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Judgment of the Court of Justice in Case C-169/07

Hartlauer Handelsgesellschaft mbH v. Wiener Landesregierung and Others

AUSTRIAN LEGISLATION ON SETTING UP PRIVATE HEALTH INSTITUTIONS IS INCOMPATIBLE WITH COMMUNITY LAW

Freedom of establishment precludes the requirement for prior authorisation on the basis of an assessment of the health needs of the population, where that rule applies to independent outpatient dental clinics but not to group practices and where the discretion of the national authorities is not adequately circumscribed.

The Austrian legislation on health institutions makes the setting up of an independent outpatient clinic – that is, an organisationally independent establishment for the examination or treatment of persons who do not require admission to a hospital – subject to the issue of a prior administrative authorisation. Authorisation can be granted only if ‘there is a need’ to set up a new institution, having regard to the care already available, inter alia from medical practitioners contracted to sickness funds. It is for the provinces to ensure that the legislation is enforced.

Thus the governments of Upper Austria and Vienna rejected applications by Hartlauer for authorisation. Hartlauer is a company established in Germany, and wishes to set up private outpatient dental clinics in Vienna and Wels, Upper Austria. Both governments argued that dental care was adequately ensured by public and private non-profit-making health institutions and other contractual practitioners offering comparable services. On that basis, they concluded that there was therefore no need to set up a private outpatient dental clinic.

Hartlauer brought proceedings before the Verwaltungsgerichtshof (Administrative Court), which then referred questions to the Court of Justice on the compatibility of the Austrian legislation with freedom of establishment.

In today’s judgment the Court of Justice observes that the Austrian legislation constitutes a restriction of freedom of establishment, since the undertakings concerned may have to bear the additional administrative and financial costs of such an authorisation, and the national legislation reserves the pursuit of self-employed activity to certain economic operators who satisfy predetermined requirements, compliance with which is a condition for the issue of authorisation.

In the present case, the application of the Austrian rules had the effect of depriving Hartlauer altogether of access to the market in dental care in Austria.

In those circumstances, the Court examines whether the contested provisions may be objectively justified by overriding reasons in the general interest, in particular the objective of maintaining a balanced high-quality medical service open to all and the objective of preventing the risk of serious harm to the financial balance of the social security system.

The Court finds that the national legislation at issue does not pursue the stated objectives in a consistent and systematic manner. Prior authorisation based on an assessment of the needs of the market is required for setting up and operating new independent outpatient dental clinics, but not for setting up new group practices, even though those two categories of providers of services may have comparable features and are thus liable to affect in an equivalent manner the attainment of the planning objectives pursued by the national authorities. That inconsistency also affects the attainment of the objective stated by Austria of preventing a risk of serious harm to the financial balance of the national social security system.

The Court then finds that the assessment of the needs of the market is not based on a condition capable of adequately circumscribing the exercise by the national authorities of their discretion. In the province of Vienna, the existence of a need is assessed on the basis of the number of patients per dental practitioner in the area covered, without the number of patients in question being fixed or brought in advance to the notice of the persons concerned in any way.

In the province of Upper Austria, the relevant assessment is made on the basis of the answers given by practitioners practising in the catchment area of the independent outpatient dental clinic intended to be set up, even though they are potential direct competitors of that clinic. Such a method is liable to affect the objectivity and impartiality of the treatment of the application for authorisation.

Consequently, the requirement of prior authorisation based on an assessment of the health needs of the population is contrary to the principle of freedom of establishment, since it applies to independent outpatient dental clinics but not to group practices, and it is not based on a condition capable of adequately circumscribing the exercise by the national authorities of their discretion.

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Languages available: DE EL EN ES FR HU IT NL PL

The full text of the judgment may be found on the Court's internet site
<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-169/07>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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*Pictures of the delivery of the judgment are available on EbS "Europe by Satellite",
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