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Enlighten...

Access to all areas? The implications of TTIP for health care services in the EU—the case of England and Wales and Scotland

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The EU as an international actor—powers and limits...

- Treaty making powers: between the Treaty and the reality...
- Earlier case law: parallelism between external and internal powers...
- ... but within limits: to what extent can unilateral action by Member States “adversely affect” the integrity and effet utile of internal measures?
- What competence is this?
- Clue 1: start from the internal competence... how wide/narrow is it?
- Clue 2: Shared v exclusive—the latter only if the corresponding internal competence has been exercised already... or if the Treaty so provides!
- The emergence of ‘mixed agreements’ as a pragmatic response to the demands of unexpressed treaty-making powers in areas of shared competence



The EU as an international actor—powers and limits after the Treaty of Lisbon

- The impact of the Treaty of Lisbon...
 - Greater clarity as regards the ‘order of competences’, both internal and external...
 - Clearer boundaries also for ‘unexpressed competences’ on the international plain...
 - The ongoing presence of mixed agreements...
- What does this mean for TTIP?
 - A ‘mixed agreement’... despite having its legal basis in the ‘common commercial policy’.
 - Its negotiation and conclusion is as with any other EU action subject to the principle of conferral.

Health care services and the internal market—the national dimension...

- Health care services as ‘services’ → falling within the remit of the internal market rules...
- But “sensitive in nature”
- ➔ public interest justifications (e.g. ‘high levels of public health’, ‘survival of population’, ‘stability of healthcare systems’) can be articulated to restrict the application of these rules...
- ➔ ...subject to caveats of necessity/appropriateness/proportionality;
- ➔ ... also design can have an impact on the applicability of free market/competition rules...
- ➔ ... and can even lead to a light touch regime when it comes to ‘contracting out’ these services—subject always to principles of ‘transparency’ and ‘non-discrimination’.

Health care services and the internal market—the EU dimension...

- “High levels of public health” as overarching Treaty goal...
- .. But to be attained by member states according to the principle of subsidiarity!
- ➔ Article 168: - sovereignty of MS over their health care systems... - subject to principles of single market BUT – with significant margin of discretion!
- ➔ EU law CANNOT mandate forms of provision of healthcare services at national level...
- ➔ ... only competence—“supporting and coordinating” → ensure “smooth running of single market” → limited to dealing with cross border situations.
- And what about external action, e.g. TTIP?
- ➔ Much ado about nothing—save for a Treaty amendment...
- ➔ Nor can an “implied competence” be found—internal competence, limited and liable to be effectively exercised without any action on international plain!
- ➔ Light touch regime in Public Procurement → possible to “ring fence” these services v/non-EU providers—see also e.g. WTO GPA or CETA!

Health care in the UK and the impact of the EU common commercial policy...

- A tale of two nations?
- ➔ Scotland: NHS safe in public hands... and with very limited resort to public procurement...
- ➔ Consistent with Article 168 TFEU... and justified also in light of the Public procurement light touch regime!
- ➔ ... again, choices protected by the principle of conferral against possible “free market inroads” owed to EU action.
- ➔ England and Wales—An “internal market of health services” ...
- ➔ Greater private sector input → is this likely to weaken the “no-profit rationale”?
- ➔ ... and more frequent “contracting out” —but always within the light touch regime!
- ➔ Applicability of competition rules but always in the patients’ interest: the role of Monitor...
- ➔ Overall in keeping with, e.g. Article 101(3)... and also with the overarching sovereignty of Article 168 TFEU!

TTIP and publicly funded health services in the EU—is the fear for access to all areas more imagined than real?

- EU as international actor... but always within the principle of conferral → need to reflect the shared nature of certain competences in the treaty making process and in the very scope of each instrument;
- Health care—an area within the control of the member states (especially when publicly funded...) → the EU as a supporting actor”
- The importance of the principle of subsidiarity → reconciling integrity of public health provision for the survival of Europe’s populations with the good functioning of the single market → Article 168 and its impact;
- Sovereignty of member states over public health services’ provision → between market principles and the public interest—a variety of different solutions... all acceptable and protected!
- TTIP: much ado about nothing? It seems so!

TTIP and publicly funded health services in the EU—is the fear for access to all areas more imagined than real?

Any questions?

Comments?

Thank you very much!

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