EUROPEAN COMMISSION
Competition DG

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COMMISSION DECISION

of 15 October 2014

on the measures SA.23008 - 2013/C (ex 2013/NN)

implemented by Slovak Republic for

Spoločná zdravotná poisťovňa, a.s (SZP) and Všeobecná zdravotná poisťovňa, a.s (VZP).

(Only the Slovak version is authentic)

(Text with EEA relevance)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (hereafter: "TFEU"), and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above[1],

Whereas:

1. PROCEDURE

(1) On 2 April 2007, the Commission received a complaint from privately-owned health insurer Dôvera zdravotná poisťovňa, a.s ("Dôvera" or "the complainant") on an alleged State aid measure to State-owned health insurer Spoločná zdravotná poisťovňa, a.s ("SZP") in the form of an increase on 26 January 2006 of its registered capital by SKK 450 million (approximately EUR 15 million).

[1] OJ C 278, 26.09.2013, p. 28.

(2) The Commission sent a request for information to the Slovak Republic on 21 August 2009. After an extension of the deadline to reply, the Slovak authorities provided the requested information by their submission dated 24 September 2009.

(3) By letter of 26 February 2010, the Commission requested the Slovak Republic to provide further information about this capital injection and asked for clarifications regarding the Slovak Risk Equalisation Scheme (RES), another measure that could possibly be classified as State aid. By letter of 25 March 2010, the Slovak authorities requested an extension of the deadline to reply to this request, which was accepted by the Commission by letter of 31 March 2010. After the Commission had reminded the Slovak Republic on 16 June 2010 to submit the information, the Slovak authorities responded to the request by letter of 9 July 2010. As requested by the Commission in its letter of 4 November 2010, the Slovak Republic submitted a non-confidential version of that reply on 3 December 2010.

(4) On 1 January 2010, SZP merged with the other State-owned Slovak health insurer Všeobecná zdravotná poisťovňa, a.s ("VZP"). From 1998 up until at least 2005, those two State-owned joint stock companies received the insurance portfolios of other health insurance companies.

(5) In two meetings between the Commission and Dôvera held on 10 October 2010 and 15 March 2011, the subject of the complaint and the functioning of the health insurance sector in Slovakia were discussed. In its submission of 15 July 2011, Dôvera provided additional information on the nature of the health insurance sector in Slovakia and extended the scope of its complaint by including three new measures allegedly granted in favour of SZP and VZP: (i) the discharge of SZP's debt by the State-owned company Veritel´ a.s. in 2004-2005 through two payments of EUR 52,7 million and EUR 28 million; (ii) a subsidy of EUR 7,6 million granted in 2006 to SZP by the Ministry of Health and (iii) a State financed capital increase totalling EUR 65,1 million granted to VZP on 1 January 2010. Consequently, the Commission invited the Slovak authorities to comment on the extended complaint with its new allegations. After an extension of the reply deadline, the Slovak authorities provided their comments by letter of 11 November 2011.

(6) After a meeting with the Commission's services on 15 December 2011, Dôvera provided further information about the nature of the national health insurance sector by letter of 16 January 2012.

(7) By letter of 2 July 2013, the Commission notified the Slovak Republic that it had decided to initiate the formal investigation procedure laid down in Article 108(2) of the Treaty (the "opening decision"). The opening decision was published in the Official Journal of the European Union[2], calling on interested parties to submit comments.

(8) By letter of 24 July 2013, the Slovak authorities requested an extension of the deadline to submit their comments on the opening decision, which was accepted by the Commission by letter of 30 July 2013. By letter of 27 August 2013, the Slovak Republic submitted its observations on the opening decision.

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2 OJ C 278/3, 26.09.2013, p. 28.

(9) The Commission received comments on the opening decision from five third parties: from the Institute for Economic and Social reforms (INEKO) by letter of 15 October 2013; from Union zdravotná poisťovňa, a.s. ("Union Health Insurance") by letter of 25 October 2013; from the Health Policy Institute ("HPI") by letter of 28 October 2013; from Združenie zdravotných poisťovní SR ("ZZP", the Association of Health Insurance Companies in Slovakia) by letter of 28 October 2013 and from Dôvera by letter of 11 November 2013.

(10) Those comments were forwarded to the Slovak authorities by letters of 20 November and 20 December 2013. On 20 December 2013, the Slovak authorities requested an extension to the deadline to respond to those comments until 31 January 2014, which was accepted by the Commission on the same day. By letter of 29 January 2014, Slovakia replied to the comments submitted by third parties on the opening decision.

(11) On 2 April 2014, a meeting took place between the Commission's services and the Slovak authorities.

(12) On 11 April 2014 and 25 August 2014, the Commission sent additional requests for information to which Slovakia replied, respectively, by letter of 15 May 2014 and 27 August 2014.

2. BACKGROUND

2.1. The evolution of the compulsory health insurance system in Slovakia

(13) In 1994, Slovakia changed from a single State run insurance company system to a pluralistic model where both public and private entities could operate. An in-depth reform comprising Acts Nos. 581/2004 and 580/2004, which entered into force on 1 January 2005 (the "2005-reform"), altered the rules for the redistribution of the collected health insurance contributions and changed the legal form of all insurance companies (whether State-owned or in private ownership) from legal entities *sui generis* to incorporated limited liability companies (i.e. profit-seeking joint stock companies of private law). An independent regulatory authority, the Slovak Health Surveillance Authority ("HSA") was set up to issue operating licenses and to supervise the insurance companies' compliance with the applicable regulations. In essence, these reforms were designed to contribute to improved efficiency in the use of available resources and increase the quality of health care provision.[3]

(14) In Slovakia, all health insurance companies, public and private, provide compulsory health insurance for Slovak residents.[4] The possibility in Act No 580/2004 to also provide individual health insurance as a top up to the basic benefit package under

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[3] See also 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), in particular p. 99.

