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Patient Mobility in the European Union: A Freedom to Choose?

Introduction

A fundamental freedom to receive cross border medical treatment is granted to citizens of the European Union under the internal market provisions of European Community Law.[1] The European Court of Justice has interpreted the extent of, and the limits to, this freedom in a series of rulings,[2] the most recent and controversial being the ruling delivered in the case of *Yvonne Watts v Bedford Primary Care Trust*,[3]

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[1] Article 49 of the European Community Treaty, Joined Cases 286/82 and 26/83 *Luisi and Carbone.*

[2] Case C-158/96 *Kohll*; Case C-120/95 *Decker*; Case C-368/98 *Vanbraekel*; *Case* C-157/99 *Geraets Smits and Peerbooms*; Case C-385/99 *Müller-Fauré and van Riet*; Case C-56/01 *Inizan.*

[3] Case C-372/04, *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health.* Judgment of the Court (Grand Chamber), 16th May 2006. Opinion of Advocate General Geelhoed delivered on 15 December 2005. Reference for a preliminary ruling under Article 234 of the European Community Treaty from the Court of

in May 2006. Competence in the field of public health is retained by individual Member States who each have the responsibility for organising and delivering health services and medical care.[4] The European Court of Justice acknowledges the need to balance the objective of the free movement of patients against overriding national objectives relating to management of the available hospital capacity, control of health expenditure and financial balance of social security systems.[5] Nevertheless, the Court ruled, in the *Watts* case that this does not exclude the possibility that Member States may be required under European Community law to make adjustments to their social security systems.[6] An obligation exists under Community law to authorise a patient registered with a national health service to obtain, at that institution's expense, hospital treatment in another Member State where the waiting time exceeds an acceptable period having regard to an objective medical assessment of the condition and clinical requirements of the patient concerned.[7]

It is the intention of this paper to assess the extent of, and the barriers that exist to, the freedom to choose to have urgent hospital treatment in another European Union Member State. This paper will also treat the Consultation on the need for Community action on health services,[8] undertaken in order to establish legal certainty for patients and for Member States. In particular, the response of the United Kingdom Government will be examined.[9] Some tentative conclusions will be drawn.

Appeal (England and Wales) (Civil Division) (United Kingdom), made by order of 12 July 2004.

[4] Article 152(5) of the European Community Treaty.

[5] Case C-372/04, para. 145 of the judgment.

[6] *Ibidem*, para. 147.

[7] *Ibidem*, para. 148.

[8] Commission Communication, "Consultation regarding Community action on health services", SEC (2006) 1195/4, 26 September 2006.

[9] UK Consultation Response to Commission Communication on Health Services, available on the Internet: http://ec.europa.eu/health/ph_overview/co-operation/mobility/results_open_consultation_en.htm#1.

Reimbursement of cross-border hospital treatment from a National Health Service

The case of Yvonne Watts concerned a reference for a preliminary ruling under Article 234 of the European Community Treaty from the Court of Appeal (England and Wales) (Civil Division), made in the course of proceedings arising from the refusal of Bedford Primary Care Trust to reimburse the cost of a hip replacement operation received in France and paid for directly by Mrs Watts, who resides in the United Kingdom.[10] Mrs Watts based her appeal on the dismissal of her application for reimbursement of the cost of treatment from the NHS and on the fact that the waiting time applicable in national law was a relevant factor in applying Article 49 EC. In the United Kingdom National Health Service (NHS), hospital care is provided free of charge to all persons ordinarily resident in the United Kingdom. Treatment is funded directly by the State, essentially from general taxation revenue which is apportioned between Primary Care Trusts (PCTs). Access to hospital treatment is dependent on referral by a general practitioner. The NHS makes use of the available resources by setting priorities, which results in some quite lengthy waiting lists for less urgent treatment. NHS bodies determine, within the limits of the budgetary provision made available to them, the weighting of clinical priorities within national guidelines.[11]

The United Kingdom Government maintained that NHS patients were not entitled to rely on Community law prescribing the freedom of movement to receive medical treatment in another European Union Member State. The European Court of Justice noted in that regard that, according to settled case-law, medical services provided for consideration fall within the scope of the provisions on the freedom to provide

[10] Case C-372/04, paras. 1 and 2. Mrs Yvonne Watt's case had been diagnosed by a Consultant in the United Kingdom as being 'routine' in the first instance. On review she was categorised as requiring surgery 'soon', a category between the most urgent cases and the routine cases. *Ibidem*, paras. 25 and 29.

