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THE EUROPEAN UNION**

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**OPINION OF THE LEGAL SERVICE\***

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to : Working Party on Public Health

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No. Cion prop. : Doc. 11307/08 SAN 136 SOC 389 MI 234 CODEC 904

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Subject : Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare  
- Private care

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1. The Council Legal Service was asked to intervene in the Working Party on Public Health at its meeting on 14 October 2008, on whether or not Member States may refuse, on the basis of the case law of the Court of Justice, the reimbursement of health care provided in another Member State on the basis that the service was provided by a private establishment. The present opinion reproduces and further develops the oral intervention made by the Legal Service in this respect.

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2. According to the ruling of the Court in *Stamatelaki*, the private or public status of the provider of medical services is irrelevant for their qualification under Article 49 EC: "*Article 49 EC applies to the situation of a patient who [...] receives, in a Member State other than his Member State of residence, medical services in a hospital environment which are provided for consideration, and it is immaterial whether the establishment in question is public or private*"<sup>(1)</sup>.
3. It is well established case law that within the sphere of Article 49 EC, Member States may not make the provision of cross-border services more difficult than those provided internally: "*Article 49 precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State*"<sup>(2)</sup>.
4. In the *Watts* case, the Court was called to pronounce itself explicitly on the application of its jurisprudence on cross-border health care to a system based on a national health service (NHS), which is public and essentially tax financed<sup>(3)</sup>. More specifically, the referring court asked whether the NHS is obliged to authorise and pay for private hospital treatment in another Member State "*notwithstanding that it is not obliged to authorise and pay for such treatment to be carried out privately by a United Kingdom service provider*"<sup>(4)</sup>. In other words, the question was whether "*in interpreting Article 49 EC [...], account should be taken [...] of the fact that there is no duty on the NHS to pay for hospital treatment received by an NHS patient in a private hospital in England or Wales*"<sup>(5)</sup>.

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<sup>1</sup> Case C-444/05, judgment of 19 April 2007, *Stamatelaki*, ECR p. I-3185, point 22, emphasis added.

<sup>2</sup> *Stamatelaki*, *ibid.*, point 25, with further references.

<sup>3</sup> Case C-372/94, judgment of 16 May 2006, *Watts*, ECR p. I-4325; commentaries on this ruling have been published inter alia by *R. Schiano*, *Revue du Droit de l'Union Européenne* 2006, p. 457; *M. Cousins*, *Legal Issues of Economic Integration* 2007, p.183; *S. Francq*, *Journal du Droit international* 2007, p. 643; *A. Cygan*, *International and Comparative Law Quarterly* 2008, p. 529.

<sup>4</sup> *Watts*, *ibid.*, point 42, question 1(b).

<sup>5</sup> *Watts*, *ibid.*, point 81.

5. In its ruling rendered in Grand Chamber composition, the Court of Justice replies, first, that Article 49 EC applies in this context, since the NHS patient in question had received medical services for consideration in another Member State. This finding is *"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"*<sup>(6)</sup>.
6. The Court goes on to conclude that the requirement of prior authorisation which exists for NHS patients who intend to go to a hospital in another Member State, is an obstacle to the freedom to provide services<sup>(7)</sup>. According to the Court, *"[t]hat conclusion is not undermined by the fact, referred to in Question 1(b), that the NHS is not obliged to authorise and assume the cost of hospital treatment provided to patients in private non-NHS hospitals in England and Wales"*<sup>(8)</sup>.
7. The Court clarifies further that the private or public nature of the care provided is not a relevant criterion for the required comparison between the treatment of cross-border reimbursement cases and the treatment of purely national cases: *"the conditions for the NHS's assuming the cost of hospital treatment to be obtained in another Member State should not be compared to the situation in national law of hospital treatment received by patients in private local hospitals. On the contrary, the comparison should be made with the conditions in which the NHS provides such services in its hospitals"*<sup>(9)</sup>.

The Council Legal Service therefore considers that the judgment of the Court in the *Watts* case addresses the very issue in question and indicates that under Article 49 EC, Member States may not refuse the reimbursement of health care provided in another Member State merely on the basis that the service was provided by a private establishment, even though the national system may not offer or reimburse such private health care.

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<sup>6</sup> *Watts*, *ibid.*, point 90.

<sup>7</sup> *Watts*, *ibid.*, point 98.

<sup>8</sup> *Watts*, *ibid.*, point 99, emphasis added.

<sup>9</sup> *Watts*, *ibid.*, point 100.