

Free Movement of Patients in the EU – A Patient’s Perspective, GABRIELLA BERKI, Intersentia, 2018, paperback, 256pp., €79.00, ISBN 9781780685755

Elizabeth M Speakman, London School of Hygiene & Tropical Medicine, England, Elizabeth.speakman@lshtm.ac.uk

The right of EU citizens to receive healthcare in other Member States, paid by their home country, is a valuable benefit, capable of greatly improving the quality of life of those who use it, but involving legal complexity, cumbersome processes, and inequalities. Gabriella Berki’s book, which originated as a doctoral thesis, examines these flaws with the aim of identifying how ‘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’ (p x). Dr Berki is now an Assistant Professor and lecturer at universities in Hungary, France and Croatia, so she brings a useful pan-European perspective to the theme.

While tourists may recognise the concept of cross-border healthcare from their European Health Insurance Card (EHIC), patient mobility (where patients travel purposely to another Member State for healthcare) is poorly understood and underutilised. Berki points out that ‘patients can easily get lost in the labyrinth of legal provisions’ (p 138), and her aim in this monograph is to lead us through this labyrinth. Berki attributes the complexity to healthcare being a ‘multi-player arena’ where multiple competing interests, competences and ideologies collide (p 201). The risk is that the patient’s wellbeing (the ostensible reason for all these rules) may ‘evaporate’ in this complex process (p 201). Berki makes innovative suggestions to remedy the defects of the different mechanisms in place. She makes no bones about her view that these are resolvable problems only with full EU integration and that this should be the long-term objective, even if not currently politically, legally or economically feasible. Her book ends with a plea for greater harmonisation for the good of EU citizens (p 234).

The book is divided into five chapters, with the first one ‘Setting the scene’. Patient mobility in Europe encompasses two of the EU’s fundamental freedoms – freedom of movement of people and freedom of movement of services. Yet, although about half of EU citizens say they would consider travelling abroad for healthcare, a footnote states that in 2014, 43% of EU citizens were not aware of their entitlement to treatment in another Member State and to be reimbursed for the cost of this treatment (p 3, footnote 14).¹ Cross-border healthcare may apply to patients away from their home country either because they are on holiday or as longer-term residents, such as pensioners or workers overseas, who then need healthcare. These patients are discussed briefly in chapter 2,² but the main focus of the book is on patient mobility: those who travel to another Member State for the express purpose of receiving medical treatment there. Motivations here include a wish to avoid long waiting lists, because the treatment is unavailable in the home country, it is cheaper, or because of perceived better quality of care. For many, it is a last resort.

Law for patient mobility has arisen from three sources: firstly, the Coordination Regulations (the Regulations), which are founded on the right to freedom of movement and are based on Article 48 of the Treaty on the Functioning of the European Union (TFEU). The second source

¹ European Commission, *Special Eurobarometer 425: Patients’ rights in cross-border healthcare in the European Union* (2015) p 31: <http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_425_sum_en.pdf> accessed 28 May 2019.

² ‘Legal complexity’.

is a raft of case law in the Court of Justice of the European Union (CJEU) from the 1990s onwards, which extended patient mobility rights, reduced the discretionary power of Member States to refuse to pay for healthcare, and applied the right to free movement of services to healthcare services.³ The third source, the Patient Mobility Directive (PMD), also known as the Patients' Rights Directive and the Cross Border Directive, became EU law in 2011 as Directive 2011/24/EU on patients' rights in cross-border healthcare. It is intended to incorporate CJEU caselaw and facilitate cooperation between Member States. Yet, there is continual tension between attempts to harmonise or coordinate national arrangements and the autonomy of Member States in regard to healthcare. Berki clearly favours greater harmonisation, since she argues that many Member States face similar problems in their healthcare systems which 'could be tackled more efficiently at supranational level' (p 33).

