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The Lisbon Treaty and Healthcare

Delivery of health and other services are subject to Internal Market rules: neither Art 152 nor Protocol 26 of the Lisbon Treaty exclude delivery of health services from market rules.

The European Commission temporarily shelved until after the Irish referendum on the Lisbon Treaty a controversial legislative proposal tackling patients' rights to receive medical treatment in another EU member state. This is a clear sign that the Commission is conspiring to keep citizens in the dark about contentious EU legislation on health which will have serious implications for the Irish taxpayer and have a damaging impact on our already beleaguered health system. Several member states are against the proposal because they think it would destroy their national health systems, with Denmark, Finland and the Netherlands being most vociferous. Member states' biggest fear is they are going to lose control over their health budget by not being able to predict how many claims might result from the Directive.

Following the exclusion of healthcare from the Services Directive, the European Commission had announced plans for a new separate directive to open up health services to free market competition. Recent European Court of Justice (ECJ) rulings have facilitated these plans by using internal market arguments contained within the original Services Directive. The Commission argues that the Directive is necessary to put into practice principles which it argues were established by a controversial ruling of the European Court of Justice in 2006. In this ruling, known as the Watts case, an osteoporosis sufferer who had gone for treatment in France to avoid a long wait in the UK sought to recover the cost of her treatment from the NHS. The Court ruled that the lack of an established NHS procedure to seek services abroad restricts the possibilities for patients to seek treatments outside the NHS system and therefore is a restriction of their freedom to receive services. The Court found that medical services are not exempt from the scope of the EC Treaty and that Mrs Watts was entitled to receive such a service and be reimbursed by the NHS. The fact that the NHS is an entirely public body, funded by the state and providing health care free at the point of delivery, was irrelevant for determining whether the situation fell within the scope of the Treaty. At the time, *The Financial Times* reported that the court's decision was a further step towards the establishment of a single market for healthcare in the EU. The Commission argues that as a result of the rulings of the court it is necessary to 'clarify' the altered role of the member states. However, the Directive is not just a 'response' to the Watts ruling. In its explanation the Commission also explicitly acknowledges that the Directive aims to fill a 'hole' made in the Services Directive which was created when healthcare was excluded from its scope. Interestingly, its proposed legal basis is under the internal market (article 95) rather than the health articles of the treaty.

The ECJ's Watts ruling of 2006 established that Article 49 (right to provide services) should apply in the provision of health services. The Commission's current policy, based on a number of ECJ rulings, is that Member States are free to define 'the mission' of a public

service and its 'objectives and principles' but when 'fixing the arrangements for implementation' the Treaty rules (Art 43 and 49) should apply. In other words, the actual provision/delivery of healthcare – as distinct from general policy making – is now subject to internal market rules. Taking its lead from the ECJ, the Commission's view is that any service for which payment is usually made, is an 'economic activity' within the meaning of Art 43 and 49 TEC. Any operator from within the EU must be allowed bid to provide the service. In its 2006 policy communication on Social Services of General Interest (social services), the Commission declared:

> 'With regard to the freedom to provide services and freedom of establishment, the Court has ruled that services provided generally for payment must be considered as economic activities within the meaning of the Treaty. However, the Treaty does not require the service to be paid for directly by those benefiting from it. *It therefore follows that almost all services offered in the social field can be considered "economic activities" within the meaning of Articles 43 and 49 of the EC Treaty*.'

Lisbon: more of the same, only worse

The Lisbon Treaty does not reverse Watts or similar ECJ rulings by explicitly declaring that market rules should not apply to the delivery of health, education or social services; nor does it exclude these services from being categorised as 'economic activities' in situations where charges or fees are involved – a category that the Commission says includes 'almost all' or 'the vast majority' of services. Market rules apply to all 'economic activities'. The principles established in this case-law in the ECJ will remain as the legal framework for any EU legislation arising in a post-Lisbon scenario.

