

*Freedom, Solidarity and Health Care in the European Union*¹

Introduction

A fundamental freedom to receive cross border medical treatment is granted to citizens of the European Union by the internal market in services under the European Community Treaty as interpreted by the European Court of Justice,² most recently in the case of *Yvonne Watts v Bedford Primary Care Trust*.³ Controversially, the Court ruled in the *Watts* case that Member States may be required under European Community law to make adjustments to their social security systems.⁴ ‘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.’⁵ The Court found that Article 49 of the European Community Treaty 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.⁶

Competence in the field of public health is retained by individual Member States, each of which has the responsibility for organising and delivering health services and medical

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² Article 49 of the European Community Treaty. Joined Cases 286/82 and 26/83 *Luisi and Carbone*; 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.

⁴ *Ibid.*, para. 147.

⁵ *Ibid.*, para. 148. See, Ryland D, ‘Patient Mobility in the European Union: A Freedom to Choose?’, Paper presented at the 7th International Academic Conference held on 28 May 2007 at Andrzej Frycz Modrzewski Kraków University College. Published on the Internet at <http://www.fom.com.pl> The implications of this ruling for the United Kingdom Health service are profound. ‘More than 450,000 patients a year wait more than 12 months between seeing their GP and their admission to hospital... The figures released by the Department of Health, spell out the scale of the challenge facing the National Health Service in England in its drive to cut the maximum wait from GP visit to operation to just 18 weeks by the end of next year. 12 per cent of patients have waited more than a year by the time they are admitted to hospital or operated on, and the average wait looks closer to 25 weeks than 18’. Source: Financial Times, 8 June, 2007, ‘NHS still short of waiting time target’.

⁶ 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. *Ibid.*, para. 90.

care.⁷ There is thus the need to balance the objective of the free movement of patients in the European Union against overriding national objectives relating to management of the available hospital capacity, control of health expenditure and financial balance of social security systems.⁸

National Health Systems versus Freedom to Receive Cross-Border Health Care

The Member States of the European Union feel that it is necessary to clarify the interaction between the European Community provisions on the free movement of services and the health services provided by national health systems;⁹ and strongly believe that developments in this area should result from political consensus, and not solely from case law. Representatives of the Member States in the Council of the European Union have endorsed a Statement on common values and principles that underpin the health systems in the Member States of the European Union;¹⁰ recalling the overarching *values* of universality, access to good quality care, equity and solidarity. Universality is defined as meaning that no-one is barred access to health care; whereas *solidarity is closely linked to the financial arrangement of Member States' own national health systems and the need to ensure accessibility to all*. The *value* of equity is stated to relate to equal access according to need, regardless of ethnicity, gender, age, social status or ability to pay. Emphasis is placed on the essential feature of all Member States' health systems, namely, the aim to make each system *financially sustainable* in a way which will safeguard the above mentioned values in that Member State for the future. In addition, and beneath these overarching values, a set of shared operating principles include: good quality health care; patient safety; care based on evidence and ethics, embracing 'the challenge of prioritising health care in such a way that *balances the needs of individual patients with the financial resources available to treat the whole population*';¹¹ patient involvement, transparency and, *where possible*, choice between different health service providers; redress, a fair complaints procedure and clear information about liabilities and compensation; and privacy and confidentiality. Any

⁷ Article 152(5) of the European Community Treaty.

⁸ Case C-372/04, *Ibid.*, para. 145 of the judgment.

⁹ See 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, 3rd conclusion, <http://www.consilium.europa.eu/Newsroom>

¹⁰ *Ibid.*, 5th and 6th conclusions.

