trol infection, and increasing development and use of vaccines.

Are we reverting to the pre-antibiotic era or advancing into the post-antibiotic era? One of the crucial questions is whether the above mentioned examples will remain anecdotal or whether a real chance exists for the strategic use of forgotten drugs on a large enough scale to affect clinical management.

The recovery of sensitivity to specific antimicrobials by pathogenic bacteria is a complex issue. Two important factors determine rates of resistant bacteria in a specific community—the "human" factor, which is the amount of antimicrobials used, and the "biological" factor, which is the burden that the resistance encoding genes impose on the fitness of the bacteria.[12]

The impact of either the discontinuation or the reintroduction of a specific drug on the rate of resistance will differ for various microorganisms. In addition to the information obtained from mathematical models of population dynamics,[12] continuous surveillance of in vitro susceptibility will inform us about the effect of reintroducing older drugs. In some instances, resistance could rapidly re-emerge owing to the presence of low rates of resistant genes in a population that once was predominantly resistant. In the future, older antimicrobials will be relied on more and more, either as isolated "no other choice" options or as part of a programmed policy of antibiotic cycling.

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The BetterCare judgment—a challenge to health care

European competition law may cover publicly funded, privately provided care

A landmark decision by the United Kingdom's Competition Commission could make all contracting out and commissioning of health care by NHS and social services subject to European Union competition law, rather than a matter for national public health policy. Healthcare reforms in the United Kingdom are already exacerbating tensions between the European Union's economic constitution and national control over healthcare policy. In principle, competition rules in the European Community focus on economic activity and entrepreneurial freedoms, leaving "true welfare state activity" to member governments,[1] but a recent judgment by a United Kingdom tribunal shows how the courts are moving the dividing line between economic and social activities.[2]

In November 2000, the BetterCare Group (a private company selling nursing and residential care in Northern Ireland) used the United Kingdom's competition law to challenge the contract price for private nursing home beds arranged with North and West Belfast Health and Social Services Trust (Northern Ireland's combined local commissioner for health and social care).

BetterCare alleged that the contract price was set too low because the trust was abusing its dominant market position in violation of competition rules.[2] The director general of fair trading, who is responsible for policing competition rules, rejected the complaint. He ruled that competition rules did not apply in this case because North and West's provision of social services was not an economic activity. BetterCare, however, appealed against this ruling on the grounds, among others, that the European Court of Justice, which interprets European competition law, defines purchasing care as an economic activity, not one of the welfare state. The appeal was upheld by a tribunal of the United Kingdom's Competition Commission, and judgment was published in August 2002.

Under the Competition Act 1998, the UK Competition Commission is required to settle competition issues in line with European Union law.[3] But the European Court has not yet ruled on the specific issue of contracting out, and so the United Kingdom's tribunal had to decide for itself whether publicly funded but privately provided nursing and social care was covered by European competition law.

The crucial question was whether the trust was engaging in economic or welfare activity. Health and social services trusts bear the hallmarks of traditional welfare activity. They are established in Northern Ireland to carry out the statutory duties of the Department of Health and the Department of Social Services and Personal Safety. They are funded with a block

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grant from government, and they redistribute resources by wholly or partly funding those who are eligible and need nursing and residential care. Nevertheless, the tribunal ruled that when contracting out trusts are acting commercially.

The tribunal took as its starting point the definition of economic activity. It ruled that "the essence of many, if not most, 'economic' activities is the making of commercial contracts ... In making such contracts, it seems to us that North & West is necessarily engaged in transactions of an economic character."[4] The tribunal also decided that partnerships with the private sector are an economic, not a social welfare, activity. The tribunal had a let-out clause that would have saved North and West's commissioning from competition law even when defined as economic activity. It could have ruled that, although contracting with a private home is an economic activity, the application of competition rules to the purchase of private nursing would damage the financial viability of the commissioning authority and therefore its ability to discharge its statutory duties. But the tribunal rejected this option on the grounds that more money could always be sought from the family concerned or charitable bodies. It held that, once the decision has been taken to rely on private sector transactions for the delivery of the services in question, it is logical to expect the rules applicable to private sector transactions to come into play.[5] These arguments are relevant to all purchasing in the public sector purchasing.

The judgment has important implications. Firstly, it challenges the whole rationale of government policy, which is that contracting and commissioning will encourage the NHS and local authorities to use their purchasing power as bulk buyers to drive down prices. The ruling allows private companies to challenge this purchasing power.

Secondly, the ruling puts in question policy statements by the government on user charges in the NHS. The government maintains that it does not matter who provides the services so long as they are publicly funded. The appeal tribunal's ruling opens the way for a legal challenge to a public pricing policy that could force the trust to pay higher prices for nursing home care if it were found to be abusing its dominant position as a purchaser. Such an outcome would add to the pressure to increase user charges and top-up fees for users. This has grave implications for the NHS, where reforms have introduced mechanisms for charges and user fees. Official guidance on intermediate care introduces new time limits for NHS care and gives trusts the potential to redefine some NHS care as means tested personal care.[6] At the same time legislation is being introduced to allow the NHS to charge social services for failing to implement discharge policies.[7]

Thirdly, the tribunal's decision has relevance for the planned expansion of acute care purchasing by primary care trusts. It gives commercial hospitals and foreign investors a mechanism for challenging the prices paid for secondary and tertiary inpatient care. The Department of Health is currently introducing national prices and tariffs for the NHS. However, the BetterCare ruling suggests that price setting could be an abuse of its monopoly purchasing power, thereby exposing the NHS to legal challenge by private providers and foundation trusts.[8] This may explain why the NHS will not require private providers to be subject to national tariffs, although NHS providers will be.

A common criticism of international trade law is that it limits the ability of democracies to control policies that affect the health of their citizens.[9 10] In placing trusts in the commercial sector, the appeals tribunal augments the power of regional and multilateral trade courts at the expense of publicly accountable health bodies. Private healthcare companies are already planning to exploit the ruling. One body planning to use this ruling to its advantage is the Federation of Independent Nursing Agencies: "We've been waiting for this decision. The way is now open for the OFT [Office of Fair Trading] to resolve our complaint that the NHS is unfairly discriminating against private nursing agencies by favouring NHS Professionals, which operates at uneconomic rates."[11]

The Office of Fair Trading has accepted the tribunal's ruling in the case of BetterCare, and, apparently, the general principle that with more public services being provided by the market, the disciplines of the market place, including competition law, should apply to that provision.[12] But the trade lawyers who debate and rule on these issues are not equipped to evaluate the implications for health policy, nor is it part of their brief. As the NHS moves inexorably towards the market place for the provision of care, officials of the Department of Health need to discuss with trade officials the extent to which competition policy and trade rules may be used to undermine the principles of the NHS and its funding and leave the NHS vulnerable to legal challenge from international healthcare corporations.[13]

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