Is the European Union the Trojan Horse of National Health Care Systems?

Course
Health Care State: Past and Present
University of Leuven, 20 March 2013

Rita Baeten & Bart Vanhercke
European Social Observatory
Mission impossible?

- A very large target...
- That moves as we speak (thanks Gregory)
- More an ‘old love’ (sociology of health) than my specific expertise

But:

- Standing on the shoulders of giants
- Mobile Fanclub 😊
Outline of the talk

1. The OSE & some Greek mythology
2. Treaty of Lisbon
3. Public health (end of comfort zone)
4. Basic freedoms!
   - Persons, Products, Services, Capital
5. Competition law (eyes open)
   - State aid and Public procurement
6. From the OMC to Economic Governance! (the real thing)
7. Structural Funds (be cool)
8. Conclusions
1. The European Social Observatory

• Founded in 1984
• Centre for research, information and training with trade union roots, now academic profile (“applied” research)
• Specialises in the social dimension of the EU: social and employment policies
• Mission is to analyse the mutual influence between the EU and the Member State level (“Europeanisation”): reciprocal relationship, not ‘top down’
Network

- **Works closely with**
  - Belgian and European **public authorities** (tendering)
  - **Academics** (B and EU + US/Canada)
  - **Trade unions** (B and EU)
  - **Civil society organisations**
The team (11 + 4)

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Dalila
David
Sophie
Bart
Nadine (I)
Andrea (I)
Rita
Ramón
Renaud
Francesca (I)
Françoise
Sebastiano
Cecilia (I)

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Core research topics

- Employment and restructuring
- Health care systems
- Pensions
- Social Inclusion and Social Protection
- Institutional issues (e.g. ‘economic governance’)
- New forms of governance (‘OMC’)
At your disposal...
Trojan Horse (remember?)

• Tale from the **Trojan war**
• After fruitless 10-year siege, the Greeks constructed a huge wooden horse, and **hid a select force** of men inside
• The Greeks **pretended to sail away**, Trojans pulled the horse into their city as a victory trophy. The Greek force crept out of the horse and opened the gates...
Metaphorically

• A "Trojan Horse" has come to mean any trick or strategy that causes a target to invite an opponent into a securely protected bastion or space

• Is the EU just that, in health?
Questions/Clarifications during presentation?

Interrupt me!
(if not I will keep on talking 😊)
Sources include


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Treaty of Lisbon:

**EU competence in the field of health**

*(Title XIV)*

- **Article 168**: Community contributes to
  - High level of human health protection in all Union policies and activities
  - Complement national policies, encourage cooperation.
  - *Excluding* any harmonisation of laws
Treaty of Lisbon

- **Article 168:**

  “Union action shall 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”.
NO!

- EU initiatives have, in fact, very significant consequences for national health care systems

- Together these influences form an EU governance “patchwork”
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Source: Belcher, P.J. R.V.Z., 1999
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EU competence health

Subsidiarity principle

Art 3(b) EC Treaty:
EU may only act “if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States”
Public health

- Initiatives mostly through European Public Health Programmes (since 2003)

- Predecessors:
  - ‘Europe against Cancer’ (1986)
  - ‘Europe against AIDS’ (1991)
Europe Against Cancer programme
(significance)

- “Appears to have been associated with the avoidance of 92,573 cancer deaths in the year 2000”, or a reduction of 10% in the EU overall (Boyle et al., 2003)
- Prevention has consequences for healthcare systems...
Public health

- eHealth Action Plan 2012-2020
- Development of the use of ICT in healthcare:
  - Electronic prescription in Denmark by 97% of doctors
  - Telemonitoring: in Sweden by 9% of doctors
  - Exchange of patient files across borders 1% of EU GP’s
- “Providing smarter, safer and patient-centred health services”
  - tablets and smartphones (mobile health)
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4. Basic Freedom
EU single market

- **Free movement of**: 
  - Persons
  - Products
  - Services
  - Capital

- **Goal**: remove trade obstacles between Member States
Key implication

Member States *have to comply* with EU single market rules and competition law when organising their national systems.
Interaction between health care systems & markets

- Pharmaceutical products
- Medical devices
- Health workforce
- Health care providers
- Health insurers
How?
EU single market instruments

- Remove regulations
- Minimum harmonisation
- Mutual recognition
- Co-ordination of regulations
- Minimum standards
To be more precise

The “fundamental freedoms” impact on health care through:

1) Specific secondary legislation
2) Non-specific secondary legislation
3) Direct application of the Treaty

⇒ Role of the ECJ
1) Specific secondary legislation

Free movement of:

- **Products:**
  - Rules on market access of pharmaceutical products, medical devices (*say wheel chairs*)