¹¹ *Emphasis added*.

standardisation of health systems in the European Union would be deemed inappropriate. Member States would commit themselves to working together to share experiences and information about good practice in health care, through the Open Method of Coordination¹² in order to promote efficient and accessible high quality health care in Europe. The Member States would only countenance *a legal framework* on health services which *enshrines the values and principles endorsed by the Council*.¹³

The European Commission, in response, is developing, through a consultation exercise, a Community framework for safe, high quality and efficient health services in the European Union. Questions being addressed include, *inter alia*: whether there are shared values and principles for health services on which citizens can rely throughout the European Union; what practical issues need to be clarified for citizens who wish to seek healthcare in other Member States, such as, for example, the availability of transparent information on good quality health care, contractual liability and after care service. Greater choice in exercising individual entitlements in an enlarged European Union needs to be reconciled with the financial sustainability of Member States' health systems and the flexibility of Member States to regulate their own systems without creating unjustified barriers to free movement. The Commission, ultimately, will propose a draft Community Directive on health services with an internal market legal basis during the course of 2007.¹⁴

¹² See the Communication from the Commission, "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 coordination'", COM(2004) 304, 20 April 2004.

Article 152 of the European Community Treaty provides, *inter alia*:

1. A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities.

Community action, ... shall complement national policies.

2. The Community shall encourage cooperation between the Member States in the areas referred to in this Article and, if necessary, lend support to their action.

Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination.

¹³ The Council invites the European Commission to ensure that the common values and principles are respected when drafting specific proposals concerning health services; and invites the institutions of the European Union to ensure that the common values and principles contained in the statement are respected in their work. *Ibid.*, 7th and 8th conclusions.

¹⁴ Commission Communication, 'Consultation regarding Community action on health services', 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 Jan. 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. See further, Ryland D, 'Patient Mobility in the European Union: A Freedom to Choose', *Ibid.* See further, Health and Consumer Protection Directorate-General, European Commission, "Summary report of the responses to the consultation regarding 'Community action on health services'", (SEC(2006)1195/4, 26 Sept. 2006). The full list of contributors and their responses received may be consulted directly on the

A High Quality of Health Care: Principles; Procedures; Competence and Reform?

To what extent can the European Community become involved in what is essentially the responsibility of Member States, namely public health?

Consider the following two opposing views.

On the one hand:

‘By providing every EU citizen with the right to access the best national healthcare services available in the EU, in circumstances where his/her own national healthcare system has failed, the Court of Justice has given him/her the most valuable service available anywhere.’¹⁵

On the other hand:

‘The European Court of Justice has embarked on a policy of strengthening the rights of EU citizens to obtain treatment in other Member States. ...is this individualistic view of health care rights mistaken and likely to damage the sense of *social solidarity* essential to any public, social welfare system?’¹⁶

*The Principle of Solidarity*¹⁷

There is a tension between the free movement of persons and the principle of national solidarity. Giubboni continues: ‘So it is not by chance that the principle of national solidarity has been invoked by the Member States as a form of *defence* against the dynamics of economic integration – and particularly of the liberalisation of services – regarded as potentially destabilising to the viability, *in primis* financial, of national social protection systems.’¹⁸

Commission’s website: http://www.ec.europa.eu/health/phoverview/cooperation/mobility/results_open_consultation_en.htm A health services Directive has been drafted and will be formally released by the Commission on 20 November, 2007. Source: Financial Times 17 October, 2007 at p. 7.

¹⁵ Kaczorowska A, ‘A Review of the Creation by the European Court of Justice of the Right to Effective and Speedy Medical Treatment and its Outcomes’, (2006) Vol. 12, No. 3 *European Law Journal*, p. 345, at p. 352.

¹⁶ *Emphasis added.* Newdick C, ‘Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity’, (2006) 43 *Common Market Law Review*, p. 1645.

¹⁷ It should be noted that the principle of solidarity is embraced in Title IV of the Charter of Fundamental Rights of the Union, but that ‘the solidarity which underpins the recognition of fundamental social rights in the Community legal order does not reach into the protected sphere of national welfare provision...’. Giubboni S, ‘Free Movement of Persons and European Solidarity’, (2007) Vol. 13, No. 3 *European Law Journal*, p. 360, at p. 374.

‘... the European Community has not so far crossed the threshold to a true social union of all Member States which could be considered as just one community with mutual solidarity, where revenues and financial charges are shared irrespective of national boundaries.’ Hailbronner K, ‘Union Citizenship and Access to Social Benefits’, (2005) 42 *Common Market Law Review*, p. 1245, at p. 1265. Citing Tomuschat, ‘annotation of Sala’ in (2003) 37 *CMLR*, 449 at 454.

