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Reflecting on Clemens et al, 'Supporting health systems in Europe: added value of EU actions' 9 HEPL (2014) 49: Europeanising health post-crisis

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Introduction

Many in the health policy community are highly critical of the European Union and its involvement in health. Clemens et al's paper is a refreshingly balanced analysis and assessment. It summarises the 'standard narrative' of the detrimental impacts of EU law and policy on national health systems. But it also illuminates an important counterbalance of 'hidden' aspects of EU health policy. These have the potential to improve health across the EU, even in the post-crisis era of public spending austerity. The conclusion – that on balance 'EU involvement can add biases and problems previously unknown at national levels' (Clemens et al, 2014) – is thus more persuasive than that in other analyses.

This commentary considers three inter-related aspects of Clemens et al's piece: the scope of enquiry; the multiple logics of EU health policy; and the Europeanisation of health, following the Eurozone crisis, which has had significant effects on health policies within the EU's Member States (Fahy 2012; Kentikelenis and Papanicolas 2012; Greer 2014).

Core areas/scope of EU health policy

The paper's exploration of EU health policy rests on five selected EU policies with a health dimension. These are: patient and health professional mobility; 'active ageing'; the public health 'action programme'; EU structural funding for economic development; and 'reflection processes' among senior governmental actors. Implicitly, Clemens et al claim that these are, if not the core of EU health policy, at least a sufficiently representative selection of examples from which to generalise about EU health policy.

Comparing this choice of examples (and claims) with the literature on EU health law and policy reveals that Clemens et al's choice departs from existing literature in several respects. Historically, public health policy enjoys a more important position than in Clemens et al's piece, which covers only the EU public health programmes. General EU public health policy has a much wider meaning and significance. It interacts with the law of the internal market, as well as World Trade Organisation law about trade in products which are, or may be, harmful for health, such as tobacco or alcohol (Hervey and McHale 2004; McKee et al 2010; Hervey and McHale 2015). The role of food in public health, especially as Europe emerged from the starvation following World War II, means that the EU's common agricultural policy is an important site for its health policy. Food safety has become a vital part of the EU's health protection policy, especially following the BSE/vCJD affair of the 1990s (Grant 2012). Early texts on EU health policy (such as McCarthy and Rees 1992) are *only* on public health, and interest continues (Greer and Kurzer 2013).

Also dating to the EU's foundational period, pharmaceutical policy continues to be central to EU health policy (Hermans et al 1992; Normand and Vaughan 2001; Busse et al 2002; Hervey 2002; McKee et al 2003; Mossialos and McKee 2004; Hervey and McHale 2004; Mossialos et al 2010; Hancher and Sauter 2012; Greer and Kurzer 2013). Recent developments in pharmaceuticals and medical devices technology (Flear et al 2013) mean that EU policy on human blood, tissue and

organs is important (Hervey and Black 2005; Lee 2010; Altenstetter 2011; Farrell 2012; Stokes 2013; Flear 2015). In the post-crisis Europe, as Clemens et al note, new health technologies are constructed as contributing to economic development and growth at least as much as to health *per se*. But the regulation of the human body also has interactions with Europe's long-standing commitment to human rights (Hervey 2003; McHale 2010; Herrmann and Toebe 2012; Harmon et al 2013; Peers et al 2014), a part of EU health policy not considered by Clemens et al.

There is general agreement that EU health policy includes mobility of patients and health care professionals, and the consequences of EU free movement and competition law for national health care systems (Mossialos et al 2002; Hervey and McHale 2004; Nihoul and Simon 2005; Thomson et al 2009; Mossialos et al 2010; Van de Gronden et al 2011; Hancher and Sauter, 2012; Greer and Kurzer 2013; Hervey and McHale 2015). A small, but growing, body of literature (Jarman 2013, 2014; Hervey and McHale 2015) is concerned with the *external* effects of the EU's health policy – how does mobility into and out of the EU of people and products related to health play out in the rest of the world? This latter aspect of the effects of trade and competition on EU health policy also falls outside the scope of Clemens et al's piece.