[4] In accordance with Section 3 of Act No 580/2004, a natural person permanently resident in the Slovak Republic must be insured under the public health insurance system. The law provides for exceptions, but only for those who have health insurance in another country. That Section 3 also defines which persons must be insured under the public health insurance system even if they are not permanently resident in the Slovak Republic. In this Decision, the term "Slovak resident" refers, as appropriate, to all categories of persons which must be insured under the public health insurance system.

compulsory health insurance has remained marginal, due to the comprehensive healthcare benefits covered by compulsory system.[5] Furthermore, in 2005, a legislative act introduced the possibility for all health insurance companies to provide voluntary health insurance for those who are excluded from compulsory health insurance[6].

(15) In 2007, Act No. 530/2007 amended Act No. 581/2004 and prohibited insurance companies active in the compulsory health insurance sector from paying out profits in the form of dividends with effect from 1 January 2008, thereby imposing an obligation to reinvest surpluses generated in the Slovak health system. As a result, health insurance companies were not allowed to distribute profits at all as of January 2008. However, on 26 January 2011, the Slovak Constitutional Court declared the ban on profit distribution incompatible with several provisions of the Slovak Constitution. Further to this Judgment, in July 2011, the Slovak authorities amended Act No. 530/2007 by Act No. 250/2011 to allow health insurers again to distribute (to their shareholders) profits achieved from the compulsory health insurance activity, subject to certain conditions[7]. As a result of these legislative changes, an infringement procedure concerning the restriction on the disbursement of profit was closed by the Commission in December 2011.[8]

(16) On 31 October 2012, the Slovak authorities approved a project plan 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 January 2014) of the privately-owned health insurance companies or through their expropriation (until 1 July 2014) and would establish a single (State-owned) health insurance company.[9] However, at the time that the present decision was adopted, neither step of the above-mentioned project plan had thus far been implemented.[10]

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5 See also 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.

6 Act No 352/2005, i..e. for people without permanent residence and not employed in Slovakia, and those with permanent residence in Slovakia but health insurance abroad. According to the reply by the Slovak authorities to the opening decision, this possibility of voluntary insurance was abolished with effect from 1 May 2010 by Act No 121/2010.

7 These conditions are: (1) mandatory use of profit for formation of a reserve up to the level of 20% of 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.

8 Infringement No. 2008/4268 in which 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 to freely dispose 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 63 of the Treaty.

9 The Permanent Court of Arbitration has recently declined jurisdiction over the claims by Dutch company Achmea (the owner of Union Health Insurance) against these plans, see Achmea v the Slovak Republic, PCA Case No. 2013-12, ruling of 24 May 2014, available on: http://news.achmea.nl/achmea-discloses-awards-of-arbitration-tribunals/.

10 See http://spectator.sme.sk/articles/view/54162/3/achmea_loses_against_slovakia.html.

2.2. Health insurers in Slovakia

(17) Under Slovak 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 HSA.

(18) Slovak residents have a choice to contract with any of the following three insurers to obtain a compulsory health insurance package:

(a) the Slovak 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; VZP was merged with State-owned company SZP on 1 January 2010 pursuant to Act No 533/2009 (therefore, where appropriate, the joint entity is hereafter referred to as "SZP/VZP"); The Slovak Republic is the sole shareholder of VZP;

(b) the privately-owned public limited company Dôvera (its main shareholder is the Central European financial group PENTA); Dôvera was established on 1 October 2005 and merged with another privately-owned Slovak health insurance company, Apollo, on 31 December 2009. In 2010, the merged entity was the biggest privately-owned health insurance company in Slovakia;

(c) the privately-owned public limited company Union Health Insurance, established on 9 March 2006 and a member of the Netherlands based Achmea group, formerly Eureko.

(19) Table 1 shows the evolution of the market shares of the different companies providing compulsory health insurance in the Slovak Republic during the years 2008-2013[11]:

[11] Figures over 2011-2013 were provided by the complainant in its comments to the opening decision.

Table 1

Year	2008	2009	2010	2011	2012	2013[12]
Companies	Number of persons insured (%)					
VZP	55,4	55,0	66,74	65,79	64,4	64,09
SZP	13,6	12,0	2010: SZP merges with VZP			
Apollo	8,4	10,0	2010: Apollo merges with Dôvera			
Dôvera	16,2	16,0	26,37	26,8	27,75	27,49
Union	6,4	7,0	6,89	7,41	7,85	8,42

(20) 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 strict budgetary constraints, they are fully responsible for financial shortfalls. As private joint-stock companies set under general company law, health insurance companies appear to autonomously manage their operations and healthcare costs.

(21) Health insurance companies can and do make profits.[13] 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), income from property, gifts and other incomes. Profits can be made by health insurance companies for instance by improving their management system and through their negotiations when contracting with healthcare providers.

2.3. Main features of the Slovak Compulsory Health Insurance sector

2.3.1. Social objective and public interest

(22) 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 Slovak residents have the obligation to be insured.[14] The right to free health care based on the health insurance is a constitutional obligation of the Slovak Republic.[15] 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 Slovak residents through managing the compulsory

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12 See also paragraph 37 of the ruling of the Permanent Court of Arbitration of 24 May 2014 in PCA Case No. 2013-12, Achmea v Slovak Republic (see footnote 9 above).