¹⁸ Giubboni S, *Ibid.* at p. 366.

It is the nation State that is faced with difficult decisions and choices in the management of its own finite resources for health care. ‘Individual health care rights at the European level may not foster notions of solidarity. They will benefit a vocal minority, but divert resources from poorly represented, less visible, less articulate groups typically composed of disabled, mentally ill and elderly patients.’¹⁹

Procedures

Newdick goes on to say that health rights in systems based on social welfare are relative rights. ‘Relative rights cannot guarantee access to substantive benefits, so it is crucial to understand the *procedure* by which the court will scrutinise the decision-maker’s authority.’²⁰

The ruling of the European Court of Justice in the *Watts* case is significant here in that it purported to circumscribe the potential for arbitrary discretionary decisions of national health authorities concerning the grant or refusal of prior authorisation and the regulation of their waiting lists.²¹ The Court noted that the National Health Service regulations do ‘not set out the criteria for the grant or refusal of the prior authorisation necessary for the 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.’²² Moreover the Court ruled, ‘... a refusal to grant prior authorisation cannot be based merely on the existence of waiting lists enabling 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

¹⁹ Newdick C, *Ibid.* at p. 1645.

²⁰ Newdick C, *Ibid.* at p. 1651.

²¹ Case C-372/04, *Ibid.* ‘It is settled case-law that a system of prior authorisation cannot legitimise discretionary decisions taken by the national authorities which are liable to negate the effectiveness of provisions of Community law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings (see Case C-157/99 *Smits and Peerbooms*, para. 90, and Case C-385/99 *Müller-Fauré and van Riet*, para. 84). Thus, in order for a system of prior authorisation to be justified even though it derogates from a fundamental freedom of that kind, it must in any event 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. Such a system must furthermore 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 and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings (*Smits and Peerbooms*, para. 90, and *Müller-Fauré and van Riet*, para. 85).’ paras. 115 and 116 of the judgment.

²² ‘The lack of a legal framework in that regard also makes it difficult to exercise judicial review of decisions refusing to grant authorisation.’ *Ibid.*, para. 118.

the request for authorisation was made or renewed.²³ Furthermore, the Commission consultation is examining such issues of procedure as, for example, more patient information; and transparency of reasons for refusing authority to undertake cross border medical treatment, these being facilitative of judicial review. Suggestions by contributors for improvements include:²⁴ clear information for patients on cross-border care; effective and transparent decision procedures; a patient-centred approach;²⁵ evidence-based standards;²⁶ and the right to appeal against refusals. There was a broad consensus that responsibility for clinical oversight should be with the country of treatment, with importance attached to cooperation with the relevant authorities in the patient's home country, inclusive of managed cross-border care and international patient transport.

*The Principle of Subsidiarity*²⁷

Many contributors to the Commission consultation (in particular from national governments, unions and purchasers) emphasised that any Community action that affects the health systems should respect the subsidiarity principle, referring in particular to Article 152 of the European Community Treaty. In particular, many argued that the 'steering capacity' of national or regional healthcare regulators should be preserved. Some contributors (especially umbrella organisations of dentists and some Member States) argued that the principle of subsidiarity does not prevent the application of European Union fundamental freedoms. In their view, increased freedom of choice and movement could be positive, and could help to increase access, quality and financial sustainability, rather than endangering the balance of the healthcare system. Some

²³ *Ibid.*, para. 119.

²⁴ European Commission, "Summary report of the responses to the consultation regarding 'Community action on health services'", (SEC(2006)1195/4, 26 Sept. 2006). *Ibid.*

²⁵ With regard to countries in which waiting lists are used to limit and manage health service supply, some contributors were concerned that 'patients could bypass waiting lists' via cross-border healthcare. However, other contributors argued that patient mobility should be seen as a signal that patients are seeking alternatives due to concerns over quality, cost or accessibility (in particular unions). From this perspective, patient mobility would signal that action should be taken by the responsible authorities to address patient's concerns over their own health system, rather than suppressing patient mobility through administrative barriers.

