COMPETITION POLICY IN HEALTHCARE

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Frontiers in Insurance-based and Taxation-funded Systems

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FOREWORD

In both the United Kingdom and the Netherlands, competition plays an important role in healthcare. Governments have made the provision of healthcare services subject to market forces. This policy has met with fierce opposition from some, while others consider it to be the Holy Grail for solving major problems, such as the increasing rise of healthcare costs. People tend to either oppose introducing competition in healthcare or to embrace this development. But what does introducing competition in healthcare mean? Healthcare is a broad field involving many actors, complex relationships and complicated legislation. In the same vein, competition law compromises a sophisticated set of rules geared towards fostering competition in a wide array of markets and towards balancing various objectives and interests. What are the ramifications of applying competition rules to the various healthcare operators? Mary Guy has explored with great care these ramifications by focusing on the essential characteristics of the healthcare systems of the United Kingdom and the Netherlands.

An important component of Mary Guy's study is that the rationale of the British and Dutch healthcare reforms is explained. It is an understatement to say that these reforms are complicated and hard to understand for an outsider. The insights offered in this book are very helpful to getting a better grasp of the effects of competition on healthcare and of the way that competition law is applied to healthcare cases. Of great interest is the interplay between the general competition rules and the healthcare specific competition provisions. It is illuminating to learn which difficulties are caused by this interplay in both the United Kingdom and the Netherlands.

A very important issue raised by Mary Guy is the aim of universal access. Is enhancing competition in healthcare an end in itself or does it serve another cause? In the European approach to healthcare it is commonly accepted that the policies adopted by the governments must aim at giving every citizen access to healthcare. Introducing competition must contribute to achieving this goal, which, of course, means that it is not an end in itself. This finding makes clear that applying competition law to healthcare also implies that the various interests at play must be balanced. It does not come as a surprise that in this study much attention is paid to the concept of Services of General Economic Interest. This concept is generally considered to be suitable for striking a balance between competition and the aim of universal access. The potential

of Services of General Interest is explored and, of great interest, its meaning at the domestic level is examined. To date, when it comes to these services, many studies (written in English) focus on developments at the EU level, such as the case law of the Court of Justice of the EU and Commission actions. It is therefore very helpful that the present study discusses in which way Services of General Economic Interest can be incorporated into domestic healthcare systems. Lessons learned from this are not only beneficial for policy makers in healthcare but also for officials responsible for policies in other areas, where universal access is a significant value.

Although general themes and directions of travel in healthcare receive considerable attention in this book, the author has not shied away from analysing in great detail some important case law. Judgments delivered both by the Union courts and domestic courts are discussed. As a result, national case law in this specialised area is made available to many scholars and policy makers interested in healthcare and competition. It is very impressive that Mary Guy has managed to master the Dutch language, to study the Dutch healthcare laws and judgments and also to understand these (complicated) laws and judgments. The Dutch competition authority is very experienced in applying competition law to healthcare, which has also given rise to interesting judgments delivered by the competent courts in the Netherlands. It is of great value that this experience is mapped in a comprehensive way in this study. It should be noted that the discussion is not limited to the application of the general competition rules to healthcare but also concerns healthcare specific competition rules.

It goes without saying that European competition law is also of interest. The competition law systems of the United Kingdom and the Netherlands are modelled after the Treaty provisions on competition. The consequence of this is that the national rules of these systems must be interpreted in accordance with EU law. It is therefore pointed out by Mary Guy that European competition law provides an overarching framework for the healthcare policies of the national competition authorities. The room for manoeuvre for these authorities is delineated by the decisions taken by the Commission and judgments handed down by the Union courts. Then again, to date, the case law of these courts dealing with competition law and healthcare remains limited. This is not a surprise, as healthcare is not high on the agenda of the policy makers in Brussels, since this area belongs to the competences of the Member States. It is on this limited EU experience that the national competition authorities must base their interventions in healthcare. This is a very challenging task, as these authorities are confronted with complex and detailed issues and questions. Decisions and rulings adopted with regard to particular issues could be interfered with by subsequent judgments handed down by the Union courts, as is evidenced by cases such as *FENIN*.

