ÖSTERREICHISCHE
ÄRZTEKAMMER

Corporation under Public Law – Member of the World Medical Association

Consultation regarding Community action on health services

Comments of the Austrian Medical Chamber

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Introduction

The Austrian Medical Chamber is the statutory professional organization of all doctors practising in Austria. We represent approximately 37 000 doctors - working either in a self-employed, or in an employed capacity. On the one hand, the Austrian Medical Chamber represents their professional, social and economic interests, on the other, it constitutes the competent national authority for Austrian doctors. The responsibilities of the Chamber comprise, besides others, the following areas: involvement in medical education, continuing medical training and professional development, quality assurance in continuing medical education and medical practice, the conclusion of contracts with social insurance institutions and of collective agreements, admission to and administration of the Medical Register, recognition of foreign medical diplomas, execution of disciplinary legislation and arbitration.

We welcome the decision of the European legislator to exclude health services from the scope of application of Directive 2006/123/EC on Services in the Internal Market and make them subject to separate consideration. This procedure guarantees that the **specific character of health services** and their **special position from a political as well as a legal point of view**, compared with other services, will receive appropriate consideration.

Already in the past, the EU Internal Market Policy has contributed decisively to complete the free movement of persons, services, goods and capital while guaranteeing high quality standards in the European health care sector. The current efforts of the European Commission to eliminate all obstacles which might hinder the cross-border provision of health services in Europe constitute the next step towards this aim.

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In this context, however, it has to be noted that the regulation of health services is intrinsically tied to the **structure, organisation and financing of the respective national social security systems**, and **reflect the values the individual states have developed in health and social policy.** This is why **the principle of subsidiarity,** anchored in the EC Treaty, sets strict limits, in particular in the field of health care provision, for the European legislator. The EU is challenged to respect these limits and grant to the Member States the necessary scope of action for organising their health care systems. At the same time, it is the EU's role to support the Member States in those areas where coordinated action is likely to achieve an added value, compared to the current status.

Therefore, we hold the opinion that Community action in health care is justified on condition that

1. **the competency of the Member States for organising their health and social insurance systems is fully respected** and
2. the **quality of health services is enhanced,** rather than compromised (for instance, by introducing a "legal loophole" for eluding national quality regulations, or by triggering a general trend downward towards a lowest common denominator).

The consultation initiated by the Commission is an important instrument for distinguishing those areas where there is need for pan-European initiatives, from those where national structures shall and must take priority over European action.

Question 1 – Current impact of cross-border health care

Normally, **patients have an interest in receiving health services as close as possible to their home.** The reason for this lies in the **confidence** they develop in both, the doctors by whom they are continuously treated and the health care system with which they are familiar. In addition, experience has shown that European citizens, despite their mobility in other areas, favour communicating with health care providers in their own **mother language**, and cooperating with them on the basis of common experiences and structures. Last, but not least, **continuity of medical care** is best guaranteed, if patients receive health care where they live. Experience has shown that situations where medical interventions take place abroad, whereas the necessary after care is delivered near the patient's home, are likely to lead to practical problems which impair the continuity of care. Not only health politicians, but also patients, being directly concerned, are aware of this fact.

For these reasons the cross-border provision of health services, at present, plays no major role in the provision of health care to European citizens.

In those areas where cross-border health care does occur, two different types have to be distinguished:

- on the one hand, cross-border health care based on **bilateral agreements between neighbouring states**, in particular in border regions
- on the other hand, cross-border health care based on the free decision of the patient to receive treatment abroad, i.e. **patient mobility in the narrow sense**

At present, the available **data** on both types of cross-border provision of health services are **insufficient** for providing a realistic picture of the situation.

One phenomenon the available data do prove clearly is that it is not a lack of legal regulations that causes problems, but rather non-compliance with the obligations laid down in Regulation 1408/71 on the reimbursement of costs for cross-border hospital care (see question 3).

Question 2 – Need for legal clarification and practical information

It is important for **patients** to have easy access to up-to-date and **comprehensible information** on the possibility of receiving health services abroad, on the law which applies in such cases, on the applicable modalities, such as necessary authorisations, on the reimbursement of costs and on indemnification in case of adverse incidents. This information should be made available via a **central European platform** under the aegis of the European Commission, receiving input from the Member States.

In this context, the Austrian Medical Chamber advocates a uniform and clear **distinction between in-patient and out-patient medical care** at European level, with the aim of defining the first in the narrowest, and the second in the widest sense possible.

Concerning the principle of **undue delay**, we hold the opinion that the definition of what constitutes an acceptable waiting time for a medical treatment should be taken on a case-by-case basis and after consultation of medical experts. In this context, attention should be focused on the patient's quality of life, and not on financial or organisational aspects.

Concerning the necessary **information of doctors**, it has to be noted that, in providing care to a foreign patient, doctors often require information on their patient's health status which has to

be obtained from the patient's home country, respectively his/her attending doctors. Only on the basis of this information they are in the position to provide high quality and continuous medical care. However, the **(cross-border) transmission of health-related data** raises a number of questions with regard to data protection, which have to be taken into consideration.

Question 3 – Allocation of responsibilities

In the view of the Austrian Medical Chamber, it is of crucial importance that health services are subject to the **legal system (including civil, criminal, labour and social legislation, as well as professional and disciplinary provisions) of the State where the service is provided.** This is the only way of safeguarding that all services offered to a patient in a certain State satisfy uniform regulations and quality standards. This principle applies to all types of health services, including telemedicine.

