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Subject: State aid SA.23008 (2013/C) (ex 2013/NN) – Slovak Republic

Alleged State aid to Spoločná zdravotná poisťovňa, a.s (SZP) and Všeobecná zdravotná poisťovňa, a.s (VZP)

Sir,

The Commission wishes to inform the Slovak Republic that, having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU).

1. THE PROCEDURE

(1) By letter dated 2 April 2007 (A/32990), the Commission received a complaint[1], submitted by one of the competitors of State-owned health insurer Spoločná zdravotná poisťovňa, a.s. ("SZP"), Dôvera zdravotná poisťovňa, a.s ("Dôvera"), on alleged State aid to SZP in the form of an increase of the registered capital in SZP by SKK 450 million (approximately EUR 15 million[2]) exercised on 26 January 2006. By letter dated 18 March 2008, the Commission informed the complainant about the state of play in his case

[1] This complaint was registered under CP 105/2007.

[2] Exchange rate of 31 December 2008: 1 EUR = 30,126 SKK (Source ECB); hereinafter all conversions from SKK to EUR are made by using this exchange rate.

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(2) A related request for information (D/53590) was sent by the Commission to the Slovak authorities on 21 August 2009. By a letter dated 22 September 2009 (A/20342), the Slovak authorities requested an extension of the deadline for submitting information until 25 September 2009 which was accepted by the Commission. By letter of 24 September 2009 (A/20491), the Slovak authorities provided the requested information.

(3) By letter dated 26 February 2010 (D/5818), the Commission requested the Slovak authorities to provide further information with respect to the alleged State aid provided to SZP. In the same letter, the Commission asked the Slovak authorities about the Slovak pooling and risk adjustment mechanism – Risk Equalisation Scheme (RES) which had come to its attention. By letter of 25 March 2010 (A/5189), the Slovak authorities requested an extension of the deadline for submitting the additional information which was accepted by the Commission on 31 March 2010 (D/6532). By letter dated 16 June 2010, the Commission reminded the Slovak authorities to submit the outstanding information. By letter of 9 July 2010 (A/10762), the Slovak authorities provided the requested information.

(4) By letter dated 4 November 2010 (D/9915), the Commission requested the Slovak authorities to submit a non-confidential version of part of the material provided on 6 July 2010. By letter of 3 December 2010 (2010/116457), the Slovak authorities provided the requested information.

(5) On 1 January 2010, SZP merged with the other State-owned Slovak health insurer Všeobecná zdravotná poisťovňa, a.s ("VZP").

(6) On 14 October 2010 and 15 March 2011, two meetings took place between the Commission and Dôvera to discuss the subject of the complaint as well as the functioning of the health insurance market in Slovakia.

(7) Dôvera provided by submission dated 15 July 2011 additional information about the nature of the health insurance market in Slovakia and additional measures adopted by the Slovak Republic to the benefit of SZP and VZP also constituting allegedly unlawful state aid. The complainant thus extended the scope of its previous allegations to the following additional measures in favour of SZP and VZP: (i) the discharge of SZP's debt by the State-owned company Veriteľ a.s. in 2004-2005 in two payments of EUR 52.7 million and EUR 28 million; (ii) a subsidy granted in 2006 to SZP by the Ministry of Health of EUR 7.6 million and (iii) a State-financed capital increase in VZP on 1 January 2010 in amount of EUR 65.1 million.

(8) By a letter dated 6 September (2011/88155), the Commission invited the Slovak authorities to comment on the extended complaint including the additional measures.

(9) By a letter dated 12 October 2011 (2011/109188), the Slovak authorities requested an extension of the deadline for submitting comments which was accepted by the Commission by a letter of 17 October 2011 (2011/109707). By letter of 11 November 2011 (2011/120441), the Slovak authorities provided the requested information.

(10) Further to a meeting which took place between the Commission and Dôvera on 16 December 2011, the latter provided additional information on 16 January 2012 (2012/004764) about the nature of the health insurance market in Slovakia.

2. DESCRIPTION

2.1. DESCRIPTION OF THE SLOVAK HEALTH INSURANCE SYSTEM

2.1.1. *The evolution of the Slovak Market for Compulsory Health Insurance*

(11) Following the split of the Czech and Slovak Federal Republic in 1993, the Slovak general tax-based health system was replaced by a social compulsory health insurance system (hereinafter referred to as the compulsory health insurance system or the "CHI"). In 1993, the National Insurance Fund was established to fund health, social and pension insurance. On 1 January 1995, the Act No. 273/1994 on Health Insurance came into force and changed the previous single insurance company system to a pluralistic model allowing several companies to provide health insurance services within the compulsory health insurance system. It introduced a compulsory health insurance scheme financed through a combination of contributions paid by the working population and contributions from the state budget on behalf of the economically inactive. The CHI scheme was based on the principles of solidarity, no profit and plurality, allowing the creation of a significant number of health insurance funds.[3] At the beginning, in 1996, there were 13 health insurance companies active in Slovakia. Private investors have also been investing in compulsory health insurance in Slovakia starting from 1995 (for instance Dôvera).[4] Soon thereafter, the legislation was amended to introduce tighter criteria for the establishment and the operation of health insurance companies. This resulted in mergers of some health insurance companies and closures of others during 1995-2004.

(12) In 2004-2005, Slovakia implemented a major healthcare reform. According to several OECD reports, the reform was necessary because the deficit in the social security funds had increased since the mid-1990s to reach around 0.8% of GDP by 2002, which had also led to the accumulation of debt at the level of healthcare providers as health insurance companies delayed payments.[5] The main aim of the reform was thus apparently to replace the state-driven health system with a more market-oriented one.

(13) Acts No 581/2004 and No 580/2004, which entered into force on 1 January 2005, altered the rules for the redistribution of the collected health insurance contributions and changed the legal form of all insurers. Thus the five health insurance funds which operated on the market in 2005, two of which were state-owned (SZP and VZP) and three privately owned were transformed from non-profit institutions organised as legal public bodies into profit-seeking joint stock companies, that is to say, "a.s." companies incorporated under Commercial law rules. Through these reforms, the compulsory health insurance in Slovakia was transformed into a profit-making activity, including

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3 Colombo, F. and N. Tapay (2004), "The Slovak Health Insurance System and the Potential Role for Private Health Insurance: Policy Challenges", OECD Health Working Papers, No. 11, OECD Publishing (http://dx.doi.org/10.1787/561285317408).

4 According to the 2004 Report, Hlavačka S, Wágner R, Riesberg A. "Health care systems in transition: Slovakia" (Vol. 6 No. 10 2004), p. 36 ff., issued by the European Observatory on Health Systems and Policies (available at http://www.euro.who.int/__data/assets/pdf_file/0007/95938/E85396.pdf).

5 See for example the OECD report of 2011, "Hüfner, F. (2011), "Increasing Public Sector Efficiency in Slovakia", OECD Economics Department Working Papers, No. 839, OECD Publishing (available at: http://dx.doi.org/10.1787/5kgj3l0m0q0r-en), p. 14.

profit distribution among shareholders in health insurance companies, by allowing them to pay off dividends.

(14) As part of the 2004-2005 reform, in addition to the compulsory health insurance, a possibility was created by law for all companies to also provide voluntary health insurance.[6] Voluntary health insurance is construed as completely independent of the public compulsory health insurance, which forms part of the Slovak social security system. However, it appears that voluntary health insurance has remained extremely marginal to this date, due to the very comprehensive healthcare benefits which are fully covered by the compulsory health insurance.[7]

(15) Some of the measures introduced by the 2004-2005 reforms were modified again after a change in government in 2006. In particular, as concerns health insurance companies, in 2007, Act No. 530/2007 amended Act No. 581/2004[8] and precluded insurance companies active in the compulsory health insurance sector from using any profit they make other than for the provision of health care in the Slovak Republic. As a consequence, health insurance companies were not allowed to distribute profits to shareholders during 2008-2011.

(16) In this respect, an insurance company formally complained to the European Commission about the alleged infringement of internal market rules and in November 2009, the European Commission sent to the Slovak government a letter of formal notice under internal market rules, observing that the prohibition on health insurance companies freely disposing of any profits resulting from the provision of public health insurance in Slovakia under section 15(6) of Act No 581/2004 constitutes an unjustified restriction on the freedom of capital movements guaranteed by Article 56 EC Treaty (now Article 63 TFEU).[9]

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6 Voluntary health insurance may be provided by any health insurance company, as this is permitted under Section 6(12) of Act No 581/2004, provided that the insurer complies with the terms of Act No 8/2008 on insurance, i.e. a special authorisation is required (permits granted by the Financial Market Authority). Voluntary health insurance covers out-of pocket payments for healthcare provided outside the basic benefit package, used by those who are excluded from compulsory health insurance (i.e. people without permanent residence and not employed in Slovakia and those with permanent residence in Slovakia but health insurance abroad).

7 According to the National Bank of Slovakia, total premiums from voluntary health insurance amounted to approximately EUR 1 million in 2009 (accounting for only 0.02% of total health expenditure and 0.2% of overall non-life insurance premiums), see the 2011 Report, Szalay T, Pažitný P, Szalayová A, Frisová S, Morvay K, Petrovič M and van Ginneken E., "Slovakia: Health system review. Health Systems in Transition" (Vol. 13 No. 2 2011), issued by the European Observatory on Health Systems and Policies (available at http://www.euro.who.int/__data/assets/pdf_file/0004/140593/e94972.pdf), p. 78

8 Act No. 530/2007 Coll. Of 25 October 2007, Amending and Supplementing Act No. 581/2004 Coll. on Health Insurance Companies and Healthcare Supervision, and Amending and Supplementing Certain Acts as Amended (2007) (prohibiting the distribution of profits to shareholders and reducing the cap on operational expenses from 4% to 3.5%).

9 Infringement No. 2008/4268.

(17) On 26 January 2011, the Slovak Constitutional Court ruled that the ban on profit distribution to shareholders, as introduced by Act No. 530/2007 was unconstitutional and annulled it. The ruling found that there had been a significant reform in the Slovak health insurance market in 2005[10], that this reform changed the previous organisation of compulsory health insurance and that this activity had thereby been "*included in the realm of competition*". As a result of the ruling of the Slovak Constitutional Court, in July 2011 the Slovak authorities amended Act No. 530/2007 by Act No. 250/2011, in order to allow health insurers to make and distribute (to their shareholders) profits achieved from the compulsory health insurance activity, subject to certain conditions.[11] Further to these legislative changes, the above mentioned internal market law infringement procedure was closed by the Commission in November 2011.

(18) On 31 October 2012, the Slovak authorities approved a project for the establishment of a unitary not-for-profit system of compulsory health insurance in the Slovak Republic, which would be introduced either through voluntary buyouts (until 1.1.2014) of the privately-owned health insurance companies or through their expropriation (until 1.7.2014) and would establish a single (State-owned) health insurance company.[12]

2.1.2. *Health insurance companies in Slovakia*

(19) Under the applicable national legislation, a health insurance company is defined as a public limited company having its registered office in the Slovak Republic, established to provide public compulsory health insurance subject to an authorisation granted by the Healthcare Surveillance Authority (the "HSA").[13] Currently, in Slovakia, all health insurance companies, whether publicly or privately-owned, provide compulsory health insurance.

(20) Citizens currently have a choice for the compulsory health insurance package between three insurers[14]:

- the State-owned public limited company VZP, which was established on 1 July 2005. It was formed by the transformation of the public enterprise VšZP, which was established under Act No 273/1994 on 1 November 1994 as the successor to the National Insurance Company (Národná poisťovňa) of the Health Insurance Fund Administration. It was merged with State-owned company SZP on 1 January

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10 Act No 581/2004 and Act No 580/2004 on "health insurance" and "health insurance companies".

11 These conditions are: (1) mandatory use of profit for formation of a reserve up to the level of 20% of the paid-up registered capital (the reserve fund may only be used to cover loss) and (2) mandatory formation of technical reserves for payment of planned healthcare for insured persons on waiting lists.

12 http://www.rokovania.sk/Rokovanie.aspx/BodRokovaniaDetail?idMaterial=21664.

13 Section 2 of Act No 581/2004. This provision is currently subject of an infringement procedure initiated by the Commission (No. 2012/2175), letter of formal notice sent on 23 November 2012 in which the Commission alleges violation of the freedom of establishment (Article 49 TFEU) and the free provision of services (Article 59 TFEU) in light of failure to fully implement the First and Third Non-Life Insurance Directives (Directive 73/239/EEC, OJ L 228, 16.8.1973, p. 3–19 and Directive 88/357/EEC, OJ L 172, 4.7.1988, p. 1–14).

