

## FREE MOVEMENT OF PATIENTS IN THE EU



FREE MOVEMENT OF PATIENTS  
IN THE EU

A Patient's Perspective

Gabriella BERKI



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ISBN 978-1-78068-575-5

D/2018/7849/4

NUR 820

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

*Édesanyának és Édesapának*  
*To Mum and Dad*



## FOREWORD

The free movement of patients and the right to cross-border medical care is a topical issue that since the development of the case law of the Court of Justice of the EU at the end of the 1990s has gained considerable interest. Not only is it a right which affects European citizens, it also concerns a domain where there is a conflict of competence between the national Member States and the European Union. Notwithstanding that healthcare is still, as confirmed in the European Treaties, a domain of national competence, the European Union has had a growing indirect influence through its case law on free movement of services and goods. While for decades the European Coordination Regulations on the social security of migrant workers has been considered the natural and only instrument dealing with cross-border healthcare, the case law of the Court has opened a new path directly based on the Treaty provisions. As a result, and striving for more legal certainty, a Patient Mobility Directive was enacted. This has led to a situation where today the rights to cross-border medical care can be found in three European instruments: the Coordination Regulations, the Patient Mobility Directive and the Treaty provisions. Needless to say this creates a complex legal situation.

In this book, which is the result of a joint PhD awarded by Ghent University in Belgium and the University of Szeged in Hungary, Gabriella Berki describes the different provisions of cross-border healthcare in a detailed way, emphasising the still existing gaps, the discrepancies (persons covered, rights obtained, tariffs of reimbursement, etc), the not always very successful interrelation between these texts, as well as the legal complexity, often leaving the patient in an unclear position.

The topic has already gained a great deal of attention in literature and Ms Berki is not the first author to describe these problems. However, in her book she approaches these problems in an innovative way. The original, fresh perspective from which the topic is dealt with is to her credit. She focuses on the rights concerned from a patient's perspective and scrutinises all provisions by asking one question: can we say that these provisions allow the patient to look for the best medical treatment regardless where in the European Union this may be (if possible at a favourable price)? Are these provisions protecting the interests of the patients or rather the national healthcare systems and the social security institutions? When elaborating this approach, she also develops an extensive list of policy proposals. The issue of cross-border medical care is still evolving. Not least through the case law of the Court and the introduction

of the European citizenship, European citizens and patients have gained a new status of rights within the European Union that allows them to rely more and more directly on primary EU provisions. It may therefore not be excluded that some of the provisions of secondary EU legislation will be questioned from a patient's perspective. The author rightly points out that the optimistic view on cross-border healthcare, resulting from the first cases of the Court, has perhaps not always been completely translated into this secondary legislation, leading to a deterioration of the patient's situation. However, on the other hand, not least in these times of economic crisis, there is a fear that people will abuse their right to free movement to profit from more beneficial systems and thus abuse cross-border medical care, leading to medical tourism. Furthermore, other legal, political and financial barriers may complicate the optimisation of the patient's situation. The most important barrier is presumably the actual division of competence in healthcare between the national Member States and the European Union. It is doubtful whether these political situations will take place and it will be extremely difficult to circumvent such political barriers. For that reason, this book is also interesting beyond the academic world.

The author has made her voice heard in this topical issue of cross-border medical care and thus contributed to its further debates.

Professor Dr Yves Jorens  
Ghent University



## PREFACE

*For, after all, the foundation of our whole nature, and, therefore, of our happiness, is our physique, and the most essential factor in happiness is health, and, next in importance after health, the ability to maintain ourselves in independence and freedom from care. There can be no competition or compensation between these essential factors on the one side, and honour, pomp, rank and reputation on the other, however much value we may set upon the latter. No one would hesitate to sacrifice the latter for the former, if it were necessary. We should add very much to our happiness by a timely recognition of the simple truth that every man's chief and real existence is in his own skin, and not in other people's opinions; and, consequently, that the actual conditions of our personal life, health, temperament, capacity, income, wife, children, friends, home, are a hundred times more important for our happiness than what other people are pleased to think of us: otherwise we shall be miserable.*

(Schopenhauer)<sup>1</sup>

Being a patient is possibly never easy. In the vast majority of cases, it is – at best – an inconvenient situation to be in. This unease might well be intensified if someone is seeing a doctor abroad in an unfamiliar setting. What are the obstacles a border-crossing patient faces and how can these barriers be overcome? These are the questions which particularly fascinated me during the years of my research. My ambition was to detect and to bring a better understanding of those legal issues which are potentially problematic when

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<sup>1</sup> A. SCHOPENHAUER, *Wisdom of Life*, Cosimo Classics, New York 2007, p. 54.

