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Introduction

Narratives surrounding the EU's response to Covid-19 have focused, to a certain extent, on the public health competence of Article 168 of the Treaty on the Functioning of the European Union (TFEU). They have explained how EU activity in health extends beyond this (Purnhagen *et al.* 2020), and how the predominance of Member State responsibilities for health policy and healthcare system organisation ([1]) gave rise to (misconceived) narratives that the initial EU-level responses were a failure (Greer 2020a, b).

A further picture emerges from looking at other aspects of EU-level activity and how these are changing in response to Covid-19 – for example, relaxation of the rules governing government subsidies (state aid) and abusive cartel and monopoly behaviour (antitrust) (European Commission 2020a and 2020b). These rules may be engaged as national governments seek to provide additional support to particular bodies (for example implementing e-health programmes as discussed below) in responding to the pandemic, or to help manage shortages of supply of products essential for health, such as hand sanitiser. Certainly there has been commitment by national competition authorities to a common focus in applying competition law (European Competition Network 2020), which has been welcomed, as it offers a more informal approach than usual to how business and competition authorities interact, and highlights the potential for 'Corona washing' (De Stefano 2020), for example if cartels form, seemingly to respond to the crisis, but result in longer-term distortive effects on markets.

It has previously been suggested that the nature of a disease may offer insights into the limits of competition – for instance, the requirement for herd immunity in addressing smallpox means that treatment cannot be withheld from those unwilling/unable to pay, as distinct from those willing/able to pay (Odudu 2011). In the same context it was acknowledged that there are distinctions to be drawn between such practical questions as where competition law can apply, and normative questions of where it may be desirable to apply competition law. The Covid-19 pandemic is highlighting both types of question – practical and normative – suggesting that regulation of competition in the current situation requires more nuance to support responses to the pandemic.

In the healthcare context more generally, there is a broad EU-level framework of case law suggesting that healthcare providers (such as hospitals) are subject to competition law, but healthcare purchasers (such as sickness funds, or state providers of health insurance) may not be (van de Gronden and Rusu 2017). Countries actively engaging with competition reforms in healthcare (such as the Netherlands and England) have developed their reforms within and around this framework (Guy 2019).

1. Article 168(7) TFEU. For further discussion in the Covid-19 context, see Guy 2020.

The Commission's temporary frameworks for relaxing EU competition law in the context of Covid-19 take a different approach, and offer insights into ways in which we may start to think about the different facets of responses to Covid-19 and how competition law may be used effectively to support national efforts.

1. The EU competition law framework and the health sector

It is important to note that there is no 'healthcare-specific' competition law at EU level: ([2]) rather, there is general competition law, which is applied to cases involving the healthcare sector (Hancher and Sauter 2012). What generally determines whether or not either the antitrust or state aid rules apply is the existence of an 'undertaking', defined as an 'economic activity' which consists in offering goods or services on a market: ([3]) a further requirement is for there to be a cross-border effect, for EU, as distinct from national, competition law to apply.

In general, this has created a framework which suggests, broadly, that competition law applies to healthcare providers, such as medical specialists. In contrast, it is not considered to apply to health purchasers, such as German sickness funds (in the AOK Bundesverband case) or purchasing bodies in the Spanish health system (in the FENIN case).

There are generally two routes to establishing that competition law may not apply.

Firstly, there can be a finding of a Service of General Interest (SGI). In broad terms, this suggests that there may not be enough competition within a healthcare system to justify applying competition law, because the system has a clear solidarity basis. Questions of 'how much competition' have been raised, with 'potential for competition' being considered sufficient (Sinclair 2014). It has also been suggested that solidarity could be more important as a starting point in determining whether competition law applies in the healthcare context (van de Gronden and Guy 2020).

A useful overview of these tensions can be seen with the recent Court of Justice of the European Union (CJEU) finding that the state aid rules did not apply in the DZP/UZP case. This involved a complaint by private health insurers against the state health insurer in Slovakia, prompting questions of whether the interaction between public and private insurers generated competition within the Slovak market. The Commission followed the approach of earlier case law, concluding that the state aid rules did not apply. On appeal, the General Court took a different view, suggesting that scope for competition on quality (as distinct from competition on price) was sufficient to justify finding that competition law did apply. On final appeal, the CJEU found that this

2. In contrast to modifications made to the antitrust rules at national level – see Guy 2019.
3. A standard definition by reference to the *Höfner-Elser* and *Commission v Italy* cases.

approach was flawed, and concluded that the state aid rules did not apply, thus apparently reverting to the approach of earlier cases.

Secondly, there can be a finding that an economic activity is partially immune from competition law because it is designated a Service of General Economic Interest (SGEI); this suggests that some activities may include an SGEI, but also aspects which are subject to competition law. For example, in the Ambulanz Glöckner case, emergency ambulance services were deemed to be an SGEI, in contrast to standard patient transport, which was deemed subject to competition law. It is for Member States to determine SGEI, and the Commission has recently reviewed rules governing SGEI in the healthcare context which were introduced in 2012 (European Commission 2019). It is important to note that the SGEI exception is considered to be more effective than more general exceptions ([4]) in protecting public interest values associated with healthcare (van de Gronden and Rusu 2017): once competition law is found to be applicable in the healthcare context, it is the more general exceptions which are used, and these form the basis for the Covid-19 temporary relaxation frameworks.

