

**Consultation regarding Community action on health services  
Communication of the Commission of 26 September 2006  
Statement by the Bavarian Chamber of Dentists<sup>1</sup>  
30 November 2006**

**1. Introduction**

The European Commission correctly assumes that high-quality health services have a significant value for European citizens. This is also expressed in the EU Charter of Fundamental Rights, which according to the European Court of Justice ‘is among the general legal principles’ of the Union (ECJ Case C-36/02, ref. 33). The fundamental rights are to be respected by both the Community and its Member States (ECJ *ibid*, ref. 33). Article 35 (Health care) of the Charter guarantees every person ‘preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices’.

The European Court of Justice had already observed in its groundbreaking judgement in the Kohll (Case C -158/36) and Decker (Case C -151/02) proceedings in 1998 that a restriction on the free choice of doctors was not in harmony with the European fundamental freedoms. (There is an equal lack of harmony if the national health insurance system prevents or restricts cross-border use of medical services.) According to the ECJ’s viewpoint the stipulation of a prior permit represents an impediment to free competition, at least in the case of outpatient treatment (Decker, ref. 36).

The free choice of doctors counts imperatively along with the fundamental right of freedom to choose an occupation and right to engage in work (Article 15 of the Charter of Fundamental Rights). Therein the EU vouches for the freedom ‘to seek employment, to work, to exercise the right of establishment and to provide services in any Member State’.

---

<sup>1</sup> The Bavarian State Chamber of Dentists is a corporate entity under public law and represents the professional interests of over 13,000 dentists in the Free State of Bavaria on the basis of the Bavarian chamber of medical professions law. Its legal duties also include supervising dental professional obligations, promoting dental training, the establishment of social facilities for dentists and their relatives, as well as co-operation in public healthcare (Art. 2 Para. 1. Law on the professional exercise, professional representations and professional jurisdiction of doctors, dentists, veterinarians, pharmacists as well as psychological psychotherapists and child and youth psychotherapists (Chamber of medical professions law - HKaG)).

Finally, references also remain to Article 16 of the Charter of Fundamental Rights which recognises the freedom to conduct a business. Protection of professional freedom from state restrictions also applies where the doctor works as a contract doctor within a legal health insurance system.<sup>2</sup>

The Commission correctly points out in the introduction of the Communication that the proposal for a directive on services in the internal market which commenced its procedure at the start of 2004 essentially contained a codification of the rulings by the European Court of Justice in applying free movement principles to health services. It therefore appears even more incomprehensible that health services were removed from the scope of application of the planned directive due to a decision by the European Parliament and the Council.

The German Federal State Chamber of Dentists submitted an expert legal opinion on this before the close of deliberations in the European Parliament. (The services directive and the healthcare area, expert legal opinion by Prof Dr Siegbert Alber, retired advocate general at the European Court of Justice). Therein Alber confirms the idea that medical activities are already governed by Article 50 of the EU Treaty according to constant jurisprudence by the ECJ. In this context, the indication here that a national regulation on social security does not exclude the application of Article 49 and 50 of the EU Treaty appears important.

Unfortunately this argument did not acquire any leading role in the deliberations of the European Parliament. Instead there was a recognisable political intention to declare health services as 'services of general interest' by definition and to remove them from the overriding principle of unadulterated competition. In this case one refers to a 'European model of society', as described by the Commission in its White Paper on services of general interest (COM(2004) 374 final).

However, this approach must not lead to a restriction on competition in the area of health services. The latter would conflict with the EU Treaty and the jurisprudence of the European Court of Justice. Community measures in the health services area should not exclude the competition aspect and should not reduce the topic solely to the aspect of 'patient mobility' and assurance as well as strengthening of high-quality services and cross-border cooperation. The service providers in the health system are also European citizens; the fundamental freedoms equally apply to them. From the viewpoint of both patients and doctors (and other service providers in the healthcare system) this therefore means creating 'clarity concerning their rights and entitlements when changing domicile from one EU Member State to another' (conclusions of the Council on shared values and principles in EU healthcare systems, 2.733 - Employment, Social Policy, Health and Consumer Affairs Council Meeting, Luxembourg, 1 - 2 June 2006).