14 In 2009, mergers of health insurers led to further market consolidation and a decrease to three insurance providers, see Hüfner, F. (2011) above cited (in footnote 5), p. 23.

2010 pursuant to Act No 533/2009. The Slovak Republic is the sole shareholder of VZP[15];

- the privately-owned public limited company Dôvera zdravotná poisťovňa ("Dôvera", the complainant,), owned by EU-based investors (main shareholder is the Central European financial group PENTA). Dôvera was established on 1 October 2005 and merged with another private company ("Apollo") on 31 December 2009. In 2010, the new Dôvera was the biggest privately-owned health insurance company in Slovakia;
- the privately-owned public limited company Union zdravotná poisťovňa, a.s. ("Union"), a private company owned by EU-based investors, established on 9 March 2006 (a member of the Netherlands based Achmea group, formerly Eureko).

(21) According to the available information, the evolution of the market shares of the different insurance companies providing compulsory health insurance in the Slovak Republic during the years 2008-2010 is the following[16]:

Year	**2008**	**2009**	**2010**
Companies	Number of persons insured (%)	Number of persons insured (%)	Number of persons insured (%)
VZP	55.4	55.0	66.74
SZP	13.6	12.0	In 2010, SZP merged with VZP-
Apollo	8.4	10.0	In 2010, Apollo merged with Dôvera-
Dôvera	16.2	16.0	26.37
Union	6.4	7.0	6.89

(22) All health insurance companies are joint stock companies, while ownership regulation allows both the State and private sectors to be shareholders. All health insurance companies are obliged to meet certain solvency criteria. Being under hard budgetary constraints, they are fully responsible for financial shortfalls.[17] As private joint-stock companies set under the general company law, health insurance companies appear to **autonomously** manage their operations and healthcare costs.

(23) Health insurance companies can and do make **profits**. The revenues of insurance companies in Slovakia are drawn from insurance contributions, the State budget (contributions on behalf of the economically inactive persons and a subsidy to cover rises in health service costs), various sanction fees (fines), income from property, gifts and other incomes. Profits can be made by health insurance companies for instance by improving their management system and, importantly, through their negotiations when

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15 Until 2004, it appears that VZP and SZP had their solvency guaranteed by the State. According to the 2004 Report, Hlavačka S, Wágner R, Riesberg A. "Health care systems in transition: Slovakia", above cited (in footnote 4), p.36, VZP and SZP could be described as "statutory" institutions. The other three health insurance companies (Apollo, VZP-Dôvera and Sideria, each insuring around 7% of the population in 2000) were "private", i.e. their solvency was not guaranteed by the State.

16 Numbers provided by the Slovak Authorities in their submission of 9 July 2010.

17 See the 2011 Report "Health Systems in Transition Vol.13 No.2 2011 – Slovakia Health System Review", above cited (in footnote 7), p. 23.

contracting with healthcare providers, as explained below (see paragraph (35)-(37)). Profit for health insurance companies is a reward for bearing the financial risk, purchasing healthcare and administering health insurance. As the percentage of healthcare expenses is not statutorily fixed, there is a wide margin for health insurance companies to engage in business negotiations with hospitals and other partners in order to save on costs and thus generate more profits.

(24) The following table gives a brief overview of the evolution of profits or losses in health insurance companies during 2005-2009.[18]

Health insurance company	**Profits (in EUR million)**				
	2005	**2006**	**2007**	**2008**	**2009**
VZP (state-owned)	-83	7	-14	0	-27
SZP (state-owned)	3	7	7	0	-11
Apollo	3	21	7	1	n.a.
Dôvera	0	17	14	16	8
Sideria	0	14	n.a.	n.a.	n.a.
European (EZP)	0	-21	-7	n.a.	n.a.
Union	–	-3	-7	-11	-17
Total	-77	42	0	6	-47
Insurance contributions total	2363	2570	2954	3185	3310
Profit as % of insurance contributions	3.2	1.6	0.0	0.2	-1.4

2.1.3. *Main features of the Slovak Compulsory Health Insurance scheme*

Social objective and public interest

(25) The Slovak Compulsory Health Insurance scheme pursues a **social objective,** i.e. to allow for the provision of health care and the maintenance of a viable health insurance system. Citizens have the right to health insurance and the obligation to be insured.[19] The Slovak Republic is responsible by law for financing the health care system and for

[18] This information is based on the 2011 Report "Health Systems in Transition Vol.13 No.2 2011 – Slovakia Health System Review", above cited (in footnote 7), citing data collected from health insurance companies for 2006–2010.

[19] The obligation to be health insured is specified by law for all defined persons (Section 3 of Act No 580/2004). All citizens specified by law are legally required to pay public health insurance contributions (Section 11 of Act No 580/2004). Non-payment of contributions is classified as a criminal offence.

covering losses in the healthcare sector.[20] The right to health insurance and free health care is a constitutional obligation of the Slovak Republic.[21] According to the Slovak authorities, by providing compulsory health insurance in the Slovak Republic, health insurance companies are considered to fulfil a constitutional obligation on behalf of the State i.e. the provision of health insurance to citizens through managing the compulsory health insurance scheme in Slovakia.

(26) Under Section 2 of Act No 580/2004 on health insurance, the provision of public compulsory health insurance is an activity in the public interest, in the operation of which public funds are managed.

Compulsory membership, open enrolment and community rating

(27) The participation in the Slovak public health insurance programme is **compulsory** for the whole population in the Slovak Republic, in accordance with the provisions of Act No 580/2004 and Act No 581/2004.[22]

(28) An insured person is **free to choose** any health insurance company. Insured persons have the right to opt for a health insurance company of their choice and to switch insurance company once a year. This triggers the launching of annual marketing campaigns/strategies, during which health insurance companies invest heavily in advertising, marketing and presentations throughout Slovakia.[23] Switching patterns are active, as the mobility of the insured has varied significantly over time, being influenced by marketing activities and by the extent to which the insured exercise their freedom of choice.[24]

(29) Under the open enrolment obligation and community rating principle, health insurance companies in Slovakia have a **legal obligation to admit** to their insurance scheme every citizen who so requests, provided that he/she meets the legal requirements for health insurance in Slovakia. In particular, health insurance companies cannot refuse to insure a person on grounds of age, state of health or disease risks[25] and have to offer basic health insurance at the same price to all persons regardless of these factors.

(30) Historic circumstances combined with the open enrolment obligation and the community rating principle may lead to a situation in which different health insurance

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20 Specifically, in conjunction with the legislative changes adopted in 2004, the Slovak Republic discharged debts of almost EUR 1 billion, which had previously been incurred by the health sector, including the debts of privately-owned health insurance companies (according to the information provided by the Slovak authorities to the Commission on 9 July 2010).

21 Article 40 of the Constitution of the Slovak Republic, among the constitutionally guaranteed "fundamental rights and freedoms", stipulates: "Everyone has a right to the protection of his health. Based on public insurance, citizens have the right to free health care and to medical supplies under conditions defined by law."

22 By law, every citizen must be health insured, in accordance with Section 3 of Act No 580/2004. A person insured under the public health insurance system is a natural person permanently resident in the Slovak Republic. The law provides for exceptions, but only for those who have health insurance in another country.

23 Dôvera in its submission of 16 January 2012, claims to have had marketing expenses above EUR 2.9M and devoted 30% of its personnel to client recruiting in 2011.

24 In November 2011, the Slovak Health Surveillance Authority examined the applications to switch insurance companies in 2012 and noted a 94% increase as compared to the previous year (see "Presentation "Switching Health Insurance Companies 2012", submitted by the complainant on 16 January 2012).

25 Section 6(9) of Act No 580/2004.

companies have portfolios of appreciably different nature in terms of age, gender, health status and disease risks of their insured persons and of the insurance risks associated therewith. The Slovak health insurance system therefore includes a legal architecture for equitable **risk-sharing among health insurance companies** through a risk equalisation scheme (RES). Under the RES[26], health insurance companies insuring persons associated with a higher risk receive funds from insurance companies whose portfolio is associated with a lower risk i.e. through monthly and annual reallocation of contributions and the administration of transfers, by virtue of a calculation designated by the HSA. Parameters applied in the RES are the age, gender and, since 2010, economic activity status of the insured.[27]

Income-related contributions and benefits

(31) Slovak compulsory health insurance is based on a system of compulsory **contributions**. Contribution rates are defined by law and are proportional to the income of the insured (similar to the tax levied on income), rather than being based on the insured risk (age of the insured or health status). The contributions, which the Slovak authorities consider to be part of the public funds are collected from: (1) employees and employers; (2) the self-employed; (3) the voluntarily unemployed; and (4) the "State-insured" (i.e. the group of mostly economically inactive people).[28] With the exception of the "State-insured", whose contributions are paid by the State, all insured are obliged to make monthly advance payments and to settle any outstanding balance on their total contribution annually. If this obligation is violated, the insured are entitled only to urgent care and the health insurance company may require reimbursement of the costs.

(32) All Slovak citizens are guaranteed the same basic level of **benefits** ("the basic benefit package"). There is no direct link between the amount of contributions paid to the scheme and the benefits[29] received. Medical services covered by compulsory health insurance are provided regardless of the contributions paid by the insured person.

(33) The basic benefit package of compulsory health insurance covers almost all healthcare procedures provided in the Slovak Republic, meaning that virtually complete healthcare is provided through this scheme. Currently, the basic insurance package entitles everyone to free healthcare with the exception of only a few treatments (e.g. cosmetic surgery), and partial payments for pharmaceuticals and spa treatments and selected healthcare related services (e.g. emergency room visits). The benefit package can be narrowed or widened by government decree (without parliamentary negotiations). Since the Slovak Constitution guarantees every citizen health care under the CHI system according to the conditions laid down by law, for the basic insurance

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26 Part 3 of Act No 580/2004

27 See below paragraph (60) ff. for more details on the RES.

28 The composition of the compulsory health insurance resources has changed significantly during 2002 - 2010. In 2002, 72% of resources came from contributions of the working population and 28% of the resources were contributions by the state on behalf of the State-insured from general tax revenue. In 2010, the share of these state contributions to total revenue reached 38%. In 2010, the payment of the state was 2.0% of GDP, while in 2002 this figure was only 1.4%. See the 2011 Report "Health Systems in Transition Vol.13 No.2 2011 – Slovakia Health System Review", above cited (in footnote 7), p. 67.

29 See Act No. 577/2004.

package, insurance companies have no influence over the benefit basket, level of coverage or premiums as these are fixed in national legislation.

(34) However, although the basic healthcare package that must be offered by all health insurance companies is fixed by law in its essential requirements, it appears that nothing precludes each health insurance company from providing additional entitlements (benefits) as part of its individual healthcare package in order to attract insured persons. Slovak health insurance companies can and do add to the basic healthcare package various additional benefits of their choice, which cover services not included therein, but which are offered by insurers free of charge to their clients, as part of the same healthcare package under compulsory health insurance. For example, according to the available information, it appears that health insurance companies can decide whether to offer additional coverage of certain complementary and preventive treatments under the same compulsory health insurance package. These additional benefits are distinct from the voluntary health insurance services that may be offered for a fee.

Selection of healthcare providers and services

(35) The health insurance companies are allowed to **select healthcare providers**, and to negotiate contracts with physicians and individual hospitals. Insurers thus contract with individual healthcare providers, the contracts are independent and one health care provider may contract with all or just some of the health insurance companies and vice versa. The health insurance companies reimburse services delivered by both the State and private health care providers. There is no separate system to cover private health care providers.

(36) To ensure geographical accessibility of health services, a minimum network requirement is set by the government to influence capacity planning. In the context of their activity of provision of CHI, health insurers are required by law to contract with a "minimum network of hospitals". Each health insurer creates its own network and improves the "minimum network" by selective contracting with additional hospitals and other healthcare services providers. Healthcare services rendered by these hospitals and/or other healthcare services providers and included in the CHI coverage are thus covered by the health insurer in favour of the insured persons. Health insurers have a certain margin of discretion in negotiating with hospitals on price and quality of the healthcare services rendered to insured persons.

