Press and Information Division

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Judgment of the Court in Case C-385/99

Müller-Fauré v *Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen* and *Van Riet* v *Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen*

THE PRINCIPLE OF FREEDOM TO PROVIDE SERVICES PRECLUDES NETHERLANDS LEGISLATION REQUIRING PRIOR AUTHORISATION FOR NON-HOSPITAL CARE PROVIDED IN ANOTHER MEMBER STATE BY A NON-CONTRACTED PROVIDER

By contrast, in the case of hospital care, the requirement for prior authorisation is justified

The Netherlands sickness insurance scheme provides for the grant of **benefits in kind**: care is provided free of charge to insured persons by providers (doctors or hospitals) which have concluded agreements with the sickness funds. Patients may receive medical care, either in the Netherlands or abroad, from non-contracted practitioners or establishments only after they have **obtained prior authorisation**. Authorisation is subject to the condition that **the care is necessary and cannot be provided "without undue delay" by a Netherlands contracted doctor**.

Ms Müller-Fauré consulted a dentist while she was on holiday in Germany in October and November 1994 without having obtained prior authorisation from her sickness fund. On her return to the Netherlands, she applied to the Zwijndrecht sickness fund for reimbursement of the cost of her treatment (the fitting of six crowns and a fixed prosthesis).

Ms Van Riet, who had been suffering from pain in her right wrist since 1985, asked the Amsterdam sickness fund to cover the cost of an arthroscopy and an ulnar reduction, both of which she had undergone in May 1993 in Belgium, without first having obtained authorisation. Care before and after this treatment, and the treatment itself, which could be carried out much sooner than in the Netherlands, were provided partly in hospital and partly elsewhere.

In both cases the sickness fund refused to reimburse the medical costs on the ground that necessary and appropriate medical care could be obtained in the Netherlands within a reasonable time.

The competent court, the Centrale Raad van Beroep (Higher Social Security Court), seised of the disputes between the persons concerned and their sickness funds, questions the Court of Justice about the compatibility of the Netherlands legislation with the principle of freedom to provide services laid down in the Treaty.

The Court finds that the Netherlands legislation deters, or even prevents, persons insured with funds from applying to medical providers established in Member States other than that of affiliation and constitutes, both for the insured and for the providers, a barrier to freedom to provide services.

The Court considers whether the barrier can be justified. It observes that the risk of seriously undermining the financial balance of the social security system and the maintenance of a high-quality, balanced medical and hospital service open to all are reasons capable of justifying that barrier. In the Court's view, a distinction must be drawn between hospital services and non-hospital services.

Hospital care

The Court previously held in its judgment in *Smits and Peerbooms*[1] that a system of prior authorisation is necessary in the context of a health care scheme based on agreements in order to ensure that there is sufficient permanent access to a balanced range of high-quality hospital care, to ensure that costs are controlled and to avoid any wastage of financial, technical and human resources.

The requirement for prior authorisation in the case of hospital care provided in another Member State is therefore **justified**. The conditions to which grant of such authorisation is subject must none the less be justified in the light of the overriding reasons referred to above, must satisfy the requirement of proportionality and must give the national authorities no scope for acting in an arbitrary manner.

Thus, as regards the condition concerning the necessity of the treatment, as provided for in the Netherlands legislation, the Court finds that prior authorisation may be refused only if treatment which is the same or equally effective can be provided to the patient without undue delay in a contracted establishment. National authorities must take account not only of the patient's actual medical condition and, where appropriate, the degree of pain or the nature of the patient's disability, which might, for example, make it impossible or extremely difficult for him to carry out a professional activity, but also of his medical history.

[1] Case C-157/99 *Smits and Peerbooms* of 12 July 2001, see Press Release No 32/01.

Non-hospital care

The Court considers that the arguments put forward before it do not show that **removal of the requirement for prior authorisation for non-hospital care would give rise to patients travelling to other countries in such large numbers** (despite linguistic barriers, geographic distance, the cost of staying abroad and lack of information about the kind of care) **that the financial balance of the Netherlands social security system would be seriously upset and that the overall level of public-health protection would be jeopardised**, something which could constitute proper justification for a barrier to the fundamental principle of freedom to provide services.

The Court also considers whether removal of the requirement for prior authorisation is likely to undermine the essential characteristics of the Netherlands system of access to health care.

In that regard, the Court observes that the Member States have power to organise their social security systems. However, in exercising that power, the Member States must comply with Community law. If fundamental freedoms such as freedom to provide services are to be a reality, the Member States are inevitably obliged to make some adjustments to their national social security systems.

The Court finds that:

- for the purpose of actually applying Regulation No 1408/71 in so far as it relates to the social security of migrant workers and members of their families, Member States which have set up a benefits-in-kind scheme have already had to provide mechanisms for *ex post facto* reimbursement of the cost of care provided in a Member State other than the competent State;
- insured persons can claim reimbursement of the costs of care received only within the limits of the cover provided by the sickness insurance scheme in the State of affiliation;
- where the competent Member State has a benefits-in-kind scheme, it may fix the amounts of reimbursement which patients who have received care in another Member State can claim, provided that those amounts are based on objective, non-discriminatory and transparent criteria.

The Court concludes **that it has not been established that removal of the requirement for prior authorisation would undermine the essential characteristics of the Netherlands sickness insurance scheme.**

The principle of freedom to provide services therefore **precludes legislation such as the Netherlands legislation, which requires** the insured to obtain **prior authorisation**, even under a benefits-in-kind scheme, **in the case of non-hospital care provided in another Member State by a non-contracted provider.**

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