The Commission correctly assumes in this context that the principles already decided by the European Court of Justice will be taken into account by all Community measures. Here, the Bavarian Chamber of Dentists, unlike the Commission, would prefer to describe the principles on which European health systems are based as:

**'Personal responsibility, solidarity and competition'**

rather than 'equity, solidarity and universality'.

It must also be ensured that the existing domestic discrimination (relating to service providers in the health system in Germany) is not continued in the new European measures. Instead,

---

<sup>2</sup> according to Prof. Winfried Kluth, medical professional freedom subject to profitability (MedR 2005, 65, 69)

recommendations for action should be made to orientate national health systems to the European fundamental freedoms.<sup>3</sup>

The planned 'support for Member States in areas where European action can add value to their national action on health services' should take account at this very point of the fact that the reimbursement of expenses principle offers the required transparency for patients and promotes competition more than an anonymous benefit in kind principle. Anyone who complains about the asymmetry of information in healthcare must also ensure transparency in this area.

## **2. The need for Community action on health services**

### **2.1. The need for legal certainty**

In its submitted paper the Commission correctly points out that 'the Court's rulings (are) ... clear in themselves'. The Bavarian Chamber of Dentists states the following in response to the questions raised:

As already shown above, the Charter of Fundamental Rights grants patients free access to services in this sector. It entitles service providers in the health system to provide services abroad in Europe as well. These principles are accompanied by the obligation to ensure quality. The European Court of Justice had already referred to the fact in its rulings in Müller-Fauré/van Riet (Case C-385/99) and Smits/Peerbooms (Case C-157/99) that doctors and dentists established in Member States must be recognised as equally qualified as those established domestically for the purposes of the free movement of services (ref. 48). So a restriction on freedom of services by invoking protection of health could not be justified on the basis that the quality of medical services provided in other Member States would be called into question. The EU professional recognition directive also guarantees this quality, with the result that possible reservations can therefore be eliminated.

As regards the scope available to Member States during the regulation of their social (insurance) systems, the European Court of Justice has decided that Member States are not allowed to 'remove the health sector as an economic sector from the elementary principle of freedom of movement, as regards free movement of services' (ECJ, Case C-157/99).

In terms of the financial sustainability of health systems there is no fear that greater freedom of choice during the exercise of individual claims will lead to disadvantages, as it cannot be assumed that patients will have themselves treated several times 'simply for pleasure'. By the way, patient behaviour can be guided, insofar as personal excess and reimbursement of expenses are combined with each other.

With regard to financial reimbursement mechanisms in cross-border healthcare measures, the creation of an unnecessary administrative burden can be excluded through the introduction of the reimbursement of expenses system.

There is a fundamental question as regards the need for regulation of the identification, selection and comparison of foreign service providers, as the Commission's question suggests. The market will ensure market comparisons in a system that is more competition oriented.

---

<sup>3</sup> (In this context it can only be noted with incomprehension that the coalition parties in the German Bundestag applied to have § 13 Para. 3 Sentence 1 of the relevant law amended in the framework of an application to amend the planned contract doctor law and other laws (contract doctor law amendment law – VÄndG) whereby, while the insured persons are actually entitled to use service providers in other EU states on the basis of reimbursement of expenses, this is not allowed for the use of service providers in Germany. (Health committee, committee document 0107, in TOP 8 of the daily agenda on 18.10.2006).

(Further questions on the context between healthcare services and related services such as social and care services are not dealt with at this point by the Bavarian Chamber of Dentists.)

## 2.2 Different kinds of cross-border healthcare

As regards the second stated alternative it should be pointed out that the introduction of a European Health Insurance Card cannot cover care alone, in any way of course. The latter is covered by the service providers and not through a technical system, which is primarily used for settlement purposes. Incidentally, in terms of the current debate in Germany on introducing the so-called electronic health card, it is not understandable how such a complex system can operate at all. The Bavarian Chamber of Dentists believes that there is no clear need for one.