(37) The health reform in 2004-2005 increased the responsibility of health insurance companies in the purchasing of healthcare services. Since the reform was adopted, all pricing and payment mechanisms, with the exception of several market segments (such as drugs, emergency medical services and 24/7 first aid), are subject to contractual freedom and freely negotiable. Providers are paid according to their individual contract with a given health insurance company. A given health insurance company may have negotiated different prices for different providers. This appears to be particularly the case in inpatient care, while outpatient healthcare providers and providers of laboratory diagnostics generally operate with uniform prices. There is

significant differentiation in terms of prices and payment mechanisms among health insurance companies.[30]

Regulatory framework

(38) The compulsory health insurance is regulated by special regulations.[31] All health insurance companies providing compulsory health insurance have, by law, identical status, rights and obligations. Each health insurance company must be established with the purpose of executing public health insurance and it must not carry out activities other than those stated in Section 6 of Act No. 581/2004. The activities of the health insurance companies managing the compulsory health insurance scheme are subject to the overall control of the State exercised in particular through the regulatory authority – the Healthcare Surveillance Authority (the "HSA").

(39) The HSA is a special body established in November 2004 in order to split the legislative and control functions in the healthcare system. Until 2004, both functions were the responsibility of the Ministry of Health. Since 2004, the Ministry of Health has been responsible for setting the legislative framework for the health insurance market[32], the healthcare purchasing market and the health care provision market. The HSA has a monitoring and supervisory role in the health system. It supervises whether health insurance companies and providers adhere to this legislative framework and intervenes when violations occur.

2.1.4. *The provision of compulsory health insurance in Slovakia as a service in the general interest*

(40) According to the Slovak authorities, all activities carried out by SZP and VZP before the 2005 transformation of the health insurance companies were strictly limited to the fulfilment of public service obligations in the health sector. Further to the Acts No 581/2004 and No 580/2004 all health insurance companies were put on an equal footing and there are currently no differences in the status of health insurance companies in Slovakia. All health insurance companies provide compulsory health insurance, as a service of general interest, in accordance with the same legal provisions, under the same statutory authority with the same rights and obligations.

(41) In particular, the Slovak authorities consider that the provision of compulsory health insurance in Slovakia is a service in the general interest, based on the following characteristics:

- Health insurance companies may provide compulsory health insurance only by virtue of an authorisation granted by the HSA.

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30 Compare the 2011 Report "Health Systems in Transition Vol.13 No.2 2011 – Slovakia Health System Review", above cited (in footnote 7), p. 143.

31 E.g. the relationship between the insured person and the health insurer is formed not by contract but by law (see section 4 of Act No 580/2004). The supervision of health insurance companies and health care provision are also governed by law.

32 The (central) government plays an important role in regulating health insurance companies. During the preparatory process of the state budget, the government decides on additional financial sources for the system through changing the contribution rate for the state-insured. Through the Ministry of Health, it defines the minimum benefit package, minimum provider network, reimbursement policy, whether user fees apply and maximum waiting lists. See the 2011 Report "Health Systems in Transition Vol.13 No.2 2011 – Slovakia Health System Review", above cited (in footnote 7), p. 35.

- Compulsory health insurance is mandatory and applies to all insured persons specifically listed in the personal scope of compulsory health insurance.
- Participants in the public health insurance system are: the insured (the person who is insured under the compulsory health insurance scheme), the health care provider and the health insurance company.
- Insured persons have the right to choose a health insurance company, and that health insurance company must not refuse to insure them, provided that they meet the conditions laid down by law.
- Insured persons are obliged to pay contributions to the health insurance company where they are insured. The amount of contributions paid to health insurance companies is fixed by law.
- Insured persons are entitled to equal health care regardless of how much they contribute to the public health insurance system.
- Public health insurance is based on the principle of solidarity between the healthy and the sick.
- A risk equalisation scheme ensures solidarity amongst insurers.
- Health insurance companies are required to ensure that persons insured with them are provided with healthcare to the extent provided for by law; the availability of healthcare provision is guaranteed by the definition of the public minimum network of healthcare providers.
- Healthcare providers are required to provide healthcare to insured persons to the extent defined by law, and are entitled to payment for non-emergency healthcare and emergency healthcare.
- Health insurance companies may use only a limited amount of financial resources from public health insurance (the volume of which is precisely defined by law) to cover operating costs.
- Compliance with applicable statutory provisions is supervised by the HSA, which oversees the activities of health insurance companies in the field of compulsory health insurance.

(42) Moreover, the Slovak authorities indicated that the definition and the entrustment of the public service missions assigned to the health insurance companies are based on the following provisions:

- The concept of public interest is defined in the Slovak Constitution, through the interpretative decisions of the Constitutional Court of the Slovak Republic, and other Constitutional Acts. Public interest may thus be regarded in compliance with Article 40 of the Constitution of the Slovak Republic, which states: *"All persons are entitled to the protection of their health. Based on their health insurance, citizens are entitled to free health care and medical devices under the conditions laid down by law."*
- Furthermore, under Section 2 of Act No 580/2004 on health insurance, the provision of public compulsory health insurance is an activity in the public interest, in the operation of which public funds are managed. The provision of compulsory health insurance is further defined as a public service and entrusted to

health insurance companies operating in Slovakia through the acts Act No. 580/2004 on health insurance and Act No. 581/2004 on health insurance companies.

(43) The Slovak authorities have also contended that the Slovak health insurance companies SZP and VZP comply with the provisions of the Commission Directive 2006/111 on transparency of financial relations between Member States and public undertakings[33], which require Member States to ensure transparency as regards public funds made available by public authorities to the public undertakings concerned, either directly or through the intermediary of public undertakings or financial institutions; as well as regarding the use to which these public funds are actually put.[34] According to the Slovak authorities, in the provision of public health insurance, health insurance companies are considered specialised financial institutions – assimilated to "a government entity" (under Act No 523/2004 on budgetary rules) that manages public resources.[35] Health insurance companies may dispose of resources that have been collected as public health insurance contributions only in accordance with an approved budget, which must be drawn via the State Treasury and accounts mandatorily opened at the State Treasury (Section 2a of Act No 291/2002 on State Treasury).

2.2. DESCRIPTION OF THE COMPLAINT AND THE STATE MEASURES CONCERNED

2.2.1. *The 2006 capital increase in SZP*

(44) By letter dated 2 April 2007, the privately-owned health insurance company Dôvera lodged a complaint before the Commission against a capital injection by the Slovak State into the State-owned company SZP in amount of SKK 450 million (approximately EUR 15 million) made in three tranches between 28 November 2005 and 18 January 2006 (the "**2006 capital increase in SZP**").

(45) SZP was provided with the sum totalling SKK 450 million (approximately EUR 15m) by its shareholders (i.e. the Ministry of Interior, the Ministry of Transport, Post and Telecommunications and the Ministry of Defence) further to the decision of the company's general assembly to increase the fixed capital and by subscription of new shares in the form of a monetary deposit in the fixed capital of SZP.

(46) The three tranches of payments of the capital increase (totalling SKK 450 million) were performed as follows:

- The Ministry of the Interior of the Slovak Republic, as the administrator of 33% of the State's shareholding, remitted SKK 148.5 million (approximately EUR 4.9 million), which was credited to SZP's account on 28 November 2005;
- the Ministry of Defence of the Slovak Republic, as the administrator of 33% of the State's shareholding, remitted SKK 148.5 million (approximately EUR 4.9 million), which was credited to SZP's account on 11 January 2006;

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33 OJ L 318, 17.11.2006.

34 Act No 431/2002 on accounting, as amended, has been amended to transpose, inter alia, legal acts of the European Communities and the European Union, also incorporating Commission Directive 2006/111/EC (codified version).

35 The Slovak public sector follows the methodology of national accounts ESA-95, according to which budgetary management is also quantified, and which is applied in all EU Member States and within the IMF.

- The Ministry of Transport, Post and Telecommunications of the Slovak Republic, as the administrator of 34% of the State's shareholding, remitted SKK 153 million (approximately EUR 5 million), which was credited to SZP's account on 18 January 2006.

(47) This capital increase was associated with the reform in healthcare and the 2004-2005 reform of the health insurance market in the Slovak Republic. In fact, at the time of its establishment as a joint-stock company in 2005, as the legal successor of a public institution[36], SZP was required by law to take over not only the assets of the original insurance company, but also its liabilities, incurred before 2005, the amount of which caused an inadequate level of solvency, as set under the requirements of Section 14(1) of the Act on health insurance companies (Act 581/2004).[37] These liabilities amounted to SKK 467 765 million (approximately EUR 15.5 million) as at 31 December 2005, whereas the estimate as at 31 December 2005 had been SKK 527 million (approximately EUR 17.5 million). The structure of these estimated liabilities was as follows:

Liabilities	**Amount of liability in SKK million**
Pharmacies	**185 (approximately EUR 6.1m)**
Healthcare facilities	**150 (approximately EUR 5m)**
Other healthcare providers	**2 (approximately EUR 0.66m)**
Charges on default	**190 (approximately EUR 6.3m)**
Total	**527 (approximately EUR 17.5m)**

(48) Further to an assessment performed by the HSA, with the aim to determine the steps necessary to ensure SZP's solvency, as required by Act 581/2004, the HSA required that SZP adopt a recovery plan[38], on the basis of a detailed analysis of the market and the options available. As instructed by the HSA, the recovery plan was amended to include the obligation to liquidate liabilities in the amount of SKK 527 million (approximately EUR 17.5 million) by 30.4.2006 from own resources, as well as the obligation on SZP shareholders to ensure necessary resources by increasing the fixed capital by at least SKK 450 million (approximately EUR 14.9 million), to be

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36 As a public institution prior to 01.01.2005, SZP functioned as an insurance company with a specific and relatively restricted insurance portfolio, while, as opposed to other health insurers, it was also obligated to its policyholders to cover specific preventive healthcare and specific healthcare provided in connection with work-related injuries and occupational diseases.

37 According to Act 581/2004, the solvency of a health insurance company is understood as the ability to permanently ensure settlement of liabilities arising under confirmed applications for public health insurance and concluded contracts from its own resources. Solvency is demonstrated by the ratio of own resources over the premiums from public health insurance after redistribution for the preceding twelve months. The minimum level of solvency must amount to 3% of the public health insurance premiums after redistribution for the preceding twelve months, but comprising at least SKK 50 million (approximately EUR 1.7 million).

38 Decision of the HSA of 30.9.2005, case ref. SK 12/000002/2005/POK. The HSA's decision imposed on SZP an obligation within the meaning of Section 50(1)(d) and Section 51(2) of the act on health insurers to draft a recovery plan to ensure the solvency of SZP to pay its liabilities within statutory time limits and submit this plan for approval to the HSA by 31 October 2005.

performed at the latest by 31 January 2006. The recovery steps were to be implemented and completed by the end of 2006.

(49) These liabilities (total amount of SKK 467 765 million) were liquidated as follows:

- SKK 162 760 million (approximately EUR 5.4 million) in January 2006
- SKK 124 208 million (approximately EUR 4.1 million) in February 2006
- SKK 37 802 million (approximately EUR 1.25 million) in March 2006
- SKK 80 398 million (approximately EUR 2.7 million) in April 2006
- SKK 23 785 million (approximately EUR 0.79 million) in May 2006
- SKK 38 812 million (approximately EUR 1.3 million) in June 2006.

According to the Slovak authorities, SZP's solvency between January and December 2006 was in accordance with the law.

2.2.2. *The discharge of SZP's debts by Veritel'*

(50) Act No. 581/2004 required all existing health insurance funds to reorganise as joint stock companies by 30 September 2005. Prior to this reorganisation (which was part of the liberalisation of the public health insurance market in Slovakia) the debts of all the public health insurance entities (including the predecessor to Dôvera) were discharged by the state-owned company Veritel'. Veritel' was established as a new state agency for the consolidation of healthcare debts in 2003[39] and was tasked by the Slovak Government with the implementation of a project to relieve healthcare facilities and health insurance companies of their debts.[40] The debt relief process was carried out pursuant to Slovak Government resolutions.

(51) In the period 2003–2005, Veritel' settled debt in the health sector exceeding EUR1100 million in accounting value at the cost of EUR 644 million in cash. Since the Ministry of Health announced that this was the last bail-out of the health care system, the agency Veritel' was abolished in 2006.[41]

(52) During this process, Veritel' discharged EUR 52.7 million of SZP's debt. The complainant notes that, being higher than what the complainant itself had received[42], this suggests unjustified discriminatory treatment in the debt-discharging process.

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39 Veritel', a.s. was established under the Slovak Government's Resolution No. 262 of 2 April 2003.

40 According to information submitted by the complainant on 15.07.2011, the Assessment of the Healthcare Debt Discharging Process through Veritel', a.s. as of 31 December 2005 stated that: "*VERITEL' was established in 2003 and was put in charge of the debt-discharging project of healthcare facilities and health insurance companies. Its shareholders are the Slovak Ministry of Health and the Slovak Ministry of Finance, each holding 50% of the company's registered capital. Veritel', a.s. carried out the debt-discharging process based on resolutions of the Slovak government [...]. The debt-discharging process was funded (...) using money from the company's increased registered capital, refundable financial assistance and a subsidy. The total amount of funding used for removing healthcare debts as of 31 December 2005 is 20.1 billion SKK (...)*".