- **Services:**
  - Professional qualifications of health professionals (*say nurses*)
  - Directive on Patient Mobility (2011)

- **Persons:**
  - Co-ordination of social security systems
2) Non-specific secondary legislation

Free movement of:

- **Persons:**
  - Working time Directive (truck drivers, pilots...)
    - Junior doctors
    - On call duties

- **Services:**
  - Electronic commerce Directives
  - Directives on insurances
3) **Direct application of the Treaty**

- **Fundamental freedoms**
- **Competition law**
  - State aid
  - Public procurement

→ Important role of the **Court of Justice of the EU** (CJEU)
Court of Justice of the EU

- Guard of the EU Treaties and application of EU law
- Interpretation of general rules in specific circumstances (esp. in the absence of legislation)
- On a case by case basis
- Reasoning behind judgments has to be implemented in national legislation
European Court of Justice

- Healthcare provision is an *economic activity*
  - Ambulatory care *and* in patient care
  - Systems that reimburse healthcare *and* systems that provide benefits in kind
ECJ: Justified restrictions (not blind)

- **Public interest**
  - Financial viability of social protection:
    - Waiting lists
    - Planning
  - High level of public health

- **Prior authorisation?**
  - Ambulatory care: not justified
  - Hospital care: justified

- **Restrictions have always to be**
  - Objective, non discriminatory, transparent (international medical standards)
  - Proportional: waiting lists
Impact of the judgements

- **Legal uncertainty: how to apply?**
  - Value of contractual relationship provider-purchaser?
  - Tariff setting, **budget ceiling**, compare treatments
  - Which **requirements** are justified?
  - Equally effective **treatments**
  - Risks of reversed discrimination
Answer:
Patient Right Directive (2011)

- **Rules of reimbursement of care abroad**
  - Prior authorisation, tariffs, conditions
- **Responsibilities of MS of affiliation and treatment**
  - Quality of care, flanking measures
- **Cooperation between MS**
  - e-health, HTA, Centers of Excellence
4 Forms of Free movement of services

1) Patient goes to the provider **abroad**
   - \(\rightarrow\) **patient mobility**

2) **Provider** provides **temporarily** in other MS
   - Reimbursement?

3) **Service** moves (e.g. telemedicine)
   - Reimbursement?

4) Provider establishes **permanently** abroad
Establishment /1

- **All** healthcare regulation is potentially an obstacle for newcomers;
- **ECJ** assesses proportionality, even if no discrimination of providers from abroad;
- **Risk of deregulation**;
- **General interest**: difficult to provide evidence
Establishment /2

• Planning
  → e.g. minimal distance between pharmacies
• Tariff setting
• Legal form (not for profit)
• Staff norms
• Requirements re providing services together
• ...
Healthcare purchasing

- Undertaking or social activity?
  - Compulsory affiliation
  - Social solidarity mechanism
  - Premiums and benefits legally defined
  - Supplementary health (BE: mutual funds)
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EU competition law

- **Goal:**
  - Development of trade by fair competition

- **Instruments:**
  - Prohibition of cartels and abuse of dominant position (monopolies)
  - Limit and define possibilities for state aid

- **Link with healthcare ???**
EU competition law and health care

- **Cartels**: price fixing systems, cross subsidies, solidarity mechanism
  - *Collective agreements* for tariff setting?
- **Monopolies**: selective contracting
- **Ban on publicity**
- "...

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State aid

- Avoid distortion of competition
- Subsidies, indirect support
- Compensation for public service obligations
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Open Method of *what*?

- **Complement and support activities of MS re social protection** (art. 137 EC Treaty)
- **Social Protection Committee and Open Method of Co-ordination** (art. 144 EC Treaty)
  - Modernization of health and long term care
  - Ensuring
    - Access
    - Quality
    - Financial viability

- Do you have a few hours ☺
OMC Healthcare: process cycle

Launching (2004)

- Common Objectives
- Peer review
- Supported by PROGRESS
- NAP (NSR)
- Joint Report (!)
- Target Indicators
- Participation
Common Objectives - Healthcare (ex.)

MS should promote accessible, high-quality and sustainable healthcare and long-term care by ensuring:

“(j) access for all to adequate health and long-term care and that the need for care does not lead to poverty and financial dependency; and that inequities in access to care and in health outcomes are addressed”
Indicators (“SPSI”)

Other Ex.