## 2.3 Relevance of Community action to overall health system objectives

In the opinion of the Bavarian Chamber of Dentists the Commission is on the wrong track here insofar as it identifies cost restriction and increased efficiency as a key for the sustainability of health systems. When prevention and health promotion measures are also mentioned in the same breath, this approach completely ignores the factors of **personal responsibility, quality and competition**. It is not comprehensible if the Commission distances itself here from the criteria stated in the directive on services in the internal market, especially competitiveness of service companies in the internal market.

The European goal of geographically extensive, high-quality healthcare can only be met if service providers and service receivers deal with the limited resources under their own responsibility. This also includes the decision on the extent of insurance protection that the insured must fulfil. The approach based on 'fairness of distribution, equity and solidarity' is completely inadequate as it denies the problems of financing health services in the next generation due to demographic reasons in particular. The European Union is required to develop sustainable financing of the health system as a model, specifically from the aspect of solidarity between generations. Sustainable financing will not succeed without (at least partial) capital protection, as the next generation should not be burdened with social insurance contributions which are not bearable for the individual citizen as well as the solidarity society and conceal a significant potential for conflict in social peace in Europe. From this specific perspective, Community measures introducing capital-protected social insurance systems should be developed.

The assertions in the Commission's paper that the EU research framework programmes are already making a contribution to improving the efficiency and effectiveness of all European health systems should be assessed critically.

The belief that it helps to set up secure health telematics infrastructures, systems and services through a European electronic health services area does not currently appear provable in the view of the Bavarian Chamber of Dentists.

## 2.4 Nature and impact of cross-border healthcare

The Bavarian Chamber of Dentists points out again here that an unnecessary administrative burden can be avoided and transparency can be developed for patients by introducing reimbursement of expenses. The effects on the host countries will develop in accordance with the principle of supply and demand (as in other markets). An opportunity for the growing health market in Europe also lies here.

**Following on question 1: What is the current impact (local, regional, national) of cross-border healthcare on accessibility, quality and financial sustainability of healthcare systems, and how might this evolve?**

**Answer:**

**The cross-border use of health services promotes competition and so simultaneously the quality of the services provided. Disadvantages for national healthcare systems are not recognisable, insofar as services will not be used several times with the introduction of the reimbursement of expenses, as is possible with the retention of the benefit in kind system in certain circumstances.**

**3. Areas of possible Community action**

3.1. Legal certainty

3.1.1. Minimum information and clarification requirements to enable cross-border healthcare

Firstly, a critical question must be asked about the premise that it is really true that the Court of Justice stipulates the condition that ‘authorisation for care abroad must be granted if such care cannot be provided domestically without undue delay’ for the use of cross-border healthcare. In the Watts case (Case C-372/04) the Advocate General at the European Court of Justice observes, as regards hospital treatment in other Member States (at the expense of the UK National Health Service), that a medical service provided in a Member State that is paid for by the patient cannot simply lose its inclusion in the scope of the free movement of services guaranteed by the EC Treaty because the reimbursement of the costs for the treatment concerned is applied for via health insurance under the legal provisions of a different Member State which essentially provides for benefits in kind (Advocate General Nr. 47).

It is therefore noted here that medical services cannot be excluded for the scope of application of the provisions of the EC Treaty on the free movement of services due to their nature or the fact that they are provided in an exclusively state context. In his opinion the Advocate General also pointed out that medical services come within the scope of application of Article 49 ff of the EU Treaty without regard to whether they were provided in a hospital facility or not.

Thus a person’s status cannot be restricted through domestic law, e.g. belonging to a national social insurance system, for the use of health services. The latter would be incompatible with Article 49 of the EC Treaty. In its decision of 16 May 2006 in this case the European Court of Justice (again) points out that paid-for medical services come within the scope of application of the provisions on the free movement of services ‘without making a distinction afterwards whether the care is provided in a hospital or outside one’ (ref. 86).

It makes no difference whether the patient later applies for the reimbursement of expenses from his national social insurance system. The ‘condition’ of a permit for the care abroad raised by the Commission only plays a role with regard to reimbursement of patients’ expenses.

If such a permit exists or if it has been wrongly refused, there is a claim to reimbursement of the expenses incurred by the patients, e.g. if no reimbursement rate is stipulated in the disputed national health system due to the absence of costs for the hospital treatment in the country of origin (ref. 127).

