1 Introduction

Health care systems are a corner stone of every European society and health care has a considerable socio-psychological dimension when it comes to establishing bonds of trust between the Member States and their citizens. This is why governments have not been eager to allow the European Union intervening with these matters. Nonetheless, the European Union's interest in expanding the internal market is clear and thus a borderless European market and social space are emerging.[1]

Meanwhile, citizens throughout Europe prefer health care to be available close to their home, i.e. where the live and work and there are still relatively few who seek cross-border health care.[2] Nonetheless, the right to seek health care in a Member State other than in which the patient is insured has expanded in the past years.[3] This situation is a direct result of a number of judgements where the Court of Justice opened the gates for patients seeking cross-border health care on the cost of their home Member State's social security system, under which they are entitled to health care, either free of charge or through reimbursement of cost incurred.

Traditionally cross-border health care on the cost of the home Member State has been seen as a privilege granted by the competent institution, through a scheme of prior authorisation, only to be granted under certain circumstances. The case-law of the Court, which is one of the sources of EU law, however suggests that reimbursement of cost incurred for cross-border treatment is a Treaty based right of every Union citizen, only to be limited through measures which are justifiable and based on objective, non-discriminatory and proportionate criteria.[4] The Court has indeed been a leading force in expanding Union citizen's right to cross-border health care on the cost of their home Member State, as it established in *Geraets-Smits and Peerbooms*[5] that the Member States' public health care systems do without a doubt fall within the scope of the internal market provisions, in particular the principle of free movement of services.[6]

Although the mentioned case-law of the Court of Justice is clear on a case-by-case basis, there currently is legal uncertainty surrounding the field as there is tension between the judicial rights established by the Court and the legislative actions of the Union. The field

[1] Steffen, Lamping and Lehto (2005) 2.
[2] The Gallup Organiztion (2007) 7.
[3] Coldron and Ackers (2007) 288.
[4] Van der Mei (2003) 288.
[5] ECJ, Case C-157/99 *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgversekeringen* [2001] ECR I-5473.
[6] Belcher and Berman (2001) 1.

however is evolving and currently under big reform.[7] It is not easy to find a common ground satisfying all parties holding an interest in the matter. For instance there are on the one hand, the interests of the Member States, who do not want to loose their grip on controlling the organisation and financing of their health care systems, while the European Union, on the other hand is aiming at a borderless health care market where patients can easily and without restrictions seek health care throughout the Union.[8]

1.1 Definitions

The concept 'public health' has, in EU Law, been understood as meaning management of collective health risks, i.e. measures taken to protect health and prevent diseases, with a view to improve quality of life. This definition is in coherence with Article 168 (ex 152 TEC) TFEU, which is the main legal basis provision directly concerning public health in EU law, in which the health care services provided for by the Member States are excluded. This leaves the European health policy divided into two separate parts, i.e. public health on one hand and health services on the other.[9] Our issue does not concern public health in the sense of management of collective health risks. On the contrary our issue concerns the health care service in the sense of delivery of such service to individual patients, which is as already stated excluded from the main legal basis provision concerned with public health in EU law. As a matter of fact, health care services might rather belong in a category with the social security systems of the Member States, as health care services are in fact considered one of the benefits, i.e. benefits-in-kind, provided by the social security system of each Member State. Yet, the regulatory and legal framework surrounding the health care service systems varies in many ways between the Member States.[10]

'Health care services', as the term will be used in this paper, refers to a health service provided by or under the supervision of a health professional in exercise of their profession, and regardless of the ways in which it is organised, delivered and financed at national level. The issue of pharmaceuticals is excluded from the scope of this paper, although it may be integrated into health care services in some Member States. 'Cross-border health care' for the purpose of this paper, means health care provided in a Member State other than in which the patient receiving the treatment is insured.

---

[7] European Commission (2008b) 2.
[8] Steffen, Lamping and Letho (2005) 2.
[9] Steffen, Lamping and Letho (2005) 5.
[10] Nickless (2001) 7 – 8.

'Health care provider' means any natural of legal person legally providing health care on the territory of a Member State. 'Insured person' or 'patient' means any natural person who receives or wishes to receive health care services in a Member State and who is insured under a Member State's social security system, regardless of the financing and other structure of that system.

The term 'Member State', as it will be used in this paper, includes EU Member States, as well as Iceland, Liechtenstein, Norway and Switzerland,[11] i.e. all the EFTA/EEA States. The terms 'home Member State', 'competent Member State' and 'Member State of affiliation' all refer to the Member State in which the patient in question is insured. The terms 'host Member State' and 'Member State of treatment' both refer to the Member State in which the health care service in question is provided. The term 'Union citizen' means, in coherence with Article 20 (ex 17 TEC) TFEU, a national of one of the EU Member States. Nationals of Iceland, Liechtenstein, Norway or Switzerland are, for the purpose of this paper, also understood to fall within the term.

The concept 'internal care' means treatment which requires at least one night of stay in a hospital or clinic as well as certain kinds of treatment that require use of highly specialised and cost intensive medical infrastructure of equipment or involve treatments that present a particular risk to the patient or the population at large. 'External care' means care provided in a hospital or clinic which does not entail these factors.[12] It should be noted, however, that there is no consistent definition of what constitutes internal and external care throughout the judgements of the Court of justice or in general in EU law, thus the definitions set out in the proposed Directive on the application of patient's rights in cross-border healthcare, the Patient Mobility Directive, will be used in this paper.

1.2 Research topic and relevance

Broadly, the intention of this paper is to shed some light and bring to Iceland the knowledge on the current status of the free movement of patients in the EEA, in particular the financial coverage in cross-border health care and how it is evolving. This I attempt to do with reviewing both existing and the proposed framework currently under negotiations on EU level, the relevant case law of the Court of Justice and the EFTA Court as well as sources of academic literature.

[11] European Parliament (2009) 282 & Van der Mei (2003) 263 – 264.
[12] European Commission (2008b) 15 and 27.