Although Clemens et al do not adopt as wide a scope as sketched here, their focus, excluding areas such as human rights in health policies, public health protection, and the EU's global health policies, is sufficiently wide for their conclusions to be persuasive nonetheless.

Multiple logics of EU health policy

Clemens et al stress how their examples highlight multiple logics inherent in EU health policy. They note that – contrary to the general tenor of the health policy community's views – no dominant narrative for discussing EU health policy has yet emerged. The discourse of 'constitutional asymmetry' (that the EU's powers to Europeanize economic policies are more complete than those for social policies) runs strong in EU health policy. But other logics are also expressed. Furthermore, it is not clear whether 'health' counts as only 'social' or also as 'economic'.

In our forthcoming book (2015), McHale and I also approach EU health through multiple logics. We consider the themes of consumerism; (human) rights; interfaces between competition, solidarity and equality; and risk. We isolate, compare and contrast an individual perspective and a systemic or collective perspective, and we consider the EU's internal health law and its interactions with global health law. Like Clemens et al, we find support for the standard narrative about EU health law and policy. We conclude that opportunities for EU health policy to improve health are missed. In Europe, the values of solidarity and equality of access according to medical need underpin health systems – and it follows that opposing values, such as mobility, consumer choice or competition, or risk within a market, sit ill with health policy communities. But we also find – in common with Clemens et al – that the dominant narrative is not the whole of the story. EU health policy *itself* expresses and embodies a range of values.

Europeanisation of health policy

Is health policy becoming 'Europeanised'? The answer depends upon how the scope of health policy is drawn. It is highly improbable that EU health policy will ever have the same substantive scope or

dominant focus as national health policies. But the EU at least touches upon virtually every aspect of such policies. In some areas (such as pharmaceuticals regulation), policies and laws are entirely EU-determined. By contrast, in others (such as end-of-life care), the EU (as opposed to the Council of Europe) barely has any influence at all. It is equally improbable that EU health policy will emerge as a simple regional variant of global health. A distinctively 'European' approach to the modification of liberal global trade involves conceptualising health as a productive factor in economic growth, but also embodies human-rights conditionality, elements of an ethic of equality, and risk-based consumer protection, particular from products known to be dangerous to health and costly for national health systems.

Conclusion

Clemens et al conclude that it is too soon to say whether the 'patchwork' of EU health policy is becoming ever more coherent, and we are seeing a process of Europeanisation, or whether the policy field will remain driven by multiple logics. I would say that the two are not mutually exclusive: we are seeing Europeanisation of a policy area that is driven by one dominant (and other subsidiary) logics at national level, but by multiple equally dominant logics at the level of the European Union.

Altenstetter, C., (2011) 'Medical Device Regulation and Nanotechnologies: Determining the role of Patient Safety Concerns in Policymaking' 33(2) *Law and Policy* 227

Busse, R., Wismar, M., Berman, P. (eds), (2002) *The European Union and Health Services* (IOS Press)

Clemens, T., K. Michelsen, and H. Brand (2014), 'Supporting health systems in Europe: added value of EU actions?' *Health Economics Policy and Law* 9 (1): 49-69

Fahy, N., 'Who is shaping the future of European health systems?' (2012) 334 *British Medical Journal* e1712

Flear, M., Farrell, A-M., Hervey, T.K. and Murphy, T. (eds), (2013) *European Law and New Health Technologies* (OUP)

Flear, M., (2015) *Governing Public Health* (Hart)

Grant, W., (2012) 'Agricultural Policy, Food Policy and Communicable Disease Policy' 37 *Journal of Health Politics, Policy and Law* 1029

Greer, S.L. and Kurzer, P. (eds), (2013) *European Union Public Health Policy: Regional and Global Trends* (Routledge)

Greer, S.L., (2014) 'The Three Faces of European Union Health Policy: Policy, markets, austerity' 33(1) *Policy and Society* 13

Hancher, L. and Sauter, W., (2012) *EU Competition and Internal Market Law in the Health Care Sector* (OUP)

Harmon, S.H.E., Laurie, G. and Courtney, A., (2013) 'Dignity, plurality and patentability: the unfinished story of *Brüstle v Greenpeace*' 38(1) *European Law Review* 92