The Court of Justice requires Member States to seek a balance between the goals of flexibility for patients on the one hand and national requirements to plan available hospital capacities, manage health costs and ensure the financial equilibrium of social security systems (ref. 145). Even when in principle it leaves the organisation of the health system and medical care under the responsibility of the individual Member State, the European Court of Justice then considers ‘adaptations’ of the national social insurance systems binding in the framework of the provisions of the Treaty. Article 22 of Council Regulation (EEC) No. 1408/71, which deals with permission for the acceptance of expenses for medical treatment in a different Member State, must be adapted accordingly concerning treatment outside a hospital so that no prior permit is required in this area of outpatient care.

This ground for consideration (Nr. 54), originally presented by the Commission in the directive on services in the internal market, should be included as a matter of urgency in the context of the current consultations and planned measures in the health sector. Everything else would be a step backwards and would remain far behind the jurisprudence of the European Court of Justice on the use of health services.

**Following on question 2: What specific legal clarification and what practical information is required by whom (e.g. authorities, purchasers, providers, patients) to enable safe, high-quality and efficient cross-border healthcare?**

**Answer:**

**The Bavarian Chamber of Dentists doubts whether the transmission of health related data between the various health systems is required for patient treatment; the same applies to the European Health Card or electronic patient file.**

**It is in the personal interest of patients, who decide positively for treatment abroad in Europe to hand over the corresponding documents from their previously treating doctors or dentists before treatment commences; a further possibility involves a request for these treatment documents from the individual doctor or dentist, which is also usual today.**

**To achieve legal clarification the Bavarian Chamber of Dentists believes that a separation between legal questions that arise from the insurance relationship and those that arise from the treatment agreement is urgently required. A safe, high-quality and efficient cross-border healthcare should concentrate on the aspect of the treatment agreement and the immediate relationship of trust between patients and service providers in healthcare and answer the question of insurance relationships in the framework of private law.**

### 3.1.2. Identifying the competent authorities and their responsibilities

The Bavarian Chamber of Dentists agrees in principle with the statement that it is important for the application of the internal market provisions to obtain clarity about which authorities from Member States are competent for (professional) supervision. The law of the country where the service was provided should apply as regards complaints and compensation problems.

The ‘continuity of care’ is guaranteed through professional law regulations, which require the provider of a health service (e.g. in the dental area) to ensure care for his patients, § 9 Para. 2 of Federal Chamber of Dentists’ model professional regulations. The State Chambers are responsible for the professional law supervision in Germany. For this purpose it is necessary for service providers who offer their services outside their country of establishment to report to or register with the responsible professional representative body in the country where the service is provided.

**Following on question 3: Which issues (e.g. clinical oversight, financial responsibility) should be under the responsibility of the authorities of which country? Are these different for the different kinds of cross-border healthcare described in section 2.2 above**

**Answer:**

**From the Bavarian Chamber of Dentists’ viewpoint there is no distinction between the responsibilities. The treatment agreement should be subject to the legal system in the country where the treatment takes place.**

### 3.1.3. Responsibility for harm caused by healthcare and compensation arising from cross-border healthcare

From the viewpoint of the Bavarian Chamber of Dentists no measure is required by the European Union. If the treatment agreement is subject to the legal system of the country where the treatment occurs, it is exclusively a matter for the country concerned to ensure corresponding mechanisms for pursuing possible legal claims. This is also a question of private law and does not require any specific measures in the context of healthcare.

**Following on question 4: Who should be responsible for ensuring safety in the case of cross-border healthcare? If patients suffer harm, how should redress for patients be ensured?**

**Answer:**

**The national legal systems as well as voluntary offers of Chambers in the area of amicable arrangements already contain adequate mechanisms for patients who have been injured while using a healthcare service. Insofar as this is not the case in all EU countries, an effort must be made to ensure that adequate personal liability insurance is guaranteed by the individual service provider for the provision of health services.**

#### 3.1.4. Securing a balanced healthcare accessible for all

The Bavarian Chamber of Dentists doubts whether it is possible to guide the use of health services by the EU citizen towards 'balanced healthcare to all' or an 'overall sustainability of the health system of the relevant Member State' through EU measures or legislative interventions by Member States. This would be in flagrant conflict with the principles of freedom to provide services and would restrict these unacceptably. The approach also adopted by the EU Lisbon strategy of reinforcing the competitiveness of service enterprises would be disrupted in contrast by state regulation.