²⁶ One university considered that the definition of 'undue delay' should be based on the best available scientific evidence rather than on cultural or national preferences, and therefore should be universal within the EU.

²⁷ Article 5, para. 2 of the European Community Treaty provides:

In areas which do not fall within its exclusive competence, the Community shall take action in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

For further reference, see: de Búrca G, 'The Quest for Legitimacy in the European Union', 59:3 (1996) *The Modern Law Review*, p. 349, at pp. 366-368; Toth AG, 'The Principle of Subsidiarity in the Maastricht Treaty', 29 (1992) *Common Market Law Review*, p. 1079; Emilou N, 'Subsidiarity: An Effective Barrier against the Enterprises of Ambition?' (1992) *European Law Review*, p. 383; de Búrca G, 'Reappraising Subsidiarity's Significance After Amsterdam', Jean Monnet Working Paper 7/1999, <http://www.jeanmonnetprogram.org>; Davies G, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time', (2006) *Common Market Law Review*, p. 63.

contributions (in particular scientists and dentists) highlighted in this context the potential danger of a series of measures that could be used to limit patient, professional and provider mobility against the principles of the Treaty and the rulings of the Court of Justice. These include a reference to insufficient provision of information to patients, extensive use of the prior authorisation requirements, or the general argument of ‘danger of instability’ to health care systems.²⁸

It should not be overlooked that the principle of subsidiarity, intended to regulate the exercise of Community competence is inextricably linked to the existence of Community competence,²⁹ soon to be Union competence.³⁰ The reformed Treaties signed at Lisbon on 19 October 2007 have delineated more explicitly the competences conferred upon the European Union.³¹

Competence and Reform

The majority view of contributors to the proposed Community action on health services Consultation was that a combination of both ‘supportive’ tools (such as practical cooperation, or the ‘open method of coordination’) and legally binding measures would be the most efficient approach. There were clearly two main approaches preferred by

²⁸ European Commission, “Summary report of the responses to the consultation regarding ‘Community action on health services’”, (SEC(2006)1195/4, 26 Sept. 2006). *Ibid.*

It is interesting to note here that the European Commission views subsidiarity ‘as a way of justifying the exercise of power by the Community, rather than as a way of limiting or restricting it.’, whereas ‘...the Council generally views the principle as an expression of a limit on Community powers, implying a reduction in and repeal of Community legislation ...’.

de Búrca G, ‘The Quest for Legitimacy in the European Union’, 59:3 (1996) *The Modern Law Review*, p. 349, at pp. 366 and 367.

²⁹ ‘... these two are not conceptually as distinct as they may first appear.’ P Craig and G de Burca, *EU Law, Text, Cases and Materials*, Fourth Edition, Oxford University Press, 2007, at p. 100.

³⁰ The Intergovernmental Conference (established on 23 July 2007) was asked to draw up a Treaty (hereinafter called ‘*Reform Treaty*’) amending the existing Treaties with a view to enhancing the efficiency and democratic legitimacy of the enlarged Union, as well as the coherence of its external action. The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called ‘Constitution’ has been abandoned. The Draft Reform Treaty - Council of the European Union, Presidency Conclusions of the Brussels European Council (21/22 June 2007) 11177/07, 23 June 2007, General Observations Point 1.

http://www.eu2007.de/en/News/download_docs/Juni/0621-ER/010conclusions.pdf

Only available to date is the draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community, which was submitted to the Intergovernmental Conference (IGC) (Foreign Ministers) meeting on 15 October 2007, with a view to its final adoption at the IGC (Heads of State or Government) meeting in Lisbon on 18 October 2007, CIG 1/1/07 REV1.

<http://www.europa.eu> The Union will be founded on the Treaty on European Union (TEU) and on the Treaty on the Functioning of the European Union (TFEU) (referred to as ‘the Treaties’), each Treaty having the same legal value. The Union will replace and succeed the European Community. Article 1, para. 3 of the Treaty on European Union.

³¹ In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States. Article 4 (1) TEU. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. Article 5 (1) TEU. Under the principle of conferral, the Union shall act *only* within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.

