

# Free movement of health services and professionals

Rita Baeten

*Observatoire social européen*

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*W. Gekiere, R. Baeten and W. Palm*



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# Forms of free movement of services

## 1. Freedom to provide services (**temporarily**)

a. Consumer/ patient goes to a provider abroad (= *patient mobility*)

b. Provider provides temporarily care in other MS

c. Service moves (e.g. *telemedicine*)



## 2. Provider establishes **permanently** abroad



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# Free movement: a double dynamic

## 1. Positive integration:

*Harmonisation at EU level* (= Secondary legislation)

## 2. Negative integration:

*Deregulation*: remove unjustified restrictions

- Direct application of Treaty rules
- Important role of the European Court of Justice
- Not politically negotiated
- Objective is economic, not social



# Secondary legislation

- Directive 2005/36/36 : Recognition of health professionals' qualifications
- Based on Treaty Article 47(3)
- Minimum training requirements and mutual recognition of diploma's



# Free movement of services

- **No restriction** of the free movement

*Unless:*

- **Necessary** : general interest objective

- **Proportional**:

- Suitable for securing the attainment of the objective
- Can not go beyond what is necessary to attain the objective



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# Restriction?

*From*

- Direct (or indirect) discriminatory measures

*to*

- Measures that apply without distinction to domestic providers and providers from abroad

*but*

*“which hinder or render less attractive the exercise of the fundamental freedoms”*



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# “Restriction”: consequence

- *Temporary provision:*
  - no double regulatory burden
  - mutual recognition, country of origin rules
- *Permanent establishment:*
  - challenges the very existence of regulatory measures
  - even without specific cross border element
  - providers can challenge regulation if it hinders their access to or exercise of the activity
  - **almost any regulation in healthcare is a potential restriction**

# Potential restrictions

- Access to and exercise of care activity
- Quantitative and qualitative restrictions
  - Ownership rules; territorial planning; legal form (not for profit); authorisation for outpatient clinic; minimum staff levels; registration requirement...
  - Cf. Services Directive (Bolkestein), art.15





# Infringement proceedings

- pharmacies (*7MS*)
- biomedical analyses laboratories (*FR*)



# Justification: Public interest objective?

- Protection of public health
  - Need for a balanced supply
- Financial sustainability of the social protection system
  - Planning, prevent overcapacity
  - Prior authorisation
    - Ambulatory care: not justified
    - Hospital care: can be justified



# Justification: Proportional?

Can not exceed what is necessary to attain the objective

- *temporary provision: Mutual trust*
  - quality standards: hospitals?
  - conditional
    - in the absence of UE level framework
    - other measures? Authorisation scheme
- *permanent establishment*
  - *least restrictive measure*



# European Court of Justice

- opticians only 1 shop
  - *not proportional*; (2005, Greece)
- quota system for psycho-therapists based on established rights
  - *necessity not proved* (2007 Germany)
- prohibition on television publicity for aesthetical surgery
  - *not justified to protect public health* (2008: Italy)
- authorisation to set up a private outpatient clinic
  - *conclusions A.G.: necessary* (2008: Austria).



# Justification

- **High burden of proof** for regulating authorities:
  - all particular circumstances for each individual case, for an individual provider
  - provide evidence of what would happen without the restriction
- **General proportionality test** for applying regulation to providers from abroad



# Conclusions

- Threshold for application of the Free Movement rules is low
- High burden of proof for health regulators
- Creeping application
- Legal uncertainty; deregulatory effect
- Fragmentation in systems, choice versus solidarity?