[11] *Ibidem*, paras. 8, 9, 12, 13 and 15.

services,[12] there being no need to distinguish between care provided in a hospital environment and care provided outside such an environment.[13] Also, that it had been held that the freedom to provide services includes the freedom for the recipients of services, including persons in need of medical treatment, to go to another Member State in order to receive those services there.[14] The Court ruled that the fact that reimbursement of the hospital treatment in question is subsequently sought from a national health service ... does not mean that the rules on the freedom to provide services guaranteed by the Treaty do not apply.[15] It further ruled that it has already been held that a supply of medical services does not cease to be a supply of services within the meaning of Article 49 EC on the ground that the patient after paying the foreign supplier for the treatment received, subsequently seeks the reimbursement of that treatment from a national health service.[16]

The Court therefore found that Article 49 EC applies where a patient receives medical services in a hospital environment for consideration in a Member State other than her State of residence, regardless of the way in which the national system with which that person is registered and from which reimbursement of the cost of those services is subsequently sought operates.[17]

What is the extent of, and what are the barriers that exist to, the freedom to choose to have urgent hospital treatment in another European Union Member State at the expense of the Member State of residence?

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[12] See: *inter alia*, case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685, para. 18, and Case C-158/96 *Kohl*, para. 29.

[13] Case C-368/98 *Vanbraekel*, para. 41; Case C-157/99 *Smits and Peerbooms*, para. 53; Case C-385/99 *Müller-Fauré and van Riet*, para. 38; Case C-56/01 *Inizan*, para. 16. Case 372/04, para. 86.

[14] See: Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, para. 16, Case C-372/04, para. 87.

[15] See to that effect: *Smits and Peerbooms*, para. 55, and *Müller-Fauré and van Riet*, para. 39.

[16] See: *Müller-Fauré and van Riet*, para. 103; Case C-372/04, para. 88.

[17] There being no need in the present case to determine whether the provision of hospital treatment in the context of a national health service such as the NHS is itself a service within the meaning of Article 49. *Ibidem*, para. 90.

a) No unjustified restrictions: prior authorisation subject to the principle of proportionality

The Grand Chamber of the European Court of Justice continued by stating that whilst it is not in dispute that Community law does not detract from the power of the Member States to organise their social security systems, and that, in the absence of harmonisation at Community level, it is for the legislation of each Member State to determine the conditions in which social security benefits are granted, when exercising that power Member States must comply with Community law, in particular the provisions on the freedom to provide services.[18] Those provisions prohibit the Member States from introducing or maintaining unjustified restrictions on the exercise of that freedom in the health care sector.[19]

Prior authorisation is a prerequisite for the NHS to assume the costs of hospital treatment available in another Member State. In the opinion of the Court, the system of prior authorisation deters, or even prevents patients from applying to providers of hospital services established in anther Member State and constitutes an obstacle/restriction to the freedom to receive and to provide services.[20] Nevertheless, such restriction is, according to the Court, capable of objective justification by, *inter alia*: overriding reasons in the general interest, such as the risk of seriously undermining the financial balance of a social security system;[21] and the objective of maintaining a balanced medical and hospital service open to all.[22] The Court was of the view that planning hospital medical care must be possible in

[18] See: *inter alia, Smits and Peerbooms,* para. 44 to 46; *Müller-Fauré and van Riet,* para. 100; *Inizan,* para. 17.

[19] Case 372/04, para. 92.

[20] See to that effect: *Smits and Peerbooms,* para. 69, *Müller-Fauré and van Riet,* para. 44; *ibidem,* para. 98.

[21] *Kohll,* para. 41; *Smits and Peerbooms,* para. 72; *Müller-Fauré and van Riet,* para. 73; *ibidem,* paras. 101 and 103.