13 Opening decision, recitals (23) and (24).

14 The obligation to be 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.

15 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 health insurance, citizens have the right to free health care and to medical supplies under conditions defined by law."

health insurance scheme in Slovakia. The Slovak Republic is responsible by law for financing the health care system and for covering losses in the healthcare sector.[16] 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.

2.3.2. Compulsory membership, open enrolment and community rating

(23) In accordance with the provisions of Act No 580/2004 and Act No 581/2004, participation in the Slovak public health insurance programme is compulsory for most of the population in the Slovak Republic.[17] Compulsory health insurance in Slovakia also covers persons insured in accordance with Council Regulation (EEC) 1408/71[18], until 30 April 2010, and, as of 1 May 2010, in accordance with Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems.[19]

(24) Insured persons have the right to opt for a health insurance company of their choice and to switch insurance company once a year. 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 Slovak resident 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 the grounds of age, state of health or disease risks[20] and have to offer basic health insurance at the same price to all persons regardless of these factors.

(25) The Slovak health insurance system therefore also includes a legal architecture for equitable risk-sharing among health insurance companies through a risk equalisation scheme (RES). Under the RES[21], 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.[22]

2.3.3. Benefits and income-related contributions

(26) 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 (such as age of the insured or health status). Those contributions, which the Slovak authorities

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16 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).

17 See footnote 4.

18 Council Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ L 149, 5.7.1971, p. 2.

19 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1.

20 See also Section 6(9) of Act No 580/2004.

21 Part 3 of Act No 580/2004

22 See below recitals (45) to (47).

consider to be part of the public funds, are collected from: (1) employees and employers; (2) the self-employed; (3) the voluntarily unemployed; (4) the State (for the "State-insured", i.e. the group of mostly economically inactive people); and (5) payers of dividends.

(27) All the insured 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[23] received. Medical services covered by compulsory health insurance are provided regardless of the contributions paid by the insured person.

(28) 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 that package. Currently, the basic benefit 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 basic benefit package can be narrowed or widened by government decree (without parliamentary negotiations). Since the Slovak Constitution guarantees every citizen health care under the compulsory health insurance system according to the conditions laid down by law, insurance companies have no influence over the benefit basket, level of coverage or premiums of the basic benefit package, as these are fixed by law.

(29) Slovak health insurance companies can and do add to the basic benefit package various additional entitlements (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 individual health insurance services that may be offered for a fee.

2.3.4. Selection of healthcare providers and services

(30) The health insurance companies are allowed to select healthcare providers and to negotiate contracts with physicians and individual hospitals. Health insurance companies thus contract with individual healthcare providers; those contracts are concluded independently of one another and a particular 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.

(31) To ensure geographical accessibility of health services, a minimum network requirement is set by the government to influence capacity planning. In the provision of compulsory health insurance, the health insurance companies are required by law to contract with a minimum network of hospitals. Each health insurance company creates its own network and improves the minimum network by selective contracting with additional hospitals and other healthcare services providers. Healthcare services rendered by those hospitals and/or other healthcare services providers and included in

[23] See Act No. 577/2004.

the compulsory health insurance coverage are thus covered by the health insurer in favour of the insured persons. Health insurance companies have a certain margin of discretion in negotiating with hospitals on price and quality of the healthcare services rendered to insured persons.

2.3.5. Regulatory framework

(32) The compulsory health insurance scheme in the Slovak Republic is regulated by special regulations.[24] 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 listed 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 HSA, which has a monitoring and supervisory role in the health system. The HSA supervises whether health insurance companies and providers adhere to this legislative framework and intervenes when violations occur.

3. DESCRIPTION OF THE CONTESTED MEASURES

(33) The present decision examines the following six measures (collectively referred to as "the contested measures"):[25]

3.1. The 2006 capital increase in SZP

(34) By letter dated 2 April 2007, the privately-owned health insurance company Dôvera lodged a complaint with the Commission against a capital injection by the Slovak Republic 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.

(35) That capital increase was associated with the reform of the healthcare sector and the 2004-2005 reform of the health insurance sector in the Slovak Republic. In fact, at the time of its establishment as a joint-stock company in 2005, SZP , as the legal successor of a public institution[26],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). Those liabilities amounted to SKK 467 765 million (approximately EUR 15,5 million) on 31 December 2005.

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24 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.

25 The measures are described in more detail in the opening decision, recitals (44) to (72).

26 As a public institution prior to 1 May 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.

3.2. The discharge of SZP's debts by Veriteľ

(36) Veriteľ was established as a new State agency for the consolidation of healthcare debts in 2003[27] and was tasked by the Slovak Government with the implementation of a project to relieve healthcare facilities and health insurance companies of their debts prior to the reorganisation of all existing health insurance funds as joint stock companies by 30 September 2005. The debt relief process was carried out pursuant to Slovak Government resolutions.

(37) In the period 2003 to 2005, Veriteľ settled debt in the health sector exceeding EUR 1 100 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 Veriteľ was abolished in 2006.[28]

(38) The complainant claims that the discharge by Veriteľ of EUR 52,7 million of SZP's debt, being higher than what the complainant itself had received[29], suggests unjustified discriminatory treatment in the debt-discharging process. However, the complainant's main concern is that, additionally, on 30 November 2005 (therefore after the transformation), Veriteľ further discharged approximately EUR 28 million of further debt that SZP had to the special premium redistribution account. This was done through the assignment by SZP to Veritel of premium claims and interest. SZP assigned to Veritel approximately SKK 929 million in claims of premium and interests (of this about SKK 343 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.[30]

3.3. The 2006 subsidy to SZP

(39) In the second half of 2006, a further subsidy was granted to SZP by the Ministry of Health using part of the liquidation balance of Veriteľ, which was dissolved in July 2006. According to the complainant, the amount of the subsidy was approximately EUR 7,6 million.

