Will Lisbon open Public Services, including health, to liberalisation?

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"*…the internal market applies to health services. People can shop around. Opening the market could provide lucrative opportunities for private providers to lure clients*"
EU Health Commissioner, Markos Kyprianou
5th September 2006

Executive Summary

In our opinion, the aim of a healthcare system should be care for all, free at the point of use and funded from taxation. Ireland has a public-private system. Underfunding, and the conflict between private interests and public service, are the source of the crisis in the Irish system. The closure of public hospitals is matched by incentives to private-for-profit operators.

Competition in public services – especially health care – means that private operators compete against public providers (to get patients). They cherry-pick the treatments and services from which they can make a profit – the object of the exercise – leaving more difficult cases to the state. Two-tier services emerge, as in the Irish system, and the public system suffers from underfunding. Money that should go into the public service goes into shareholders pockets. We oppose this and support campaigns for a fully funded public health system.

Recent decisions by the European Court of Justice, together with pronouncements by the Commission give rise to serious concern regarding the future of public services – including healthcare – in the EU. The legal and judicial bases have now been laid allowing for many areas of healthcare provision to be subjected to the internal market and competition rules. Lisbon fails to reverse these neo-liberal developments.

Instead, it reasserts the principles underpinning this groundbreaking ECJ case-law and sets out for the first time the procedure for the enactment of laws based upon these principles. Furthermore, Lisbon effectively removes the ability of individual states to prevent the inclusion of healthcare in the WTO's controversial GATS trade negotiations. It does this by radically narrowing the grounds on which a member state can veto a GATS-type international trade deal.

Subject to Internal Market rules

The ECJ's Watts ruling of 2006 established that Art 49 (right to provide services) should apply in the provision of health services. The Commission 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) apply. In other words, the actual provision/delivery of healthcare – as distinct from general policy making - is now subject to internal market rules. Other ECJ case-law establishes that public procurement and competition rules apply to the delivery of public services – including health.

Taking its lead from the ECJ, the Commission view now 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. :(Comm SSGI 2006 p7. Emphasis - BY)*

This position is re-stated in a White Paper (policy document) from the Commission of Nov 2007. It has built upon the Watts ruling, which said that Art 49 and other market rules apply also to health services. (see Commission reference to Watts below).

So how would Lisbon change this situation? Has it sought to allow for the reversal or challenge to these worrying developments?

Lisbon: more of the same, only worse

Art 16 of Lisbon would give the EU power to legislate upon the *'economic and financial conditions'* for the running of public services. It says the EU *'...shall establish these principles and set these conditions, without prejudice to the Member States, in compliance with the Treaties, to provide, commission and fund such services*.'

This Article does not set aside the existing case-law of the ECJ, whose rulings determine what is in compliance with the treaties. Neither Art 16 nor the related Protocol 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 do they 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 will remain as the legal framework for any EU legislation arising in a post-Lisbon scenario. According to the Commission and the ECJ, 'compliance with the treaties' means letting private operators compete to deliver services. Legislation flowing from Art 16 would have to accord with ECJ case-law and include the right of private operators to bid for public services, including health care.

In a speech outlining his concerns about the Lisbon Treaty given in the House of Commons on Feb 6th, 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. It turns out that some parts of the treaties are more equal than others.

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 … [they] are roaming around Europe and Britain looking for markets. They are promoting the concept of competition in health provision…"

Any hopes that the European Parliament might correct the neo-liberal direction of the Commission seem unrealistic. The 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. (see below)

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'. The European Parliament, and the Party of European Socialists (to which the Irish Labour Party is affiliated), accepts this framework. On top of this, Art 115 would give the EU powers to issue guidelines for the economic policy of the member states. These would be seek to keep public spending low, to maintain 'price stability'. Lisbon would provide the means to legislate for this policy framework.

Unrestricted Veto on WTO Services deal removed

Art 188c.4b removes the unrestricted veto on international trade in health, education and social services. Removing this veto is a declaration of intent: EU leaders want to allow non-EU operators into the 'market' for health and education in exchange for getting into their markets. A veto would only be available if a deal ' *...risks seriously disturbing the national organisation of such services or prejudicing the responsibility of the Member State to deliver them'*.

'Seriously disturbing' is not defined in the Treaty. In circumstances where there is a public-private mix, the number of private operators allowed into a system that could be said to be 'seriously disturbing' is a matter of judgment – by the ECJ!

The question of '*…responsibility ... to deliver'* has already been tested in the ECJ. In the Watts ruling the Court said that the *'responsibilities ... for the organisation and delivery of health and medical care'* reserved for the Member States by Art 152 of the TEC did not mean that Art 49 does not apply: i.e.- private operators cannot be excluded.

So if EU-based private operators can provide cross-border health services, on what grounds could a veto be applied to non-EU operators as long as they are regulated? As for regulation – remember Leas Cross?

Watts and other rulings mean that a veto on trade in health, social and education services would be available in only in very exceptional circumstances. The burden of proof would lie with an individual member state to prove that a GATS deal covering healthcare 'risks seriously disturbing' the provision on health services on their territory. Who will decide what "seriously disturbing' is? What are the criteria? Ultimately it will be the ECJ – with its increasingly neo-liberal bent.

With the GATS negotiation process happening behind closed doors and away from democratic accountability this dimunition of veto power is deeply worrying.

The only grounds for a veto on the current WTO negotiations are because vetos still remain for health, education, social service and cultural & audiovisual services; and because some other services require unanimity for changes in the internal rules. Almost all of these, except for taxation and defense, will move from unanimity to QMV under Lisbon. Thus the grounds for a veto will be all but eliminated.