• At-risk-of-poverty-rate (60%)!
• Healthy life expectancy
• Aggregate replacement ratio
• In-work poverty risk
• Waiting time ???
Social Investment Package (SIP)
(European Commission 20-03-13)

- **Europe 2020 Strategy**: smart, sustainable and inclusive growth of EU

- In context of **financial crisis** and ageing societies
  - Member States “choose” for cuts in social spending
  - Need to reform social policies: future growth and competitiveness requires **investments**
    - *One extra year of pre-school investment gives 10 times better outcomes in school results at the age of fifteen.*

- “Child-friendly Social Investment Package” (SIP)
“The large share of healthcare costs in the EU raises the issue of cost-effectiveness and the financial sustainability of health systems”

“The greater the expenditure, the lower the marginal improvement in health status as a result of its increase”
But very strong tensions with “The Next Big Thing”

ECONOMIC GOVERNANCE APPLIED TO HEALTH CARE!
EU macro-economic policies

Since long

- Sustainability of public finances, also in healthcare

New

- Dealing with the **content** of healthcare policies
- **Detail** of the guidelines
- Potential financial **sanctions**
Country-Specific Recommendations

Addressing healthcare

- 2011: 3 countries
- 2012: 6 countries
  - Cyprus: Complete and implement the national healthcare system without delay, on the basis of a roadmap, which should ensure its financial sustainability while providing universal coverage.
  - Provoked by Member States?

European Commission

“health-care related country specific recommendations may feature more prominently in future European Semesters”
Economic Adjustment Programmes (M.O.U.) /1

- **Greece, Portugal, Ireland**
  - Ceiling to HC spending (6% of GDP)!
  - Centralised public procurement
  - e-health
  - Hospital management
  - Reduce prices: salaries, fees
    - Generics and price reductions in pharmaceuticals (shortages!)
  - Increasing out of pocket payments
  - Reduce benefit packages
  - Close health facilities/hospitals

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Economic Adjustment Programmes (M.O.U.) /2

Parallel with “Structural Adjustment Programmes” in the ‘80s and ’90s (imposed by IMF /WB):

- Reducing size of the state
- Market enabling
- Bad for equity and the poor
- Not effective

(Greer 2013, forthcoming)
Sustainability of public finances: in sum

- Healthcare targeted
- From improving cost effectiveness to cutting public expenditure

1. Council conclusions 2010
2. Health in the Social Investment Package (SIP)
3. Country Specific Recommendations (CSR), all MS
4. Economic Adjustment Programmes, 3 MS

Did the crisis create a window of opportunity for “getting tough” on HC spending (and solidarity)?
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Implications SIP on HealthCare

- **What’s new?**
  - Same objectives, same Structural Funds and same instruments (see slide 49 t/m 54)

- **Unanswered in working documents:**
  - How will EU make Member States implement investments in times of crisis?
  - What are the consequences if they don’t?
  
  → **Missing in SIP:** reconciliation

  Economie + Social policies

  (Palier, Lunchtime Session OSE)
Structural Funds

- **Structural Funds**: European Social Fund (ESF) & the European Regional Development Fund (ERDF)
- Actions such as “preventing health risks” and “filling the gaps in health infrastructure and promoting efficient provision of services”
- Developing collaboration, capacity and joint use of infrastructures, in particular in sectors such as health
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In sum: conflicting goals, conflicting instruments?

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Negative vs positive integration

- **Negative integration**
  - Market integration and liberalisation;
  - Remove national law if it conflicts with European law, without putting anything new in its place.

- **Positive integration**
  - Harmonisation of national healthcare regulation?
  - But: Subsidiarity?
  - But: huge structural differences, culturally and historically rooted systems.
Constitutional (a)symmetry between economic and social goals

- **National level**
  - Balance between *market making* (economic interests) and *market correcting* (social protection) policies
  - Same constitutional status
  - Conflicts to be solved politically

- **European level**
  - Goal: Economic integration and internal market
  - European law takes precedence over national law, even national constitutional law
Despite safeguards

- Legal uncertainty
- “Preventive” deregulation;
- Grey zone;
- Introduction of market mechanism;
- Global loss of steering capacity.
Political developments gain momentum

- Services Directive;
- Debate on services of general (economic) interest;
- Health services directive;
- Commission applies to healthcare: state aid, public procurement;
- Infringement procedures;
- Driving forces behind developments?
Explicit competencies and scope for positive integration strictly limited;
Impact of internal market is potentially enormous, but creeping;
Mainly through ECJ and direct application of the Treaty;
Impact: legal uncertainty and deregulation, global loss of steering capacity.
In a nutshell... /2

- Global loss of **steering capacity**
- Fast moving area: **economic governance** since 2010
- From IM to **Peer Pressure** (OMC) to financial sanctions ("patchwork")
- Impact on social character of healthcare systems?
- Medical Sociologists: **Cui Bono?**
Is the European Union the Trojan Horse of National Healthcare Systems?

(a “trick” that causes a target to invite an enemy into a securely protected bastion or space)

You decide!
Thanks for your sustained effort!

Comments/criticism/questions very welcome, now or at:

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