(40) 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 those debts continued to exist at the time of the grant.

(41) However, according to the Slovak authorities, the financial resources from the liquidation balance of Veriteľ 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

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

28 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. 142.

29 According to the complainant, Dôvera's predecessors, by comparison, which were jointly larger in size than SZP saw their debts discharged by an amount of EUR 27,25 million only.

30 According to the complainant, quoting from the Report on Inquiry into the Activities of Veriteľ, a.s. Throughout its Existence, Slovak Ministry of Finance, September 2007.

authorities, no subsidy was involved, but rather a normal payment of existing undisputed liabilities by the State – unpaid premiums for health insurance.

3.4. The 2010 capital increase in VZP

(42) 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.

(43) 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. The complainant also claims the State had absolutely no hope of receiving a return on its investment within a reasonable timeframe, particularly given that Slovakia had just introduced a law preventing health insurance companies from distributing their profits.

(44) 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.

3.5. The Risk Equalisation Scheme (RES)

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

(46) The RES[31] 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), the State and the payers of dividends, 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, by virtue of a calculation designated by the HSA. [32] Parameters applied in the RES are the age, gender and, since 2010, economic activity status of the insured.

(47) The Slovak authorities consider the RES not to be a form of State aid but rather a matter of equalising funds in accordance with applicable RES criteria for insured persons, i.e. it is a case of solidarity between insured persons and therefore not State aid.

3.6. The transfers of portfolios to SZP and VZP

(48) Another measure which has come to the Commission's attention during its preliminary assessment is the existence of several direct transfers, by intervention of the State, to SZP and VZP of portfolios of other health insurance companies (in particular of the company Družstevná zdravotná poisťovňa to VZP, and of the company Európská zdravotná poisťovňa to SZP) which were liquidated over time.

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31 Part 3 of Act No 580/2004

32 See recitals (60) to (67) of the opening decision for more details on the RES.

(49) According to the Dôvera, the EZP portfolio was transferred directly to SZP even though there were other interested operators on the market, whereas the limits and conditions of the transfer were unclear.

(50) The Slovak Republic argues that the decision of the HSA to transfer EZP's portfolio to SZP without any consideration is in line with the provisions of Act No 581/2004 while respecting the right of the insured to choose a health insurance company. They claim that other insurance companies have expressed an interest in this portfolio, but with conditions that would have disproportionately prolonged the liquidation process. Furthermore, according to the Slovak authorities, since the transfer of portfolios concerned all the claims and all the liabilities of the liquidated companies, no advantage was granted to the recipients VZP and SZP.

4. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(51) In its opening decision, the Commission expressed doubts about determining the economic or non-economic nature of the activity concerned and indicated that, in light of the particularities of the case, 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 1 January 2005. It considered that the mixture of economic and non-economic features of the Slovak compulsory health insurance system made it necessary to perform an in-depth analysis of its different elements and their respective importance within the scheme to determine whether the activity of compulsory health insurance, in the way it is organised and carried out in Slovakia, is to be considered as economic (as from 1 January 2005) or non-economic in nature.

(52) The Commission also indicated that – in case the activity would need to be considered as economic in nature – it did not have enough information at its disposal to determine whether the measures under scrutiny provide SZP/VZP with a selective advantage.

(53) Having concluded that it could therefore not exclude the existence of State aid at that stage, in the absence of specific arguments or clear indications as to their compatibility with the internal market, the Commission also expressed doubts as to whether those measures could be considered compatible with the internal market under Article 106(2) or Article 107(3)(c) of the Treaty, in the event it would conclude that those measures qualify as State aid.

(54) In that context, the Commission noted that the final conclusion as to whether 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 internal market could only be drawn in a final 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.

5. COMMENTS FROM INTERESTED PARTIES

(55) The Commission received the following comments from interested parties, as summarised below:

5.1. Dôvera

(56) In response to the opening decision, Dôvera, the complainant, provided additional information about the health insurance system and additional argumentation in particular to substantiate its view that SZP/VZP are undertakings subject to competition law and have benefitted from incompatible State aid.

(57) Dôvera points out that SZP/VZP compete with private health insurance companies offering the same service while seeking profit, referring to its previous submissions on the economic nature of the activity and to recent case law of the Court. [33] In this context, Dôvera claims that the several elements presented by the Slovak Republic listed in the opening decision as pointing to the non-economic nature of VZP/SZP activities do not withstand scrutiny. According to Dôvera, the 2004-2005 reform was meant to create a competitive market, which has been recognised and confirmed by the Slovak judiciary (i.e. the Slovak Constitutional Court) as well as the Slovak authorities themselves. In this context, Dôvera also points to the fact that insurers compete for healthcare providers through selective contracting and negotiations on price and quality of services, and it also mentions marketing campaigns by health insurance companies to retain and attract clients. Dovera also denies the exclusively social nature of the system, referring to the possibility for health insurers to make and distribute profits and the willingness of private investors to invest in operators active in the Slovak compulsory health insurance sector.

(58) Referring to its previous submissions to the Commission before the opening decision, Dôvera further submits that all measures identified in that decision should be qualified as unlawful aid since all the other elements of Article 107(1) of the Treaty have been fulfilled. In its view, the Slovak Republic cannot be considered to have acted as a market economy investor when increasing SZP's capital in 2006 and VZP's capital in 2010. Dôvera also argues that the Slovak Republic discriminated between SZP/VZP and private insurance companies by a more favourable treatment of SZP in the 2003-2005 debt discharge process as well as by the introduction of two new parameters in the RES in 2009 and 2012. As regards the transfer of portfolios, Dôvera's comments focus on the transfer of EZP's insurance portfolio, as it has no information on a previous portfolio transfer to VZP. In this respect, it states that the Commission may have been misinformed by the Slovak authorities about the applicable legal framework for that portfolio transfer.

