenses from the Spanish Social Security System for those costs which, according to French law should be paid, in all cases, by the patient. That is to say, those costs outside of those paid by the French health care system. The Spanish institution is denied due to the invoking of the Spanish Regulation which

> does not contemplate the possibility that a member of the National Health Service would obtain, by the competent Institution, the reimbursement of medical expenses generated out of the above mentioned system, except in exceptional circumstances at the time, foreseen in Article 5 of the Royal decree 63/1995 (F.J. n 22).

The Spanish State adds that to attend to such refunds would alter the financial balance of the National Health Service, criterion refuted by the Tribunal on having understood that such reimbursements cannot have a significant impact on the global financing of a system of National Social Security (F.J. n 24 and n 57).

The national framework of application is harbored in a plurality of regulations of different nationality, nevertheless the reflections of the Tribunal are included in Law 16/2003 of May 23, of the cohesion and quality of the National Health Service, and to its standard development across the Royal decree 1030/2006, of September 15, by which there is established the portfolio of common services of the National Health System and the procedure for its update. Specifically, this is mentioned in Article 4, paragraph 3, of the Royal decree 1030/2006 which states that

> the portfolio of common services will only be facilitated by centers, establishments and services of the National Health System, public or public/private partnership, except in situations of vital risk, when one justifies that they could not be utilized by the National Health Service.
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> In those cases of urgent, immediate, health care assistance and vital character that have been dealt with outside of the National Health System, the expenses will be reimbursed, and once verified that the services could not be used appropriately and that they do not constitute a deviant or improper utilization of this exception. All this without prejudice of what has been established in the international agreements in which Spain is a part or in regulatory procedure of Internal Law of the Health Service in suppositions of provision of services abroad.

The interpretation defended by the Spanish institutions would imply that a member of the Spanish Health System would only have the right to reimbursement of part of the cost of the

treatment not covered by the intervention of the institution of the Member State, in the cases of urgent health care, immediate assistance and of vital character,

> once verified that the services could not be used appropriately and does not constitute a deviant or improper utilization of this exception.

Precisely this thesis is maintained by the Kingdom of Spain, provoking that in the writing of the Commission of July 19, 2007, one affirms that Spanish regulation was in contradiction to Article 49 CE, and urging the State to adopt the correct methods necessary in the space of two months.

2. The community regulations related to the application of the rules of social security

The community regulation recognizes the employed or self-employed worker should satisfy the conditions demanded by the legislation of the proper State to have the right to benefits, and whose condition needs services, to pay in kind so that they are necessary from a medical point of view during a stay in the territory of another Member state, taking into consideration the nature of the services and the duration foreseen of the stay, the right

> to the services pay in kind is served by, at the expense of the proper institution, the institution of the place of stay [...], according to the regulations of the legislation that this one applies, as if it was affiliated to the institution, there being regulated the duration of the service or services by the legislation of the proper State [art 22.1. A) and i), I Regulation nº 1408/71][3].

In addition, the assistance to pay in kind served by the Sanitary institution of a Member state at the expense of the institution of another Member, will give rise to the reimbursement of the complete expense, applying this right by analogy to the students and family members when necessary (art. 34 bis and 36.1 I Regulate 1408/71).

In developing this regulation the Administrative Commission for the National Health Service of migrant workers, in a Decision of December 17, 2003, relative to the uniform application of the clause i) of the letter a) of the paragraph 1 of the Article 22 of the Regulation nº 1408/71 of the Council in the Member State of permanence[4], specifies the application of the

[3] Regulation (EEC) n º 1408/71 of the Council, of June 14, 1971, relative to the application of the system of social security to the state employed and unemployed workers, to their families that move inside the Community, its updated and modified version by the Regulation (EC) n º 118/97 of the Council, of December 2, 1996 (DO 1997, L 28, p. 1), its modified version by the Regulation (EC) n º 1992/2006 of the European Parliament and of the Council), 18 December 2006 (DO L 392, p. 1).

[4] DO 2004, L 104, p. 127.

Art.22 of the Regulation 1408/71. Specifically it defends that the community regulation cannot be interpreted "so that chronic or preexisting diseases are excluded" and that

> the concept of "necessary assistance" cannot provoke that these services limit themselves only to the cases in which the offered assistance is necessary due to a sudden disease. In particular, the fact that the treatment resulting in being necessary due to the evolution of the state of health of the insured person during his or her temporary stay in another member state could be related to a preexisting pathology and known by the policyholder, as for example a chronic disease, does not mean that the application conditions are not fulfilled by these regulations (F.J. nº 9).

