Freedom of Health and Medical Care Services within the European Union

Recent Jurisprudence of the European Court of Justice, with Particular Reference to Case C-372/04 *Yvonne Watts*, 16 May 2006

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I. Introduction

A. Policy Background

On 16 May 2006 a preliminary question dealing with the freedom to provide and receive health care services was decided by the European Court of Justice (ECJ).[1] The judgment was significant in the light of the overall situation concerning medical and health care services within the European Union (EU). The ever closer economic integration within the Union generates many issues in fields related to the social policy of each Member State. This is particularly visible when the internal market requirements at EU level encounter the social protection choices at domestic level. A certain uneasiness emerged, recently, in regard to amendments tabled to the proposed directive on the free movement of services within the EU, the so-called Bolkenstein directive.[2] This proposal on services in the internal market included the medical and health care services within its scope of application, it aimed at codifying the jurisprudence of the ECJ and provided for the application of the principle of origin in the health care area. Thus, the service provider offering its services within the EU would have been subject to the requirements concerning social legislation of the country of origin. After vehement protests, the proposal was modified and one of the sectors excluded from the general proposal on free movement of services is precisely the medical and health care

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1 Case C-372/04, *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health*, 2006 ECR I-0000.

2 Proposal for a Directive of the European Parliament and of the Council on services in the internal market of 13 January 2004, COM/2004/0002 final; in the presentation of the main features of the proposal is stated as following: "For the recipients of health services, the proposal clarifies, in accordance with the case-law of the Court of Justice, the circumstances in which a Member State may make assumption of the costs of health care provided in another Member State subject to prior authorisation."

ZaöRV 68 (2008), 195-207

sector.[3] Later in 2006, the Commission organised a consultation in order to elaborate a new proposal for a Directive regulating exclusively this field.[4] The Commission aims at achieving greater legal certainty and support for the Member States enabling a better cooperation among their national health care systems. This secondary legislation proposal does not seek to achieve a harmonisation of domestic social security systems' functioning. The judgment in the *Watts* case has an impact on the issue of ensuring legal certainty within this framework.

B. Basic Legal Provisions

The treaty provisions at issue are Art. 49 European Community Treaty (ECT), on the freedom to provide (and receive) services, and Art. 152 (5) ECT, on the competence in the public health sector. In addition, the relevant secondary law provision playing a role in the *Watts* case is Art. 22 of the Regulation 1408 of 1971,[5] on the application of social security schemes to employed persons, to self employed persons and to members of their families moving within the Community. This provision is applicable in the case where a citizen of a Member State is allowed to receive a hospital treatment in another Member State, being covered nevertheless by the home health insurance system. These three basic legal provisions contribute, in different and sometimes opposing ways, to the coordination of the social security schemes or medical health care systems of the different Member States and the provision of the related services.

Art. 152 (5) of the ECT provides that:

> "Community action in the field of public health shall fully respect the responsibilities of the Member States for the organization and delivery of health services and medical care."

This provision emphasizes that the organization and the delivery of medical and health care services stay essentially under the exclusive competence of the Member States. It is significant that the provision includes not only the organization of the health services but also their delivery, which means that these are regarded as remaining essentially national and community action shall only enhance the level of cooperation. However, the importance of this provision has successively been eroded by the jurisprudence of the ECJ. In 1998, the ECJ started to use internal

[3] Report on the proposal for a directive of the European Parliament and of the Council on services in the internal market of 15 December 2005 (COM(2004)0002 – C5-0069/2004 – 2004/0001(COD)); <http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=188810>.

[4] Communication from the Commission on a consultation regarding Community action on health services of 26 September 2006, SEC (2006) 1195/4, 1.

[5] Council Regulation (EC) 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 as modified by the Council Regulation (EC) No 1290/97 of 27 June 1997, OJ No L 28 of 30 January 1997, 1. Art. 22 of the Regulation 1408/71 has become, without wording modification, Art. 20 of Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ NoL 166, 30.4.2004, 1-123.

market rules, namely free movement of persons and freedom to provide and receive services, in order to justify the reimbursement of health services provided to patients abroad circumventing the system provided by Regulation 1408/71 on the coordination of social security systems, the so called E 112 scheme.[6]

The Regulation 1408/71 entitles persons for whom a medical treatment becomes necessary during a stay in the territory of another Member State to the same benefits as patients insured in the host State, or ensures, subject to prior authorization of the affiliation security scheme, the covering of fees incurred for treatment in another Member State. The necessary authorization cannot be refused where the treatment in question is normally available in the Member State of residence and cannot be provided, in the individual case, within a reasonable time. The health insurance fund is then required to reimburse the costs for the treatment abroad.