(59) Dôvera finally argues that the Slovak authorities have failed to demonstrate that the provision of compulsory health insurance is a service of general interest and thereby questions the very basis of an analysis under the *Altmark* case law[34] and the Commission's SGEI package.

5.2. Union Health Insurance

(60) The observations on the opening decision submitted by Union Health Insurance, the other privately-owned competitor of SZP/VZP, are broadly in line with the comments provided by Dovera, arguing that SZP and VZP are undertakings within the meaning of

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[33] Case T-347/09, Germany v. Commission, 12 September 2013, not yet published.

[34] Case C-280/00 Altmark [2003] ECR I-7747.

Article 107(1) of the Treaty. Union Health Insurance submits that five of the six measures described in section 3 of this Decision qualify as State aid and are incompatible with the internal market. As regards the sixth measure, the RES, Union Health Insurance claims that it could potentially fulfil the conditions of the *Altmark* case-law for public service compensation or may be compatible with the internal market under Article 106(2) of the Treaty, requiring further investigation into its potential discriminatory approach in favour of the net recipient of the RES, i.e. SZP/VZP.

5.3. HPI, INEKO and ZZP

(61) The observations on the opening decision submitted by the other three third parties, i.e. HPI, INEKO and ZZP are mainly supportive of the position of the complainant Dôvera and Union Health Insurance that the activity is of an economic nature and the measures involve State aid by providing SZP/VZP with a selective advantage, showing their conviction that health insurers are operating in a competitive environment (by using different ways to attract clients) and claiming that the State has given preferential treatment to its State-owned health insurance companies.

6. COMMENTS ON THE OPENING DECISION AND ADDITIONAL SUBMISSIONS OF THE SLOVAK REPUBLIC

(62) The Slovak Republic submitted its observations on the opening decision and provided comments on the third-party observations.

(63) In their submissions, the Slovak authorities provided clarifications and additional argumentation to strengthen their position that the system of compulsory health insurance is not subject to competition rules as it does not involve an economic activity. They allege that Slovak compulsory health insurance cannot be qualified as economic pursuant to settled case law of the Court of Justice[35] in particular for the following reasons:

(a) The system has a social objective.

(b) The system is based on solidarity, in particular in view of the following:

i. compulsory enrolment for Slovak residents;

ii. all the insured are guaranteed the same minimum level of benefits;

iii. contributions are unrelated to benefits on an individual level, as contributions are fixed by law (no competition on prices);

iv. there is risk-solidarity among insurers: RES and community rating.

(c) There is a detailed regulatory framework, subject to supervision by the State: status, rights and obligations of all health insurance companies are established by law.

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[35] In particular Joined Cases C-159/91 and C-160/91 Poucet and Pistre; Case C-218/00 Cisal and INAIL; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 AOK Bundesverband.

(64) The Slovak Republic rebuts the assumption that, as a result of 2005 legislative changes, the Slovak health system changed into a commercial system and claims that the system never lost its public non-economic nature. They also draw attention to the fact that the Slovak health insurance system is part of the social security system and point to the competences of Member States under Article 168(7) of the Treaty for the organisation and delivery of health care services.

(65) The Slovak authorities further state that the health insurance reform did not replace public health insurance with private health insurance and did not open the coverage of any risk pertaining to statutory social security to private insurers. According to Slovakia, the primary aim of the health sector reform was to set precise rules for dealing with financial resources allocated to health and reorganising, by 30 September 2005, all existing health insurance funds as joint stock companies with clearly defined accounting rules seemed to be an appropriate way of setting those rules. The Slovak authorities consider that all health insurers in Slovakia are involved in managing public funds entrusted to them within the public health insurance system.

(66) According to the Slovak authorities, the fact that the Slovak compulsory health insurance system allows for a limited degree of competition on quality could be seen as an element that encourages health insurance companies to operate economically in accordance with principles of sound management, in the interests of the proper functioning of the system, but not as an element that could influence the non-economic nature of the health insurance system as a whole.

(67) The Slovak authorities also explain that the funds accumulated and redistributed within the structure of the Slovak public health insurance system via the health insurance companies are the sum of public health insurance contributions which are mandatory under the law, and are thus part of Slovakia's public finances. All health insurance companies are therefore tasked with the management of public funds collected from the public in accordance with relevant legal regulations with a view to their use in the coverage of health care.

(68) To further support their claim, the Slovak authorities also recall the fact that even after the ban on profit distribution was abolished in 2011, the amending Act No 250/2011 allowed health insurance companies to make a profit only under precisely defined conditions, i.e.:

(a) the introduction of a tax on the profits of health insurance companies;

(b) the mandatory use of profits to create a reserve fund of up to 20% of the paid-up registered capital of the insurance company (the reserve fund may be used only to cover losses of that insurance company);

(c) the mandatory creation of technical provisions to cover the planned health care of insured persons on waiting lists (consequently, health insurance companies cannot make a profit at the expense of their clients by placing them on waiting lists instead of promptly covering their health care; this is essential for compliance with generally accepted accounting standards in public health insurance).

(69) In this respect, the Slovak authorities explained that, when VZP reported a surplus, it created a health care fund to cover the use of health care and to finance particularly costly health care covered by public health insurance. In addition, in the years in which they reported a surplus, part of the profits of VZP was also allocated to the statutory reserve fund which was subsequently used to reduce accumulated losses. Therefore, according to the Slovak authorities, no profit made by a State–owned health insurance companies was ever disbursed to shareholders.