Competences not conferred upon the Union in the Treaties remain with the Member States. Article 5 (2) TEU. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. Article 5 (3), first para., TEU. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. Article 5 (4), first para., TEU. See further Declaration 28, Declaration in relation to the delimitation of competences, DS 870/07 Lisbon, 19 October 2007.

different contributors. Some contributors preferred to include any changes within the Regulations on the coordination of social security systems³², while other contributors preferred a new Directive on health services.

The internal market will remain a shared competence of the European Union with the Member States under the reformed Treaties,³³ whereas the Union may only take complementary or supportive action,³⁴ *respecting the defined responsibilities of the Member States for health services.*³⁵ A new provision in the health Article 152³⁶ empowers the Union in particular to encourage cooperation between Member States to improve the complementarity of their health services in cross border areas. A further addition authorises the Commission in close contact with the Member States to take any useful initiative to promote coordination amongst Member States of their policies and programmes on health services in cross-border areas, and *'in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best*

³² Regulations (EC) No. 1408/71 and 574/72, [1971] OJ L149/2 and [1972] OJ L74/1, as since amended by Regulation (EC) No. 883/2004, [2004] OJ L200/1. These are based on Article 42 of the European Community Treaty (under the chapter on the free movement of workers), and entitle persons for whom a medical treatment becomes necessary during a stay in the territory of another Member State, using the European Health Insurance Card. Reimbursement between the Member State and the providers is regulated by national rules. The Regulations ensure assumption of costs for planned treatment in other Member States, subject to prior authorisation, and deal with the settlement of financial claims between receiving and sending Member States.

Article 22 of Regulation 1408/71:

(1) An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits ..., and:

(c) who is authorised by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his condition, shall be entitled:

(i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay ... in accordance with the provisions of the legislation which it administers, as though he were insured with it;

(2) The authorisation required under paragraph 1(c) may not be refused where the treatment in question is among the benefits provided by the legislation of the Member State on whose territory the person resides and where he cannot be given such treatment within the time normally necessary for obtaining the treatment in question in the Member State of residence taking account of his current state of health and the probable course of his disease.

Form E 112 is the certificate necessary for the application of Article 22 (1) (c) (i) of Regulation 1408/71.

³³ Under the Treaty on the Functioning of the European Union, replacing the European Community Treaty. Shared competence between the Union and the Member States applies in the area of the internal market. Article 4 (2) (a) TFEU. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence. Article 2 (2) TFEU. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties. Article 22a (1) TFEU. See also, Protocol Number 8 on the Exercise of Shared Competence: With reference to Article 2 (2) of the Treaty on the Functioning of the European Union on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area. , CIG 2/01/07 REV 1, Brussels, 5 October 2007, Conference of the Representatives of the Governments of the Member States, IGC 2007, Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community – Protocols. <http://www.europa.eu>

³⁴ In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations. Article 2 (5) TFEU. The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States in the area of the protection and improvement of human health. Article 6 (a) TFEU.

³⁵ Article 152 (7) TFEU.

³⁶ Article 152, (2), subpara. 1 TFEU.

*practice, and the preparation of the necessary elements for periodic monitoring and evaluation.*³⁷ These fall short of empowering command and control legislation, legitimising supporting, supplementary or coordinating action only. It remains the case that the responsibilities of a Member State for its health services have been further strengthened under the reformed Treaty on the Functioning of the European Union so as to include the management of its health services and medical care and the allocation of the resources assigned to them in each Member State.³⁸ This is a significant confirmation of the competence of a Member State as regards the allocation of resources assigned to health services and medical care and their consequential management in that Member State.