In addition, Art. 49 ECT, in the interpretation given by the ECJ, completes the panorama since the Court recognized that there is no general exclusion for "welfare provision", such as health care, from the Treaty provisions on freedom to provide and receive services.[7] Furthermore the Court includes in Art. 49 ECT not only the freedom to provide and receive services but also the reverse right, namely, the right of individuals to travel to another Member State to r e c e i v e services which enables patient mobility within the EU.[8]

II. The Judgment of the ECJ in Case C-372/04

A. The Facts of the Case

Suffering from arthritis of the hips, Mrs W a t t s applied to the Bedford Primary Care Trust (PCT, i.e. the primary health care fund for the town of Bedford, in England) for authorization to undergo surgery abroad under the E 112 scheme. The delivery of such an authorization is regulated in Art. 22(1) (c) (i) of Regulation 1408/71 which provides that:

> "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 authorized 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 or residence in accordance with the provisions of the legislation which it administers, as though he were insured with it; the length of the period during

[6] Case C-120/95, *Nicolas Decker v Caisse de maladie des employés privés*, 1998 ECR I-01831; Case C-158/96 *Raymond Kohll v Union des caisses de maladie*, 1998 ECR I-01931.

[7] Case C-158/96 *Raymond Kohll v Union des caisses de maladie*, 1998 ECR I-01931, para. 46; Case C-157/99, *Geraets-Smith and Peerbooms*, 2001 ECR I-5473, para. 54.

[8] Cases C-286/82 and C-26/83, *Luisi and Carbone*, 1984 ECR I-377, para. 16.

which benefits are provided shall be governed, however, by the legislation of the competent State".[9]

According to Article 22(2), second paragraph, of the Regulation 1408/71, this authorisation may not be refused where two conditions have been fulfilled, namely:

> "where the treatment in question is among the benefits provided for by the legislation of the Member State on whose territory the person concerned resided 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 the disease".

The original piece of legislation did not contain this latter condition, which was introduced by amendment in 1981[10] in order to reassert the control of Member States over the authorisation procedure and to limit the cross-border movement of patients only to the cases considered justified.[11]

In that context, Mrs Watts was seen by a consultant in October 2002 who classified her case as "routine", which meant a wait of one year for surgery. The Bedford PCT declined to issue Mrs Watts with an E 112 form on the ground that treatment could be provided to the patient:

> "in a local hospital 'within the Government's National Health Service Plan targets' and therefore 'without undue delay'".[12]

Mrs Watts lodged an application with the High Court of Justice for judicial review of the decision refusing authorization.

Following deterioration in her state of health, Mrs Watts was re-examined in January 2003 and was listed for surgery within three or four months. The Bedford PCT repeated its refusal to issue an E 112 scheme form, defending its position that the treatment would follow within a reasonable time under the National Health Service (NHS). In March 2003, Mrs Watts underwent a hip replacement operation in France for which she paid £ 3,900. She therefore continued with her application before the High Court of Justice, claiming in addition reimbursement of the medical fees incurred in France. The High Court dismissed the application on the ground that Mrs Watts had not had to face undue delay after the re-examination of her case in January 2003.

Both Mrs Watts and the Secretary of State for Health appealed against that judgment. In those circumstances, the Court of Appeal referred to the Court of Justice of the European Communities questions on the scope of Regulation 1408/71 and

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[9] Council Regulation (EC) No 1408/71 of 14 June 1971 as modified by the Council Regulation (EC) No 1290/97 of 27 June 1997, OJ No L 28 of 30 January 1997, 1.

[10] Council Regulation (EEC) No 2793/81 of 17 September 1981 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, and Regulation (EEC) No 574/72 fixing the procedure for implementing Regulation (EEC) No 1408/71, OJ 1981 No L 275/1.

[11] To this issue Tamara K. Hervey/Jean V. McHale, Health Law and the European Union, 2004, 116.