2. Temporary relaxation of EU competition law and the healthcare context

The two temporary relaxation frameworks address wider aspects and acknowledge shocks to national economies arising from responses to Covid-19, although various aspects are necessarily directed at the healthcare sector.

Within the temporary relaxation framework for the antitrust rules, uncertainty regarding the duration and intensity of the shock is acknowledged, as is the influence of decisions by public authorities driven inter alia by public health considerations (European Commission 2020b: paragraph 2). A primary focus is the need recognised for greater cooperation to ensure the supply and adequate distribution of essential scarce products, including medicines and medical equipment used to test and treat Covid-19 patients or necessary to mitigate and possibly overcome the outbreak (European Commission 2020b: paragraph 4). However, it is recognised that cooperation in the health sector might need to go even further to overcome critical supply shortages, for example, coordinating reorganisation of production with a view to increasing and optimising output to avoid over-production and under-production of medicines, so that such reorganisation would allow producers to satisfy demand for urgently needed medicines across Member States (European Commission 2020b: paragraph 14).

In envisaging the form such cooperation may take, the Commission is informed by its recent experience, and suggests that cooperation in the health sector might be limited to entrusting a trade association, an independent advisor, an independent service provider or a public body with

4. Article 101(3) and Article 107(3) TFEU.

specific activities, such as contributing to identifying essential medicines at risk of shortage, or coordinating joint transport for input materials (European Commission 2020b: paragraphs 12 (a) and (b)). While some of the language used may be evocative of the SGEI exception, clear limits are also set, reinforcing the strict nature of the general exceptions. For example, exchanges of commercially sensitive information and coordination of production would – in the emergency situation and because of their temporary nature – not currently be deemed problematic under EU competition law or represent an enforcement priority for the Commission, because such arrangements are objectively necessary to counteract shortages of supply of essential products or services, and do not go beyond this aim, partly by being temporary in nature (European Commission 2020b: paragraph 15).

Within the temporary framework relaxing the state aid rules, much of the health-specific guidance appears to relate to going beyond the exception which permits aid to facilitate the development of certain economic activities or areas ([5]). Thus specific guidance relates to facilitating Covid-19-relevant research and development (R&D) (European Commission 2020a: section 3.6) and production of Covid-19-relevant products, including medicinal products and treatments, medical devices and equipment, disinfectants and data collection/processing tools (European Commission 2020a: section 3.8).

A further exception to the state aid rules is concerned with remedying a 'serious disturbance' in the economy of a Member State ([6]). This exception has formed the basis for the Commission permitting temporary payment of direct grants by the Dutch Ministry for Health, Wellbeing and Sport to cover costs for the purchase, leasing, licensing and implementation of e-health applications to support providers of general practitioner care, district nursing, mental health care and social support services (Case SA.57897).

3. Can Covid-19 change the EU competition law framework in healthcare?

Whether or not Covid-19 can change the EU competition law framework might be seen as a variation on questions of whether a fundamental review of healthcare system organisation in general is needed in light of the pandemic. Such questions have been raised in the Netherlands, amid concerns that heavy reliance on competition and marketisation reforms may have inhibited responses to Covid-19 and may not be suitable in the future (Jeurissen *et al.* 2020; Varkevisser and Schut 2020).

At the time of writing (August 2020), it is difficult to see the temporary frameworks as simply there pending an unequivocal return to 'business as usual', and to assume that no other, longer-term,

5. Article 107(3)(c) TFEU.
6. Article 107(3)(b) TFEU.

changes may be either needed or desirable. This is particularly so as countries review interactions between public and private healthcare, both to support Covid-19 services and to ensure continuity of non-Covid-19-related services – trends which are also in evidence at global level (O'Hanlon and Hellowell 2020).

It may be the case that the coexistence of the temporary frameworks and the wider EU competition law framework will prove to be sustainable over time as the EU and Member State levels respond to Covid-19. The clear emphasis in the Commission frameworks on their *temporary* nature prompts questions of how long 'temporary' can last as the pandemic evolves, or whether there may be cycles of application and disapplication of the frameworks. This may prove to be a helpful targeted response to some aspects, such as avoiding shortages of supply of specific products, but may prove less effective for longer-term aspects, such as R&D. It may also prove an effective and desirable approach to maintain EU-level coordination over specific Covid-19 responses.

In contrast, the EU competition law framework may appear shaped by developments at Member State level, particularly with regard to the assignment of SGEI, but also with emphasis on solidarity within a healthcare system – as reinforced by the recent (June 2020) CJEU judgment in *DZP/UZP*. Although calls have been made for a mandatory principle of solidarity to be established at EU level in response to Covid-19, the difficulty of this is acknowledged, particularly with regard to synchronising national and EU-level interpretations of 'solidarity'. Nevertheless, as national responses to Covid-19 evolve, the SGEI exception may prove more serviceable beyond the temporary frameworks.

Conclusion

Responses to the Covid-19 pandemic are drawing attention to a range of EU-level activity. While the EU competition law framework does not typically recognise modifications to take account of the specificities of the healthcare sector, the wide-ranging impact of Covid-19 has necessitated the introduction of temporary frameworks relaxing the application of the antitrust and state aid rules. These frameworks take a notably different approach to the exception mechanisms generally utilised in connection with competition in healthcare. As the pandemic evolves, however, it may be more pragmatic to re-examine in particular how the Services of General Economic Interest (SGEI) exception is used in the healthcare sector rather than relying on definitions of 'temporary', or cycles of application and disapplication of the temporary frameworks.

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