The Charter of Fundamental Rights of the Union

The Charter of Fundamental Rights of the Union³⁹ provides: Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.⁴⁰

This two-pronged provision corroborates the conferred substantive competence of Member States in the field of health care. At the same time it lends weight to the shared competence of the Union to integrate a high level of health care into its internal market activities.⁴¹ In exercising this shared competence, a framework directive which would leave as much scope for national decision as possible and which would respect well established national arrangements and the organisation and working of Member State's legal systems;⁴² incorporating procedural objectives only, would constitute a viable

³⁷ The European Parliament shall be kept fully informed. Article 152 (2), subpara. 2 TFEU. *Emphasis added.*

³⁸ Union action shall respect the responsibilities of the Member States *for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them.* Article 152 (7) TFEU *Emphasis added.*

³⁹ The Charter's provisions will be solemnly proclaimed by the European Institutions one day before the Treaty of Lisbon is signed formally in December 2007. Source: Professor Hans-Gert Pöttering, President of the European Parliament and honorary Patron of the international Conference entitled, 'The European Constitution and National Constitutions', *Ibid.* Kraków 24 October 2007.

⁴⁰ In Title IV Solidarity, Article 35.

⁴¹ See further the explanatory notes to Article 35 of the Charter.

See: Ryland D, 'The Charter of Fundamental Rights of the European Union: Questions, Problems and Perspectives', (2005) No. 1, *Państwo I Społeczeństwo (State and Society)*, Andrzej Frycz Modrzewski Kraków University College Press, p. 113; Ryland D, 'The Charter of Fundamental Rights of the European Union: Pandora's Box or Panacea?' (2003) Vol. 45, No. 5/6 *Managerial Law*, p. 145.

⁴² In accordance with the currently worded Protocol on the Application of the Principle of Subsidiarity and Proportionality attached to the European Community Treaty, Article 7.

instrument, and one which would fall within the remit of the Member States' endorsed statement in the Council.

The Charter of Fundamental Rights is not incorporated in the Treaty of Lisbon; instead it receives a cross reference in an amended Article 6 of the Treaty on European Union, which provides that the Union recognises the rights, freedoms and principles set out in the Charter,⁴³ which accords to the Charter the same legal value as the Treaties, and which confirms that the Charter's provisions shall not extend in any way the competences of the Union as defined in the Treaties.⁴⁴ Moreover, 'the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.'⁴⁵ In order to assuage doubts and dilemmas in the controversial area of social 'rights', in particular those of the United Kingdom government which is opposed to their direct enforceability in the national courts, the inserted Article 52(5)⁴⁶ of the Charter provides: 'The provisions of this Charter which contain principles may be implemented by legislative and executive acts of Member States when they are implementing Union law, in the exercise of their respective powers. *They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality*'.⁴⁷ The interpretative provisions incorporated in the Constitution may have circumvented the direct enforceability of the Charter of Fundamental Rights. The scope still exists for the provisions of the Charter to be enforced indirectly by way of an interpretative ruling from the European Court of Justice, on a reference from a national court on a question of Union law.⁴⁸

It is submitted that the United Kingdom's exclusion from the jurisdiction of the Courts concerning the Solidarity Title IV of the Charter is intended solely to protect the United

⁴³ The Charter of Fundamental Rights of 7 December 2000, as adapted [at..., on... 2007].

⁴⁴ Article 6 (1), paras. 1 and 2, TEU.

⁴⁵ Article 6 (1), para. 3, TEU.

⁴⁶ This subarticle would have been inserted by the Constitutional Treaty. See P Craig and G De Burca, *Ibid.*, at p. 416. It is not known whether it will be confirmed by the 2007 Intergovernmental Conference in the Charter of 2000 as adapted, which will be proclaimed in December 2007. See note 43, above.

⁴⁷ (*emphasis added*). 'One may wonder to what extent the Court of Justice of the European Communities will accept such limitation.' J Duteil de la Rochère, 'The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty', (2004) *Common Market Law Review*, p. 345, at p. 352. See Ryland D, 'The Charter of Fundamental Rights of the European Union: Questions, Problems and Perspectives', *Ibid.*, at p. 117.

⁴⁸ *Ibid.*, Ryland D, at p. 122.