[12] Case C-372/04, *Yvonne Watts*, para. 26.

of the Treaty provisions ensuring freedom to provide and receive services and those on the organization and delivery of public health and medical services.

B. The Questions Referred by the Court of Appeal (England and Wales) to the ECJ for Preliminary Ruling

The Court of Appeal sought clarification on the scope of application and interrelation of the relevant provisions. Therefore, it was first concerned with the question whether Art. 49 ECT poses the principle that individuals usually resident in the UK enjoy an entitlement, under EU law, to receive hospital treatment in another Member State at the expense of the NHS irrespective of the nature of the domestic system, the NHS being a public taxation funded system.[13] The reason for considering the nature of the system lies in the fact that public taxation funded systems like the NHS do not have budget availability, the services being provided for patient free of charge at the point of delivery and the expenses being covered by redistribution of the income from public taxation.

The Court of Appeal then raised a possible question of discrimination between individuals within a Member State.[14] Patients traveling abroad would receive reimbursement for their treatment, while those waiting for the treatment in the UK would undergo the treatment free of charge and patients deciding to receive the treatment on a private basis in the UK would have to pay without reimbursement irrespective of whether the waiting period was reasonable or not.

Further, the Court of Appeal addressed the issue of the possible justifications for refusing a prior authorization according to Art. 22 of the Regulation 1408/71. The Court of Appeal was concerned with the possibility of balancing the health interests of an individual with possible economic and managerial difficulties of the national health system.[15]

The Court of Appeal went on to raise the question of the relationship between Art. 22 of the Regulation and Art. 49 of the ECT.[16] It specifically concentrated on the question whether the principle of "undue delay", introduced by the jurisprudence on Art. 49 and Art. 22 imposing on the national health system a duty to authorize a treatment abroad when the national system is not able to offer the treatment "within the time normally necessary for obtaining the treatment in question" must apply similarly. The High Court had defended the view that the waiting period referred to in Art. 22 must be assessed in comparison to the national waiting times of the NHS and that Mrs Watts being affiliated to the NHS could not rely

[13] Ibid., para. 42 (1).

[14] Ibid., para. 42 (3) b).

[15] Ibid., para. 42 (4).

[16] In particular in the fifth question referred for preliminary ruling, Case C-372/04, *Yvonne Watts*, para. 42 (5).

on Art. 49 ECT, which is a general provision, and is subject to the requirements of Art. 22 of the Regulation as interpreted above.

The Court of Appeal then addressed the question of the reimbursement modalities of the expenses Mrs Watts requested from NHS,[17] inquiring about the precise extent of the obligation of reimbursement. Finally, the interrelation between Art. 49 ECT together with Art. 22 of the Regulation 1408/71 and Art. 152 (5) ECT is the object of the last preliminary question, challenging the compatibility of the provisions.[18] In the meanwhile, following the ECJ Judgment, the parties in the UK agreed on a negociated settlement out of Court.

C. Findings of the European Court of Justice

The ECJ stated that the application of Art. 49 ECT and Art. 22 of the Regulation 1408/71 are simultaneous and not mutually exclusive.[19] Hence, the application of the system provided for in Art. 22 of the Regulation does not exempt a state from ensuring, additionally, that Art. 49 ECT requirements are observed in order to achieve freedom to provide and/or receive services.

The ECJ then turned to the interpretation of Art. 22 of the Regulation 1408/71 and the second condition laid down for delivering an authorization for treatment abroad, namely the interpretation of the expression "within the time normally necessary for obtaining the treatment in question". The Court considered that the assessment of this condition has to follow objective criteria related to an objective medical assessment, the patient's medical condition, his or her medical history, and the degree of pain suffered.[20] The existence of waiting lists corresponding to the targets of the NHS, intended to enable the supply of hospital care to be planned and managed on the basis of predetermined general clinical priorities, was not a valid reason to refuse such an authorization. The ECJ considered the requirements of both provisions to be similar and to be exclusively related to the medical situation of the patient. This result basically mitigates the role of economic or structural priorities of the NHS compared to the personal medical concerns of the patient when assessing the necessity of a treatment abroad. This was also expressed in the position the Court held with regard to the public health provisions of the Treaty.