The original quote in German reads as follows: 'Denn überhaupt ist die Basis unseres Wesens und folglich auch unseres Glückes unsere animalische Natur. Daher ist für unsere Wohlfahrt Gesundheit das Wesentlichste, nächst dieser aber die Mittel zu unserer Erhaltung, also ein sorgenfreies Auskommen. Ehre, Glanz, Rang, Ruhm, soviel Wert auch mancher darauf legen mag, können mit jenen wesentlichen Gütern nicht kompetieren, noch sie ersetzen: vielmehr würden sie erforderlichenfalls unbedenklich für jene hingegeben werden. Dieserwegen wird es zu unserm Glücke beitragen, wenn wir beizeiten die simple Einsicht erlangen, daß jeder zunächst und wirklich in seiner eigenen Haut lebt, nicht aber in der Meinung anderer, und daß demnach unser realer und persönlicher Zustand, wie er durch Gesundheit, Temperament, Fähigkeiten, Einkommen, Weib, Kind, Freunde, Wohnort usw. bestimmt wird, für unser Glück hundertmal wichtiger ist, als was es andern beliebt aus uns zu machen. Der entgegengesetzte Wahn macht unglücklich.' A. SCHOPENHAUER, *Aphorismen zur Lebensweisheit (Separatausgabe aus 'Parerga und Paralipomena')*, F. A. Brockhaus, Leipzig 1886.

obtaining healthcare abroad and to examine whether these can be solved with the legal tools currently available on the European level. The main question behind this research was how the current landscape of European cross-border patient mobility legislation can be improved in a way that better serves patients' interests while respecting the responsibilities of the Member States in this field.

Principally, this book aims to analyse the European legal framework governing cross-border patient movements from a strictly patient-centred approach. I confess that as a social lawyer, my main interest is the social status of the individual. Thus, when I chose the rather well-researched topic of cross-border patient mobility, I set my focus on an aspect which seemed lacking: I approached the subject from the perspective of the patients. By doing this, I was led by Schopenhauer's thought who said that 'für unsere Wohlfahrt Gesundheit ist das Wesentlichste.'<sup>2</sup>

Admittedly this book is one-sided to a certain extent, implying a demand-side approach and setting aside the providers' market-based and the Member States financial interests. Since I observe each occurring problem through this filter, some observations or suggestions may be seen as provocative and hold potential for debate. As I see it, evoking an exchange of views and different opinions is one of the missions of academic writing, thus while I hereby act as an advocate of patients, I seek to bring on board arguments from the other sides involved in cross-border healthcare situations as well – especially in the last part of the book.

The legal framework under scrutiny in the book is far from simple. It is far from perfect too. It is complex on multiple levels: it both applies different rules to diverse scenarios and different legal tools to the same situation. When I think of the possibilities a patient might have when in need of healthcare, I imagine a maze with a mouse in it looking for the cheese. The mouse knows exactly what it wants, it just does not know how to get there. There are various paths to follow, but the dilemma is: which one leads to trouble and which one leads to fulfilment?

In order to reach my goal, I examined the legislation in its totality, paying special attention to the interrelations of the different legal tools, rather than studying the various legal paths separately. Furthermore, as a starting point of my research, I formulated an axiom with the aim to articulate patients' needs properly: *Patients wish to benefit from the most effective, highest quality healthcare provided as quickly as possible for the most favourable price.*<sup>3</sup> The order of the different elements in this sentence does not necessarily indicate an order of preference. Whether it is the quality, the timeliness or the price which holds the highest importance for a patient, varies from person to person.

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<sup>2</sup> It can be translated as 'the most essential factor in happiness is health.' SCHOPENHAUER, above n. 1.

<sup>3</sup> The expression '*the most favourable price*' must be understood as the amount of money which is to be paid by the patient him/herself.

However, when obtaining healthcare, each of these factors is relevant. From the intriguing issues identified throughout this research, the present book details three key areas of patient mobility, namely legal complexity, financial affordability and information obstacles.<sup>4</sup>

This book is based on my doctoral dissertation which was defended in the summer of 2015 at the Ghent University in Belgium. Since then, my interest in the coordination of healthcare schemes and cross-border patient mobility has not diminished and I have continued to work in this domain. Recently, I participated in a reporting exercise whose aim was to revisit certain issues of access to healthcare in another Member State and to provide the European Commission with an in-depth analysis of different legal scenarios of cross-border healthcare.<sup>5</sup> This exercise, besides the experience of numerous conferences and expert discussions inspired me to update and extend my manuscript and to write this book, which was completed on 30 April 2017. I hope it can serve as a compass in the maze.

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<sup>4</sup> Since issues related to quality and patient safety require specialised expertise in healthcare protocols and are not directly related to social security matters (not included into the Social Security Coordination Regulations either), and as they raise questions related to e.g. cross-border medical liability and cross-border remedy for medical malpractice, which are deserving as a subject of another book, they are beyond the scope of the present research. However, quality is an important concern for patients and a leading factor in the quest to obtain healthcare abroad, so the in-depth observation of legal problems related to that field holds great potential for future research.

