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Subject: SA.19864 (2014/C) (ex NN 54/2009) – Belgium
Public financing of Brussels public IRIS hospitals

Sir,

The Commission wishes to inform Belgium that, following the Judgment of the General Court of the European Union of 7 November 2012 in case T-137/10 which annulled the Commission's decision of 28 October 2009, it is now under the duty to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) on the measures referred to above.

1. THE PROCEDURE

(1) By letters of 7 September 2005 and 17 October 2005, registered on 12 September 2005 and 19 October 2005, the Commission received a complaint against the Belgian State as regards the alleged granting since 1995 of unlawful and incompatible aid to the five public hospitals (hereinafter "IRIS-H")[1] belonging to the IRIS[2] network of the Brussels Capital Region (hereinafter "IRIS"). The complaint was lodged by two associations (i.e. the *Coordination bruxelloise d'institutions sociales et de santé* (CBI) and the

[1] See section 2.1 for more details about these public hospitals.
[2] The abbreviation IRIS corresponds to *Interhospitalière Régionale des Infrastructures de Soins*.

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Association bruxelloise des institutions de soins privées (ABISP)) representing hospitals managed by legal persons governed under private law (hereinafter "private hospitals") and individually by several hospitals that are members of these associations.[3]

(2) The complaint focuses on the following groups of arguments: (i) the absence or insufficiently clear definition and entrustment of the specific public service missions that are only conferred to the IRIS-H, (ii) the compensation of losses of these hospitals by public authorities, (iii) the overcompensation of the costs linked to the public service missions of the IRIS-H through the *Fonds Régional Bruxellois de Refinancement des Trésoreries Communales* (hereinafter the "FRBRTC"), (iv) the lack of transparency in the method of public financing of the IRIS-H, and finally (v) the presence of cross-subsidisation of the non-hospital activities of the IRIS-H through the State compensation received for the provision of their hospital missions.[4]

(3) Following the submission of additional information by the Belgian authorities, the Commission services informed the complainants by letter of 10 January 2008 of their preliminary views on the complaint[5] and asked the complainants to submit new information allowing them to reconsider the preliminary assessment of the complaint, failing which the complaint would be considered withdrawn. Following the reply from the complainant, the Commission services confirmed their preliminary assessment in their letter of 10 April 2008.

(4) Subsequently, the complainants informed the Commission of the fact that they had introduced an application for annulment before the Court of First Instance of the European Communities (hereinafter "CFI") against the letter of 10 January 2008, which they saw as a Commission decision.[6] Furthermore, on 20 June 2008 the complainants lodged an application for annulment of the letter of the Commission services of 10 April 2008.[7] Both Court procedures were suspended until 31 October 2009 by the CFI, based on the information submitted by the Commission that it intended to adopt a decision pursuant to the Council Regulation (EC) 659/1999.[8] With a view of adopting such a decision, the Commission services requested additional information from the Belgian authorities as well as from the complainant.

(5) In its decision of 28 October 2009, the Commission decided not to raise objections to the aid for financing of the public hospitals of the IRIS network in the region Brussels-Capital as the financing at hand was deemed compatible with the common market under the conditions set out in the Commission Decision of 28 November 2005 on the

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3 The complainants had requested that their respective identities remain confidential. However, given the applications for annulment introduced by these parties and the following annulment judgment by the General Court in Case number T-137/10, these identities are now public (see paragraphs (4) and (6)). It also has to be noted that the ABISP is no longer pursuing the complaint.

4 This latter argument was first raised by the complainants around the end of 2008.

5 In essence, the Commission services' preliminary assessment was that it appeared that the IRIS-H were duly entrusted with public service missions, that their compensation was clearly defined and that there was no overcompensation. Therefore, the Commission services considered that there were no problems with respect to State aid rules. In addition, they noted that the requirements concerning transparency also seemed to be fulfilled. As a result, the Commission services concluded that there were insufficient reasons to pursue the investigation unless new elements were brought forward by the complainant.

6 Case T-128/08, not reported.

7 Case T-241/08, not reported.

8 OJ L 83, 27.03.1999, p. 1. as amended by Council Regulation (EU) 734/2013 of 22.07.2013.

application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (hereinafter "2005 SGEI Decision")[9] and directly with Article 86(2) EC Treaty (now Article 106(2) TFEU) with respect to entrustments pre-dating the entry into force of the 2005 SGEI Decision on 19 December 2005.