A veto is the only means by which we – the people – have some say in how these services should work. Removing the veto means that if we elect a government committed to fully funded public health care, they could be outvoted on an EU agreement to liberalise services. Pressure on a government to block a trade deal – like farmers are attempting now – would have little effect because the government would have no direct veto (as is the case with agriculture since 1997). Democratic control is being eroded by trade agreements at the WTO.

The Irish government is currently letting multinational operators into our health system, albeit with little on no regulation: cancer smear-testing (Quest Diagnostics); dialysis (Fresnius); and the operation of the co-located private hospitals (including Beacon Health – owned by Triad). The fraud-mired background of these companies has not deterred the government.

GATS agreements to guarantee continuity of these kinds of contracts would be part of EU-negotiated trade deals at the WTO. Lisbon would help lock in the anti-social healthcare policies of the current Irish government.

Who better than IBEC to sum up the privatising impact of Lisbon:

> "Through our membership of the EU many markets have been subject to liberalisation and through this process new business opportunities have been created for Irish companies. The Lisbon Reform Treaty creates the legal basis for the liberalisation of services of general economic interest (Art. 106). A yes vote for the Lisbon Treaty creates the potential for increased opportunities for Irish business particularly in areas subject to increasing liberalisation such as Health, Education, Transport, Energy and the Environment."

Full text of IBEC submission http://www.forumoneurope.ie/index.asp?locID=113&docID=1650

In conclusion, Lisbon would lock in a creeping privatisation of health, education and social services because it would secure the rights of EU-based private operators to compete for public service contracts; furthermore, what is available in the EU public service market could progressively be opened to transnational operators through the GATS agreements.

Sources and references.

What is the existing legal / political approach of the Commission regarding SGIs and SGEIs?
Based on rulings by the ECJ, the Commission regards almost all social services as 'economic activities'.

> "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. "* (Comm SSGI 2006 p7. Emphasis - BY)

What does the Commission regard as the role of the Member State in the provision of social services?
In general, the case law of the Court of Justice ("the Court") indicates that the EC Treaty gives Member States the freedom to define missions of general interest and to establish the organisational principles of the services intended to accomplish them:

> *However, this freedom must be exercised transparently and without misusing the notion of general interest,*

> *and the Member States must take account of Community law when fixing the arrangements for implementing the objectives and principles they have laid down. For example, they must respect the principle of non-discrimination and the Community legislation on public contracts and concessions when organising a public service.* (Comm SSGI 2006 p6. Emphasis – BY)

What is the Commission position on health services?

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 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.*
>
> Second, some Member States have argued that the requirement in Article 152, paragraph five of the Treaty to "*fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care*" prevented binding obligations under Community law regarding health systems. In the judgment, the Court stated that this provision does not 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 (EC) 1408/71, to make adjustments to their national systems of social security."

1195/4 goes on to discuss four types of cross-border healthcare: cross-border provision of services; use of services abroad - 'patient mobility'; permanent presence of a service provider; temporary presence of persons. These categories echo the categories in the GATS agreements (the four modes of service provision) for allowing transnationals compete to run services.

We cannot discuss these matters further here. For our concerns, the ECJ is ruling that existing treaty provisions, including the right to provide cross-border services (Art 49 TEC), apply to healthcare; that Art 152 (above) does not stop the delivery of health services being regarded as an economic activity to which market rules apply; and that member states may have to change their social security arrangements to provide payment for such services.

Art 152 has been amended by Lisbon to read:

> *Union action shall fully 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.*

This amendment (underlined) however, would not affect the impact of ECJ rulings based on Art 49 – freedom to provide services: a public authority can manage the service delivered by private contractors; similarly a public authority (of the member state) would retain the power to decide on the resourcing – but the EU would have power to issue guidelines for the management of the member states economies' under Art 115. Nor would this amendment eliminate the applicability of treaty rules where remuneration is present. And it would not effect the use of PPPs in the provision of healthcare infrastructure. This is especially the case in a country like Ireland where there is a mix of public and private providers: remuneration and competition already exist.

Finally, in its White Paper 2007 the Commission integrates the Protocol on SGEI's into its framework for public services. It reiterates ECJ rulings that

> "In practice, ... it follows that the vast majority of services can be considered as "economic activities" within the meaning of EC Treaty rules on the internal market (Articles 43 and 49)" [p.5 White Paper].

It is in this context it says that the Protocol will 'serve as a reference for all levels of governance' (p9).

The view that private provision of social services is a positive form of modernisation – for profit or otherwise – is reflected in a resolution of the European Parliament (2006/2101 INI) on the Commission's 2004 White Paper on services of general interest or SGIs (public services that have a social role). The EP resolution

> "…recalls it is not important who provides SGIs ... and emphasises that the majority of SGIs can be provided under conditions of fair competition, according to the principle that private and public undertakings must receive equal treatment."

So neither the Parliament nor the Party of European Socialists (which supported this resolution) pose opposition in principle to outsourcing and privatisation as long as there is "fair competition".

Resolution of the European Parliament (2006/2101 INI)
http://www.google.ie/search?q=European+Parliament+(2006%2F2101+INI)&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-GB:official&client=firefox-a

Frank Dobson MP, Speech to House of Commons, February 6th, 2008. Sourced at http://www.theyworkforyou.com/debate/?id=2008-02-06b.1000.2

Markos Kyprianou quoted in Jane Lethbridge. "European healthcare services and multinational companies : Major trends and eligibility for European Works Councils" - September 2007 - Public Services International Research Unit

This analysis is based upon the Lisbon Treaty;

The European Commission White Paper COM (2007) 725 of Nov. 20, 2007 on Services of General Interest;

The 'Consultation on Community Action on health services' SEC (2006) 1195/4 including the Watts ruling on 16 May 2006;

'Communication COM (2006) 177, Implementing the Community Lisbon Programme: Social services of general interest (SSGIs) in the European Union';