On the relations between, the public health provisions in the Treaty and, the freedom to provide and receive services provisions as well as Art. 22 of the Regulation, the ECJ recognized and confirmed the right of Member States to organize their public health services. But the Court also stated as follows:

> "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

[17] Ibid., para. 42 (6).
[18] Ibid., para. 42 (7).
[19] Ibid., para. 48.
[20] Ibid., para. 68.

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. Those provisions *prohibit* the Member States from introducing or maintaining unjustified restrictions on the exercise of that freedom in the healthcare sector." (Paragraph 92, emphasis added).

In this case, the way in which the NHS reimburses fees may constitute an unjustified restriction to the freedom to provide and receive services. In order to identify what Art. 49 ECT exactly requires for ensuring freedom to provide and receive services, the Court affirmed in the judgment:

"Although Community law does not detract from the power of the Member States to organise their social security systems and decide the level of resources to be allocated to their operation, the achievement of the fundamental freedoms guaranteed by the Treaty nevertheless *inevitably* requires Member States to make adjustments to those systems. It does not follow that this undermines their sovereign powers in the field." (Paragraph 121, emphasis added).[21]

The Court considered the issue of the reimbursement also from the perspective of the combined application of Art. 49 ECT and Art. 22 of the Regulation. The latter ensures the recovering of the costs for the treatment while Art. 49, seeking the implementation of the freedom to provide and receive services, ensures the recovery of ancillary costs as long as the national system reimburses these costs on its territory. Since the NHS provides for a hospital treatment free of charge for the patient at the point of delivery also in regard to the costs of the stay in the hospital, Mrs Watts was entitled to receive the reimbursement of the whole fees paid.

III. Evaluation

A. General Remarks

The *Watts* case raised a particular dilemma in comparison to the previous jurisprudence of the ECJ, since the NHS, which is a domestic health system financed largely by public taxation, does not have reimbursement availability. In order to ensure the realization of the freedom to provide and receive services, as well as the functioning of the Art. 22 procedures and therefore of the cross-border medical care, the NHS has to guarantee budget availability. This could mean an overall restructuring of the UK health system. Such a modification of the NHS, at least with

[21] Similarly the Court considered, in Paragraph 147 of the Judgment, that: "that provision (Art. 152 (5) ECT) does not, however, exclude the possibility that the Member *States may be required under other Treaty provisions*, such as Article 49 EC, or Community measures adopted on the basis of other Treaty provisions, such as Article 22 of Regulation No 1408/71, *to make adjustments to their national systems of social security*". Emphasis added, Case C-372/04, *Yvonne Watts*.

regard to the financial aspects of the system, would objectively constitute a violation of the rights of the Member States set out in Art. 152 (5) of the Treaty.[22]

Bearing this in mind, the contribution of the judgment in *Watts* enhances in two ways the prominent position of the freedom to provide and receive services. First, the significance of this case lies in the recognition of a reimbursement duty also for the UK NHS system, although the particular nature of this system, namely the fact that it is a public taxation funded system, where the treatment is supplied free of charge for the patient at time of delivery, renders reimbursements problematic. The second achievement concerns the recognition by the ECJ of a reimbursement duty for a treatment undergone without authorization on the ground that the refusal was not justified although, according to its earlier jurisprudence, a hospital care would require citizens to seek prior authorisation before undergoing a treatment in order to obtain reimbursement through the affiliation security scheme. The ECJ seems to consider the achievement of the freedom to provide and receive services as the higher interest disregarding any particularities of the system, which, according to Art. 152 (5) ECT, remains within the competences of the Member States.

B. The Freedom to Provide and Receive Services as a Means to Achieve Better Cooperation among Health Care Systems within the EU and Increased Patient Mobility for EU Citizens

The judgment of the ECJ in the *Watts* case is justified by the will to push forward the accessibility to health care of the EU citizens in the territory of the EU irrespective of their nationality, bearing in mind that the final objective is the realization of the internal market also in respect of the delivery of services. The objective should be achievable within a framework of respect for the Treaty's structure and maybe with some consideration for the political will shown by the Member States. In this sense, some consequences, which may arise out of this judgment, seem to be worthy of further examination.

