

Saint Martin Conference 2012

Competition in Health Care

How Germany implements a
competition dynamic in
social health insurance

Brno, November 14th, 2012

Wilko Töllner, LL.M. (Brugge)

Bundeskartellamt

Case Handler



Overview

2

- 3rd Decision Division of the FCO covers all branches of the health care sector:
 - Pharmaceutical industry
 - **Hospitals**
 - Doctors, Pharmacies
 - Medical technology sector
 - **Public health care funds** and private insurance companies

Hospitals

3

	Health costs			
Provider	2000		2010	
	Bn €	%	Bn €	%
Hospital	56,1	26,3%	74,3	25,9%
GP, dentist	45,2	21,3%	60,8	21,2%
Pharmacies	28,6	13,4%	40,8	14,2%
Health craftsmen	14,9	7,0%	18,9	6,6%
Subtotal	144,8	67,9%	194,8	67,8%
Total	212,9	100%	287,3	100%
Health funds	123,9	58,2%	165,5	57,6%
Private Ins.	17,6	8,3%	26,7	9,3%

Hospital Sector

4

Year	Quantity	Beds	Utilisation	Private	Non-Prof.	Public
2000	2242	556.000	81,9%	21,7%	40,7%	37,6%
2011	2045	502.000	77,3%	33,2%	36,5%	30,4%

Hospital Sector

5

- Cooperations between hospitals are widely used
- Examples:
 - purchasing cooperations
 - shared utilisation of large scale equipment
 - training, qualification of staff
 - agreement on specialization

Hospital Sector

6

- Not every cooperation is prohibited by cartel law, esp. not if
 - it improves the performance of services
 - customers (patients) have a fair share of benefit
 - it does not distort competition

No case until now.

Hospital Sector

7

- Merger control cases 2003 – 2012
 - 176 notifications
 - 21 not subject to control
 - 155 decisions
 - 90% 1st phase (1 month)
 - 19 2nd phase
 - 5 clearances without conditions
 - 5 clearances with conditions
 - 2 clearances after substantial changes
 - 6 prohibition decisions
 - 1 unbundling

Hospital Sector

8

- **Main issues** in hospital merger cases
 - jurisdiction under competition law (in addition to state planning authorities)
 - definition of the product market
 - definition of the geographical market
 - market dominance
 - failing company defence

Hospital Sector

9

■ **Product market definition**

- Principle: **Substitutability** of the product from the consumer's perspective
in hospital markets **patient** is the relevant consumer (not the funds, not the GP)
- product market: **all acute care hospitals**
 - no differentiation between medical departments, certain services, general hospitals and specialised hospitals
 - purely private hospital (e.g. plastic surgery), rehabilitation centres and ambulant services are **not part** of the market

Hospital Sector

10

■ **Geographic market definition**

- Principle: **which hospital from which regions are regarded as substitutes by the patient**

EU: The relevant geographic market comprises the area in which the undertakings are involved in the supply and demand of products and services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area.

- Hospital markets: no theoretical considerations, but **analysis of the flow of patients** (account figures of the DRG refunding system) including a prognosis of future developments during the period of assessment

Hospital Sector

11

- Market dominance analysis
 - **no fixed thresholds** in the assessment of patient flow data
 - decisive is the assessment of the **demand side**, not the supply side, til 2011 no prohibition under 50% market share
 - overall assessment of the patient flow data within the framework of additional criteria:
 - size of emigration and immigration between neighbouring regions
 - mutual market penetration
 - type and size of competitors in neighbouring regions
 - reasons for immigration / emigration (specialised hospitals)
 - self-supply of neighbouring regions
 - distance (in km and time) between hospitals
 - type of settlement area, transport connections

Hospital Sector

12

- Other structural factors:
 - financial strength
 - size and broadness of supply
 - access to the demand side (GPs)
 - competitive advantages with regard to health funds
 - synergies (group-effects)
 - effects on competitors (termination of cooperation agreements)

Hospital Sector

13

- Failing company defence - cumulative conditions:
 - there is no alternative buyer
 - the target would have to leave the market
 - in case of market exit, the market shares of the target would largely devolve to the dominant company anyway
- In all but one case there has been at least one alternative potential buyer

Hospital Sector

14

- There is no conflict between competition law (merger control) and health care politics
 - diversity of hospital operators
 - security of supply, no dependance on dominant hospital supplier
 - guarantees the sovereignty of the patients, right to chose between different hospitals
 - economic and efficient supply, competition forces to compete in quality and innovation to attract patients and keeps structure open for real price competition in the future

Health insurance funds

15

■ **General Facts:**

- **Private** health insurance companies – **Compulsory** Health Insurance Funds (approx. 150 public entities)
- 90 % of German citizens are members of funds
- Special **regulations** for funds – Social Insurance Code
- Reform of health care system in 2006 and 2011:
„more competition“

Health insurance funds

16

■ **Preliminary remarks**

1. Health insurance funds are the key for an efficient health market
2. Funds as supplier of services must compete for their insured persons
3. In the interest of premium payers funds as demanders must initiate competition between providers

Health insurance funds

17

4. Health policy has taken three basic preliminary decisions:
 1. Health funds are open to new members
 2. Extension of selective contracts
 3. Application of cartel law with respect to vertical relations between funds and providers (2011)

Health insurance funds

18

- Application of cartel law in vertical relations
 - yes if contracts may be concluded individually by the funds
 - no if contracts are concluded collectively (cartel law application unsolved)

Drug discount agreements:

pro: 1,1 bn. € savings in 2010
funds: financial flexibility
no purveyors to the court
public procurement law applicable

con: power of demand may lead to squeeze out
innovative small or medium-sized enterprises

Health insurance funds

19

- Other rebate contracts:
 - influenza vaccines
 - specific eye surgery treatments
 - different rebate models are designed and will be „tested“ in due time under public procurement law and cartel law

Health insurance funds

20

- Application of cartel law in horizontal relations

1. Cartel agreements?

Case: Joint introduction of additional premium in 2010

Problem: public health fund = company in terms of cartel law?

State Social Court Hessen (Sept. 2011): no company, but state authority!

2. Merger control

Legislator committed to this procedure in 2006

Over 40 proceedings, no prohibition until 2011

Health insurance funds

21

- Consequences:
 - Plan to close loophole by amending Social Security Code
 - Government and German Federal Parliament decided:
 - Cartel Law shall be made applicable to public health funds generally, not only on the demand side
 - Appeal against decisions of the competition authority to civil courts, which have specific branches for competition and cartel law
 - However: Position of Federal States unclear
 - Entry into force planned: January 1st, 2013

Saint Martin Conference 2012

Competition in Health Care

22

Finis

Thank you very much for your
attention!

Wilko Töllner, LL.M. (Brugge)

Bundeskartellamt

wilko.toellner@bundeskartellamt.bund.de



Bundeskartellamt