[22] *Kohll,* para. 50; *Smits and Peerbooms,* para. 73; *Müller-Fauré and van Riet,* para. 67; *ibidem,* para. 104.

order to ensure sufficient and permanent access to a balanced range of high-quality hospital treatment in the State concerned. Planning, furthermore, assists in meeting a desire to control costs and to prevent, as far as possible, any wastage of financial, technical and human resources. The hospital care sector generates considerable costs and must satisfy increasing needs, while the financial resources that may be made available for healthcare are not unlimited. From these two points of view, the Court concluded that the requirement that the assumption of costs by the national system of hospital treatment provided in another Member State be subject to *prior authorisation* appeared to be a measure which was both *necessary and reasonable* and thus not precluded by Community law and in particular Article 49 EC.[23]

b) Conditions attached to grant of prior authorisation must be proportionate; and based on objective, non-discriminatory criteria known in advance in order to circumscribe the exercise of national authorities' discretion: A procedure

The conditions attached to the grant of such authorisation must be justified in the light of the overriding considerations of the Member State and must satisfy the requirement of *proportionality*, ruled the Court.[24] Thus, in order for the system of prior authorisation to be justified, "it must be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily.

It must be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time. Moreover, refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings."[25]

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[23] *Ibidem*, paras. 109, 110 and 113.

[24] See to that effect: *Smits and Peerbooms*, para. 82, *Müller-Fauré and van Riet*, para. 83; *ibidem*, para. 114.

[25] *Smits and Peerbooms*, para. 90, *Müller-Fauré and van Riet*, para. 84 and 85; *ibidem*, para. 116.

The Court noted that the Regulations on the NHS do not set out the criteria for the grant or refusal of the prior authorisation necessary for reimbursement of the cost of hospital treatment provided in another Member State, and therefore do not circumscribe the exercise of the national competent authorities' discretionary power in that context. Furthermore, the lack of a legal framework in that regard also makes it difficult to exercise judicial review of decisions refusing to grant authorisation.[26]

It is evident that the procedure in the United Kingdom is deficient in this regard. Accordingly, the United Kingdom needs to introduce positive changes concerning the transparency and availability of criteria which are known in advance on which the decision to grant prior authorisation must be based and which make it possible to undertake judicial review of the decision taken.

c) Undue delay? The need to carry out in the individual case in question an objective medical assessment of the patient's medical condition, the history and probable cause of his illness, the degree of pain he is in and/or the nature of his disability at the time when the request for authorisation was made or renewed.

The Court clearly stated that "a refusal to grant prior authorisation could not be based merely on the existence of waiting lists intended to enable the supply of hospital care to be planned and managed on the basis of predetermined general clinical priorities, without carrying out in the individual case in question an objective medical assessment of the patient's medical condition, the history and probable cause of his illness, the degree of pain he is in and/or the nature of his disability at the time when the request for authorisation was made or renewed.[27] It followed, therefore, that where the delay arising from such waiting lists appears to exceed in the individual case concerned an acceptable period having regard to an objective medical assessment of all the circumstances of the situation and the clinical needs of the person

[26] *Ibidem*, para. 118.

[27] *Ibidem*, para. 119.

concerned, the competent institution may not refuse the authorisation sought on the grounds of the existence of those lists, an alleged distortion of the normal priorities linked to the relative urgency of the cases to be treated, the fact that the hospital treatment provided under the national system in question is free of charge, the duty to make available specific funds to reimburse the cost of treatment provided in another Member State and/or a comparison between the cost of that treatment and that of equivalent treatment in the competent Member State."[28]

d) Mechanisms for reimbursement

It is significant in its impact on the United Kingdom that the Court further ruled that the need for Member States to reconcile the principles and broad scheme of their health care system with the requirements arising from the Community freedoms, entails a "duty on the part of the competent authorities of a national health service, such as the NHS, to provide mechanisms for the reimbursement of the cost of hospital; treatment in another Member State to patients to whom that service is not able to provide the treatment required within a medically acceptable period."[29]

With regard to costs, the Court went on to state that a patient registered with the NHS who was authorised to receive hospital treatment in another Member State or who received a refusal to authorise subsequently held to be unfounded, was entitled to have the cost of that treatment reimbursed in full pursuant to the provisions of the legislation of the host Member State.[30] But not where the cost of that treatment was greater than the cost of equivalent treatment in the competent Member State, since that would afford the patient cover in excess of that to which he was entitled under the national health service with which he was registered.[31] In that case the competent authority would only be required to cover up to the cost of the same treatment in the Member

[28] *Ibidem*, para. 120.

[29] *Ibidem*, para. 122.

[30] *Ibidem*, para. 130.

[31] *Ibidem*, para. 132.