(6) Subsequently, the complainants launched an action for annulment of this Commission decision at the General Court of the European Union (hereinafter "GC")[10]. The GC annulled the Commission decision by its judgment of 7 November 2012, concluding that this decision had been adopted in violation of the procedural rights of the complainants. In particular, the GC concluded that the Commission should have had serious doubts concerning the compatibility of the measures at hand with the internal market considering the arguments of the complainants with respect to the compatibility. These doubts according to the GC concern: the existence of clearly defined entrustment acts for the additional SGEI that are specific to the IRIS-H (see paragraph (28) for these SGEI); the existence of clear compensation parameters established *ex ante* and the existence of methods that allow avoiding overcompensation. The GC therefore concluded that the Commission was required to initiate the formal investigation procedure, in order to gather any relevant information for verifying the compatibility of all the aid measures at issue with the internal market, and to allow the complainants and other interested parties to present their observations in connection with that procedure.[11] In this context, it should be noted that neither the complainants nor the GC raised any doubts about the compatibility of the public financing of the so-called basic hospital mission (see below paragraphs (22), (87), (90) and (94)) which is common to both public and private hospitals in Belgium.

(7) Accordingly, as a result of the GC's annulment judgment the Commission is now under the duty to initiate the formal investigation proceedings under Article 108(2) TFEU in respect of the public financing measures of the IRIS-H.

2. DESCRIPTION

2.1. THE PUBLIC IRIS HOSPITALS

(8) This decision concerns public hospitals in the Brussels Capital Region that are part of the IRIS-network. In particular, it concerns the following five public general hospitals: the CHU Brugmann (CHU-B), the CHU Saint-Pierre (CHU-SP), the Queen Fabiola Children's University Hospital (HUDERF), Iris South (IS) and the Institut Bordet (IB).[12] Together, these five public hospitals (i.e. the "IRIS-H") operate circa 2600 of the 8800 hospitals beds available in the Brussels Capital Region and employ almost 10000 staff. The IRIS-H provide over 1 million medical consultations each year.[13]

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[9] OJ L 312, 29.11.2005, p. 6.

[10] Formerly the Court of First Instance (CFI), renamed to the General Court as from 1 December 2009 with the entry into force of the Treaty of Lisbon.

[11] Case T-137/10 *CBI v Commission,* [2012] ECR (not yet reported), paragraph 313.

[12] Some of these hospitals operate on several sites. In particular, CHU-B is active at three sites (Victor Horta, Paul Brien, and Reine Astrid); CHU-SP is active at two sites (Porte de Hal and César de Paepe); and IS is active at four sites (Etterbeek-Ixelles, J. Bracops, Molière-Longchamp, and Baron Lambert).

[13] Figures are based on information provided by the Belgian authorities for the year 2012 and on information from the website of IRIS (http://www.iris-hopitaux.be).

(9) The IRIS-H did not exist in their current form until the end of 1995. Before 1996, the Brussels public hospitals were not incorporated but were supervised and managed directly by the *Centres Publics d'Action Sociale* (hereinafter "CPAS"). The CPAS are public bodies, with legal personality, that were established by the Organic Law of 8 July 1976[14] (hereinafter "Loi CPAS", see also section 2.3.2). Each Belgian municipality has its own CPAS. The CPAS provide social aid to persons who do not have the resources to be able to live in dignity and who are ineligible for other forms of social security. In case the CPAS is loss-making, its corresponding municipality is obliged to cover these deficits.

(10) The municipalities and the CPAS[15] of the Brussels Capital Region all had structural financial deficits, primarily caused by the deficits of the public hospitals under their supervision. To end this situation of continuing deficits and to guarantee the continuity and the viability of the Brussels public hospitals, the Brussels Regional Government decided in 1994 to restructure these hospitals. In the course of 1994 and 1995 the necessary legal and practical arrangements were taken.

(11) The structural part of the restructuring plan consisted of the liquidation of the old public hospitals and the transfer of their activities to new independent legal structures (i.e. the IRIS-H). In particular, for each of these hospitals an association under public law was established on the basis of Chapter XII of the Loi CPAS. In this way, the IRIS-H obtained legal and financial independence in January 1996. For each hospital, these associations were formed between the respective municipality (or municipalities), the respective CPAS (or CPASs), the association representing the hospital's doctors and, where relevant, the *Université Libre de Bruxelles* and/or the *Vrije Universiteit Brussel*. Each of the five IRIS hospitals has a General Assembly and Administrative Council in which these parties are represented but in each case the government representatives (i.e. the municipality and the CPAS) occupy a large majority of the seats in these decision-making bodies. As a result, it is clear that each of the IRIS-H is controlled by the public authorities.