Chapter 2, the longest, deals with 'Legal Complexity'. Many difficulties arise because the Coordination Regulations and the PMD are founded on different freedoms (of movement of people and of movement of services respectively) and have different administrative mechanisms. Potentially a wonderful resource for EU citizens, in practice the mechanisms for these two legal vehicles are frequently confused and confusing. Establishing a patient's residence is 'of utmost importance' (p 61) to their healthcare rights but this may be far from clear for overseas workers. Special rules apply to frontier workers and pensioners (pp 66-73). Tourists relying on their EHIC have faced refusal by some healthcare providers to accept the card. Some Member States have also refused to pay for treatment which, while 'unplanned' they consider should have been reasonably foreseeable, such as for patients with a pre-existing condition. Nevertheless, Berki notes that in 2013 around 200 million EHICs were in circulation – about 40% of the insured population of the EU – an enormous achievement (p 94).

Berki then examines the challenges for patients planning to travel to another Member State for the express purpose of receiving medical treatment. This is only possible if they first meet two criteria. First, the patient must be entitled to the healthcare (that is, they are insured in their 'home country' and it is in the 'benefits basket'), and, secondly, that it cannot be provided in a medically justifiable time limit (pp 101-116). Beyond this similarity, there are numerous differences between the two provisions (p 151). For example, for the Regulations the 'benefit basket' is the Member State of residence, for the Directive it is the benefit basket of the Member State of affiliation. There are challenges in defining both 'residence' and 'affiliation', and the 28 EU countries all have different 'benefit baskets'. This is before we even look at what is a 'medically justifiable time limit' (pp 108-116), taking into account the patient's current state of health and the likely course of their illness. Then, some Member States require a priori authorisation, others do not. Obtaining authorisation can prove a complicated and bureaucratic hurdle for vulnerable patients, sometimes requiring additional medical examinations, reports and authorisations. Berki argues for 'a standardised package of healthcare offered across the European Union' (p 105), agreed EU-wide maximum waiting times and maximum times for reimbursement of patients. But while this would eradicate many of the complexities and unfairnesses of the current system, it would also bite deeply into Member State autonomy and is therefore not likely to happen any time soon.

In Chapter 3 Berki focuses on 'Financial Affordability'. The principles of equity and non-discrimination are intended to be at the heart of provisions to enable domestic and cross-border

³ For example, Case C-120/95 *Decker vs Caisse de maladie des employés privés* [1998] ECR I-01831; Case C-158/96 *Kohll vs Union des Caisses des Maladies* [1998] ECR I-01931; Case C-368/98 *Vanbraekel* [2001] ECR I-5363; Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473; Case C-372/04 *Watts vs Bedford Primary Care Trust* [2006] ECR I-4352.

patients to have equal rights (including access to and equal cost of healthcare). However, this is extremely challenging in practice given that it entails coordination of 28 different health systems with different tariffs and benefit baskets. Only state healthcare is covered under the Regulations, so if patients want private healthcare they must apply under the PMD. The cost of treatment is directly reimbursed between states under the Regulations and is payable at the actual tariff charged by the provider. Under the Directive, patients must generally pay upfront themselves, then claim reimbursement. They are reimbursed at the (often much lower) rate which would have been charged in their home country. Thus, the Directive favours patients who are able to afford the initial outlay. Berki argues that this may also have a disproportionately adverse impact on low-income patients from countries with lower tariffs. This 'can result in a one-sided European patient mobility phenomenon from the western countries to the eastern countries' (p 176). Berki points out that the PMD risks exacerbating inequality as it is far more likely to be used by patients who are both wealthy and well-informed (p 174).⁴

Berki deals with the critical issue of information obstacles in Chapter 4.⁵ These include language difficulties, potentially a problem both for the patient and for the treatment provider. She questions whether the right to a professional medical interpreter should be provided under EU law to ensure informed consent and informed decision making (p 183). Berki also explains the very low awareness of most people of their rights under both the Regulations and the PMD:

the Member State of affiliation must provide information on the patients' rights and entitlements in that state in relation to receiving cross-border healthcare and the Member State of treatment must inform the patient about the standards and guidelines on quality and safety laid down in that state (p 191).