The jurisprudence developed on the relationship between Art. 49 and Art. 152 (5) of the ECT is highly protective of the achievement of the internal market, conceding a primary role to Art. 49 ECT over other provisions such as Art. 152 (5) ECT. Some authors try to analyse the result from a classical perspective and consider both provisions as primary rules. In principle, in their opinion, the more special rule should be looked for in order to apply it over the more general rule. Art. 49 ECT is certainly the most general rule applying to the fundamental freedom to provide and receive services in the internal market, while Art. 152 (5) is the special rule limiting this freedom and ensuring that Member States maintain their right to organise and deliver health services and medical care according to their social pol-

[22] In this sense see Mel Cousins, Patient Mobility and National Helth Systems, Legal Issues of Economic Integration 34(2), 2007, 191.

icy scheme. The *lex specialis*, in this case Art. 152 (5), should prevail.[23] The Court for years has not been using this approach at all, but follows a more pragmatic approach and tries to give predominance to the general and constitutional provisions which aim at pursuing the achievement of the internal market.

Though recognising the Member States' competence to organise their own social system, the ECJ nevertheless stresses their duties to modify such organization in order to satisfy the requirements under Art. 49 ECT and the Regulation 1408/71. This position of the ECJ, strongly in favour of the achievement of the freedom of health services, is confirmed by the selection of the pertinent criteria for the delivery of the authorization. The ECJ only enumerates criteria concerning the health situation of the patient and excludes any criteria related to economic or managerial concerns in the health care systems. Introducing these latter in the assessment of the authorization could have been a way of taking into account the right of Member States to organise their health care systems and maybe to focus also on the qualitative improvement of the health care services in the whole territory of the EU.

The Court did not attribute any meaning to the fact that the situation of Mrs Watts had been reconsidered, according to changes in her health condition, and that the NHS system had reviewed her position. The length of the waiting time was regarded as sufficient to demonstrate a lacuna of the NHS health care system.[24]

Indeed, Mrs Watts had been reclassified and would have been able to receive treatment in April or May 2003, but decided to undergo the treatment in March 2003 abroad. The ECJ seems to strongly defend the position of the citizen in order to ensure free mobility of patients having the possibility of undergoing treatment abroad. But would this not be a situation where the national health system ensured flexibility within the framework of the overall structure of the health care system? There could have been more free room to take into account the requirements of Art. 152 (5) ECT.

C. What Is Left in Regulation 1408/71?

This question appears justified as, from the evolution of the jurisprudence of the Court, it seems that the conditions of the Regulation are now completely remodelled in order to ensure the freedom to provide and receive health services and contribute thereby to a broader accessibility for EU citizens to health care treatment. But this approach raises an important dilemma: does mobility within the EU lead necessarily to a higher standard in the health care services and a better functioning

[23] In this sense Heinz-Uwe Dettling, Ethisches Leitbild und EuGH-Kompetenz für die Gesundheitssysteme?, Europäische Zeitschrift für Wirtschaftsrecht 17/2006, 520.

[24] Case C-372/04, *Yvonne Watts*, para. 69: "the setting of waiting times should be done flexibly and dynamically, so that the period initially notified (...) may be reconsidered in the light of any deterioration in state of health occurring after the first request".

of the different national health care systems in the whole territory of the EU? The objective should be while ensuring the free movement of services and patients also to adopt an approach leading to a qualitative improvement of the health care services in each Member State, developing henceforth a more or less EU homogenous qualitative level.

The jurisprudence, prior to the *Watts* case, tried to balance the interests deriving from the freedom to provide and receive health services and the needs of ensuring a basic minimum level of organisation of the health systems by differentiating between ambulant medical services and hospital services. The latter being considered as necessitating more intensive management and organisation, the Court gave more room to the national authorities and justified for this purpose, more easily, the restriction of the freedom to provide and receive services.

A differentiation between medical care and hospital treatment had been developed in the ECJ's previous jurisprudence.[25] As the ECJ stated in its judgment in the case of *Muller-Fauré and Van Riet*:

> "In those circumstances, a requirement that the assumption of costs, under a national social security system, of hospital treatment provided in a Member State other than that of affiliation must be subject to prior authorisation appears to be a measure which is both necessary and reasonable."[26]

But the ECJ adopted a much stricter approach in the *Watts* case:

> "However, a refusal to grant prior authorisation which is based not on fear of wastage resulting from hospital overcapacity but solely on the ground that there are waiting lists on national territory for the hospital treatment concerned, without account being taken of the specific circumstances attaching to the patient's medical condition, cannot amount to a properly justified restriction on freedom to provide services."[27]

In respect of the reimbursement, in the *Watts* case, the Court went further than the previous jurisprudence, enabling the reimbursement not only of the cost of the treatment but also, on the basis of Art. 49 ECT, of the travel fees, which do not fall inside the scope of the Regulation. This is done through circumvention of the restrictions of the Regulation 1408/71 which sought to maintain a certain balance in the costs the domestic health care system would have to bear and the concern of enabling access to treatment by patients if necessary abroad within an acceptable time.