(70) In this context, the Slovak Republic also point to a further restriction on health insurance companies in that they can only borrow funds in accordance with the Act 523/2004 on public administration budgetary rules, subject to prior approval from the HSA.

(71) To further support their claim that the activity of compulsory health insurance does not fall under competition rules, the authorities also draw attention to a 2009 investigation by the Slovak Antimonopoly Office which revealed that the activities by health insurance companies are performed within a system characterised by a high degree of solidarity where health care is provided free of charge and the essential elements of such activities are regulated by the State and that, therefore, the activities carried out by health insurance companies in the provision of public health insurance cannot be regarded as an economic activity by undertakings which restricts competition. Hence, according to the Antimonopoly Office, the Slovak Competition Act does not apply to the activities of health insurance companies carried out in the provision of public health insurance. [36]

(72) The Slovak authorities also explain that in 2011, the Constitutional Court declared the ban on profit distribution as from 2007 unconstitutional because it violated Slovak constitutional rights of ownership, but that it did not share the view that the Health Insurance Companies Act restricted the principles of a market economy. They also point to the fact that the Constitutional Court further observed, in this regard, that legislation on health insurance excluding or significantly restricting the impact of market-economy tools and hence restricting competition is constitutionally acceptable.

(73) In addition to their claim that the activity of compulsory health insurance in Slovakia falls outside the scope of competition rules, the Slovak authorities claim that the measures do not fulfil the other State aid elements under Article 107(1) of the Treaty. In this context, they claim that the 2006 and 2009 capital injections were not aid as they respected the market economy investor principle. They further deny that there was unjustified discriminatory treatment in the debt-discharging process by Veritel' and maintain that no subsidy was granted to VZP in 2006, but rather that this operation involved a normal payment of existing undisputed liabilities by the State. The Slovak authorities provide further details on the transfers of portfolio's from DZP to VZP and of EZP to SZP and claim that also those transfers did not provide SZP/VZP with a selective advantage under Article 107(1) of the Treaty. Finally, they also provide further information on the RES, clarifying in particular how the contributions were redistributed (monthly and annually) in the years 2006 to 2012, and argue that this

[36] Investigation performed by the Antimonopoly Office in connection to the proposed merger between SZP and VZP, completed on 3 December 2009; see also the 2009 annual report of the Antimonopoly office available at http://www.antimon.gov.sk/data/att/958.pdf.

measure does not qualify as State aid either, as it equalises the risks included in the system due to the existence of uniform contribution rates for all groups of insured persons with varying degrees of risk.

(74) The Slovak authorities devoted their comments to the opening decision on defending their position that SZP/VZP, due to the absence of economic activity, are not undertakings and that the measures are compliant with the market economy investor principle and do not provide SZP/VZP with an advantage and, hence, do not involve aid. Therefore, they did not consider it necessary to present any arguments about the compatibility of the alleged aid measures.

7. ASSESSMENT OF THE MEASURES

(75) Article 107, paragraph 1 of the TFEU provides that "[…] 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."

(76) On the basis of that provision, the State aid rules only apply where the beneficiary of the measure is an "undertaking". The case-law of the Court of Justice of the European Union ("CJEU") defines an undertaking for the purposes of Article 107(1) of the Treaty as any entity engaged in an economic activity, regardless of its legal status or the way in which it is financed.[37] The classification of a particular entity as an undertaking thus depends entirely on the economic or non-economic nature of its activities.

(77) As explained in the opening decision, the question whether the measures granted in favour of SZP/VZP constitute State aid therefore depends in the first instance on whether and to what extent SZP/VZP, when they 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 case-law.

(78) According to the CJEU, an economic activity is any activity consisting in offering goods and/or services on a given market.[38] In this context, 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.[39] 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.[40]

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

38 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.

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

40 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 5, point 12.

(79) In relation to the provision of health care, the qualification of health care schemes as involving an economic activity depends on their political and economic specificities and on the particular way in which such schemes are set up and structured in the Member State concerned. In essence, the case-law of the CJEU distinguishes between schemes based on the principle of solidarity and economic schemes.[41]

(80) The case-law of the CJEU uses a range of criteria to determine whether a social security scheme is solidarity-based and therefore does not involve an economic activity. A number of factors can be relevant in this respect: (i) whether affiliation with the scheme is compulsory[42]; (ii) whether the scheme pursues an exclusively social purpose[43]; (iii) whether the scheme is non-profit[44]; (iv) whether the benefits are independent of the contributions made[45]; (v) whether the amount of benefits paid is not necessarily proportionate to the insured persons' earnings[46]; and (vi) whether the scheme is supervised by the State.[47]

(81) In contrast to solidarity-based schemes, economic schemes are regularly characterised by: (i) optional membership[48]; (ii) the principle of capitalisation – i.e. dependency of entitlements on the contributions paid and the financial results of the scheme[49]; (iii) their profit-making nature[50] and (iv) the provision of entitlements which are supplementary to those under a basic scheme.[51]

(82) Certain schemes combine elements of both categories (solidarity-based and economic schemes)[52], so that, in order to determine whether a particular scheme is economic or non-economic in nature, the Commission must verify the presence and weigh the respective importance of each of the different elements listed in the two preceding recitals to the scheme at hand. [53]

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41 The Commission has summarised the relevant case law of the CJEU with regard to the application of these rules to the financing of social security and health care schemes 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 ("2012 SGEI-Communication").

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

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

44 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.

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

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

47 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.