Although the marketisation of healthcare started a long time ago, it is striking that many EU judgments still address whether or not competition law applies to entities operating in this sector. The 'gate to competition law' is constituted by the concept of undertaking. In many cases, the question has risen of whether a particular healthcare operator is an undertaking for the purposes of competition law. It remains very difficult to answer this fundamental question, which involves a sound analysis of the interests at play. One of them is, evidently, solidarity and in particular universal access. The research carried out by Mary Guy shows that many questions are left open and that issues are addressed on a case by case basis; in other words, the analysis to be carried out is based on a piecemeal approach. It cannot be excluded that the Union courts should reconsider their case law and further shape the concept of undertaking in order to do justice to the specific features of the healthcare sector. In this regard, it must be noted that to date every healthcare provider has been qualified as an undertaking. It is, however, clear from Mary Guy's study that the term 'healthcare provider' may be too wide as a category.

To a certain extent the uncertainties surrounding the concept of undertaking are exemplary for the questions resulting from the introduction of competition in healthcare. This introduction has led to much controversy and new interventions on the part of the national governments. It is apparent from the research carried out by Mary Guy that the organisation of the oversight of the competition process in healthcare is subject to a continuous process of restructuring. Mary Guy has been able to make the national measures regarding this process and the rationale underpinning them transparent. As a result, this book is a must-read for every policy maker who is somehow involved in matters related to healthcare and competition. The application of competition rules has become a sensitive issue, which requires permanent attention from the government. It is not the Holy Grail for solving problems resulting from, for example, the increasing costs of medical treatments. On the other hand, it would go too far to argue that the introduction of competition in healthcare is a failure. The present study has demonstrated that precise and accurate analysis of the effects and legal consequences of a (partly) competition driven healthcare system is required. Fine-tuning of the measures taken and close monitoring may enhance the success of a healthcare policy (partly) based on competition. In this regard, it should be noted that the concept of managed competition presupposes that regulation and competition should go hand in hand.

One of the common threads running through Mary Guy's study is the impact of EU law on national healthcare policies and competition rules. This will definitely change after Brexit. Consequently, it remains to be seen to what extent European competition law will continue to provide an overarching structure for UK oversight of competition in healthcare. Divergent approaches may occur, but then again British authorities could also decide to follow EU good practices. In other words, it remains of great importance to learn lessons from other

jurisdictions, especially in a field such as healthcare, in which great interests are at stake. Similarly, the EU could learn lessons from the UK experience with healthcare and competition. Therefore, I express the wish that scholars working in both the UK and the EU, such as Mary Guy, continue to carry out comparative analyses of the various national systems on both sides of the North Sea. The lessons learned, the best practices exchanged and the knowledge gained in such analyses will be of imminent importance in the post-Brexit era.

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PREFACE

How a nation manages healthcare provision is a mark of its civilisation. Since resources are always finite, the best of intentions requires the management of processes and allocations. How best to proceed is a question that continues to receive varying answers and continual refinements in policy and legal frameworks. The development of competition policy is but one example of this.

An initial stimulus for my research in this area arose from the confidence evident in claims that competition policy could work in the English National Health Service (NHS) as in other sectors of the economy. Was it really that simple, was my first response. Many more questions followed. To what extent could such comparisons work, and what could they usefully prove? Are there complexities attached to the NHS (or healthcare generally) which need to be explored? If the devil is indeed in the detail, surely that is where we should look. How did we get to where we are? Could elucidation be found by examining the attempts being made to introduce competition policy into another healthcare system?

These last two questions seemed especially promising if we are to understand the issues of developing competition in healthcare and move beyond polarised claims of competition being exclusively "good" or "bad" for healthcare reform. Despite the obvious distinction between taxation-funded and insurance-based system models, the Netherlands provided an obvious comparison in view of the common features of the organising principle of solidarity and the underlying EU competition law framework (the development of Brexit notwithstanding).

What has emerged from my doctoral research and subsequent updates for this book is an understanding of the English reforms in light of the Dutch experience, and considerations for the development of competition policy in healthcare. This book therefore provides comprehensive insight into how the operation of general competition law, merger control and sectoral regulation has developed over the first years following the introduction of mandatory private health insurance in the Netherlands in 2006, and the restructuring of the English NHS by the Health and Social Care Act 2012. This contribution is intended to facilitate future discussion both within the Academy and beyond.

