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Mossialos, E; McKee, M (2001) Is a European healthcare policy emerging? *BMJ (Clinical research ed)*, 323 (7307). p. 248. ISSN 0959-8138

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Is a European healthcare policy emerging?

Yes, but its nature is far from clear

In 1998 two rulings by the European Court of Justice caused alarm in health ministries across Europe.^{1,2} Until then governments and insurance funds had believed that they had the right to decide whether they would pay for non-urgent treatment carried out abroad. Free movement of people within the European Union necessitates the provision of emergency care and also allows health authorities to send patients abroad for treatment not available in their own country. However, the authorities had to authorise this in advance.³ Now a further ruling by the court has brought some additional clarity but still leaves many questions unresolved.⁴

The 1998 rulings involved two citizens of Luxembourg. Mr Decker, who had obtained spectacles, and Mr Kohll, who underwent orthodontic treatment, argued successfully that they should be reimbursed by the Luxembourg health insurance fund even though it had not authorised their treatment abroad.⁵

One element of the Kohll ruling was explicit: the mutual recognition of qualifications precludes health authorities from arguing that care provided in one country is of lower quality than in another. This does, however, seem to challenge emerging initiatives on accreditation and revalidation.⁶

The wider implications of the rulings were, however, much less clear. Some saw them as establishing an important precedent—that health care should be subject to European laws on the free movement of people and services. They argued that this would have major implications for planning health services, especially in countries with cost containment policies.

Others noted that the provision of spectacles and orthodontic treatment was only a minute part of total health care and both had particular characteristics that limited the wider applications of the rulings. Firstly, under the Luxembourg health insurance system patients pay in advance and are reimbursed later. Most European healthcare systems pay providers directly. It was thus argued that, at most, the rulings applied only to those countries in which patients are reimbursed—France, Belgium, and Luxembourg. Secondly, the court's advocate general stated that the provision of orthodontic services did not interfere with the legitimate right of governments to plan their hospital systems. This was seen by some governments to preclude the rulings being applied to hospital services.⁷

The latest ruling concerned two Dutch citizens who had received treatment in Germany and Austria and were seeking reimbursement from their sickness fund. A Dutch district court had referred the cases to the European Court of Justice because of the legal uncertainty involved. The European court confirmed that member states had the right to organise their health care systems as they chose, although they must comply with relevant European law.³ However, for the first time, and in the face of forceful arguments to the contrary,⁷ the court held that medical care provided in hospital was subject to European law on free movement of services, regardless of how it is paid for. It also held that demanding prior authorisation was an

obstacle to free movement of patients but that this could, in certain circumstances, be justified.

The first circumstance is when it prevents the national healthcare system from being undermined. The court argued that this could apply if large numbers of patients were involved but, by implication, was not relevant where numbers are small. A second is where the treatment is considered to be ineffective. The court held that decisions on effectiveness must be based on what is “sufficiently tried and tested by international medical science.” Preauthorisation could be refused when the treatment had been deemed ineffective according to explicit criteria. This presupposes that there is a common medical paradigm in Europe, a view that pays little attention to the evidence of national diversity in health beliefs and treatment patterns.⁸

The third relates to the timeliness of treatment. The court confirmed that authorities could decline authorisation only if the patient could receive the same or equally effective treatment in their own country without undue delay. It did not, however, define “undue delay.” Surprisingly, although waiting lists have been cited in requests by British citizens seeking treatment abroad, so far none has mounted a legal challenge as a means of obtaining faster care elsewhere.

Perhaps the most important message of these rulings is that a European healthcare policy is emerging, but it is being developed by the European Court on the basis of a series of often quite atypical cases. Governments have long believed that health care is a matter of national sovereignty. This view is rapidly becoming outdated and they must now consider whether they wish to leave the development of such an important element of social policy to the courts.

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BMJ 2001;323:248