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

49 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.

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

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

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

53 In this respect, it should also be noted that the recent Judgment (T-347/09, Germany v. Commission, Judgment of 12 September 2013, not yet published) referred to by the complainant Dôvera in its comments to the opening decision merely confirms the fact that non-profit organisations can offer goods and services on a market too (see also 2012 SGEI-Communication, paragraph 9 with reference to the

(83) The ultimate determination whether the provision of compulsory health insurance services in the Slovak Republic is a non-economic or an economic activity will therefore depend on a thorough analysis of the specific way in which that activity is organised and carried out in that Member State and will therefore be specific to the compulsory health insurance system in that Member State. It is in the light of these general observations that the Commission will assess whether the contested measures allegedly granted to SZP/VZP constitute State aid as measures granted to an "undertaking" within the meaning of Article 107(1) of the Treaty.

(84) A number of indicators point to the non-economic nature of the Slovak health insurance system, in particular as regards its social features and objectives, which feature predominantly in the operation of that system, and that the system is centrally based on the solidarity principle.

(85) First, participation in the public health insurance programme is compulsory by law for most of the 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 that person insurance on the grounds of his age, state of health or disease risks. [54]

(86) Second, Slovak compulsory health insurance is based on contributions that are fixed by law proportional to the income of the insured, rather than being based on the insured risk (age, health status, disease risks of the insured person). Moreover, 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. As a result, insurance companies have no possibility to influence either the amount of contributions or the minimum level of coverage to which the insured persons are entitled as this is all fixed by national legislation.

(87) Third, all the insured are guaranteed by law to receive the same basic level of benefits, which is in fact very high since it covers almost all healthcare procedures provided in the Slovak Republic, meaning that virtually complete healthcare is provided through the compulsory health insurance scheme.[55] The Slovak risk equalisation scheme (RES) ensures that insurance risks are shared and therefore further strengthens solidarity. In addition, the Slovak system imposes the community rating principle, that is, 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.[56]

(88) Finally, in addition to all of the above-mentioned social and solidarity characteristics, the Commission recalls that Slovak compulsory health insurance is organised and carried out under a strong regulatory framework: the status, rights and obligations of all

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case-law). However, this does not change the fact that the conclusion as to the economic or non-economic nature of the activity in a given case has to be based on the presence and weighing of the respective importance of each of the different elements.

54 See recitals (23) to (25).

55 See recitals (26) to (29).

56 See recitals (23) to (25).

health insurance companies are established by laws laying down detailed conditions and they operate subject to tight supervision by the State.[57]

(89) On the basis of these characteristics, the Commission concludes that the Slovak compulsory health insurance system is non-economic in nature, so that SZP/VZP cannot be considered to qualify as an "undertaking" within the meaning of Article 107(1) of the Treaty.[58]

(90) The Commission acknowledges certain features of the Slovak compulsory health insurance system could point to the economic nature of the activities involved in that system: (i) the presence of several insurance operators (public and private) in the Slovak compulsory health insurance sector, (ii) some degree of competition between these health insurers, which are (iii) involved in a for-profit activity, and (iv) the fact that the activity was considered to be open to competition by the Slovak Constitutional Court. Nevertheless, the Commission is of the opinion that the presence of those features do not call into question its conclusion that compulsory health insurance in Slovakia is a non-economic activity.

(91) First, the Commission notes that the fact that there are several (public and private) operators active in the compulsory health insurance sector does not in itself confer an economic nature to their activities in a system where, as explained in recitals (85) to (87), the social features and objectives of the system are predominant, the solidarity principle is central to the operation of that system and State supervision is tight. Such an interpretation would grant inappropriate weight to the organisational arrangements chosen by a Member State in operating part of its social security system, rather than to the substance of the system in question. [59]

(92) Second, from the case law of the CJEU it follows that also the presence of scope for competition in the health insurance system and competition actually happening, even if intended by the legislator and confirmed by the judiciary, does not necessarily confer an economic nature to the activity in question. The CJEU has made clear that for concluding on the economic or non-economic nature of activities in statutory health insurance system which, like the Slovak system, gives some latitude for competition, the nature and degree of this competition, the circumstances in which it takes place and the presence and weight of the other relevant factors are decisive.[60] In the case at hand,

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57 See recital (32).

58 The features of the Slovak compulsory health insurance system are similar to the German statutory public health insurance system assessed by the CJEU in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 AOK Bundesverband. The CJEU considered the German system to be of non-economic nature and noted in particular that the German sickness funds were compelled by law to offer to their members essentially identical obligatory benefits fixed by the State which did not depend on the amount of the contributions paid by the insured persons, were therefore not in competition with one another as regards the grant of obligatory statutory benefits and were engaged in a system of risk equalisation (see, paragraphs 52 to 54 of that judgment).

59 See also Case C-350/07 Kattner Stahlbau (cited above), paragraph 53, and in particular the opinion of Advocate-General Mazak in that case (paragraph 59).

60 In this respect, the Commission recalls that the fact that the German sickness funds in the AOK case (Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 AOK Bundesverband) were even engaged in some price competition through a certain scope to vary the contribution rates of affiliates did not call into question the finding of the Court that they were not involved in an economic activity. According to the CJEU, the introduction of an element of competition with regard to contributions to encourage the

the type of competition which is most interesting for consumers – price competition with regard to the level of contributions – is ruled out since Slovak health insurers cannot modify the level of contributions of the insured which are fixed by law. Moreover, the scope for quality competition is rather limited since the Slovak compulsory health insurance system foresees a very wide range of statutory benefits which are equal for all insured persons, thus leaving little scope for insurers to compete for clients on the basis of offering additional (gratuitous) entitlements. Health insurers therefore have no possibility of influence over those statutory benefits and are therefore not in competition with one another or as regards the grant of the obligatory statutory benefits in respect of health care which constitutes their main function.