State of Residence. Article 49 EC, according to the Court, furthermore must be interpreted as meaning that an authorised patient is entitled to seek from the competent institution reimbursement of the ancillary costs (transport and accommodation) associated with that cross-border movement for medical purposes provided that the legislation of the competent Member State imposes a corresponding obligation on the national system to reimburse in respect of treatment provided in a local hospital covered by that system.[32]

Commission Consultation: Community Action on Health Services

Following the consecutive rulings in which the European Court of Justice interpreted European Community law in favour of the internal market in health care, there was a call for clarity of the law by institutional actors as opposed to rulings emanating from the Court.[33] In response, the European Commission, in a Communication Regarding Community Action on Health Services,[34] has engaged in a Consultation process with all interested parties with the stated objective of achieving legal certainty concerning cross-border health care for both

[32] *Ibidem*, para. 143. It was for the referring court, in this case the UK Court of Appeal, to determine whether the United Kingdom rules provide for the assumption of ancialliary costs associated with cross-border movement authorised for medical purposes. Para. 141.

[33] See further Council Conclusions on Common values and principles in EU Health Systems, 2733rd Employment, Social Policy, Health and Consumer Affairs Council meeting, Luxembourg, 1–2 June 2006, http://www.consilium.europa.eu/Newsroom. "The Council recognises that recent judgments in the European Court of Justice have highlighted the need to clarify the interaction between the EC Treaty provisions, particularly on the free movement of services and the health services provided by national health systems". Point 3 of the Council conclusions.

[34] SEC (2006) 1195/4, 26 September 2006. Therein, the Commission explains that the Commission proposal for a Directive on Services in the Internal Market (COM (2004) 2, 13 January 2004) included proposals codifying the rulings of the European Court of Justice in applying free movement principles to health services but that this approach was not considered to be appropriate by the European Parliament and the Council, which institutions invited the Commission to develop a specific proposal in this area.

patients and Member States. The aim is for a clear framework of Community law in order to ensure a more general and effective application of the freedom to receive health services in other Member States. The Commission identifies the following issues which need to be addressed, namely:

- there are shared values and principles for health services on which citizens can rely throughout the EU;
- What practical issues need to be clarified for citizens who wish to seek health care in another Member State;
- What flexibility Member States have to regulate and plan their own health systems without creating unjustified barriers to free movement;
- How to reconcile patient choice with financial sustainability of health systems;
- How to ensure a financial compensation mechanism for cross-border healthcare provided by 'receiving' health systems;
- How patients can identify, compare or choose between providers in other countries.

Therein, the Commission poses a number of questions: nine in total.

- Question 1: What is the current impact of cross-border health care on accessibility, quality and financial sustainability of health care systems and how might this evolve?

According to the Commission, the current volume of patient mobility is low, estimated at around 1% of overall public expenditure on health care, but a lack of data in this respect is highlighted. The Commission underlines the fact that the lack of information about health care possibilities in other Member States and the lack of a transparent framework act as deterrents to seeking care abroad.

- Question 2: What specific legal clarification (Community action) and what practical information is required by whom (authorities, providers, patients)?

Clarification is suggested of the condition that authorisation for care abroad must be granted if such care cannot be provided in the member

state of residence without 'undue delay'. Although the Commission is of the view that this should focus more on processes for consideration rather than setting any specific period. Mechanisms are advocated through which patients could contest decisions regarding cross-border care, perhaps such as requirements to designate fair appeals procedures and timetables. The Commission is adamant that patients must have adequate information to make informed choices about treatments and providers in other Member States. This, in order to give substance to the freedom to receive medical services in another Member State of the European Union.

- Question 3: Which issues (e.g. clinical oversight, financial responsibility) should be the responsibility of which country?
- Specific issues here, according to the Commission, include continuity of care when a patient travels to another Member State to undergo medical treatment after which he returns to his own Member State.
- Question 4: Who should be responsible for ensuring safety in the case of cross-border health care? If patients suffer harm, how should redress for patients be ensured?
- An issue of importance highlighted by the Commission is the need to be clear about who is responsible for ensuring patient safety in cross-border health care; how patients will be compensated when they suffer harm; if there are errors, whose liability rules will apply and how those errors will be followed up so as to avoid repetition.
- Question 5: What action is needed to ensure that treating patients from other Member States is compatible with the provision of a balanced medical and hospital services accessible to all in the 'receiving' country?