Singularly it is specified that the health care of the person is covered by the protection of Art. 22 where it is mentioned that health care necessary from the medical point of view that is offered to an immigrant who is temporarily in a member state, with the aim to prevent him/her returning prematurely to the proper state in order to obtain the treatment that said person needs, before the end of the foreseen stay (point 1 and 2 of the Decision n. 194)[5].

3. Distinction between "planned assistance" and "unplanned assistance" as determinant criterion in the argumentation of the court of justice

The Court finds of great relevancy, justifying the ruling in this aspect, that health care contemplated in Art. 22 is comprised of two well differentiated modalities. On one hand, we find the planned assistance defined [art.22, 1, c)] in that the subject moves to the territory of another State to receive a health care, in which the policyholder could have obtained an estimation of the global cost of the hospital treatment in question, in the shape of a budget, which allows him/her to compare the applicable levels of coverage, respectively, in the member state in which he/she has intention of being hospitalized and in the member state of affiliation (F.J. 62). This hypothesis is completely different from the cases in which the policyholder moves to another member state with a tourist or educational purpose, meanwhile in the course of the stay some unforeseeable incident of a health character results in medical attention. In this respect, the community regulation does not guarantee neutrality with regard to all the health services covered by the diverse national systems, being important to indicate that the aim of the community regulation in the matter is of coordinating the national legislations of social security, and therefore health care, but not to harmonize them[6].

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[5] It must be mentioned that with the cited Regulation, the matter of community ruling is found in Regulation (EEC) n º 574/72 of the Council, of March 21, 1972, by which there are established the models of application of the Regulation n º 1408/71, in the modified version and updated by the Regulation n º 118/97, in its modified version by the Regulation (CE) n º 311/2007 of the Commission, of March 19, 2007 (DO L 82, p. 6). Specifically in Art. 2.1, one gives nationalization papers in the form E-111, nowadays replaced with the sanitary European card.

[6] The fact that member states enjoy autonomy in establishing their political health policies in their own

The relevancy of this distinction takes root in the fact that the guarantee of the right to the reimbursement of the eventual positive differences between the level of coverage of hospital assistance of different member states „ can induce the policyholder to resign to the treatment projected in another member state, which supposes an obstacle to the free provision of services, as the Court of Justice declared "Vanbraekel and others and Watts" rulings (F.J.63). Precisely it will be the violation of this recognized principle in the Art.49 CE, allowing the Tribunal to review Spanish regulation.

Specifically the Spanish Government invokes that the Spanish regulation suitably deals with situations of unplanned assistance, in a way that grants a proper coverage adapted to the cases of temporary stay by circumstances linked to the urgency of the situation, to the gravity of the disease or to the accident.

4. The application of the principle of free service provision in the health area

In principal terms the Court determines that health care must be considered a service subject to the free provision of services[7] (F.J. 47y ss.). In fact, from the diverse rulings of the Court it is clear that within this concept either services given in consultation or those given in hospitals must be included.[8]

With respect to the specific content of the ruling, it is underlined that the regulation established in the mentioned Art. 22, tries to prevent that a policyholder is obliged to return prematurely to the member state of affiliation to obtain the medical assistance that he/she needs, offering him/her the right of access to medical treatment in the territory of stay in conditions of coverage as beneficial as those that the natives enjoy in their country. Nevertheless, this assumption of unplanned assistance applies a lack of certainty, regarding that the tourist or

organizations is well known and includes management and assignment of resources and for assumed provision of services. This autonomy is recognized by Art. 168.7 of the Treaty on the functioning of the European Union.

7 „47. With regards to medical services, it must be remembered that, according to repeated jurisprudence of the Court of Justice, the medical benefits distributed are stipulated as exchange for a remuneration included in the area of application of the relative regulations to the free provision of services, including the assistance given out in a hospital framework (there has been seen, in this respect, the judgments Watts, before mentioned, paragraph 86 and mentioned jurisprudence, and of April 19, 2007, Stamatelaki, C 444/05, Rec. p. I 3185, paragraph 19). For the rest, a medical benefit does not lose its provisional standing of services with effects of Article 49 CE because the patient requests from a National Health Service that pays for the expenses after he has paid the treatment received to the foreign lender of services (see the judgment Watts, before mentioned, paragraph 89 and mentioned jurisprudence cited)".