41 See the 2011 Report "Health Systems in Transition Vol.13 No.2 2011 – Slovakia Health System Review", above cited (in footnote 7), p. 142.

42 According to the complainant, by comparison, Dôvera's predecessors, which were jointly larger in size than SZP saw their debts discharged by an amount of EUR 27.25 million.

(53) The complainant's main concern is that, additionally, on 30 November 2005 (therefore after the transformation), Veritel' further discharged approximately EUR 28 million of further debt that SZP had to the special premium redistribution account.[43] This was done through the assignment by SZP to Veritel' of premium claims and interest (of approximately SKK 929 million), while according to the complainant, interest was not eligible for discharge under the applicable rules on debt discharge. SZP assigned to Veritel' approximately SKK 929 million (approximately EUR 30.8 million) in claims of premium and interests (about SKK 343 million (approximately EUR 11.4 million) in interest). In return, Veritel' provided consideration of SKK 840 million (approximately EUR 28 million) to SZP by setting off its debt to the special premium redistribution account.[44]

2.2.3. *The 2006 subsidy to SZP*

(54) In the second semester of 2006, a further subsidy was granted to SZP by the Ministry of Health using part of the liquidation balance of Veritel', which was dissolved in July 2006. The amount of the subsidy was of about EUR 7.6 million.

(55) The complainant alleges that this subsidy was provided to settle SZP's liabilities with healthcare providers dating from before 2005, although it was not clear whether these debts continued to exist at the time of the grant.

(56) However, according to the Slovak authorities, the financial resources from the liquidation balance of Veritel' were not provided to SZP but to medical facilities, which at the time were owned by the State, for payment of their liabilities (i.e. health insurance contributions for their employees) to SZP. Consequently, according to the Slovak authorities, no subsidy was involved, but rather a normal payment of existing undisputed liabilities by the State – unpaid premiums for health insurance. According to the Slovak authorities, if the State had not paid these premiums, it would have been exposed to the risk of execution of the unpaid claims of medical facilities and the additional costs of that execution.

2.2.4. *The 2010 capital increase in VZP*

(57) The Slovak Republic, through the Ministry of Health Services, increased its registered share capital in VZP on 1 January 2010. The increase in share capital amounted to approximately EUR 65.1 million.

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[43] Prior to liberalisation, a portion of the health insurance funds' premiums were paid into the Special Redistribution Account to be redistributed among them (i.e. into the RES, which continued to operate after the reform enacted through Acts No 581/2004 and No 580/2004 as explained herein) and at that time (i.e. prior to 2005) SZP was a known non-payer of contributions into the special redistribution account. The complainant, quoting the Ministry of Health (Motion of Accelerated Legislative Procedure concerning the bill amending Act No. 273/1994 Z. z. regulating health insurance, funding of health insurance, the establishment of VZP and of departmental, industrial branch, corporate and civil health insurance funds, as amended, 13 October 2003. SZL/1299/2003) alleges that in 2003 SZP had about 2.5 billion SKK (around EUR 83 million)in debt with the redistribution account (i.e. the RES) as it had continuously breached its obligation to pay the required contributions for two years. According to the quoted act of the Ministry of Health, SZP's debt to the RES could not be settled "*without impacting the state budget except by a systemic measure preceding transformation of health insurance companies under the health insurance companies and healthcare surveillance bill*".

[44] According to the complainant, quoting from the Report on Inquiry into the Activities of Veritel', a.s. Throughout its Existence, Slovak Ministry of Finance, September 2007.

(58) According to the complainant, given that VZP was close to insolvency, it appears that the State acted in this way to bridge VZP's revenue deficit. However, the complainant did not explain on what grounds it considers that VZP was at the time close to insolvency. The complainant noted that there was no restructuring plan for VZP. The complainant also indicated that in its opinion the State had absolutely no hope of receiving a return on its investment within a reasonable time frame, particularly given that Slovakia had just introduced a law preventing health insurance companies from distributing their profits.

(59) According to the Slovak authorities, this 2010 capital increase in VZP was made to eliminate the impacts of the financial crisis and to support VZP in withstanding the pressure to increase the level of indebtedness with growing demand for health care.

2.2.5 *The Risk Equalisation Scheme (RES)*

(60) During its preliminary assessment, the Commission also found out that the funding of health insurance companies in the Slovak Republic includes a pooling and risk adjustment mechanism – a Risk Equalisation Scheme (RES).

(61) The RES applies fully to all health insurance companies providing compulsory health insurance in the Slovak Republic. While contributions to the compulsory health insurance are collected directly by health insurance companies from employers, the self-employed, self-payers (voluntarily unemployed) and the State, the distribution of revenues and expenditures among the health insurance companies is unequal due to the different structure of their insured populations. To alleviate the financial burden on health insurance companies with a higher-risk portfolio and to reduce the potential for risk selection, contributions are redistributed among the health insurance companies using the RES.

(62) The reallocation of contributions was established by Act No 273/1994 on compulsory health insurance and was introduced on 1 January 1995.[45] This Act created conditions for the establishment of health insurance companies to provide public health insurance in the health insurance system, and for the principle of solidarity with insurers, which was ensured by means of the reallocation of contributions (Part 8 of Act No 273/1994).[46]

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45 Act No 273/1994 on health insurance and on the establishment of departmental, sectoral, corporate and civic health insurance companies in January 1995. On 1 November 1995, an amendment to Act No. 273/1994 came into force which defined stricter conditions for the redistribution of mandatory contributions between health insurance companies and introduced more rigorous conditions for the establishment and operation of health insurance companies.

46 The RES was frequently reformed. Act No. 202/1997 amended the Act on Health Insurance concerning the redistribution mechanism of the health insurance contributions; Act No. 124/1998: amended the Act on Health Insurance concerning redistribution mechanisms in the risk adjustment scheme among health insurance companies and the introduction of a central registry of insured persons at the Ministry of Health. Act No. 151/1999 was a further amendment of the Act on Health Insurance. It changed the redistribution mechanism and the state guarantee. Further amendments are mentioned in paragraph (64) ff. of the present decision.

(63) **Between 1995 and 2004**, the system was based on an internal system of risk adjustment, which was administered by the State-owned VZP using a special "central redistribution account".[47]

(64) Initially, the RES redistributed 60% of collected revenues on the basis of the number of economically active and inactive insured persons. **With the 2004 reform**, through Acts No 580/2004 and No 581/2004, the internal risk-adjustment scheme was replaced by an external risk-adjustment system supervised by the HSA. The HSA also became responsible for administering the central register of insured. Using risk adjusters, the receivable–payable relations between health insurance companies are calculated. As a result, each health insurance company knows which health insurance company is the net debtor and which health insurance company is the net creditor within the risk adjustment scheme.

(65) According to Part 3 of Act No 580/2004, a percentage of the insurance premiums collected by health insurance companies are redistributed among all the health insurance companies in accordance with a risk index of the costs of the insured persons determined by the HSA and based on the solidarity principle. As of 2009, 95% of the contributions are subject to risk adjustment. This (i.e. the limitation to 95 %) is to motivate the health insurance companies to increase their level of collected contributions (for example from defaulters). Until 2009, the redistribution system took only two demographic risk adjusters into account – age and gender of the insured.

(66) For the year of 2010 an additional parameter related to the economic activity status of the insured persons was added to the redistribution mechanism.[48] The age and gender related risk index is defined separately for the State-insured and insured people for whom the State does not pay contributions. A further additional element for the redistribution of the collected health insurance premiums based on different pharmaceutical-expense groups[49] was introduced in 2012[50] and continues being applied also for the year 2013.[51]

(67) The Slovak authorities indicate, in reply to a Commission's request for information on the RES, that the RES is not a form of State aid but a matter of equalising funds in accordance with applicable RES criteria for insured persons, i.e. it is clearly a case of solidarity between insured persons and therefore not State aid.

2.2.6. *The transfers of portfolios to SZP and VZP*

(68) During its preliminary assessment, other aspects have come to the Commission's attention, in relation to several direct transfers, by intervention of the State, to SZP and

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47 Under the 1995 legal provisions, a special compulsory health insurance account was set up and VZP was appointed as special account manager.

48 According to the 2011 Report "Health Systems in Transition Vol.13 No.2 2011 – Slovakia Health System Review", above cited (in footnote 7), p. 73.

49 Each group (e.g. asthma, diabetes type I, heart diseases) are linked to the cost risk index of a different level.

50 Regulation of the Ministry of Health of the Slovak Republic of 7 September 2012, by which it issues the cost risk index for health care for the period from 1 July 2012 to 31 December 2012 (No. 265/2012 Coll.).

51 Regulation of the Ministry of Health of the Slovak Republic of 14 December 2012, by which it issues the cost risk index for health care for the year 2013.

VZP, of portfolios of other health insurance companies which were liquidated over time.

(69) While the information on these aspects is extremely limited, it appears that such portfolios were transferred directly to SZP and VZP without an open and transparent competitive procedure, although there were other operators on the market which may have been interested and willing to pay a price.

(70) The Commission has very limited knowledge in this regard at this moment, and is only aware that certain transfers appear to have occurred, apparently initiated around 1998-1999 and continued into 2005 at least, with respect to a transfer of the portfolio of the company Družstevná zdravotná poisťovňa to VZP, and of the company Európská zdravotná poisťovňa to SZP. Other transfers of portfolios may have occurred of which the Commission does not have knowledge at this moment.

(71) Thus, according to the information submitted by the Slovak authorities, in the case of the dissolution of the health insurance company Družstevná zdravotná poisťovňa, its insurance portfolio was transferred to VZP, in order to secure continual healthcare in accordance with the Slovak constitutional law. The legal arrangements of the transfer specified that if a dissolved insurer's liabilities towards medical facilities cannot be satisfied from the assets of that insurer, both the liabilities and the claims of the insurer towards medical facilities, claims for contributions and default charges should be transferred to VZP. As a consequence of the above, since 1999, VZP joint-stock company, as the legal successor of the public VZP, has been subjected to great pressure from the creditors of the dissolved health insurance company, which have claimed and are still claiming payment of VZP's liabilities to them by way of about 1 000 court and enforcement proceedings. The Slovak authorities view the results of these enforcement procedures as an unjustified deprivation of VZP of significant financial resources – given that formerly such issues have been resolved by the debt discharging process operated through the State-owned company Veriteľ. According to the Slovak authorities, the financial resources thus levied were subsequently amortised with a loan provided to VZP by the State joint-stock company Veriteľ.

(72) According to the information submitted by the Slovak authorities, in the case of the Európská zdravotná poisťovňa, the chairman of the HSA, as the competent administrative organ, issued a decision by which, in accordance with the provisions of Act No 581/2004, it ordered the gratuitous transfer of the insurance portfolio from the Európská zdravotná poisťovňa, a.s., in liquidation, to SZP on 1 January 2009. Subsequently, SZP had the same obligations to the Európská zdravotná poisťovňa insured persons as to its own insured persons.

3. PRELIMINARY ASSESSMENT

(73) At the outset, the Commission observes that the complainant did not challenge all the above-described State measures, in particular the compensations granted from the RES for the fulfilment of public service missions imparted to all health insurance companies. Neither did the complainant challenge the transfers of portfolios to SZP and VZP.

(74) However, since the Slovak authorities indicated that the various sources of funding received by SZP and VZP are generally addressed at compensating the public services missions entrusted to them, and given the requirements of the judgment in *Deutsche*

Post AG[52], the Commission must take into account in its assessment all relevant public funding received by SZP and VZP, in particular in order to verify that the compensations received to carry out their respective SGEI obligations do not exceed what is necessary and proportionate for covering the relevant net costs.

(75) The Commission will therefore assess in its formal investigation procedure all the relevant public funding received by SZP and VZP of which the Commission is currently aware, including: the 2006 capital increase in SZP, the discharge of SZP's debts by Veritel', the 2006 subsidy to SZP, the 2010 capital increase in VZP, the Risk Equalisation Scheme (RES) and the transfers of portfolios to SZP and VZP.

3.1. STATE AID WITHIN THE MEANING OF ARTICLE 107(1) OF THE TFEU

(76) Article 107, paragraph 1 of the TFEU provides that "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

(77) This means that in order for a measure to be qualified as State aid, the following cumulative conditions have to be met: (i) the measure has to be granted out of State resources, (ii) it has to confer an economic advantage to undertakings, (iii) the advantage has to be selective, and (iv) the measure has to distort or threaten to distort competition and to affect intra-EU trade.

