

EC Competition Law and National Health Systems

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- The Question:

When could Competition law apply to health services?

- The Answer is uncertain-

It lies between law and politics

- interaction between health policy reforms and competition law enforcement

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- Legal Framework
 - Conceptual approach
 - Competition law rules
- Enforcement
 - ECJ & National Competition Authorities
 - Trends
- Conclusions

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■ Conceptual Approach

Single European Market

Borderless integrated market, neutral playing field,
and cross-border health service provision

v.

Traditional Welfare States

Territorially bound compulsory public health services for
discreet populations based on solidarity (Ferrera, 2005);
public service organizations; market correcting policies

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EC Competition Rules- Treaty Based

- *Undertakings*
 - Functional definition based on economic activity
 - Competing in the market against other firms
 - Problem: binary distinction, does not allow experimentation
 - Consider PPPs
 - Consider differences between pharmaceuticals and services
- Article 81
- Article 82

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EC Competition Rules

- *Undertakings*
- Article 81 Cartels prohibition
 - Undertakings are prohibited from making agreements or coordinating practices which affect trade and have as their object the prevention, restriction, or distortion of competition within the common market.
 - Examples: to fix prices, or to limit or control production
- Article 82

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EC Competition Rules

- *Undertakings*
- Article 81
- Article 82 Abuse of Dominant Position
 - Undertakings are prohibited from abusing dominant position within a market
 - Examples: predatory pricing, barriers to market entry

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EC Competition Rules

- *Undertakings*
- Article 81
- Article 82
- Services of General Economic Interest (**SGEI**)
86(2)
 - Based on solidarity, universal service obligations

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EC Competition Rules

- **Services of General Interest (SGEI)**
 - Based on solidarity
 - **Defence** against claims of anticompetitive laws or practices
 - **Article 16**- play a “role in promoting social and territorial cohesion”, and MS shall enable them to fulfil their missions
 - **Article 86(2)**- application of competition rules does not obstruct the performance of the particular tasks assigned to them
 - Proposed Treaty protocol and amendments to Article 16

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- Enforcement Mechanisms
 - European Court of Justice (ECJ)
 - National Competition Authorities (NCAs)
Decentralization of enforcement- Reg 2003

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- Enforcement Trend
 - Commission- broader focus, pharma sector
 - NCAs are increasingly active in health policy
 - Health systems incorporating market reforms
 - Local issues with more depth
 - Potential for wide variation across the EU:
lack of capacity, resources, and health expertise

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■ Conclusions

■ Cyclical interface and convergence of law and politics

- Court cases applying EU economic laws to health systems causes Europeanization
- Politics driving market-based health reforms
- Uncertainty for policy-makers

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■ Conclusions

- Court's case-by-case analysis unpredictable
- Unfulfilled potential to enforce competition law as health systems reform
- NCAs will play a greater role in this area
- As cross-border health care increases, and private sector involvement in health expands, there will be more scrutiny of health policy under competition law

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Thank You

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■ Legal Framework

- Welfare States v. Single European Market
- EC Competition law provisions
- Health system reforms expose the system to the application of competition laws
- Decentralization of Competition law enforcement facilitates this trend

■ Legal Enforcement

■ Conclusions

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- **NCA**s are increasingly active in health policy
 - **Italian**- focus on pharmaceutical industry and inconsistencies in regional implementation
 - **Swedish**- municipalities both pay for and providing services concentrate services in public sector & discourage competition
 - Difficulties for **Newer Member States** with fewer resources and less experienced personnel, lack of judicial review
 - **UK OFT** - lack of investigations into NHS reforms
 - **Dutch**- competition reforms have gone the furthest to incorporate markets while retaining regulated solidarity

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Could SGEI exemption be the solution?

■ YES

- Political perspective - want a safe harbor
- Europeanization of competition law that incorporates solidarity, market correcting policies

■ NO

- Legal perspective - too vague and abstract
- Would require a 2-tier enforcement system