(12) The IRIS-H are part of IRIS, an umbrella organisation that was established on 1 January 1996. IRIS supervises these hospitals and coordinates their activities.[16] The local and regional government (i.e. the municipalities, the CPAS and the Brussels Capital Region) control IRIS via their large majority in the General Assembly and the Administrative Council. The main objective of IRIS is to reach a sustainable financial equilibrium for the hospital activities performed by the IRIS-H. Therefore the main tasks of IRIS are to coordinate the activities of the IRIS-H, determining the strategic plan for the IRIS network, improving the quality of the services offered, and monitoring the budget of the network. The financial part of the restructuring will be described in more detail in section 2.4 of this decision.

[14] Belgisch Staatsblad/Moniteur Belge of 5 August 1976, p. 9876.

[15] In particular this concerns the municipalities and CPAS of Anderlecht, la Ville de Bruxelles, Etterbeek, Ixelles, Schaerbeek and Saint-Gilles as only they have public general hospitals under their supervision.

[16] This supervision is subject to the conditions specified in the Ordonnance (by the Brussel Capital Region) of 22 December 1995 (Belgisch Staatsblad/Moniteur Belge of 7 February 1996, p. 2737).

2.2. FINANCING OF THE IRIS HOSPITALS

2.2.1. General Financing

(13) The Law of 7 August 1987[17] (*Loi coordonnée sur les hôpitaux*, hereinafter "LCH") describes the different financing sources for Belgian hospitals irrespective of whether they are public or private institutions. In total, five different sources can be distinguished in the financing of hospitals. The operating costs of Belgian hospitals are mainly covered by the first three financing sources[18] while the fourth and fifth sources are related to hospitals' investments costs.

a) The first financing source is the *budget des moyens financiers* (hereinafter "BMF")[19], which is established by the Federal Minister responsible for public health, and only takes into account healthcare activities that are covered by the social security. The BMF is determined for each hospital within the boundaries of the global Federal State budget. Since 2002, the BMF for each hospital is mainly determined on the basis of the number of days of treatment provided by each hospital during the previous year. This specific amount is then paid out to each of the hospitals in two different ways. In particular, about 85% (the fixed part) of this amount is being paid to the hospitals on a monthly basis, while the remaining 15% (the variable part) is paid on the basis of the actual admissions and days of treatment in the hospital during the year. At the end of each year, the BMF is recalculated on the basis of the actual figures for the year and depending on the outcome the hospital either receives or has to repay an amount.

The BMF is regulated by the Royal Decree of 25 April 2002 which defines the conditions and rules for setting the BMF granted to hospitals. In particular, the Royal Decree determines how the BMF is set, which costs are accepted and what criteria apply.[20] Among others, the BMF contains a section B8 which consists of an additional (limited) financing for hospitals that have a high proportion of disadvantaged patients. The financing awarded based on section B8 of the BMF however does not compensate the actual costs incurred by the hospitals. Instead, a fixed amount is allocated (based on criteria set out in the Royal Decree) among those hospitals that meet the conditions.[21]

b) The second source of financing are the social security payments, i.e. made by the *Institut National d'Assurance Maladie-Invalidité* (hereinafter "INAMI"), to the hospitals for the treatments they offered to their patients. This financing is based on the *Loi Assurance Maladie-Invalidité* (hereinafter "Loi AMI") which is the law setting up the Belgian social security system with regard to sickness and

[17] Belgisch Staatsblad/Moniteur Belge of 7 October 1987, p. 14652, replaced by the coordinated hospital Law of 10 July 2008 (Belgisch Staatsblad/Moniteur Belge of 7 November 2008, p. 58624).

[18] In September 2013, the *Mutualité Chrétienne*, one of the largest Belgian *mutuelles* (which are the organisations that are responsible for the reimbursement of medical costs under the social security) published an article which shows that in 2011 Belgian hospitals' revenues were on average divided as follows between these three sources: (1) BMF: 49%, (2) INAMI: 42%, and (3) patients (or their private insurers): 9%.

[19] See Articles 87 and following of the Law of 7 August 1987.

[20] See Articles 24 until 87 of the Royal Decree of 25 April 2002, Belgisch Staatsblad/Moniteur Belge of 5 July 2002, p. 30290.

[21] See Article 102 §2 of the Law of 7 August 1987.

invalidity.[22] The hospitals directly charge part of the doctor's fees and the cost of the patients' medication to the INAMI. These payments however do not cover the full costs that the hospitals incur when providing their healthcare activities.

c) A third source of financing are payments made directly by the patient or by their private health insurers to the hospitals. These payments are necessary because the social security does not cover 100% of doctors' fees nor of medication and other medical supplies (e.g. implants). In addition, if patients choose to have a single room then supplements can be charged on top of the normal hospitalisation price and on top of the normal doctor's fee (i.e. more than the standard rates that apply per treatment). Finally, patients may also be charged for the use of additional services (e.g. rent for a TV, use of the hospital parking, etc.).