(78) Since the Slovak authorities have mainly argued that no State aid is involved in the Slovak compulsory health insurance system because this activity is non-economic in nature, the classification of the beneficiaries as 'undertaking' within the meaning of EU competition law is examined in more detail first.

(79) As a further preliminary remark, the Commission would like to note that even if a unitary system, as currently proposed by the Slovak authorities[53], was finally established in the Slovak Republic in 2014 or later, it would only concern the future organisation of CHI in Slovakia and would therefore not impact on the assessment of the State aid qualification of the measures at stake in the case at hand.

3.1.1. *Classification as undertaking within the meaning of EU law*

(a) Principles

(80) According to Article 107(1) TFEU, the State aid rules of the TFEU only apply where the recipient of an aid is an "undertaking". The case-law of the Court of Justice ("ECJ") defines an undertaking for the purposes of the EU competition and State aid rules as any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.[54] The question whether the measures granted in favour of SZP/VZP constitute State aid within the meaning of Article 107(1) TFEU therefore depends in the first instance on whether and to what extent SZP/VZP, when they

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52 Judgment of 1 July 2008, T-266/02 - Deutsche Post AG (DPAG)/Commission [2008] ECR II-1233, paragraphs 72 and 73.

53 See paragraph (18).

54 See e.g. Joined Cases C-180/98 to C-184/98 Pavlov and Others [2000] ECR I-6451, paragraph 74.

operate within the Slovak compulsory health insurance system, act as undertakings because they could be considered to be engaged in an economic activity as defined by the ECJ's case-law.

(81) According to the ECJ, any activity consisting in offering goods and/or services in a given market is an economic activity within the meaning of the EU competition and State aid rules.[55] In this context, the fact that the activity in question is termed 'social', or is carried on by a non-profit operator, is not in itself enough to avoid classification as an economic activity.[56] The existence of social or general interest objectives associated with a given field of activity does not deprive it as such of its economic character.[57]

(82) It is also noted that the regulatory or funding arrangements applied by a Member State to a given field of activity do not determine the applicability of the EU competition rules, as in fact such arrangements may themselves fall to be assessed under those rules.[58] The classification of a particular entity as an undertaking thus depends entirely on the economic or non-economic nature of its activities.

(83) Importantly, the question whether a market exists for certain services may depend on the specific way those services are organised and carried out in the Member State concerned.[59] The State aid rules only apply where a certain activity is provided in a market environment. The economic nature of the same kind of services can therefore differ from one Member State to another. Moreover, due to political choices or economic developments, the classification of a given service can change over time. What is not a market activity today may turn into one in the future, and vice versa.[60] Furthermore, the decision of an authority not to allow third parties to provide a certain service does not rule out the existence of an economic activity. In spite of such market closure, an economic activity can exist where other operators would be willing and able to provide the service in the market concerned. [61]

(84) In its 2012 Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest

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55 Case 118/85 Commission v Italy [1987] ECR 2599, paragraph 7; Case C-35/96 Commission v Italy [1998] ECR I-3851, paragraph 36; Joined Cases C-180/98 to C-184/98 Pavlov and Others, paragraph 75.

56 Joined Cases C-180/98 to C-184/98 Pavlov (cited above), paragraph 118; Case C-218/00 INAIL [2002] ECR I-691, paragraph 37; and Case C-355/00 Freskot [2003] ECR I-5263, paragraph 77.

57 Such objectives may, however, provide a justification under Article 106(2) TFEU for arrangements which would otherwise infringe EU competition law; see Case C-67/96 Albany [1999] ECR I-5751, paragraph 85 and 86.

58 See Case C-41/90 Höfner and Elser [1991] ECR I-1979, paragraph 21 of the judgment; Joined Cases C-159/91 and C-160/91 Poucet and Pistre [1993] ECR I-637, paragraph 17; Case C-218/00 Cisal [2002] ECR I-691, paragraph 22.

59 Joined Cases C-159/91 and C-160/91 Poucet and Pistre [1993] ECR I-637.

60 See also the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest ("2012 SGEI-Communication"), OJ C8, 11.01.2012, p 4-5.

61 See 2012 SGEI-Communication, page 5.

("2012 SGEI-Communication")[62], the Commission laid out its approach to the application of these rules to the financing of schemes in the area of social security. The potential qualification of such schemes as an economic activity depends on political and economic specificities and on the way such schemes are set up and structured in the Member State concerned. In essence, the Court of Justice and the General Court distinguish between schemes based on the principle of solidarity and economic schemes.

(85) The Union Courts use a range of criteria to determine whether a social security scheme is solidarity-based and does not constitute an economic activity. A number of factors can be relevant in this respect: (i) whether affiliation with the scheme is compulsory[63]; (ii) whether the scheme pursues an exclusively social purpose[64]; (iii) whether the scheme is non-profit[65]; (iv) whether the benefits are independent of the contributions made[66]; (v) whether the amount of benefits paid is not necessarily proportionate to the insured persons' earnings [67] and (vi) whether the scheme is supervised by the State.[68]

(86) In contrast to solidarity-based schemes, economic schemes are regularly characterised by: (i) optional membership[69]; (ii) the principle of capitalisation – i.e. dependency of entitlements on the contributions paid and the financial results of the scheme[70]; (iii) their profit-making nature[71] and (iv) the provision of entitlements which are supplementary to those under a basic scheme.[72]

(87) These criteria should not be considered as a cumulative list of factors and, moreover, the Union Courts have also acknowledged that some schemes combine elements of both categories (solidarity-based and economic schemes). In the Commission's analysis, the presence and respective importance of each of the different elements should be verified and weighted in order to reach a final conclusion.[73] In the case at hand, the final classification, at the end of the formal investigation procedure, of the provision of compulsory health insurance services as an economic or non-economic

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62 2012 SGEI-Communication, pages 4-14.

63 Joined Cases C-159/91 and C-160/91 Poucet and Pistre [1993] ECR I-637, paragraph 13.

64 Case C-218/00 Cisal and INAIL [2002] ECR I-691, paragraph 45.

65 Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 AOK Bundesverband [2004] ECR I-2493, paragraphs 47 to 55.

66 Joined Cases C-159/91 and C-160/91 Poucet and Pistre (cited above), paragraphs 15 to 18.

67 Case C-218/00 Cisal and INAIL (cited above), paragraph 40.

68 Joined Cases C-159/91 and C-160/91 Poucet and Pistre (cited above), paragraph 14; Case C-218/00 Cisal and INAIL (cited above), paragraphs 43-48; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 AOK Bundesverband (cited above), paragraphs 51-55.

69 Case C-67/96 Albany [1999] ECR I-5751, paragraphs 80-87.

70 Case C-244/94 FFSA and Others (cited above), paragraphs 9 and 17 to 20; Case C-67/96 Albany (cited above), paragraphs 81 to 85; see also Joined Cases C 115/97 to C 117/97 Brentjens [1999] ECR I 6025, paragraphs 81 to 85, Case C 219/97 Drijvende Bokken [1999] ECR I 6121, paragraphs 71 to 75, and Joined Cases C-180/98 to C-184/98 Pavlov (cited above), paragraphs 114 and 115.

71 Joined Cases C 115/97 to C 117/97 Brentjens (cited above).

72 Joined Cases C-180/98 to C-184/98 Pavlov and Others (cited above).

73 See e.g. the weighting exercise conducted by the ECJ in Case C-350/07 Kattner Stahlbau [2009] ECR I-1513, in particular paragraphs 33-68.

activity will therefore depend on a thorough analysis of the specific way in which that activity is organised and carried out in the Member State concerned and will therefore be specific to the CHI system in the Slovak Republic.

(b) Compulsory health insurance as organised and carried out in the Slovak Republic

(i) Elements possibly pointing to non-economic nature

(88) In the current case, the compulsory health insurance in the Slovak Republic displays characteristics that appear on the one hand close to what the Court has considered in the past to be typical for a social insurance system of **non-economic nature.**[74] Most of these characteristics have also been invoked by the Slovak authorities when arguing that no State aid is involved in the Slovak compulsory health insurance system and that the activity has not been opened to competition:

(89) Compulsory membership/contributions: As described above (paragraphs (27) ff.), participation in the public health insurance programme is by law compulsory for the whole population in the Slovak Republic and medical services covered under the compulsory health insurance are provided regardless of the contributions paid by the insured person. An insured person is free to choose any health insurance company, and under the open enrolment obligation, the health insurance company chosen cannot refuse him insurance on the grounds of his age, state of health or disease risks.

(90) Social objective (public interest according to the Slovak Constitution): The Slovak CHI scheme pursues a social objective, i.e. the provision of health care and the maintenance of a viable health insurance system. The Slovak Republic is responsible by law for financing the health care system and for covering losses in the healthcare sector. Furthermore, the Slovak authorities claim that the right to health insurance and free health care is a constitutional obligation of the Slovak Republic; by providing compulsory health insurance in the Slovak Republic, health insurance companies are fulfilling a constitutional obligation on behalf of the State, i.e. providing health insurance to the citizens through managing/administering the compulsory health insurance scheme in Slovakia.

(91) Solidarity (income-related contributions, Risk equalisation system - RES - and community rating): The Slovak compulsory health insurance is based on contributions that are proportional to the income of the insured (similar to the tax levied on income), rather than being based on the insured risk (age of the insured or health status). There is no direct link between the amount of contributions paid by an individual into the scheme and the value of the benefits received by that same individual from the scheme. The insurance companies have no possibility to influence either the amount of contributions or the minimum level of coverage to which the insured are entitled as this is fixed in national legislation. In this respect, it is worth recalling, as described above (paragraphs (31) ff.), that all Slovak citizens are guaranteed the same basic level of benefits covering almost all healthcare procedures provided in the Slovak Republic, meaning that virtually complete healthcare is provided through this scheme.

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[74] See for example Case C-355/01 AOK Bundesverband [2004] ECR I-02493.

(92) Furthermore, risk equalisation schemes such as the one in Slovakia aim to ensure that risks are shared and therefore create solidarity. In addition, the Slovak system supports the community rating principle, i.e. insurers are not allowed to differentiate premiums according to insurance risk, while risk equalisation partially compensates insurers who have a riskier demographic profile in their portfolio by re-distributing money from those insurers paying less than average benefits to those paying higher than average benefits to their insured persons.

(93) Activity subject to supervision by the State under a detailed regulatory framework: As described above (paragraphs (38) ff.), compulsory health insurance is governed by special regulations. All health insurance companies providing compulsory health insurance have, by law, identical status, rights and obligations. Each health insurance company must be established with the purpose of executing public health insurance and it must not carry out activities other than those stated in Section 6 of Act No. 581/2004. The activities of the health insurance companies managing the compulsory health insurance scheme are subject to the overall control of the State. They may be established only under a permit issued by the Healthcare Supervision Authority (HSA), a special body that has been entrusted with the supervision of the scheme and the healthcare provision as a matter of public administration.

(ii) Elements possibly pointing to economic nature

(94) On the other hand, various features of the compulsory health insurance in Slovakia may provide arguments in favour of considering the compulsory health insurance in Slovakia as an **economic activity as from 01.01.2005** when the Slovak Health insurance market under Acts 581/2004 and 580/2004 entered into force with the following effects:

(95) Presence of several private operators on the Slovak market: Private investors have been investing in compulsory health insurance in Slovakia since 2005 and perhaps even as early as 1994. In particular, the national legislator specifically allowed private operators to enter the market and some scope for (non-price) competition appears to have been introduced into the Slovak compulsory health insurance system by the reform enacted through Acts No 581/2004 and No 580/2004, which enabled operators to compete for insured persons and service providers, in order to make profits.

(96) For-profit activity: Since the entry into force of the 2004-reform, in January 2005, the legal form of all health insurance operators was changed to private law joint stock companies (under Commercial code rules). Thus, the public health insurance in Slovakia was transformed into a profit-making activity, including profit distribution among shareholders in health insurance companies, by allowing them to pay off dividends. [75]

(97) Competition between insurers: While there is no price competition due to the level of contributions being fixed by law, health insurance companies are nevertheless engaged in some degree of competition with one another, particularly competition based on additional entitlements as well as the quality, variety and accessibility of services in

[75] Subject to certain conditions as specified in footnote 11.

order to attract potential clients.[76] All Slovak public health insurance companies compete with each other for insured persons by, for instance, selectively contracting with certain health care providers in order to provide specific quality services. Furthermore, in the effort to define an attractive network of healthcare providers, health insurers also compete upstream, for health providers. The competitive nature of the Slovak health insurance market is thus underpinned by the fact that health insurance companies are chosen by their business partners (e.g. healthcare providers) on the basis of financial and economic considerations from among other health insurance companies with which they are in competition.