Hermans, A., H.E.G.M., Casparie, A.F. and Paelinck, J.H.P. (eds), (1992) *Health Care in Europe after 1992* (Dartmouth)

Herrmann, J.R. and Toebe, B., (2012) 'The EU and Human Rights' in Toebe, B., Hartlev, M., Hendriks, A. and Herrmann, J.R. (eds), *Health and Human Rights in Europe* (Intersentia)

Hervey, T.K. and Black, H., (2005) 'The European Union and the governance of stem cell research' 12(1) *Maastricht Journal of European and Comparative Law* 3

Hervey, T.K. and McHale, J.V., (2015) *European Union Health Law: Themes and Implications* (CUP)

Hervey, T.K. and McHale, J.V., (2004) *Health Law and the European Union* (CUP)

Hervey, T.K., (2002) 'Mapping the Contours of EU Health Law and Policy' 8 *European Public Law* 69

Jarman, H., (2014) 'Healthcare, borders and boundaries: Crossborder health markets and the entrepreneurial state' 33(1) *Policy and Society* 1

Jarman, H., (2013) 'Trade in Services and the Public's Health: A Fortress Europe for Health' in Greer, S.L. and Kurzer, P. (eds), *European Union Public Health Policy: Regional and Global Trends* (Routledge)

Kentikelenis, A. and Papanicolas, I., (2012) 'Economic crisis, austerity and the Greek public health system' 22 *European Journal of Public Health* 4

Lee, M., (2010) 'Risk and Beyond: EU Regulation of Nanotechnology' 35(6) *European Law Review* 799

McCarthy, M. and Rees, S., (1992) *Health Systems and Public Health Medicine in the EC* (Royal College of Physicians)

McHale, J.V., (2010) 'Fundamental Rights and Health Care' in Mossialos, E., Permanand, G., Baeten, R. and Hervey, T.K. (eds), *Health Systems Governance in Europe: The Role of European Union Law and Policy* (CUP)

McKee, M., Hervey, T.K. and Gilmore, A., (2010) 'Public health policies' in Mossialos, E., Permanand, G., Baeten, R. and Hervey, T.K. (eds), *Health Systems Governance in Europe: The Role of European Union Law and Policy* (CUP)

McKee, M., Mossialos, E. and Baeten, R. (eds), (2003) *The Impact of EU Law on Health Care Systems* (PIE Peter Lang)

Mossialos, E., and McKee, M. (eds), (2004) *EU Law and the Social Character of Health Care* (PIE Peter Lang)

Mossialos, E., Dixon, A., Figueras, J. and Kutzin, J. (eds), (2002) *Funding Health Care: Options for Europe* (Open University Press)

Mossialos, E., Permanand, G., Baeten, R. and Hervey, T.K. (eds), (2010) *Health Systems Governance in Europe: The Role of European Union Law and Policy* (CUP)

Nihoul, P. and Simon, A.C. (eds), (2005) *L'Europe et les soins de santé: Marché intérieur, sécurité sociale, concurrence* (Larcier)

Normand, E.M. and Vaughan, P. (eds), (1993) *Europe without Frontiers: The Implications for Health* (Wiley)

Peers, S., Hervey, T.K., Kenner, J. and Ward, A. (eds), (2014) *The EU Charter of Fundamental Rights: A Commentary* (Hart)

Randall, E.D., (2001) *The European Union and Health Policy* (Palgrave)

Stokes, E., (2013) 'Something Old, Something New, Something Borrowed: Emerging Health Technologies and the Continuing Role of Existing Regulations' in Flear, M., Farrell, A-M., Hervey, T.K. and Murphy, T. (eds), *European Law and New Health Technologies* (OUP)

Thomson, S., Foubister, T. and Mossialos, E., (2009) 'Financing health care in the European Union: Challenges and policy responses' (WHO)

http://www.euro.who.int/_data/assets/pdf_file/0009/98307/E92469.pdf

Van de Gronden, J.W., Szyszczak, E., Neergaard, U. and Krajewski, M. (eds), (2011) *Health Care and EU Law* (Springer)