The proportion of patient mobility can be higher in border regions or popular tourist destinations, explains the Commission. Greater clarity is needed over the possibilities given to the Member State of treatment i.e. the 'receiving country' to ensure that treatment given to patients from other Member States will not prevent the provision of a balanced health care service open to all or undermine the sustainability of the health system of the receiving Member State.

- Question 6: Are there further issues to be addressed in the specific context of health services regarding the establishment of health care providers not already addressed by Community legislation?
- The Commission is of the opinion that there should be clarity over ethical issues, and the ability of Member States to take different decisions about what care they consider appropriate to provide, for example, fertility treatment.
- Question 7: Are there other issues where legal certainty should also be improved? In particular, what improvements do those directly involved in receiving patients from other Member States, such as healthcare providers and social security institutions, suggest in order to facilitate cross-border health care?
- Question 8: In what ways should European action help support the health systems of the Member States?
- The Commission advocates the need for a formal Community framework to ensure that co-ordinated action between all Member States will be implemented effectively and on a sustained basis in order to bring added value to national health systems.
- European networks of centres of reference are suggested, as is realising the potential of health innovation to ensure that treatment is provided on the basis of the best scientific evidence. A shared evidence base would improve the availability and comparability of health care data.
- Question 9: What Community tools or instruments would be appropriate to tackle the different issues related to health services?

Legal certainty would be best ensured, emphasises the Commission, by a binding legal instrument in the form of a Regulation or Directive based on Article 95 EC, the approximation of laws for the attainment of the internal market legal basis.

An interpretive Communication of case law is projected as a possibility. Other non-legislative options would include practical co-operation through the High level Group on health services and medical care,[35] together with the open method of co-ordination supporting

[35] Documents of the High level Group and its working groups are available on the Internet at

Member States in the reform and development of health care.[36] Although valuable in taking forward practical co-operation between Member States, the Commission underlines the fact that they alone would not provide legal certainty for patients and Member States concerning the freedom to receive medical services in another European Union Member State. There is an increasing need in the face of increased expectations, new medical technologies, dissemination through information technology and the enlargement of the European Union, concludes the Commission, to reconcile national health policies with the obligations of the internal market.

It is interesting to note that the Commission includes, in its Legislative and Work Programme for 2007,[37] a legislative proposal for a Community Framework for safe and efficient health services with Article 95 of the European Community Treaty as its legal basis. Its specific objective is stated to be to establish a Community framework for safe, high-quality and efficient health services in order to:

- ensure patient safety wherever health care is provided throughout the Community;
- address uncertainties over application of Community law to health services that create obstacles to cross-border healthcare;
- improve the efficiency and effectiveness of health services throughout the European Union.

The United Kingdom Response to the Consultation

The United Kingdom (UK) thinks that there are certain fundamental underlying principles that need to underpin, and be reflected in, any proposals in order to ensure a system of patient mobility that is mana-

http://ec.europa.eu/health/ph_overview/co_operation/mobility/high_level_documents_en.htm.

[36] See further: Com (2004) 304, 20 April 2004. "Modernising social protection for the development of high quality, accessible and sustainable health care and long-term care: support for the national strategies using the open method of co-ordination".

[37] COM (2006) 629, 24 October 2006.

geable and sustainable in the long term: one that respects the rights and responsibilities of Member States to organise and manage their health care systems.[38] The UK Government is adamant that the home health system in the individual Member State needs to be able to determine what health care services are offered to individual patients, and to manage the clinical decision about whether, given the individual circumstances of the patient, 'undue delay' applies. In the UK this is done through referral processes as an integral part of the process of determining what health services will be offered to the patient. It is essential to the Government that such processes must be respected in any legislative proposals.