(98) Activity already declared/considered open to competition by national courts: The evolution of the market into a competitive market was recognised by the Slovak Constitutional Court in its ruling of 26 January 2011[77], which stated that based on the 2004 reform, compulsory health insurance has been "included in the realm of competition", as demonstrated by the preparatory legislative works, which show that the intention was *"to create an environment for health insurance companies where they will be competing to attract their insured persons based on the quality of their services"*.[78] In this respect, it should be mentioned that the case-law of the Union Courts attaches a lot of importance to the consideration of the will of the national legislator when deciding whether competition law should be applicable or not.[79] In the same vein, several OECD reports consider that the provision of compulsory health insurance in Slovakia has become a market open to competition as a result of these reforms.[80]

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76 The provision of such additional entitlements can in fact constitute an indication of the economic nature of the activity in question; See also joined Cases C-180/98 to C-184/98 Pavlov and Others, p. 122.

77 Predpis č. 79/2011 Z. z., Nález Ústavného súdu Slovenskej republiky z 26. januára 2011 vo veci vyslovenia nesúladu ustanovenia § 15 ods. 6 zákona č. 581/2004 Z. z. o zdravotných poisťovniach, dohľade nad zdravotnou starostlivosťou a o zmene a doplnení niektorých zákonov v znení neskorších predpisov s čl. 1 ods. 1, čl. 20 ods. 1 a 4 a čl. 35 ods. 1 v spojení s čl. 13 ods. 4 Ústavy Slovenskej republiky, ako aj s čl. 1 Dodatkového protokolu k Dohovoru o ochrane ľudských práv a základných slobôd.

78 Referring to Section 2 of the Reasoned Statement accompanying the Slovak government's health insurance companies bill [i.e. Act No. 580/2004] (parliamentary print no.651). The ruling of the Constitutional Court also stated that "*at the time of* [the adoption of the 2004 Health Insurance Act]*, nobody challenged, in any substantial measure, the fact that health insurance companies were, under that law, entities that were (being) established for purposes of carrying out public health insurance and whose legal form is that of joint-stock companies and that fulfil the tasks (duties) as imposed on them by the Health Insurance Companies Act (particularly Section 15), while carrying out public health insurance in a competitive environment, for purposes that also include achieving profit, and, as such, are, without a doubt, business entities. It was this particular interpretation of the legal standing of health insurance companies under the originally enacted Health Insurance Companies Act that was the key motivational factor for establishing joint-stock companies associating private shareholders (and their "capital investments") […]*".

79 See for instance joined cases C-264/01, C-306/01, C-351/01 and C-355/01, AOK et al., [2004] ECR I-2493.

80 In an 2004 OECD report, which assessed the effects and impact of the then-upcoming reform of the Slovak healthcare system, including the reform of the health insurance sector, it was observed that the will of the national legislator was to introduce a certain level of competition on the market: see Colombo, F. and Tapay, N. (2004), above cited (see footnote 3), p. 18 ff. See also OECD Economic Surveys: Slovak Republic, Volume 2010/17, November 2010 and "Hüfner, F. (2011) above cited (in footnote 5), which also found that competition in the insurance market has stalled due to a number of

(c) Conclusion

(99) In conclusion, the mixture of economic and non-economic features of the Slovak compulsory health insurance system makes it necessary to perform an in-depth analysis of the different elements and their respective importance within the scheme, in order to determine whether the activity of compulsory health insurance in the way it is organised and carried out in Slovakia is to be considered economic (as from 01.01.2005) or non-economic in nature. On the basis of the information available at this stage, the Commission has doubts in determining the economic or non-economic nature of the activity concerned.

(100) Therefore, the Commission would like to further examine in a formal investigation procedure whether the provision of compulsory health insurance services in Slovakia and thus the activities of SZP, VZP and the other providers of these services are economic or non-economic in nature. By opening the formal investigation procedure, the Commission invites the Slovak authorities and any interested third parties to submit any information and comments relevant to verify the presence, and weigh the respective importance, of each of the different elements tending to show whether compulsory health insurance is economic or non-economic in nature.

(101) In line with the above considerations, the Commission acknowledges that the other conditions constitutive of State aid and questions of compatibility of possible State aid would become decisive only if in the course of the formal investigation procedure the Commission services came to the conclusion that compulsory health insurance in Slovakia is an activity of an economic nature. For reasons of procedural efficiency, this should however not prevent the Commission from simultaneously collecting and examining in its formal investigation procedure all information about elements constitutive of State aid as well as the elements relevant for the assessment of the compatibility of possible State aid. The following sections concerning the potential qualification of the measure as State aid and their prospective compatibility under State aid rules should therefore be read in this light.

3.1.2. Measure granted by the State or through State resources

(102) In order to constitute State aid within the meaning of EU law, a measure must be granted by the State or through State resources. Such resources may include public funds administered by the Member State, at central, regional or local level, or through other public or private bodies designated or controlled by the State.

- **The 2006 capital increase in SZP**

(103) The 2006 capital increase was carried out through several payments performed by SZP's three shareholders, the Ministry of the Interior of the Slovak Republic, the Ministry of Defence of the Slovak Republic and the Ministry of Transport, Posts and Telecommunications of the Slovak Republic. The measure was thus granted by the State through State resources.

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regulations (dating from 2007) and increasing market concentration and advised for several measures to be taken in order to support the growing competition in the Slovak market.

➢ **The discharge of SZP's debts by Veritel'**

(104) As described above (paragraphs 50 ff.), Veritel' was a State-owned company, established under the control of the Government of the Slovak Republic and was tasked by the Slovak Government with the discharge of SZP's debt, as well as with the discharge of the debts of other health insurance operators at the time, prior to the reform enacted through Acts No 581/2004 and No 580/2004 and the transformation of the health insurance operators into joint-stock companies. The two shareholders of Veritel' were the Slovak Ministry of Health and the Slovak Ministry of Finance, each holding 50% of the company's registered capital. According to the currently available information, Veritel' carried out the debt-discharging process based on resolutions of the Slovak government and the process was apparently funded using public money. The discharge of SZP's debts by Veritel' was therefore performed through State resources.

➢ **The 2006 subsidy to SZP**

(105) From the information currently available, this appears to be a potential subsidy granted by the Slovak Republic's government through its Ministry of Health. It is therefore to be considered as granted by the State through State resources.

➢ **The 2010 capital increase in VZP**

(106) Based on the currently available information, it appears that the 2010 capital increase was performed by the Ministry of Health, as sole shareholder of VZP. The measure was thus granted by the State through State resources.

➢ **The Risk Equalisation Scheme (RES)**

(107) This mechanism of adjustment appears to lead to a redistribution of revenues among health insurance companies, which involves indirect transfer of payments between market operators, operating by virtue of State legislation. Based on settled case law and the practice of the Commission, a risk adjustment scheme leading to a redistribution of revenues among health insurance companies by virtue of State legislation may be considered to involve State resources.[81]

(108) However, the Commission invites the Slovak Republic to submit their observations on these aspects, and all relevant information (including legislation) and in particular to provide a complete overview of all financial flows in the RES.

➢ **The transfers of portfolios to SZP and VZP**

(109) Based on the currently available information, it appears that the transfer of these portfolios was operated further to decisions made by the State in accordance with the legal provisions then in force which, until the amendments of 2011, allowed the transfers of portfolios of health insurance companies free of charge. Given that such transfers of portfolios were operated towards a specific health insurance company

[81] Where funds used for a State measure are financed through compulsory contributions by the health insurance companies and then distributed according to State legislation they may be regarded as State resources even if they are collected and administered by institutions distinct from the public authorities. E.g.: Case T-289/03 BUPA v Commission, 12.02.2008, [2008] ECR, p. II-81; Case 173/73 Italy v Commission [1974] ECR 709, paragraph 35 of the judgement; opinion of the AG Jacobs of 30.04.2001, on the Case C-126/01 GEMO SA, paragraph 54.

chosen by the State and directly performed by operation of State resolutions, they appear to be imputable to the State and therefore can be considered as measures granted by the State.

3.1.3. Presence of a selective economic advantage

(110) In order to constitute State aid within the meaning of EU law, a State measure, to the extent that it would benefit an activity that can be described as economic in nature, must also satisfy the condition of selectivity in the sense of favouring a certain undertaking as laid down in Article 107(1) TFEU.[82]

- **The 2006 capital increase in SZP**

(111) The Slovak authorities mainly argue that the 2006 capital injection respected the Market Economy Investor Principle (MEIP), thus no advantage was granted, and therefore the measure did not constitute State aid. Furthermore, the Slovak authorities maintain that the capital increase was a precondition imposed by the HSA to re-establish SZP's solvency, given that SZP had overdue liabilities of approximately EUR 17.5 million resulting from SZP's pre-existing obligations as a public institution in the health sector, prior to its transformation into a limited liability company.

(112) The Commission observes that the Slovak authorities' line of argumentation based on MEIP compliance would be difficult to accept given the fact that (a) the measure seems to address past liabilities of the company, (b) SZP was apparently undergoing solvency problems, and also taking into account (c) the increased competition in the compulsory health insurance sector as a result of the reform enacted through Acts No 581/2004 and No 580/2004 makes it difficult to maintain there was market failure.

(113) However, the Commission observes that, based on the currently available information, it could be possible that the difficulties that SZP was experiencing at the time were indeed exclusively and entirely related to the constraints of previously existing SGEI obligations incumbent upon it which were not otherwise compensated for. According to the *Altmark* judgment of the European Court of Justice[83], compensation for the provision of services of general interest does not constitute an advantage and thus does not amount to State aid – and is therefore not subject to prior notification and approval by the European Commission – only if four cumulative conditions are met. The Slovak authorities have not claimed that the measure fulfils these criteria, but should such be the case, they are invited to further argue and substantiate the potential for this measure not to constitute an advantage granted to SZP in light of the *Altmark* criteria.

- **The discharge of SZP's debts by Veritel'**

(114) Based on the currently available information, it appears that within the general debt-discharging system set up through the intervention of the State-controlled entity Veritel' prior to the transformation process of all health insurance funds into new companies, which had to be completed by September 2005, all health insurance funds existing at that time (i.e. SZP and VZP, both State-owned, and the three privately owned companies) appear to have been at least eligible to benefit from a debt-

82 Judgment of 6 September 2006, C-88/03, Portugal / Commission, Rec. p. I 7115, paragraph 54.

83 Case C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht [2003] ECR I-7747, paragraphs 87-93.

discharge under the same non-discriminatory terms. It is not clear at this moment whether indeed all health insurance funds in fact received such debt-discharges. The exact conditions of each such operation would have to be assessed to determine the absence of discrimination.

(115) In this context, the Commission notes that payments performed as a result of the general debt-discharging process may not constitute State aid if done in an open, transparent, non-discriminatory manner, as they would not grant a selective advantage to specific entities, given that all existing health insurers would be eligible for debt-discharge under the same terms.

(116) The complainant Dôvera does not directly complain about the general debt-discharging system. In relation to the debt-discharge of EUR 52.7 million of SZP's debt, the complainant notes that since SZP's debt discharge was higher than what the complainant itself received, this would strongly suggest unjustified discriminatory treatment in the debt-discharging process. However this allegation is not supported by other relevant information – such as the volume of debt incurred by the companies, which may have justified different levels of discharge, while complying with common non-discriminatory rules.

(117) The complainant's main concern relates to the additional discharge by Veriteľ of EUR 28 million of further debt that SZP owed to the special premium redistribution account, performed on 30 November 2005 (therefore after the transformation from health insurance funds into health insurance companies).

(118) The complainant argues that this measure amounts to State aid because the consideration provided by Veriteľ (SKK 840 million, approximately EUR 28 million) for the claims assignment by SZP (SKK 929 million, approximately EUR 31 million in claims of premium and interests, of which about SKK 343 million, approximately EUR 11 million in interest) was unreasonably excessive and not on market terms due to the fact that SZP's claims were essentially uncollectable. The Slovak authorities argue that the debt-discharge does not amount to State aid, since liabilities and claims of entities with the same owner were involved.

(119) It is not clear at this moment on what grounds these further EUR 28 million were discharged in favour of SZP. It appears possible that this amount potentially represented a delayed payment performed by Veriteľ in line with its previous intervention and on the same legal grounds (prior to the transformation) – which, if performed under non-discriminatory conditions, would not constitute State aid from this perspective.

