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European Union Committee

4th Report of Session 2008–09

Healthcare across EU borders: a safe framework

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The European Union Committee

The European Union Committee of the House of Lords considers EU documents and other matters relating to the EU in advance of decisions being taken on them in Brussels. It does this in order to influence the Government's position in negotiations, and to hold them to account for their actions at EU level.

The Government are required to deposit EU documents in Parliament, and to produce within two weeks an Explanatory Memorandum setting out the implications for the UK. The Committee examines these documents, and 'holds under scrutiny' any about which it has concerns, entering into correspondence with the relevant Minister until satisfied. Letters must be answered within two weeks. Under the 'scrutiny reserve resolution', the Government may not agree in the EU Council of Ministers to any proposal still held under scrutiny; reasons must be given for any breach.

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The Members of the Sub-Committee which conducted this inquiry are listed in Appendix 1.

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(Q) refers to a question in the oral evidence

(p) refers to a page of written evidence

The Report of the Committee is published in Volume I (HL Paper 30–I) and the Evidence is published in Volume II (HL Paper 30–II)

Summary

The right of patients from EU Member States to travel to another Member State to receive healthcare is a principle that has been confirmed on a number of occasions over the last ten years by the European Court of Justice, but uncertainty remains over how that right should function in practice. In an attempt to provide some clarity, the Commission published its proposal for a Directive on the application of patients' rights in cross-border healthcare.

Our report examines the proposal and considers that it is a justified and necessary attempt to codify ten years of European Court of Justice case law. Until now, patients' rights in cross-border healthcare have evolved through courts rather than considered legislation, and we do not consider that to be sustainable.

The Council of Ministers recognised the need for a legal framework in 2006, and the European Parliament has been similarly supportive. In our report we have emphasised the need for a proportionate response that does not go beyond what is necessary to provide clarity over patients' rights and fully respects the constitutional arrangements of each Member State, such as the UK's system of devolved governance.

The right to access cross-border healthcare presents patients with choice, an opportunity which we welcome, particularly if it has a positive effect on the efficient delivery of health services locally. Along with choice, we have recognised too that equity must underpin the drafting and implementation of this legislation. This means equitable access to cross-border healthcare for all, regardless of financial means, but avoiding any distortion of national health services. We are confident that Member States' right to organise and deliver their own health services and medical care may be protected under this draft Directive.

The demand for cross-border healthcare is, at best, unclear and it is likely to differ significantly across the European Union with demand greater in countries that share land borders or, for reasons of size, lack certain specialities. The precise mechanisms required to deliver it are equally unclear. Our report identifies some of the challenges to be met that are unresolved in the Directive as drafted, such as: delivering a smooth pathway of care for patients; ensuring that patients and practitioners are able to communicate with one another; and collating and disseminating information on cross-border healthcare.

We understand and accept the need for the legislation but we consider the impact to be so hard to predict, and potentially very significant for patients and practitioners alike, that the implementation of the Directive must be submitted to early, rigorous and regular review.

Healthcare across EU borders: a safe framework

CHAPTER 1: INTRODUCTION

Cross-border healthcare: Background to the Commission's initiative

1. On 28 April 1998, the European Court of Justice (ECJ) ruled that EU citizens have a right to obtain planned medical and dental treatment in a Member State other than their home State (see Box 1). Just over ten years later, the European Commission published a proposal for a directive on cross-border healthcare,¹ which aims to clarify and facilitate these rights in relation to cross-border healthcare and to provide some legal certainty. That proposal is the subject of this report.
2. The Commission's proposal and our report are not about the right to unplanned emergency treatment abroad, which is covered by the European Health Insurance Card.² This allows all EU citizens to use the same state-provided healthcare as residents of the country that is being visited. Nor are the proposal and our report about the mobility of healthcare professionals, which is covered by Directive 2005/36/EC on the recognition of professional qualifications.³

BOX 1

The key provisions considered by the ECJ

Article 49: The free movement of services

Article 49 of the EC Treaty provides that restrictions on the freedom to provide services across borders within the Community shall be prohibited. This prohibition also applies to restrictions on the receipt of services. Healthcare is a service covered by this Article.