Furthermore, in the view of the UK, patient mobility must be cost-neutral to the home health system. According to the UK response, further clarification is needed of the fact that when patients request to go abroad in order to be treated, it is the standard of care, governance, and redress arrangements of the Member State of treatment that will apply. Moreover, a principle of transparency could be established making it clear what information should be made available to patients by providers before they travel abroad for treatment. The UK Government insists that there

[38] UK Consultation Response to Commission Communication on Health Services, available on the Internet: http://ec.europa.eu/health/ph_overview/co-operation/mobility/results_open_consultation_en.htm#1. This response takes account of the views of UK stakeholders that contributed to a consultation in the UK, and views expressed in the UK Parliament, following appearances by the Right Honourable Rosie Winterton MP, the Minister of State for Health Services, before both a House of Commons Standing Committee, and Sub-Committee G of the House of Lords European Union Select Committee. Minutes of the Commons appearance are available at: http://www.publications.parliament.uk/pa/cm200607/cmgeneral/euro/070116/70116s01.htm. Minutes of the House of Lords appearance are published at: http://www.publications.parliament.uk/pa/ld/ldeucom.htm#evid, House of Lords European Union Committee 8th Report of Session 2006-07, HL Paper 48, Cross Border Health Services in the European Union. This Report makes available the oral evidence provided by the Rt. Hon. Rosie Winterton MP, Minister of State for Health Services to EU Sub-Committee G on 25 January relating to cross border health services in the European Union. The meeting with the Minister helped to improve the Sub-Committee's understanding of the significant and sensitive issues, of both a legal and political nature, that need to be resolved in order to find an acceptable way forward in this case. In particular, Sub-Committee G recognised the point the Minister made that there was a need to get the framework for European Health Services right so that it can provide a fair and transparent system for people seeking health care and, at the same time, ensure that it does not undermine the UK health service. (Point 5 of the Report). Sub-Committee G will look further at these issues when the Commission publish firm proposals. (Point 6).

must be no 'requirement to treat' on the part of Member States receiving patients travelling abroad for elective treatment. In other words, Member States must be able to prioritise their own residents above patients travelling to them specifically for treatment. Further, in accordance with the stated position of the UK, the principles of equity and solidarity need to be respected with regard to patient mobility, thereby avoiding the risk of creating a system whereby those European Union citizens who can afford to pay initially for services can access health care services faster than those with greater needs. The UK stresses that is important that any proposed solution be proportionate to the demand from patients which may grow. Accordingly, any system that is put in place to facilitate patient mobility needs to be both sustainable and flexible enough to take account of long term developments. Finally, the government underline that any legislative proposal should be based on the fundamental principles spelt out in its response and should not be overly detailed, nor simply transpose European Court of Justice case law into legislation.

Concluding Comments

The Commission will shortly publish a formal response on the Consultation and a Community legislative proposal will follow, having as its legal basis the Internal Market approximation of laws Article 95 EC, pursuant to which the European Parliament and the Council of the European Union will have each have an opportunity to debate and have an input under the Co-decision procedure.[39]

It may well transpire in the legislative proposal which will ensue, that the substantive decision as to what constitutes 'undue delay' in the referral system for hospital treatment will remain a decision for the Member State's competent authorities.[40] Nevertheless procedural requirements underpin-

[39] In accordance with Article 251EC.

[40] It is interesting to note that the Court of Appeal has not yet applied the preliminary ruling delivered by the European Court of Justice in the *Watts* case on 16 May 2006. It is for that refer-

ning this decision will, inevitably, be laid down by Community law. The conditions on which the grant of prior authorisation must be based; the fact that these must be transparent, objectively justified and detailed in advance in order to circumscribe any potential for the exercise of administrative discretion will, it is submitted, be part and parcel of the draft Community legislation. Adequate judicial review mechanisms will have to comply with principles of European Community law. Procedural transparency and available information for patients to enable them to choose to receive hospital treatment in another European Member State in individual circumstances when that treatment cannot be made available to them in the time deemed necessary having regard to their clinical condition *etc.* will emanate from European Community law. A lack of such information would constitute a potential barrier to the exercise of the fundamental freedom to receive cross-border treatment. Important issues such as the duty of care; liability and compensation mechanisms; and after care service will also feature in a European Community legislative act. It is this author's opinion that the form of European Community law will be a Framework Directive which will, in accordance with the principle of subsidiarity,[41] leave an element of flexibility in transposition to take account of the diverse systems that exist in the Member States. The freedom to choose to receive urgent health care in another European Union Member State will be facilitated and also circumscribed within a Community framework which will provide legal certainty for both patients and Member States.

ring court to decide on the facts *inter alia* whether there was 'undue delay' in according hospital treatment to Mrs Yvonne Watts. The formal outcome of the Consultation regarding Community Action on Health Services is, no doubt, awaited.

[41] See: Article 6 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality annexed to the European Community Treaty.