(120) The Commission therefore invites the Member State and any interested parties to submit their observations on these aspects.

- **The 2006 subsidy to SZP**

(121) To date, based on the information provided by the complainant as well as the Slovak authorities, it cannot be excluded that the financial resources taken from the liquidation balance of Veriteľ constitute a grant of an advantage to SZP through State resources.

(122) Furthermore, it remains as yet unclear on what legal basis the State performed this operation.

(123) The Commission invites the Member State and any interested parties to submit their observations on these aspects.

➢ **The 2010 capital increase in VZP**

(124) The Slovak authorities state that i) "increasing the registered capital is the natural right of the company's owner, which is reacting to developments of the environment in which the company owned by it operates", ii) it reflected the general trend in the health insurance area, particularly when considering the level of growth and the total sum of registered capital in relation to the size of the insurance portfolio. Therefore, according to the Slovak authorities, the capital increase was legitimate as "the State cannot not participate in providing public health insurance as a service in the public interest and therefore cannot refuse to maintain the capital security of the company owned by it providing this service at a level comparable to its surroundings".[84]

(125) It is not as yet clear to what extent the State did act as a market investor when performing this capital increase. The currently available information does not allow the Commission to assess the financial state of VZP at the time and thus it is not possible to determine whether the company was indeed close to insolvency. Neither is it possible to determine whether the State could or did receive a return on its investment.

(126) The Commission also observes that it could be possible that the capital increase to VZP might have been performed in order to compensate existing SGEI obligations incumbent upon VZP which were not otherwise compensated for. Should such be the case, the Slovak authorities are invited to further argue and substantiate the potential for this measure not to constitute an advantage granted to SZP in light of the *Altmark* criteria (see below paragraph (139) ff.).

(127) The Commission invites the Member State and any interested parties to submit their observations on these aspects.

➢ **The Risk Equalisation Scheme (RES)**

(128) The RES has the effect of compensating some undertakings for costs that they normally have to bear. Under normal market conditions, insurance companies have to bear the costs arising due to their risk profile and adapt their policy as a consequence. Thus, a scheme imposed by the State which compensates with public funds some undertakings for costs that they normally have to bear, could be considered as providing an advantage to these undertakings.

(129) At this moment it is not clear to what extent SZP or VZP are beneficiaries or contributors in the RES.

(130) VZP appears to be the biggest recipient of redistributed funds. Since it was the only insurer on the market in 1994, historically it appears to have an over-representation of the elderly part of the population (thus creating a higher-risk portfolio for VZP). When new health insurance companies entered the market, it appears that it was generally the younger (healthier) people who switched health insurance companies towards these new entrants (thus allowing them to build up lower-risk portfolios).[85]

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84 Submission of the Slovak authorities of 15 July 2011.

85 According to the 2011 Report "Health Systems in Transition Vol.13 No.2 2011 – Slovakia Health System Review", above cited (in footnote 7), p. 74.

(131) However, according to the information submitted by the Slovak authorities, based on the results of the monthly reallocation of contributions, a levy was imposed on SZP to pay funds to other health insurance companies. While this imprecise indication may lead to believe that SZP was a net contributor in the RES, it is not clear when this levy was imposed, what amount it involved, on what conditions and terms, and whether this was a general or an exceptional occurrence.

(132) The Commission invites the Slovak Republic to clarify the exact functioning of the RES and to identify who are the net beneficiaries and net contributors in this Scheme. Should VZP/SZP be net beneficiary(s) of the RES, as a general rule, the RES may be construed to grant an advantage to VZP/SZP.

(133) Notwithstanding the above, the Commission notes that, based on the current information, the RES is designed to provide compensation for the SGEI obligations incumbent upon all health insurance companies active in the Slovak health insurance market. The Slovak authorities are therefore invited to clarify whether the RES should be considered to cover entirely and exclusively the financing of the respective SGEI obligations entrusted to the health insurance companies or whether other sources of financing exist. The Slovak authorities are also invited to further substantiate the potential for this measure not to constitute State aid in light of the *Altmark* criteria.

(134) Apart from the Slovak Republic, the Commission invites the Member State and any interested parties to submit their observations on these aspects.

- **The transfers of portfolios to SZP and VZP**

(135) It could be considered that an advantage was granted to SZP and VZP through the transfer of these portfolios itself: the transfer of concluded insurance contracts can be seen as an advantage which other insurance companies did not get as they did not receive a business but had to start up and develop their business independently. These transfers appear to have been performed free of charge, directly to an operator chosen by the Member State, although other operators may have been interested and may have been willing to pay a market price for these transfers. However, the State appears to have decided to transfer these portfolios free of charge to the State-owned operators. According to the currently available information, only in 2011 was the law changed to provide that transfers of portfolios will be performed against payment of a market price.

(136) Furthermore, it is not clear whether these transfers of portfolios concerned all the claims and all the liabilities of the liquidated companies. If only the rights were transferred partially or entirely but not all the corresponding liabilities, this may indicate that an advantage was granted to the recipients SZP and VZP.

(137) Moreover, the value of the transfer of a portfolio of policies of insured persons can also be assessed in terms of its risk profile. For instance, a transfer of a high-risk portfolio may in itself constitute a burden on the recipient company. The obligation for the recipient company to accept such portfolio without the possibility to refuse under normal market terms could be construed as an SGEI obligation. Holding a high-risk portfolio would also mean that the recipient company would be entitled to the corresponding compensation from the RES. By comparison, the transfer of a low-risk portfolio may be viewed as an advantage to the recipient company, but in turn would trigger a higher payment/contribution from the recipient company into the RES.

Depending on these aspects, the transfer of an insurance portfolio may or may not constitute an advantage granted to the recipient company.

(138) The Commission therefore invites the Member State and any interested parties to submit their observations on these aspects.

➢ **General considerations on the applicability of the *Altmark* criteria**

(139) It appears that there are general SGEI obligations entrusted to all health insurance companies in Slovakia, deriving from the operation as an insurance company in accordance with the national provisions of Act No. 580/2004 and Act No. 581/2004. However, SZP and VZP may have been entrusted with additional specific SGEI obligations. This may be the case in particular for the SGEI obligations that SZP apparently was entrusted with prior to its transformation into a joint-stock company, and which have produced SGEI liabilities possibly eligible for compensation. It may also be the case as concerns the further transfers of portfolios of insurance companies, as explained above.

(140) In this context, the Commission recalls that SGEI compensations granted to a company may not constitute an economic advantage under certain strictly defined conditions.

(141) In particular, in its *Altmark* judgment[86], the Court of Justice held that where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 107(1) TFEU.

(142) However, the Court also made clear that for such public service compensation to escape qualification as State aid in a particular case, the four cumulative criteria summarised below must be satisfied:

- First, the recipient undertaking must be properly entrusted with the performance of SGEI obligations, and these obligations must be clearly defined;
- Second, the parameters on which the compensation of these SGEI obligations is calculated must be established in advance in an objective and transparent manner;
- Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in discharging the SGEI obligations, taking into account the relevant receipts and a reasonable profit;
- Fourth, when the choice of the undertaking to perform the SGEI obligations, in a concrete case, is not done pursuant to a public procurement procedure allowing for selection of the candidate capable of providing those services at the least cost to the community, the level of compensation to be granted must

[86] Case C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht [2003] ECR I-7747, paragraphs 87 to 93.

be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred.

(143) In the later *BUPA* judgment, the Court of First Instance (CFI) recalled that in its *Altmark* judgment the Court of Justice did not place any temporal limitation on the scope of its findings. In this context, the CFI explained that the interpretation which the ECJ gave to a provision of EU law was limited to clarifying and defining the meaning and scope of that provision as it ought to have been understood and applied from the time of its entry into force. It followed from this that the provision thus interpreted had to be applied even retroactively to legal relationships which arose and were established before the judgment in question was delivered and that it was only exceptionally that, under a general principle of legal certainty inherent to the EU legal order, the Court might decide to restrict the right to rely on the provision thus interpreted where that could call into question legal relationships established in good faith. However, the CFI also made clear that such a restriction in the application of the provision thus interpreted had to be laid down itself in the judgment delivering that interpretation of the provision in question.[87]

(144) For the case at hand this means that, since in *Altmark* the ECJ did not impose any restriction on the retroactive application of its interpretation of the notion of aid and selective advantage under Article 107(1) TFEU, the principles, considerations and assessment criteria set out in the *Altmark* ruling are fully applicable to the factual and legal situation of the case at hand.

(145) The Commission would therefore analyse the *Altmark* criteria listed above with regard to the measures under assessment. However, given that the conditions of applicability of the *Altmark* case law are cumulative, non-compliance with one of these conditions would trigger the qualification of the measures as State aid within the meaning of EU law.

(146) Based on the current information, it is not possible to establish without any doubt whether all the above *Altmark* criteria are respected with regard to all measures at stake. First of all, given the lack of sufficient information, it is not possible to determine whether indeed all measures have been directed at compensating SGEI obligations which were possibly entrusted to SZP and VZP. Even if this was the case, it appears that in any circumstance the fulfilment of the fourth *Altmark* criterion may be questionable with regard to the measures at stake. Indeed, with regard to any of these measures, it does not seem that the choice of the health insurers SZP or VZP, to whom an SGEI was entrusted and compensated, was done as part of a public procurement procedure and moreover, one which would have ensured the least cost to the community. Furthermore, the Slovak authorities have not submitted evidence that the calculation of any SGEI compensation granted to SZP and VZP was based on the costs of a typical well-run and adequately equipped undertaking.

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87 Judgment of 12 February 2008, Case. T-289/03 BUPA c / Commission, [2008] ECR II-81, paragraphs 158-159. This judgment is final, not having been appealed to the Court of Justice. According to this ruling, these considerations deriving from case-law that concerns, in particular, the duty of the national courts to implement EU law apply *mutatis mutandis* to the EU institutions when they are, in turn, called to implement the provisions of EU law subject to a later interpretation of the Court (paragraph 159 of the judgment).

(147) The Commission therefore requests the Slovak Republic to clarify these aspects and invites the Slovak authorities and any interested parties to submit on all aspect raised above their respective observations and concrete detailed argumentations, where necessary supported by the relevant documentation.

3.1.4. *Distortion of competition and effect on trade between Member States*

(148) According to Article 107(1) TFEU, the measure must affect intra-EU trade and distort, or threaten to distort competition.

(149) When aid granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid. It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition.[88]

(150) For this purpose, with regard to all measures under assessment, the Commission notes that health insurance services are subject to intra-EU trade. In this context, where a Member State grants aid to an enterprise, its activity can be maintained or increased, with the result that the chances of other undertakings established in other Member States to enter the market of that Member State are reduced. Health insurance companies or other investors from EU Member States may indeed provide public health insurance in Slovakia by establishing a new company or acquiring a shareholding in an existing Slovak health insurance company.

(151) In fact, SZP and VZP operate in a market where various public and private operators engage in the provision of health insurance in a compulsory system. The private operators in that system are owned and/or controlled by foreign intra-EU and extra-EU investors. Some of the private health insurance companies active in Slovakia or their parent companies provide health insurance in other EU Member States. Since the State measures allow the beneficiary to compete more actively on those markets, they distort or risk distorting competition. In this context, the decision of health insurance companies from other Member States to invest in the Slovak market for compulsory health insurance may be influenced by State measures granted in favour of the State-owned operators SZP and VZP.

(152) Given that various operators in this market may receive public funding, the Commission considers that the measures under assessment, insofar as they would promote activities of an economic nature, would probably strengthen the position of operators who benefit from them and, therefore, cannot exclude that they have a potential effect on intra-EU trade, by restricting the ability of operators from other Member States to develop their activities in the Slovak health insurance market.

(153) Therefore, the Commission finds that at this stage it cannot be excluded that the measures under scrutiny are liable to affect EU trade and distort competition within the internal market.

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[88] Case C-730/79, judgment of 17 September 1980, Philip Morris / *Commission*, [1980] ECR, p. 2671, paragraphs 11 and 12, and judgment of 30 April 1998, Het Vlaamse Gewest / Commission, case T-214/95 [1998] ECR, p. II-717, paragraphs 48 to 50.

3.2. EXISTING AID

(154) In the current case, the Member State has not argued that any of the measures constitute existing aid, and has mainly argued that the provision of compulsory health insurance in Slovakia is a non-economic activity and thus there is no State aid.

(155) However, inasmuch as it cannot be excluded that compulsory health insurance in Slovakia may constitute economic activity, the possible presence of existing aid may be raised in relation to the RES (on-going measure), which was set up in 1995 and continued after Slovakia's accession to the EU (which took place on 01.05.2004). The RES was modified and continued further to the reforms of the Slovak health insurance system of 01.01.2005, which created the basis for the possibility that the activity may be of economic nature.