In a speech outlining his concerns about the Lisbon Treaty given in the House of Commons on 6 February 2008, former UK health secretary Frank Dobson (Labour) highlighted the concern of many social democrats at these developments:

> 'Appearances would suggest that our national health service is and will remain the exclusive responsibility of the UK Government, but it is not and, under the Lisbon treaty, it will not. All the *apparent* protection for our sovereignty that was provided in the old and new treaties does not exist.
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> In a recent ECJ decision, now followed up by the European Commission, the neo-liberals who hold powerful positions on the Court and the Commission decided to open everything to do with health care up to internal market forces … I am very dubious about supporting a treaty that has not done something to set aside the Watts decision. I should warn the House that I think that there are very powerful forces at work behind the proposition, and they are in this country now. Those forces are the US health corporations …'

The European Parliament has already made clear that it accepts the legal definitions and framework set out by the ECJ and the Commission. In 2006, a resolution from the Parliament declared that it does not matter whether public services are provided by state or private operators; there must simply be 'fair' competition and adequate regulation. The trajectory of EU policy is to reinforce liberalisation and cast the state in the role of regulator and provider

of funding – as long as the level of funding (public spending) does not threaten ‘price stability’ and free market competition.

According to Comm 1195/4 on health 2006, two clarifications were provided by the Watts ruling on 16 May 2006:

> ‘First, some Member States with systems based on integrated public funding and private provision of health services had argued that the Treaty provisions on the freedom to provide services did not apply to them; *the Watts judgment confirmed that they do*’.

Two features of the Directive – at least as currently drafted – are particularly problematic and would potentially favour higher income groups. Firstly that people would spend money on treatments abroad, and then be reimbursed later, and secondly, that the system would operate on a top-up basis – patients could get a certain proportion of the cost of a treatment reimbursed by the HSE, but make up the difference themselves. These features would lead to the diversion of resources towards higher income groups. People who are able to travel can go and get their procedure and because the HSE has a fixed budget, that effectively means they can get first call on the HSE resources; one of the concerns that a number of people have – and not just in this country – is the impact that this has on trying to run an equitable system. There could be an effect where those who are able to travel and pay up-front can to some extent push to the front of the queue. It would establish a system that would favour the young, mobile and relatively affluent. Advocates of patient choice suggest that giving everyone equal choice about how and where they are treated will create greater equality. However, this argument doesn’t work if patients need to have enough money to exercise that choice (i.e. the top-up-and-reimbursement based model now being proposed by the Commission).

The current minister of health, Mary Harney, introduced the National Treatment Purchase Fund (NTPF) to help reduce waiting lists in the public health system by allowing public patients access treatment in private hospitals. Though the fund enabled waiting lists to be reduced it was strongly criticised because it diverted much needed resources from the public health budget. The NTPF is strictly controlled and funded by the Irish government through the HSE. Under the EU Health Service Directive patients’ ability to travel abroad for treatment will be greatly extended with the funding coming from the Irish health budget but the HSE will have little control over this area of expenditure. Thus Irish taxes will be used to enhance the German, French, Dutch, British etc. health service while funding for chronic and long-term health care in Ireland will be further depleted. As democrats we can reject Mary Harney in the next general election for removing funding for such services as the cervical cancer vaccine program. Who do we hold to account for the EU Health Service Directive and the budgetary implications therein?

Other aspects of the Directive also raise longer term questions about the role of the European Union in health policy. In particular proposals in the Directive that the Commission should designate specialist centres for particular treatments; its proposal for a new EU health committee chaired by the Commission; and the end of the veto over public health issues in the

Lisbon Treaty all suggest that the Commission sees a much greater role for itself in running health policy in the future. Health economist Professor Ray Kinsella says the issue of the Lisbon Treaty is a constitutional one ‘the Lisbon Treaty is a constitutional artefact that I will be voting against. They had a European Constitution that they just could not get by. People

did not buy into it so they redressed it and put it into the form of a Treaty and they are now cheating people across Europe out of a referendum.'

The Lisbon Treaty was negotiated between 2001 and 2004 at the peak of the global economic bubble. Free market, neo-liberal principals are enshrined in what is basically an EU constitution. However the near-obsessive determination by EU bureaucrats to privatise all-manner of public services seems to be out of step with current criticism of the free-market driven private sector, which daily gets louder and harsher. This criticism is no longer restricted to the traditional 'left wing' but is increasingly to be heard from major 'establishment' players. In a recent interview with the *Financial Times* (23 February) Frank-Walter Steinmeier, vice-chancellor and foreign minister of Germany said: 'It will take many years of work to restore people's confidence in this economic system and its rules'. Steinmeier, who is the SPD challenger to replace Angela Merkel as chancellor at the general election in September, has drawn up a programme aimed at ending the focus on short-term returns among businesses and investors: 'The turbo-capitalism of the past few years is dead, irrevocably so. We must now create a new order for the future.'

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