Over the course of writing this book, various agencies have undergone changes, including with regard to their name. The most significant of these is the incorporation of Monitor – initially established as the independent

regulator of NHS Foundation Trusts and subsequently re-cast as the sectoral regulator for healthcare by the Health and Social Care Act 2012 (HSCA 2012) reforms – into NHS Improvement in April 2016, along with the NHS Trust Development Authority (NHS TDA), another oversight body established by the HSCA 2012. A consequence of this has been a dilemma of which name to use. In order to make the discussions of this book as up-to-date as possible, I decided to use 'NHS Improvement' throughout unless it was necessary to draw a distinction between Monitor and the NHS TDA, for example in connection with the discussions of sectoral regulation in Chapter 3 and merger assessment in Chapter 4. Associated literature is listed in the Bibliography according to the agency which published it, under 'Monitor', 'NHS Trust Development Authority' and 'NHS Improvement', accordingly.

Chapter 3 in particular is concerned with the relationship between competition authorities and sectoral regulators; thus, it has been necessary to engage with the specific concepts of 'concurrency' in respect of UK economic regulation and *samenloop* in the Netherlands. In many circumstances, it would be perfectly acceptable and accurate to translate *samenloop* as 'concurrent', particularly in view of the general definition of the latter in the Oxford English Dictionary as 'Existing, happening or done at the same time'. However, when discussing aspects of UK economic regulation, 'concurrency' takes on the meaning of the competition authority and the economic regulator applying the *same* rules (applying general competition law). This situation is arguably better described as the agencies being 'co-competent'.[1] As the English nomenclature proves problematic in this comparative analysis, *samenloop* has therefore been translated as 'overlap' throughout this book.

Mary Guy
Utrecht, 1 October 2018

[1] A term used by Sánchez Graells to describe the relationship between Monitor and the Competition and Markets Authority (CMA). See A. Sánchez Graells, 'Monitor and the Competition and Markets Authority', (2014) *University of Leicester School of Law Research Paper*, 14(32).

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Individual thanks are due to the following for various kinds of support and encouragement: my PhD supervisors and internal examiner at UEA Law School, Professors Michael Harker, Morten Hviid and Andreas Stephan; Professor Johan van de Gronden (Radboud University, Nijmegen) for acting as external examiner for my thesis, providing the Foreword to this book and for ongoing collaborations and discussions of EU competition law and healthcare which have helped shape Chapter 2; Professor Wolf Sauter (Authority for Consumers and Markets and Tilburg University) for encouragement and support in related projects, many illuminating discussions which have helped to develop Chapters 2–4, and for specific feedback on an early draft of what has become Chapter 3; and Andrew Taylor (Aldwych Partners) for discussions about NHS reform and for feedback on Chapter 4.

I am also very grateful to my colleagues at Lancaster Law School and to Ann-Christin Maak-Scherpe, Rebecca Moffat and Ahmed Hegazi at Intersentia for their ongoing support in the production of this book. I am also grateful to Intersentia for allowing material from Chapter 3 to appear in an article, "Competition and sectoral regulation in Dutch and English healthcare: factors shaping the competition focus of the new healthcare regulators and their relationship with the competition authorities", published by Ius Publicum in December 2017.

This book is dedicated to my family.

CONTENTS

LIST OF CASES

1. EUROPEAN UNION (EU)

COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU) CASES

GENERAL COURT (GC) CASES

ADVOCATE GENERAL'S OPINION

2. THE NETHERLANDS

COURTS AND TRIBUNALS

Rechtbank Rotterdam – Rotterdam District Court (Rb)

College van Beroep voor het Bedrijfsleven – Trade and Industry Appeals Tribunal (CBb)

AUTORITEIT CONSUMENT EN MARKT (AUTHORITY FOR CONSUMERS AND MARKETS (ACM))/*NEDERLANDSE MEDEDINGINGSAUTORITEIT* (DUTCH COMPETITION AUTHORITY (NMa)) – CASES AND INFORMAL OPINION

NEDERLANDSE ZORGAUTORITEIT (DUTCH HEALTHCARE AUTHORITY (NZa)) – CASES, OPINIONS AND REGULATION

3. UNITED KINGDOM (ENGLAND)

COURTS AND TRIBUNALS

COMPETITION AND MARKETS AUTHORITY (CMA)

COMPETITION COMMISSION (CC)

MONITOR

NHS COOPERATION AND COMPETITION PANEL (NHS CCP)

NHS IMPROVEMENT

NHS TRUST DEVELOPMENT AUTHORITY (NHS TDA)

OFFICE OF FAIR TRADING (OFT)