(156) The Treaty on the Accession of Slovakia (among other States) provides that aid that has been granted in the new Member States prior to accession and which is still applicable after, is only deemed to be existing aid if one of the following criteria is met:

(i) the aid measure was put into effect before 10 December 1994;

(ii) the aid measure falls under the Accession Treaty's transitional arrangements;

(iii) the aid measure is explicitly mentioned in an appendix to the Accession Treaty (the so-called "existing aid list"); or

(iv) under a procedure (the so-called interim procedure) provided under the Accession Treaty and to be applied between entry into force of the Accession Treaty and accession on 1 May 2004, the aid is notified to the national State aid authority and approved by this authority, and no objection has been raised by the Commission within 3 months following formal notification by the Accession country (the aid is then put on the existing aid list).

(157) The RES was not put into effect before 10 December 1994 and it was never notified or communicated to the Commission. It was neither part of the transitional arrangements nor mentioned in the appendix to the Accession Treaty. It was also not part of the interim mechanism prior to Slovakia's accession to the EU on 1 May 2004, as the Slovak authorities did not consider the compulsory health insurance activity economic in nature. Therefore, if compulsory health insurance in Slovakia had been activity of economic nature already at the moment of Slovakia's accession to the EU on 1.5.2004, payments under the RES could not qualify as existing aid.

(158) However, the Commission itself acknowledges that the provision of compulsory health insurance potentially became an economic activity only since the reform of the Slovak Health insurance market that entered into force on 1 January 2005. This would mean that ongoing State support measures in that sector such as the RES, which were put into effect before that date, initially could not constitute State aid but could have become existing aid on 1 January 2005 under the rule laid down in Article 1(b)(v) of Council Regulation 659/1999.[89]

[89] Which states 'aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of

(159) At the same time, in accordance with the case-law of the Court[90], the Commission must verify whether or not the legal framework under which an aid is granted changes after its introduction. According to the case law in Gibraltar[91], an alteration to existing aid should be regarded as changing the existing aid into new aid only "where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme".

(160) In light of these considerations, the Commission believes that, in any event, the modification of the RES on 1 January 2010 (see above paragraph (66)), by adding a new risk adjuster (economic activity status of the insured person) to gender and age, has affected the actual substance of the original measure (i.e. the nature of the advantage) and must therefore be held to constitute an alteration to the existing aid system. On the basis that CHI in Slovakia can be considered an activity of an economic nature, this alteration on 1 January 2010 transformed the RES into new aid within the meaning of Article 1(c) of the Procedural Regulation as from that date.

3.3. LAWFULNESS OF THE AID MEASURES

(161) Neither the modification of the RES (1 January 2010) nor any of the other measures were notified to the Commission according to Article 108(3) TFEU.

(162) Since the measures have therefore been put into effect before formal approval by the Commission, to the extent that the measures qualify as State aid, the Slovak authorities have not fulfilled their stand-still obligation under Article 108(3) TFEU.

3.4. COMPATIBILITY WITH THE INTERNAL MARKET

3.4.1. *Legal basis*

(163) If the measures constituted aid under Article 107(1) TFEU, their compatibility would need to be assessed.

(164) According to the case-law of the Court,[92] it is up to the Member State to invoke possible grounds of compatibility, and to demonstrate that the conditions for such compatibility are met.

(165) As regards measures in favour of SZP/VZP, the Commission notes that, since the Slovak authorities do not consider these measures to amount to State aid, no specific and detailed argumentation has been brought forward as to their compatibility with the internal market.

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the common market and without having been altered by the Member State'; Council Regulation 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ('Procedural Regulation'), OJ L 83, 27.3.1999, p. 1. Compare the Decision of the Commission of 3 October 2012 in Case SA. 23600, Financing arrangements concerning Munich Airport Terminal 2.

90 Case C-44/93 Namur-Les Assurances du Crédit SA v Office National du. Ducroire and Belgian State [1994] ECR I-3829.

91 Joined cases T-195/01 and T-207/01, [2002] ECR II-2309, paragraph 111.

92 Case C-364/90, Italy/Commission, paragraph 20.

(166) However, the Slovak authorities do claim that the provision of compulsory health insurance in Slovakia is a service in the general interest, and that SZP was entrusted therewith, although in their view this service qualifies as non-economic.

(167) To the extent that the Commission finds the activity to be economic in nature and accepts the qualification of the services as SGEIs, a compatibility assessment of the measures in favour of SZP/VZP could be carried out in light of Article 106(2) TFEU (paragraphs (169) ff.).

(168) In the alternative, the possible compatibility of the State aid with the internal market on the basis of the derogation provided in Article 107(3)(c) of the TFEU could be explored (paragraphs (185) ff.), while the derogations provided for in Articles 107(2) TFEU and 107(3)(a)(b) and (d) TFEU clearly do not apply.

3.4.2. *Compatibility under Article 106(2) TFEU*

(169) Article 106(2) TFEU provides that "undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union."

(170) This Article provides a derogation from the prohibition of State aid contained in Article 107(1) TFEU to the extent that the aid is necessary and proportional in that the lack of aid would hinder the performance of the SGEI under acceptable economic conditions. Under Article 106(3) TFEU it is for the Commission to ensure the application of this Article, including *inter alia* by specifying under which conditions it considers the criteria of necessity and proportionality to be fulfilled.

(171) On 31 January 2012, the new SGEI package, including the 2012 SGEI Framework[93] and the 2012 SGEI Decision[94] entered into force. As of this date, the compatibility of aid in the form of public service compensation has to be examined in light of the criteria laid down in the 2012 SGEI Decision and in the 2012 SGEI Framework.

(172) According to Article 2 of the 2012 SGEI Decision, this Decision is only applicable to State aid in the form of compensation for SGEI below EUR 15 million and to aid in the form of compensation of SGEI provided by hospitals and undertakings in connection with the running of social services, more specifically health and long term care, childcare, access to and reintegration in the labour market, social housing and the care and social inclusion of vulnerable groups.

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93 Communication from the Commission: European Framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15-22.

94 Commission Decision of 20 December 2011 on the application of Article106(2) of the TFEU on State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEI, OJ L 7, 11.1.2012, p. 3-10.

(173) On the basis of paragraph 11 of the 2012 SGEI Framework, State aid falling outside the scope of the 2012 SGEI Decision may be declared compatible with Article 106(2) of the Treaty if it is necessary for the operation of the service of general economic interest concerned and does not affect the development of trade to such an extent as to be contrary to the interests of the Union. Furthermore, the 2012 SGEI Framework applies retroactively to any aid on which the Commission takes a decision after 31 January 2012, even if such aid was notified and/or granted before this date. [95]

(174) The Commission notes that the argumentation provided by the Slovak authorities is insufficient as regards the application of Article 106 (2) TFEU.

(175) It is true that the Slovak authorities indicate that public health insurance is a (non-economic) service of general interest. However, the Slovak authorities do not provide any detailed argumentation in respect of the applicability of Article 106(2) TFEU.

(176) The basic compatibility conditions underlying Article 106(2) TFEU, that can be found both in the SGEI Decision as well as in the SGEI Framework are:

- the aid should granted for a genuine and correctly defined service of general economic interest as referred to in Article 106(2) of the Treaty;
- the responsibility for the operation of the SGEI must be entrusted to the undertaking concerned by way of one or more acts, the form of which may be determined by each Member State. Such act should clearly specify the content and duration of the public service obligations; the undertaking entrusted with these obligations and, where applicable, the territory concerned; the nature of any exclusive or special rights assigned to the undertaking; the description of the compensation mechanism and the parameters for calculating, monitoring and reviewing the compensation; and the arrangements for avoiding and recovering any overcompensation.
- the amount of compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit.

(177) The Commission has doubts as regards the fulfilment of these basic compatibility conditions, which coincides with the Commission's doubts about the fulfilment of the materially similar first three *Altmark* criteria (see above paragraphs (139) ff.).

(178) First, given that the Slovak authorities have not provided the Commission with a clear definition of the scope and nature of the obligations imposed on SZP/VZP, the Commission does not at this stage have sufficient information to conclude on the existence of a genuine public service.

(179) Second, insofar as at this stage the public service obligations have not been precisely defined, on the basis of the information available the Commission cannot consider that the public mission has been adequately entrusted to the beneficiary. As a result, there

[95] However, in case of illegal State aid, according to its paragraph 69, the 2012 SGEI Framework excludes retro-active application of its paragraphs 14, 19, 20, 24, 39 and 60.

is currently a lack of information and clarity about all the specifications which a proper act of entrustment should make.

(180) Moreover, since the Commission does not have a clear picture regarding the definition of the SGEI obligations precisely relevant for the different measures in this case nor does it know of the specifications a proper act of entrustment should contain, it is not in a position to assess the costs resulting from those obligations and the level of compensation that would be proportionate.

(181) In addition, with the information available at this stage, it is questionable that the other compatibility requirements under Article 106(2) would all be met cumulatively, as required.

(182) In view of the above, at this stage the Commission raises doubts as to whether any potential aid granted to SZP/VZP could be declared compatible with the internal market under Article 106(2) TFEU.

(183) The Commission therefore invites the Slovak authorities to provide concrete, specific and detailed argumentation and documentation whether, why and to what extent the measures fall under the 2012 SGEI Decision or 2012 SGEI Framework and whether, why and to what extent the compatibility criteria laid down therein would be fulfilled.

(184) Other interested parties are also invited to submit their observations in this respect.

3.4.3. COMPATIBILITY UNDER ARTICLE 107(3)(C) TFEU

(185) Article 107(3)(c) TFEU states that "aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest" may be considered to be compatible with the internal market.

(186) The Commission notes that the argumentation provided by the Slovak authorities is also insufficient as regards the direct application of Article 107(3)(c) TFEU.

(187) The Commission also notes that Paragraph 9 of the 2012 SGEI Framework states that "aid for providers of SGEIs in difficulty will be assessed under the Community guidelines on State aid for rescuing and restructuring firms in difficulty".

(188) However, the Commission currently has insufficient information on whether SZP/VZP was a firm in difficulty at the time of the receipt of SGEI compensation, nor, if relevant, on whether the compatibility conditions of the Guidelines on Rescue and Restructuring aid[96] have been fulfilled.

(189) Hence, prima facie, the Commission doubts that the measure could be considered compatible under Article 107(3)(c) TFEU.

(190) By opening the formal investigation procedure, the Commission invites the Slovak authorities and third parties to provide comments in this respect.

[96] OJ C 244, 1.10.2004, p. 2.

4. SUMMARY CONCLUSIONS AS TO THE COMMISSION'S DOUBTS

(191) In light of the particularities of the case (as described above), SZP/VZP and the other companies offering health insurance in the compulsory system in the Slovak Republic may have been engaged in an economic activity as from 01.01.2005.

(192) On the basis of the explanations made above, the Commission considers at this stage that it cannot be ruled out that the measures at stake in this case constitute State aid to SZP/VZP within the meaning of Article 107(1) TFEU.

(193) In the absence of specific arguments or clear indications as to their compatibility with the internal market, at this stage of the procedure there are doubts as to whether those measures could be considered compatible with the internal market under Article 106(2) or Article 107(3)(c) TFEU.

(194) Therefore, the Commission considers it necessary to initiate the formal investigation procedure provided for in Article 108(2) TFEU in relation to these measures.

(195) The final conclusion as to whether or not the activity of compulsory health insurance in the Slovak Republic is indeed economic or non-economic in nature, whether the State measures fulfil all the other conditions to constitute State aid and if so whether they are compatible with the TFEU will only be drawn in the closing decision to be adopted after completion of the formal investigation, when all available information (including further Member State's and third parties comments) have been collected and an in-depth assessment of all information has been made.

In the light of the foregoing considerations, the Commission has decided to initiate the formal investigation procedure provided for in Article 108(2) TFEU in relation to the measures described above.

Acting under the procedure laid down in Article 108(2) TFEU, the Commission requests the Slovak Republic to submit its comments and provide all such information as may help to assess the abovementioned measures, within one month of receipt of this letter. It also requests your authorities to forward a copy of this letter to the potential recipients of the aid immediately.

The Commission wishes to remind the Slovak Republic that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipients.

The Commission warns the Slovak Republic that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories of the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does

not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State aid Greffe
1049 Brussels
Belgium
Fax: +32 2 296.12.42

Yours faithfully,

For the Commission

Joaquín *ALMUNIA*

Vice-President