On the issues related to quality and patient safety, see among others European Commission, *Special Eurobarometer 327: Patient safety and quality of healthcare*, 2010; H. LEGIDO-QUIGLEY, I.A. GLINOS, K. WALSHE, B. VAN BEEK, C. CUCIC and M. MCKEE, 'Quality and safety' in M. WISMAR, W. PALM, J. FIGUERAS, K. ERNST, E. VAN GINNEKEN, *Cross-border Health Care in the European Union – Mapping and analysing practices and policies*, European Observatory on Health Systems and Policies, Brussels 2011 and V. PASKALIA, 'Cross-border Healthcare in the EU: And What if Something Goes Wrong?' *European Journal of Health Law* 2016, <http://booksandjournals.brillonline.com/content/journals/10.1163/15718093-12341435> (accessed 22.04.2017).

<sup>5</sup> G. STRBAN (ed.), G. BERKI, D. CARRASCOSA and F. VAN OVERMEIREN, *Access to healthcare in cross-border situations*, FreSsco Network, Ghent 2017.



## ACKNOWLEDGEMENTS

I believe that most achievements do not belong to one single person. I certainly consider mine as team work. Each and every one of my team has carried out his/her job wonderfully: some did the cheering and supporting part, some did the pushing and criticising part and some were simply listening on the other side of the table when that was needed.

This book is the icing on the cake, the baking of which took me several years and I cannot possibly be grateful enough for having had all these amazing people around me. Without even attempting to enumerate everyone I owe my thanks, I would like to express my gratitude to my PhD-supervisors, Prof. Yves Jorens and Prof. József Hajdú and to the members of my doctoral defence committee, Prof. Saskia Klosse, Rob Cornelissen, Prof. Grega Strban and Filip Van Overmeiren, all of whom contributed to the betterment of my work. Similarly, special thanks go to my friends and colleagues both at the Ghent University and the University of Szeged.

The process which has led me to writing this book was one of the greatest personal and professional experiences of my life. It was not only an exciting task but a real adventure which challenged my skills. I feel lucky because of the unique opportunity this work has given me: I was inspired by the outstanding work experience I gained abroad, by the people I met and the joy I found in researching. What is more, it not only brought new relationships into my life but also put the old ones into new perspectives. My friends and family never ceased to stand by me during this – sometimes thorny – procedure and I love them for this as well. Thanks to all of you!

Szeged, 30 April 2017  
Gabriella



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## LIST OF ABBREVIATIONS

|          |   |
|----------|---|
| AC       | Administrative Commission   |
| AG       | Advocate General  |
| BR       | Basic Regulation, Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems   |
| CFREU    | Charter of Fundamental Rights of the European Union   |
| CJEU     | Court of Justice of the European Union  |
| COE      | Council of Europe   |
| DG       | Directorate General   |
| DG EMPL  | Directorate General Employment, Social Affairs and Inclusion  |
| DG SANTE | Directorate General Health and Food Safety  |
| ECJ      | European Court of Justice   |
| ECLI     | European Case Law Identifier  |
| EEA      | European Economic Area  |
| EEC      | European Economic Community   |
| EESSI    | Electronic Exchange of Social Security Information  |
| EFTA     | European Free Trade Association   |
| EHIC     | European Health Insurance Card  |
| EP       | European Parliament   |
| EPF      | European Patients' Forum  |
| EU       | European Union  |
| ICT      | Information and Communication Technology  |
| ILO      | International Labour Organization   |
| IR       | Implementing Regulation, Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems |
| MPT      | Maximum Processing Time   |
| MS       | Member State  |
| MWT      | Maximum Waiting Time  |
| NEAK     | Nemzeti Egészségbiztosítási Alapkezelő (Hungarian Healthcare Fund)  |
| NCP      | National Contact Point  |
| NHS      | National Health Service   |
| OECD     | Organisation for Economic Co-operation and Development  |
| OJ       | Official Journal  |

|        |  |
|--------|--|
| OMC    | Open Method of Coordination  |
| PA     | Prior Authorisation  |
| PD     | Portable Document  |
| PMD    | Patient Mobility Directive, Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare |
| PRC    | Provisional Replacement Certificate  |
| SED    | Structured Electronic Document   |
| SSGI   | Social Services of General Interest  |
| TCN    | Third Country National   |
| TEC    | Treaty Establishing the European Community   |
| TEEC   | Treaty of Rome establishing the European Economic Community  |
| TEU    | Treaty on the European Union   |
| TFEU   | Treaty on the Functioning of the European Union  |
| UK     | United Kingdom   |
| UN     | United Nations   |
| UNESCO | United Nations Educational, Scientific and Cultural Organization   |
| WHO    | World Health Organization  |