8 According to detailed study of cases Kohll, of April 28, 1998, Geraets and Peerbooms, of July 12, 2001, and Watts of May 16, 2006, in: CANTERO MARTINEZ, J., „ The cross-border health care in the European Union: Between health citizenship and rules of market „, in GASCON ABELLAN, M.,/STONE-CUTTER MARTINEZ, J.,/GONZALEZ CARRASCO, C., (coords.), Questions of Health Law and Bioética, Tirant lo blanch, Valencia, 2011, pages. 12 and ss. In an opinion of the same authorship, before this doctrine it was understood that the health care "was staying directly out of the area of the community dispositions(regulations) relative to the free provision of services the Regulation was ruled entirely 1408/71", pg. 12

student, for example, is going to need health care and of which type. Also, chronic diseases, or the situation of community citizens of advanced age, fulfill this unpredictability since in spite of running a major risk that his/her health deteriorates, only in certain assumptions they are going to need hospital treatment during the temporary stay in another state.

Implementing this reasoning to the assumption, the Court understands that

> it turns out to be too random and indirect the fact that the members to the Spanish system of health could be urged to move forward his/her return to Spain to receive the necessary hospital assistance due to the degradation of his/her state of health during a temporary stay in another member state or renouncing travelling, for example, with tourist or study purposes to the above mentioned member state, because of not being able to take into consideration, except in the foreseen assumption in Article 4, paragraph 3, second sentence, of the Royal decree 1030/2006, with a complementary intervention of the proper institution in case the cost of an equivalent treatment in Spain was above the level of cover applicable in another member state.

Of all this, the Court concludes that the denounced Spanish regulation does not hinder the free provision of services of hospital care, tourist services or educational services.

In conclusion, the Court observes that the mechanism of reimbursement between the affected institutions is based on a system of "global compensation of risk", because of assumptions of unplanned hospital assistance, when the member state of affiliation assumes a higher economic cost than that which would correspond if such services had been given in one of its establishments,

> they are compensated globally by the cases in which, on the contrary, the application of the rules of the member state of stay has as a lower resulting financial cost in the member state of affiliation than the one that would have been applied by its own legislation regulation for the hospital treatment which is necessary

Consequently the Court proceeds to scorn the appeal in which the Kingdom of Belgium, the Kingdom of Denmark, the Republic of Finland and the United Kingdom acted as co-helpers.

5. Conclusions

The commented ruling is a manifestation of the tension of opposite interests between the preservation of purely economic freedoms, such as the free provision of services and social rights as it is the right to health care. In fact this ruling is a continuation of a series of pronouncements in this way that have finally been materialized in the recent Directive of application of the rights of the patients in the cross-border health attention, of January 19, 2010.

In this way, two systems of coordination of the regulation proceeding from the member states coexist, so that the application of the Directive or the Regulations of the Union of exclusive form must be realized without depriving the patient of the major benefits that the Regulations recognize, in case the conditions for his/her application for a specific assumption are fulfilled[9].

In spite of any interpretive activity, what turns out to be undeniable is that beside the community declaration recognizing the ability of the member states to organize their social security systems, "in the development of the above mentioned ability, the member states must respect the Law of the Union, especially the regulations relative to the free provision of services" (F.J.53), the consequences of this distribution suppose that the principle of equality and universality in the access to health services in some member states they remain seriously committed "every time the access to health care provision is conditioned by the economic capacity of the patient, the latter will have to take charge directly of the travel expenses and of the treatment before requesting the reimbursement". In addition, in this process of coordination they can also turn injured persons rights relative to the management of the medical attention based on the public monopoly of the health care[10].

The analyzed ruling insists, in diverse moments, on the importance of the respect of the principle of free provision of services, not only medical services, but also in tourist or educational (F.J. 51 and 52), without observing that such application can reduce the standard of rights recognized by the natives of certain member states.

[9] CANTERO MARTINEZ, J., *op. cit.*, p. 21 The doctrinal opinions concerning the proposal of the Board have been on occasions quite critical; SEVILLE PEREZ, F., claims, „ the Community tries to regulate Sanitary attention in Europe, bearing the rules of the market in mind as the unique base, forgetting the tradition of all the European health systems „, in „ Managerial proposal of application of the rights of the patients in cross-border health care „, *Magazine of Sanitary Administration*, 2009; 7 (4), pg. 551.

[10] CANTERO MARTINEZ, J., *op. cit.*, pages. 29 and 30