E112: The cross-border application of social security schemes

Article 22 of Regulation 1408/71 of the Council of 14 June 1971 on the cross-border application of social security schemes⁴ allows nationals of EU Member States to travel to other Member States for treatment, at the cost of the relevant authority in the home Member State, as long as they have been authorised to do so by that authority. Authorisation may not be refused where the treatment is among the benefits normally provided within the home Member State and where the treatment cannot be provided within the normal time necessary, taking into account the current state of health and probable course of treatment. This is otherwise known as the “undue delay” clause. “E112” refers to the number of the necessary administrative form.

Article 152(5): Competence over national health services

Article 152 of the EC Treaty gives the Community a limited right to act in the field of public health but, according to Article 152(5), Community action should fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care.

¹ Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare (COM(2008)414), 02.07.2008

² www.nhs.uk/EHIC/Pages/About.aspx

³ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ L255, 30.9.2005, pp 22–142)

⁴ Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ L 149, 5.7.1971, pp 2–50)

3. The two 1998 cases⁵ both related to Luxembourg citizens who had been denied reimbursement for non-hospital medical services provided abroad. In the *Kohll* case, Mr Kohll's social security institution refused authorisation for his daughter to travel to Germany for dental treatment. The ECJ decided that rules under which reimbursement of the cost of dental treatment provided in another Member State is subject to authorisation constitute a restriction to the freedom to provide services. In the *Decker* case, Mr Decker was refused reimbursement for spectacles that he had bought across the border in Belgium using a prescription issued in Luxembourg. In that instance, the ECJ decided similarly that the rule constituted a restriction to the free movement of goods. It recognised that such a restriction could in principle be justified if it were necessary to ensure the financial balance of the social security scheme, maintaining a balanced medical and hospital service to all of its insured persons. But in these cases that justification was not established.
4. Since 1998, the ECJ has delivered further judgments clarifying its reasoning. One such judgment was the *Watts* case, delivered on 16 May 2006.⁶ In 2002, a UK citizen, Mrs Watts, investigated the possibility of hip arthritis treatment abroad on the basis of an E112 form (see Box 1). The request was refused because the projected one-year wait for the operation was within Government targets and therefore could be considered to be "without undue delay" (one of the criteria for an E112 authorisation). Upon appeal, Mrs Watts' case was reviewed and considered to be more urgent, but it was felt that the revised period of three to four months was still "without undue delay". Having failed to secure prior authorisation, Mrs Watts proceeded with treatment in France and continued her case against the local Primary Care Trust.
5. Ruling on the *Watts* case, the ECJ considered the application of both the "E112 route" and Article 49 (see Box 1), and of their interaction with Article 152(5) of the EC Treaty. The ECJ emphasised that consideration of undue delay must extend beyond the existence of waiting lists and overall clinical priorities, and must consider the specific clinical needs of the individual patient. It judged that Mrs Watts had faced "undue delay" and that failure to grant prior authorisation contravened both Regulation 1408/71 and Article 49, EC.
6. The Court also considered reimbursement under the E112 scheme and Article 49. Where an E112 form is used the treatment costs would normally be paid by the social security institution of the host Member State as they would be for one of its nationals, with the social security institution of the home Member State reimbursing the authority of the host Member State direct. Where a national of the host Member State would be required to make a contribution to the cost of the treatment, as is the case in some EU Member States, the home Member State must reimburse any such contribution by a patient from the home Member State, subject to the following condition: the total amount to be paid by the home Member State should not exceed the cost of equivalent treatment in the home Member State or (if lower) the amount invoiced for the treatment by the host Member State. Where Article 49 alone is relied upon the reimbursement to the patient

⁵ Case C-158/96 *Kohll vs Union des Caisses des Maladies* [1998] ECR I-01931 and Case C-120/95 *Decker vs Caisse de maladie des employés privés* [1998] ECR I-01831.

⁶ Case C-372/04 *Watts vs Bedford Primary Care Trust* [2006] ECR I-4352.