In Chapter 5 Berki provides her 'Conclusions and Suggestions'. These are based on her judgement that 'current Union legislation cannot fully cope with all the problems identified in the course of the research' (p 202). Berki puts forward proposals to deal with each of the flaws she has identified, many of which by her own admission are 'perhaps over-ambitious' (p 228). She argues that the resistance and over-restrictiveness of Member States is irrational as there is no indication that cross border patient movement will grow into a mass phenomenon. Indeed, most Europeans will still prefer to be treated at home by a healthcare system which they understand and with a familiar support network. Given this, Berki argues that the requirement for prior authorisation should be abolished, and that cross-border healthcare should only be restricted 'in case of emergency (ICE), that is, if a Member State "undergoes or foresees disturbances in its national healthcare system' (p 205). Furthermore, 'If such evidence cannot be given, patients are free to access healthcare in any other Member State' (p 206). The reader might see the logic of having common EU-wide rules on tariffs, and maximum waiting times for treatment, processing and reimbursement, while also recognising that this would entail overcoming huge objections from Member States.

Berki argues strongly for a 'drastic simplification' of both legislation and administration (p 203). Her proposal is for a 'consistent, integrated legal system' based on equal cross-border healthcare entitlements (p 202). Challenging indeed in the current political environment. She also recommends the establishment of a number of new EU bodies to administer the system and support existing contact points in individual Member States. These are a European

⁴ Berki cites H Legido-Quigley et al., 'Cross-border healthcare in Europe: clarifying patients' rights' (2011) 342 *BMJ* 364.

⁵ 'Information obstacles'.

Monitoring Centre for Healthcare Provision which would ‘ensure that in all Member States patients receive good quality healthcare services’(pp 208-209), and a European Healthcare Fund to ensure ‘standardised European benefit coverage to guarantee the exact same entitlements to each insured person throughout Europe’ (p 211) and to compensate Member States for the difference between their domestic tariffs and the foreign tariffs invoiced to them (p 213). The Fund would act as a supranational healthcare insurance scheme. Other recommendations are a European Coordination Centre of Cross-Border Healthcare to coordinate and cooperate with national contact points (p 217), and a European Medical Interpretation Agency to act as a central source of language assistance for patients and healthcare staff (p 230). Berki suggests that these innovations are required in order to empower patients, educate them about their rights, and to tackle inequalities in EU laws. She argues that ‘budgetary sources could be found for these specialised purposes if the legislative bodies so decide ... In my view the Achilles’ heel of the economic feasibility is the national side of the issue’ (p 227). This is likely to be an understatement.

Berki’s heartfelt conclusion considers the current political turmoil in Europe and she argues that Europe is at a critical point:

it either rises above the national difference and finds a way to create an enhanced European integration along the line of our common values; or the dream of the United States of Europe falls apart for good (p 219).

These are stark choices and may not be the most convincing argument to use at this time. Berki ends with four policy options (slightly confusingly labelled 0, 1, 2, 3) ranging from little more than ‘information spreading activities’, to a final option which calls for reforming the whole legal landscape and goes beyond Union competence (p 232). She sees this as a vision for an alternative future.

I finished the book with a greater understanding of this important aspect of EU law. It also made me aware of the numerous challenges patients face in getting necessary healthcare in another country, including lack of information, language difficulties, and upfront payment. The book is meticulous, covering such minutiae as the pros and cons of different validity periods for EHICs in different Member States, or the possibility of an app to assist with medical interpretation. I have only a few small quibbles. The sub-title of this monograph, ‘A Patient’s Perspective’, is somewhat misleading as there are no patients’ first person experiences of cross-border healthcare. The inclusion of such would certainly have been a welcome feature. What Berki actually means is that her analysis is ‘from a strictly patient-centred approach’(p x). It would also have been helpful to have had some statistics for those making use of either the Regulations or the PMD across the EU. Where from, for what sorts of treatments, at what cost etc, but perhaps this information is not readily available.

Current events show us that most Europeans still have only a limited understanding of EU structures and procedures. It is absolutely right that scholars should put these structures and processes under the spotlight, examining their benefits, where they fall short and what might be done so they reach their full potential for the good of all. Berki does a commendable job in leading the reader through a mass of rules, identifying weaknesses and contradictions, and putting forward proposals for improvement. While some of her proposals might seem idealistic and impractical, if the EU is to meet its potential it must be self-critical and open to continual efforts to improve a beneficial, but cumbersome and sometimes inequitable, process so it can better meet its potential. This is a book for academics and practitioners of EU health law. I

hope that it will also be read by policy-makers for its proposals and vision of what might be achieved.