LIST OF LEGISLATION

1. EUROPEAN UNION (EU)

2. THE NETHERLANDS

GOVERNMENT DECREES

LEGISLATIVE PROPOSALS AND ASSOCIATED DOCUMENTATION

POLICY RULES

3. UNITED KINGDOM

PRIMARY LEGISLATION

SECONDARY LEGISLATION

BILLS AND ASSOCIATED DOCUMENTATION

Hansard

Policy Documents

TABLE OF FIGURES

Chapter 4

Conclusions

ABBREVIATIONS

ACM	*Autoriteit Consument en Markt* (Dutch Authority for Consumers and Markets)
ACO	Accountable Care Organisation
AMC	*Academisch Medisch Centrum* (Academic Medical Centre of the University of Amsterdam)
AQP	Any Qualified Provider
AWP	Any Willing Provider
CA98	Competition Act 1998
CAT	Competition Appeals Tribunal
CBb	*College van Beroep voor het bedrijfsleven* (Dutch Trade and Industry Tribunal – upper appeal court for competition cases)
CC	Competition Commission
CCG	Clinical Commissioning Group
CJEU	Court of Justice of the European Union
CMA	Competition and Markets Authority
CQC	Care Quality Commission
CVZ	*College voor Zorgverzekeringen* (Dutch Healthcare Insurance Board)
DHA	District Health Authority
DNB	*De Nederlandsche Bank* (Dutch National Bank)
EA02	Enterprise Act 2002
ERRA 2013	Enterprise and Regulatory Reform Act 2013
EUMR	EU Merger Regulation
FFT	Friends and Family Test
GP	General Practitioner
HSCA 2012	Health and Social Care Act 2012
IGJ	*Inspectie voor de gezondheidszorg en jeugd* (Dutch Health and Youth Care Inspectorate – quality regulator)
ISTC	Independent Sector Treatment Centre
KNAW	*Koninklijke Nederlandse Akademie van Wetenschappen* (Royal Netherlands Academy of Arts and Sciences)
LHV	*Landelijke Huisartsen Vereniging* (Dutch GPs' Association)
LOCI	Logit Competition Index
LLP	Limited Liability Partnership

Mw	*Mededingingswet* (Dutch Competition Act 1998)
NCA	National Competition Authority
NHS	National Health Service
NHS CCP	NHS Cooperation and Competition Panel
NHS FYFV	NHS Five Year Forward View
NHS PRCC	NHS Principles and Rules for Competition and Cooperation
NHS TDA	NHS Trust Development Authority (now part of NHS Improvement)
NMa	*Nederlandse Mededingingsautoriteit* (Dutch Competition Authority)
NVP	*Nederlandse Vereniging van Participatiemaatschappijen* (Dutch Venture Capital Association)
NZa	*Nederlandse Zorgautoriteit* (Dutch Healthcare Authority)
ODM	Option Demand Method
OFT	Office of Fair Trading
OPTA	*Onafhankelijke Post en Telecommunicatie Autoriteit* (Dutch Independent Postal and Telecoms Regulator)
PCT	Primary Care Trust
PMI	Private Medical Insurance
PPU	Private Patient Unit
PSO	Public Service Obligation
Rb	*Rechtbank Rotterdam* (Rotterdam District Court – lower appeal court for competition cases)
RES	Risk Equalisation Scheme
SGI	Service of General Interest
SGEI(s)	Service(s) of General Economic Interest
SIEC	Significant Impediment to Effective Competition
SLC	Substantial Lessening of Competition
SMP	Significant Market Power
SSNIP	Small but Significant and Non-Transitory Increase in Price
STP	Sustainability and Transformation Partnership
TFEU	Treaty on the Functioning of the European Union
VUmc	*Vrije Universiteit Medisch Centrum* (Vrije Universiteit Medical Centre)
WBMV	*Wet op bijzondere medische verrichtingen* (Dutch Special Medical Procedures Act 1997)
Whc	*Wet handhaving consumentenbescherming* (Dutch Consumer Protection (Enforcement) Act 2006)
Wlz	*Wet langdurige zorg* (Dutch Long-Term Care Act 2015)

Wmg	*Wet marktordening gezondheidszorg* (Dutch Healthcare (Market Regulation) Act 2006)
Wmo	*Wet maatschappelijke ondersteuning* (Dutch Social Support Act 2015)
WTP	Willingness To Pay
ZBO	*Zelfsbestuursorgaan* (autonomous administrative agency)
Zvw	*Zorgverzekeringswet* (Dutch Health Insurance Act 2006)