Kingdom's laws on industrial action.⁴⁹ In any case, it has been submitted that '[t]he effect of this exemption is questionable, however, as it would appear to undermine fundamental principles about the obligation of Member States to adhere to the *acquis communautaire* (EC law, the Treaties and the case-law of the European Court of Justice).'⁵⁰ Moreover, '[i]t has been suggested that the Charter could still have an indirect impact on UK law, particularly in cases where the ECJ ruled on Charter-related issues in other EU Member States.'⁵¹ The United Kingdom House of Commons European Scrutiny Committee have reported their concerns about the security of the United Kingdom's position under the Charter. In their view, it requires to be made clear that Protocol Number 7 to the reformed Treaties takes effect notwithstanding other provisions of the Treaty or Union law generally.⁵² Fundamental principles of non-discrimination on grounds of nationality and proportionality spring to mind in this regard. The TEU explicitly provides that 'fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States shall constitute general principles of the Union's law.'⁵³ The European Court of Justice has declared: 'The Charter was solemnly proclaimed by the Parliament, the Council and the

⁴⁹ Protocol (No. 7) on the Application of the Charter of Fundamental Rights to Poland and to the United Kingdom, CIG 2/01/07 REV 1, Brussels, 5 October 2007, *Ibid*.

Article 1 (1) The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or the United Kingdom, to find that the laws, regulations or administrative provisions of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

Article 1 (2) In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

Article 2 To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

Poland would appear to be doing somersaults here as a further Declaration would appear to contradict that which Poland purports to safeguard by way of being a Party to this Protocol. See Declaration Number 53, Declaration by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights in relation to Poland and the United Kingdom. Therein Poland declares that, having regard to the tradition of social movement of 'Solidarity' and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union. CIG 3/1/07 REV 1, Brussels, 5 October 2007, *Ibid*.

⁵⁰ Miller V, 'EU Reform: a new treaty or an old constitution?' House of Commons Library Research Paper 07/64, <http://www.parliament.uk>

⁵¹ *Ibid*. Citing EUObserver 27 June 2007, <http://www.euobserver.com>

⁵² The United Kingdom Parliament Select Committee on European Scrutiny Thirty Fifth Report on the European Union Intergovernmental Conference, para. 73. "the words of the recital reaffirm that the Protocol is 'without prejudice to other obligations of the United Kingdom under the Treaty on European Union, the Treaty on the Functioning of the European Union, and Union law generally.' ... If it is intended that ECJ case law based on the Charter should have no effect at all within the UK, we should have expected some provision in the Protocol to make it clear that the Protocol takes effect notwithstanding other provisions in the Treaties or Union law generally. This would be the more necessary given the tendency for any derogation from the Treaties to be interpreted restrictively by the ECJ." A possibility would seem to exist 'that following a reference to the ECJ from some other Member State the Court might find that, in the light of the Charter,' a derogation from a provision of EU law, 'has to be interpreted more restrictively than before (i.e. before the Charter had legal effect).' para. 58. <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/1014/101403>

⁵³ Article 6 (3) TEU.

Commission in Nice on 7 December 2000.... Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm ‘rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case law of the Court ... and of the European Court of Human Rights’.⁵⁴ The Charter, states one learned commentator, ‘is bound, in time, to be recognised as an authoritative re-statement of fundamental rights that derive their character as general principles of law from the constitutional traditions of the Member States or from international agreements to which the Member States are parties.’⁵⁵

Conclusion

A balance of the principles as succinctly laid out in the Health Article of the Charter of Fundamental Rights of the Union, which does have the same legal value as the Treaties, should, thus, be the benchmark for any Union action on health care. Issues of conferred competence are at stake and, respecting the principles of subsidiarity and proportionality, the patient’s right of access to a high quality of health care in an internal market in health services in the European Union should be facilitated legislatively by best practice procedures, information and transparency; it should further be qualified by the principles of solidarity and the sustainability of Member States’ national health systems.

⁵⁴ Case C-540/03 *European Parliament v Council*, [2006] ECR I-5768, para. 38. See further Declaration 29, Declaration concerning the Charter of Fundamental Rights: The Charter of Fundamental Rights, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States.

The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties. CIG 3/1/07 REV 1.

⁵⁵ Editorial Comments: ‘What should replace the Constitutional Treaty?’ 44, 3 (2007) *Common Market Law Review*, p. 561, at p. 566.