**Following on question 5: What action is needed to ensure that treating patients from other Member States is compatible with the provision of a balanced medical and hospital service accessible to all (for example by means of financial compensation for their treatment in 'receiving' countries)?**

**Answer:**

**The Bavarian Chamber of Dentists assumes that the Commission (as already planned in the draft of a directive on services in the internal market (Article 23)) establishes the reimbursement of expenses principle as the basis for all further measures. It holds the opinion that adequate capacities for balanced healthcare can be made available with this guiding element.**

#### 3.1.5. Other issues

The insured parties (not the Member States) must be enabled to make decisions on which health services they individually consider appropriate and wish to use. The currently existing imposition of wills on European citizens in their individual social insurance and national health systems is incompatible with the model of the mature, personally responsible EU citizen. Reinforcement of personal responsibility is important specifically from this viewpoint, e.g. through the involvement of health protection in national training systems.

It may possibly be a state duty to ensure basic services (*ad curam vitae*) by guaranteeing sufficient financial resources. Compulsory insurance can only exist in this context, if and insofar as the individual health system is not financed by taxes.

**Following on question 6: Are there further issues to be addressed in the specific context of health services regarding movement of health professionals or establishment of healthcare providers not already addressed by Community legislation?**

**Answer:**

**The Bavarian Chamber of Dentists considers the stronger involvement of health topics in national training plans necessary, to promote the citizens' own responsibility for their own health. A uniform basic catalogue of required medical services, which are to be financed by the solidarity community via contributions or taxes, should be developed in a dialogue involving society as a whole.**

**Following question 7: Are there other issues where legal certainty should also be improved in the context of each specific health or social protection system? In particular, what improvements do stakeholders directly involved in receiving patients from other Member States – such as healthcare providers and social security institutions – suggest in order facilitating cross-border healthcare?**

**Answer:**

**From the viewpoint of the Bavarian Chamber of Dentists a stronger orientation towards competition by health systems is necessary. Only free competition ensures high quality medical care for EU citizens.**

**As already stated, it is equally necessary to have a strict separation between the patients' insurance relationship and the treatment agreement between service providers and service receivers.**

### 3.2. Support to Member States

No separate explanations by the Bavarian Chamber of Dentists are required for this purpose.

**Following question 8: In what ways should European action help to support the health systems of the Member States and the different actors within them? Are there areas not identified above?**

**Answer:**

**From the viewpoint of the Bavarian Chamber of Dentists it is urgently necessary to end the state's imposition of its will in the area of healthcare provision. Instead, incentive systems whose goal is stronger health protection must be developed, e.g. in the prevention sector or through the introduction of a no claims bonus/penalty system.**

**Overall, the health sector must place a stronger emphasis on the own responsibility of all players (service providers as well as service receivers), on self management and competition, in order to make future innovations in this sector possible as well.**

## 4. Tools and instruments for Community action

### 4.1 Options for instruments

The method of open coordination has proved itself from the viewpoint of the Bavarian Chamber of Dentists. Insofar as binding legislation (e.g. through a regulation or directive) is considered, it should codify the jurisprudence of the European Court of Justice on healthcare services. Reinforcing the practical cooperation between players in the healthcare system is supported in particular by the Bavarian Chamber of Dentists. Self management of dentists can make an important contribution here, e.g. in the context of a European professional regulation for dentists.

**Following on question 9: What tools would be appropriate to tackle the different issues related to health services at EU level? What issues should be addressed through Community legislation and what through non-legislative means?**

**Answer:**

**The Bavarian Chamber of Dentists advocates a directive on health services in the internal market, if this codifies the jurisprudence of the European Court of Justice. Otherwise, the Bavarian Chamber of Dentists prefers non-legislative means, especially to avoid disproportionate bureaucracy, which can also be expected from implementation in national law.**

Munich, 30 November 2006

Michael Schwarz  
President

Peter Knüpper  
Chief Executive