

Financing Health Care under State aid rules

Introduction - The applicability of State aid rules to financing Health Care in the EU/EEA

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Differences between Health Care systems in the Member States

“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...”

(Article 168(7) TFEU, ex 152(5) EC)

Typology of Health Care systems

National Health
Services (NHS)

Social Insurance
Systems (SIS)

National Health Services (NHS)

- mainly funded by general taxation;
- as a rule, operates as a benefit-in-kind system;
- delivery and funding of health care typically integrated into one single, public body;
- hospitals are state owned and general practitioners have contracts with the NHS;
- patients have a free of charge access to public or contracted providers (benefits in kind);
- Examples (2010): the United Kingdom, Ireland, Denmark, Sweden, Spain.

Social Insurance Systems (SIS)

- mainly funded by means of earmarked social contributions from employers and employees;
- based on a compulsory insurance;
- two types: reimbursement systems (RS) and benefit-in-kind systems;
- RS: care can be paid for through a fee for service, the patient or provider is reimbursed for the costs;
- benefit-in-kind: providers remunerated at a flat rate, a lump sum based on the population size they serve.
Patients: (often free of charge) access to the providers with whom concluded agreements for service delivery.

Social Insurance Systems (SISs) (2)

Benefit-in-kind SISs:

- Germany
- Poland
- Slovenia
- Hungary (2010)

Reimbursement SISs:

- Belgium
- France
- Luxembourg (2010)

However, ...

- Typology should be read with the necessary caution;
- Health Care systems: dynamic, change over time, incorporate elements of systems with different characteristics;
- Reforms can furthermore overrule the basic characteristics of a system;
- Example: the Netherlands - after the 2006 reform: a stand alone type of system, no longer a typical benefit-in-kind system.
- Source: Rita Baeten, Bart Vanhercke, Michael Coucheir, Research paper: The Europeanization of National Health Care Systems: Creative Adaptation in the Shadow of Patient Mobility Case Law, July 2010.



Despite the differences, the point of departure of EU/EEA State aid policy is the same

Article 107(1) TFEU, (ex Article 87(1) EC)

“Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.”

Article 61(1) EEA Agreement

“Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.”

The notion of State aid - 5 cumulative conditions:

1. granted by the state or through state resources;
2. confers an economic advantage upon an undertaking(s) or the production of certain goods;
3. selective;
4. affects trade between EU/EEA Member States;
5. distorts or threatens to distort competition between EU/EEA Member States.

de minimis aid - small amounts of aid – NO potential effect on competition and trade – **no aid**

Commission Regulation (EC) No 1998/2006 of 15.12.2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid, OJ L 379, 28.12.2006, pp. 5–10.

(under review, expires 31.12.2013)

aid \leq EUR 200 000 over any period of three fiscal years

Commission Regulation (EU) No 360/2012 of 25.4.2012 on the application of Articles 107 and 108 of the TFEU to de minimis aid granted to undertakings providing **services of general economic interest** OJ L 114, 26.4.2012, pp. 8–13.

aid \leq EUR 500 000 over any period of three fiscal years

State aid control (1)

- the objective: prevent Member States (MSs) from granting aid to undertakings that distorts or can distort competition and has an adverse effect on trade between MSs;
- a general prohibition on granting State aid;
- but, numerous exemptions - under certain circumstances State aid is or may be declared compatible with the internal market;
- if properly designed, aid can constitute an important tool in correcting market failures.

Compatibility of aid

- Article 107(2) TFEU and 61(2) EEA - aid **shall be** declared compatible with the internal market or the EEA Agreement;
- Articles 107(3) TFEU and 61(3) EEA - aid **may be** compatible;
- Article 106(2) and 59(2) EEA Agreement - financing **Services of General Economic Interest (SGEI)**.

State aid control (2)

- If all five conditions met \Rightarrow aid;
- as a rule – ex ante notification, standstill obligation;
- aid granted without being approved is per se unlawful;
- the Commission and ESA - powers to recover unlawful aid that was declared incompatible;
- compatibility – an exclusive competence of the Commission and ESA.

State aid control (3)

- the Commission and ESA - strong investigative and decision-making powers;
- unlike legal regimes concerning cartels, abuse of dominant position and mergers no national equivalent of State aid control;
- the enforcement concentrated in the hands of the Commission/ESA;
- political sensitivity of State aid.

However, ...

- national courts as a “national element” in the enforcement regime;
- can establish whether a given state measure amounts to aid and whether the state infringed the notification/standstill obligation;
- NOT entitled to rule on the compatibility with the internal market.

The notion of aid – not only subsidies...

- not only positive benefits (subsidies);
- but also state measures mitigating charges that beneficiaries would normally include in their budgets – the same effect as the one of subsidies;

Case 30-59 De Gezamenlijke Steenkolenmijnen v High Authority [1961] ECR 1

- examples: capital injections, guarantees, tax write-offs, privileged access to infrastructure without paying a fee, sale of land to the state for a price higher than a market price.

Financing Health Care under Article 107(1) TFEU

- the wide notion of aid;
- the wide concept of undertaking - “every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed” (C-41/90 Höfner and Elser [1991]);
- financing Health Care - State aid?
- (potential) negative consequences – ex ante notification, standstill obligation, repayment of incompatible aid.

At the same time, the EU stresses

the importance of access to necessary
Health Care – **universal coverage**, quality,
a minimum level of Health Care benefits

- Article 35 of the Charter of the Fundamental Rights of the European Union, OJ C 364, 18.12.2000;
- The Council's statement on common values and principles in EU healthcare systems, 2006/C 146/01;
- The Commission's White Paper Together for Health: A Strategic Approach for the EU 2008-2013, COM(2007) 630 final.

C-280/00 Altmark Trans [2003] ECR I-7747 (1)

A state measure that meets the following **four conditions** must be regarded as **compensation** for the services provided by the recipient undertakings in order to discharge **public service obligations (PSO) - NO AID.**

Altmark Trans (2), paras 87-93

1. an entrustment act clearly defining the public service obligation (PSO);
2. the parameters for calculating the compensation must be established in advance in an objective and transparent manner;

Altmark Trans (3), paras 87-93

3. the compensation cannot exceed the relevant costs and a reasonable profit (no overcompensation);
4. the provider is either chosen through a public procurement procedure or the level of compensation is determined based on an analysis of the costs of an average "well-run" undertaking in the sector concerned - **EFFICIENCY** criterion.

Altmark Trans (4)

- all the four conditions met – no aid, no notification, no standstill obligation;
- in particular, problems with the efficiency requirement;
- at least one condition not met – State aid.

Altmark Trans (5) – questions/problems

- the Commission's and the Court's practice on applying the Altmark conditions to financing Health Care
- at least one condition not met – aid – what then?
- 2005 – «Altmark I» – Monti package;
- 2011 – «Altmark II» (de minimis Regulation in 2012).

Thank you for your attention



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