(93) Third, the Commission considers the non-economic nature of the activity of compulsory health insurance not to be affected by the fact that health insurance companies engage in quality competition and procurement efficiency competition by buying healthcare and related services of good quality from providers at competitive prices. In this way, the insurance companies, through an activity severable from their contracts with the insured persons within the compulsory health insurance procure the inputs necessary to fulfil their role within that system. It follows from the case law of the CJEU that if the system of compulsory health insurance is due to its inherent features of a non-economic nature, then the activity of procuring inputs necessary to run this system is likewise of a non-economic nature. [61]

(94) Fourth, the fact that the regulation of compulsory health insurance in Slovakia allows health insurers to make profits and to distribute some profits to their shareholders does not change the non-economic nature of their activities since they are performed in a system which has a strong presence of all the above mentioned features indicating the non-economic nature. The mere fact that health insurers are allowed to make profits and to distribute some profits cannot in itself overturn the predominance of the system's social features and objectives, the central role of the solidarity principle in it and the tight degree of State regulation and supervision under which it operates. With regard to that State regulation, the Commission recalls that the possibility to make, use and distribute profits is framed and limited by legal obligations imposed by the State on the Slovak insurance companies designed to ensure the viability and continuity of compulsory health insurance with all its predominant social and solidarity objectives.[62] The freedom to make, use and distribute profits is therefore significantly more restricted in the sector of Slovak compulsory health insurance than in normal commercial sectors and subjected to the attainment of social and solidarity objectives.

(95) As a result, due to the limited nature of competition that was introduced into the Slovak compulsory health insurance system (i.e. only limited quality competition and no price competition at all) as well as the restrictions on the way profits can be made and used, the elements of competition and profit-orientation which are present in the Slovak system of compulsory health insurance do not call into question the predominant social,

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sickness funds to operate in accordance with principles of sound management, that is to say in the most effective and least costly manner possible, was in the interests of the proper functioning of the German social security system. According to the CJEU, the pursuit of that objective does not in any way change the nature of the sickness funds' activity (see paragraph 56 of that judgment).

61 See Case T-319/99 FENIN [2003] ECR II-357 (in particular paragraph 37).

62 Recitals (84) to (88).

solidarity and regulatory features indicating the non-economic nature of the activities performed by health insurance companies in that system. Rather, the elements of competition and profit-orientation present in the Slovak system of compulsory health insurance should be considered to pursue the prime objective of encouraging the insurance companies to operate in accordance with the principles of sound management in the interest of a proper functioning of that social security system, thereby contributing to ensure that the social and solidarity objectives of that system are attained.[63]

(96) Finally, the Commission considers that the fact that the Slovak Constitutional Court (when assessing a possible violation of the right under the Slovak Constitution to conduct a business) considered the Slovak compulsory health insurance system to be "included in the realm of competition" does not mean that this system involves activities of an economic nature within the meaning of the State aid rules. In fact, in that case the Slovak Constitutional Court was asked to review whether the 2007 legislative ban on profit distribution by health insurance companies was compatible with the Slovak Constitution (violation of the right of ownership, protection of property and right to conduct a business) and compatible with Articles 18, 49, 54, 63 of the Treaty. The Slovak Constitutional Court decided that this ban violated the Slovak Constitution, and that therefore there was no reason to discuss the substantive elements of the EU internal market rules or to rule on their violation.

(97) Against this background, taking account of the particularities of the current case and the presence and weighting of the relevant indicators, the activity of compulsory health insurance as organised and carried out in Slovakia cannot be considered as an economic activity.

(98) In light of the above, the Commission concludes that SZP/VZP, as the recipients of the contested measures, cannot be considered to constitute undertakings within the meaning of Article 107(1) of the Treaty and thus that those measures do not give rise to State aid within the meaning of that provision.

(99) Therefore, there is no need to examine the other conditions for the existence of State aid within the meaning of Article 107(1) TFEU nor to assess the compatibility of the contested measures.

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8. CONCLUSION

(100) In light of the above considerations, the Commission concludes that the contested measures do not constitute State aid within the meaning of Article 107(1) of the Treaty,

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[63] Also in light of the main (efficiency) objective of the reform stated in recital (13).

HAS ADOPTED THIS DECISION:

Article 1

The following measures granted by the Slovak Republic to Spoločná zdravotná poisťovňa, a.s (SZP) and/or Všeobecná zdravotná poisťovňa, a.s (VZP) do not constitute aid within the meaning of Article 107(1) of the Treaty:

(a) the capital increase in SZP of SKK 450 million made between 28 November 2005 and 18 January 2006;
(b) the discharge of SZP's debts through Veritel' a.s. from 2003 to 2006;
(c) the subsidy granted to SZP by the Ministry of Health in 2006;
(d) the capital increase in VZP of EUR 65,1 million on 1 January 2010;
(e) the Risk Equalisation Scheme set up by Part 3 of Act No 580/2004; and
(f) the transfer of portfolios of liquidated health insurance companies, in particular of the company Družstevná zdravotná poisťovňa to VZP and of the company Európská zdravotná poisťovňa to SZP.

Article 2

This Decision is addressed to Slovak Republic.

Done at Brussels, 15 October 2014

For the Commission

Joaquín ALMUNIA
Vice-President of the Commission

Notice

If the decision 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 the decision. Your request specifying the relevant information should be sent by registered letter or fax to:

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State Aid Greffe
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