Thus according to the Court:

> "The Regulation must be interpreted as meaning that the right it confers on the patient concerned relates exclusively to the expenditure connected with the healthcare received

[25] For example, Case C-368/98, *Vanbraekel*, 2001 ECR I-5363; Case C-157/99, *Smits and Peerbooms*, 2001 I-5473; Case C-56/01, *Inizan*, 2003 I-12403; Case C-8/02, *Leichtle*, 2004 ECR I-2641; Case C-385/99, *Müller-Fauré and Van Riet*, 2003 ECR I-4503. See on the necessity of prior authorisation Anthony Dawes, "Bonjour Herr Doctor": National Healthcare Systems, the Internal Market and Cross-border Medical Care within the European Union, Legal Issues of Economic Integration 33(2) 2006, 172-173.

[26] Case C-385/99, *Müller-Fauré and Van Riet*, 2003 ECR I-4503, para. 81.

[27] Case C-372/04, *Yvonne Watts*, para. 92.

by that patient in the host Member State, namely, in the case of hospital treatment, the cost of medical services strictly defined and inextricably linked costs to his stay in the hospital."[28]

The Court, then, stated that Art. 49 ECT entitles a patient:

"To seek from the competent institution reimbursement of the ancillary costs associated with the 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."[29]

The result reached is that with the cumulative application of the two provisions, a patient without authorization can travel to another Member State and obtain hospital treatment, whithout complying with the requirements of Art. 22 of the Regulation 1408/71. Furthermore, the patient can then seek reimbursement of all fees incurred on the basis of both provisions, given that the national administration's refusal was unjustified under Art. 22 (2) second paragraph.

It may seem unfair to use the double action of Art. 22 of the Regulation 1408/71 and Art. 49 ECT in order to obtain the reimbursement following the procedure of Regulation 1408/71 but without respecting all the conditions set out in the Regulation. An unjustified refusal can, in the above-described circumstances, produce the same legal consequences as a due authorisation. This approach might be justified, though it detaches itself from the pragmatic *ratio* of the system which originally pursued the achievement of a balance between the freedom to provide and receive services and the concession made to the affiliation system in enabling a certain control over the treatment occurred abroad. Of course the ECJ clarified, in its previous jurisprudence,[30] the relation between the two provisions and considered that Art. 22 of the Regulation 1408/71 is meant to confer on insured persons an additional entitlement to cross border medical treatment rather than to add limits to Art. 49 ECT.[31] However, this should not happen in disregard of the conditions laid down in Art. 22 of the Regulation 1408/71. It appears that the Regulation 1408/71 is partially emptied of its substance, and it might be added: does not the jurisprudence of the ECJ leave nothing but an empty shell, a "*peau de chagrin*"?

D. The Creation of a "Patients' Elite" Travelling Around the EU?

The purpose of the ruling is, in the understanding of the ECJ, to enable and uphold EU cross boarder medical care. The ruling has some side effects, however.

[28] Ibid., para. 143.

[29] Ibid., para. 143. Case C-381/93, *Commission v. France*, 1994 I-5145, para. 17; Case C-158/96 *Raymond Kohll v Union des caisses de maladie*, 1998 ECR I-01931, para. 33; Case C-157/99, *Smits and Peerbooms*, 2001 I-5473, para. 61.

[30] Case C-56/01, *Inizan*, 2003 I-12403, para. 60.

[31] D a w e s (Anm. 25), 173.