At present, the **financial responsibility** for cross-border health services is regulated, depending on the situation, either in Regulation 1408/71, respectively 883/04, or by the jurisdiction of the European Court of Justice. In our view, the regulations based on these two pillars are perfectly satisfying. However, they should be understandable and distinguishable for patients.

As explained earlier, **deficits** exist in the **execution of existing provisions on the reimbursement of costs,** in terms of Regulation 1408/71. On the one hand, the present legal situation does not provide for reimbursement of total costs which correspond to the actual value of the provided services. On the other hand, we experience longstanding payment delays, which accumulate to considerable outstanding debts, the total cover of which does not seem realistic anymore. **Measures at execution level**, rather than legal initiatives, should be taken to resolve this problem.

Question 4 – Ensuring safety of cross-border health care

As already set out earlier, we hold the opinion that **all types of cross-border health services** should be subject to the **legal system of the country where the service is delivered**. This goes also for patient safety regulations, including arbitration and compensation systems. As outlined in our answer to question 2, European citizens should have the possibility to obtain objective information on the legal regulations of a state where a certain medical service is offered, before they decide to refer to medical care abroad. If a patient takes the informed decision to make use of medical services abroad, he accepts at the same time that the legal system of this state will apply to his treatment.

The Austrian Medical Chamber **supports the main conclusions of the Luxembourg Conference.** As a matter of principle, we consider it vital to stress that patient safety initiatives have to concentrate first and foremost on system errors, and not on individuals. The Austrian Medical Chamber strongly **opposes any "blame and shame system"**, as such a system would rather hide than reveal the main sources of medical errors. Instead, we appeal for **finding and identifying latent errors within the system as such,** which have harmful impact on patient care. Therefore, it is important that any **Patient Safety Incident Reporting System** has to follow the **principles of anonymity and confidentiality**. Otherwise cover-up tactics will be promoted and the chance to contribute to improving patient safety will be wasted.

In the area of arbitration, the Austrian Medical Chamber advocates **out-of-court-settlement of disputes**, which has been practised and proved successful over many years in Austria. In addition, we have no objections against an **obligatory professional liability insurance**. Concerning the **issue of non-fault liability** for damages resulting from medical care, we hold the opinion that the introduction of such systems falls under the sphere of **competence of the Member States, and not of the EU**. A harmonised European regulation of compensation for damages, maybe even including the amount of indemnities to be paid, would neither seem legally justifiable to us in terms of the principle of subsidiarity, nor realistic, due to the diversity of the existing systems in the individual Member States, the differences in economic performance and their diverging traditions of dispute settlement.

Apart from these considerations, we believe that any system of non-fault liability should be **financed exclusively by those who profit from it** – namely the society, respectively the community of patients.

One important aspect relating to patient safety is the protection of personal data: In order to guarantee the continuity of medical care, the exchange of information between the attending doctors is of vital importance, no matter whether they are located in the same or different Member States. In this context, **data protection requirements**, in particular with regard to the **special confidentiality of health-related data**, have to be considered.

Question 5 – Compatibility of cross-border healthcare with a balanced healthcare system in the receiving countries

Reliable data on the actual impact of cross-border health care, as well as the effective reimbursement of total costs of hospital care in terms of Regulation 1408/71, are indispensable

requirements to keep the cross-border provision of health services compatible with balanced healthcare systems in both the "sending country" and the receiving country.

Question 6 – Further issues, not already addressed by Community legislation

The cross-border provision of medical services and the cross-border establishment of doctors are regulated in **Directive 2005/36/EC**. This Directive was adopted only recently after lengthy discussions, and will have to be implemented by the Member States by October 2007. The Austrian Medical Chamber holds the view that at present, the Directive on the Recognition of Professional Qualifications provides **sufficient regulations for the free movement and cross-border establishment of doctors**. Our suggestion is, therefore, to concentrate on the implementation of the Directive, and to observe its functioning in practice, instead of adopting new regulations which might interfere with the scope of this Directive.

Question 7 – Other issues where legal certainty should be improved

We do welcome a **codification of the legislation of the European Court of Justice** in the area of cross-border provision of health services and reimbursement of their costs, for the benefit of legal certainty and legal clarity for patients. However, we consider it important to **maintain** the **different systems of provision of services and reimbursement of costs**, as currently regulated in the Regulation 1408/71 on the one hand and ECJ jurisprudence on the other.

Question 8 – European action to support the health systems of the Member States

We support European **cooperation in medical questions**, where **Europe faces trans-border problems**, such as pandemics, food safety issues or rare diseases. This cooperation should primarily take place at **scientific level**, and should not lead to a situation where patients are no longer taken care of in their home country, but "sent" to other countries all over Europe. The EU could support the Member States by providing **fora for the exchange of scientific information** between the Member States, publishing information gained from experience, as well as **best practices**, and making these data available at European level. Another area of action could be the **collection and structured publication of data** on both, medical questions and patient mobility.

Question 9 – appropriate tools to tackle the different issues

As already mentioned, it would obviously make sense to codify the existing **jurisdiction of the European Court of Justice on patient mobility in one binding legal instrument**. In our view, this can be done by way of an individual Directive, or by an amendment of the Regulation 1408/71, respectively 883/04.

In the area of **patient safety**, by contrast, we cannot identify any legal and factual scope of action for the EU to provide a legally binding instrument. In this area, as well as regarding the general improvement of European cooperation, non-binding guidelines, recommendations, the collection of information and databases could be appropriate instruments.

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