On the one hand, the recognition of the possibility of going abroad and obtaining the reimbursement of all the fees raises the issue of possible discrimination between the different kinds of patients within one Member State. Indeed, the situation of Mrs Watts is not so distant from the situation of a UK citizen deciding not to wait for the NHS treatment and paying for private treatment in the UK. The main difference resides in the fact that she decided to travel to France. Trying to achieve a better realization of what the ECJ defined as the necessary corollary of the right of a provider to provide the services in the recipient's Member State,[32] namely the freedom of patients to travel to other Member States in order to receive the treatment needed by discriminating among citizens of a Member State is not the wisest solution. It could contribute to the creation of an "elite" which is able to afford or is aware of the possibility of travelling abroad in order to obtain immediate treatment. This situation would in no way achieve the result of producing a more or less homogeneous higher level of medical care within the Union which should be, as stated above,[33] one of the complementary objectives to the freedom to provide and receive services. It would only facilitate the development of a "patients' elite".

Furthermore, the jurisprudence might create discrimination also among EU citizens because it is not so clear why the hospital structure abroad accepted Mrs Watts. Was it because the structure offered objectively a faster possibility of undergoing the treatment? Or was it because Mrs Watts paying as a private international client would be a financially more interesting patient than nationals? Is the jurisprudence of the ECJ really able to rebalance demand and supply of hospital treatment or is it creating only distortions in the different domestic health systems? Would it not be better to try to modify the available legislation in order to create a real cooperation between health systems?

Finally, the approach of the Court, which bases its ruling pre-eminently on the freedom to provide and receive services, transforms the patients into consumers. This shift in the approach has some positive effects for the patients themselves. Patients are able to choose the State of treatment according to the efficiency of the system.[34] However, this approach can hide negative effects. As mentioned above, consumers who can afford travel costs will be able to choose the faster and probably the best treatment opportunities within the European Union while the others might remain confined to the "discounts" of the health care systems. It could jeopardize the social principle of effective health care accessible to all.[35] This situation could lead to the development of zones with a very active and high level of medical treatment and others that might remain comparatively deprived and isolated. To

[32] Cases C-286/82 and C-26/83, *Luisi and Carbone*, 1984 ECR 377, para. 16.

[33] See above III. C.

[34] Hervey/McHale (Anm. 11), 139.

[35] To the principle of solidarity in the health care systems in the EU: Klaus Sieveking, ECJ Rulings on Health Care Services and Their Effects on the Freedom of Cross-Border Patient Mobility in the EU, ZERP Discussionpaper 3/2006, 3-5.

some extent this patients' elite already exists. The ones who can afford to travel to other Member States are mostly also able to pay for private treatment. This jurisprudence will be, therefore, only really interesting for "next door patient mobility", namely the mobility at the borders between Members States where the travel expenses will be affordable.

The possibility of such an unbalanced evolution arising in the future should not be underestimated and the dangers linked with the "consumerist approach" should be not totally neglected. For the present and near future, these consequences remain probably very limited as the recovery of costs for treatment in another Member State extends only to the level of treatment that would have been covered by the health care system of affiliation.

IV. Conclusion

The jurisprudence considered above reveals a will to strengthen the freedom to provide and receive health care services and requires a high level of social solidarity among Member States of the EU in health matters, and even development of a new financial solidarity. Whenever a topic is politically of very great interest, the ECJ tends to adopt a strong position in defence of individual citizens by means of internal market achievements. However, on this occasion, though pursuing a praiseworthy overall objective, the ECJ may have stretched its interpretation power somewhat in favour of the achievement of the internal market and reached a result which either could destabilize some domestic health security systems, or may place some Member States in the position of automatically violating the jurisprudential finding, being not able to reorganise and adapt the functioning of their domestic social security schemes so easily and quickly, in accordance with the requirements set out by the ECJ. It remains questionable whether the jurisprudence will lead to the enhancement of the quality of the services in the whole EU which should be part of the concerns in health care matters. The coordination of the social systems or at least their compatibility is a burning issue and should obviously be dealt with in order to ensure a better functioning of the internal market. But is this really an issue which should be left to the ECJ? Should this not be more the result of considered political decisions? The positive aspects remain certainly the fact that the ECJ, by its progressive approach, is pointing out deficiencies in the functioning of the internal market which must be faced through legislative measures. Art. 22 of the Regulation has been emptied of its content by the ECJ because it is not satisfactory anymore and it should be modified. Further answers and developments relating to this topic will come with the Commission's directive proposal which is currently being worked on.