All payments made by patients or third parties to compensate hospital doctors for their treatment of hospitalised patients, have to be collected centrally.[23] The hospitals and their doctors conclude agreements that determine the percentages of the fees that the hospitals can keep to cover their collection costs and other costs that are not financed by the BMF.[24] Similarly as for the normal doctors' fees, part of the abovementioned supplements can also be retained by the hospital to cover part of its costs (again conditional on an agreement between the hospital and its doctors). Part of the doctors' fees are hence not a payment for the doctors but instead are used to cover the operating costs of the hospitals.

d) The fourth source of financing is specifically meant to cover investment costs incurred by the hospitals. The investments of hospitals are mainly covered by the State (the Federal government and the Regions each pay a part) and the remaining part is paid from the hospitals' own resources combined with bank loans. The government financing is aimed at the costs of building or renovating a hospital or hospital ward and the costs of the first acquisition of equipment and medical devices.[25] Investment subsidies are capped (e.g. a fixed amount per square meter or per unit).

e) The fifth and last source of public financing is related to investments and concerns damages payments for studies, the development of building projects, but also costs resulting from the closure or not using a hospital or hospital ward.[26]

2.2.2. Additional Financing for the IRIS-H

(14) Article 109 of the LCH (now Article 125 of the LCH in the version of the Law of 10 July 2008) contains an additional financing mechanism of which only public hospitals (such as the IRIS-H) can benefit. More specifically, the deficits of public hospitals have to be covered by the municipalities that control them (i.e. via their CPAS or via a central structure such as IRIS). The principle of the deficit cover by the municipalities was

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[22] See Law of 9 August 1963 as amended, Belgisch Staatsblad/Moniteur Belge of 1 November 1963, p. 10555.
[23] See Articles 133 until 135 of the Law of 7 August 1987.
[24] See Article 140 of the Law of 7 August 1987.
[25] See Article 46 and following of the Law of 7 August 1987.
[26] See Article 47 of the Law of 7 August 1987.

already included in the predecessor of the LCH i.e. in the Law of 23 December 1963[27] and was confirmed by Article 34 of the Law of 28 December 1973[28]. The criteria to calculate the deficits that the municipalities are obliged to cover are determined in a Royal Decree.[29] On this basis, the Federal Minister responsible for public health each year determines the deficit that must be covered for each hospital. In practice, the deficit that must be covered as determined by the Minister is not exactly equal to the deficit reported in the financial accounts of the hospital, since certain cost elements (e.g., the result of the non-hospital activities) contained in the latter are excluded from the former.[30]

(15) According to the complainants, the Brussels Capital Region has chosen to *de facto* take up the role of the relevant Brussels municipalities for the deficit financing. While the complainants do not put into doubt the competence of the Brussels Capital Region towards these municipalities they consider that what they qualify as regional financing of the IRIS-H goes beyond what is envisaged by the deficit cover as specified by Article 109 (now Article 125) of the LCH.

(16) In particular, the complaint specifically mentions interventions by the *Fonds Régional Bruxellois de Refinancement des Trésoreries Communales* (hereinafter "FRBRTC").[31] In addition, the complaint adds that the Brussels Capital Region itself also allegedly granted special subsidies to the municipalities[32] (i.e. up to EUR 10 million annually since 2003), which were allegedly intended to be passed on as aid for the hospitals. The complainants conclude that the IRIS-H benefited significantly from regional financing awarded to the municipalities in which they are located and that this financing cannot be justified on the basis of the Federal hospital financing system.

(17) The Commission observes in this context that the FRBRTC financing mechanism does not, as such, appear to constitute public financing of the IRIS-H. *Prima facie,* the FRBRTC merely seems to redistribute funds from the Brussels Capital Region to the municipalities in charge of the IRIS-H, while no funds seem to be granted directly to the IRIS-H via the FRBRTC. Likewise, the Brussels Capital Region appears to award the special subsidies (of up to EUR 10 million) only to the municipalities and not to the IRIS-H themselves. The relevant financing measures here under investigation are only transfers of public resources to the IRIS-H, not transfers of funds between the Brussels Capital Region and the Brussels municipalities. The Commission therefore seeks clarification on whether any FRBRTC funds respectively the special subsidies were directly transferred to the IRIS-H, or whether the FRBRTC and the special subsidies are

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27 Belgisch Staatsblad/Moniteur Belge of 1 January 1964, p. 2; this Law required that 10% of the deficit was covered by the municipality where the hospital was located and the remaining 90% by the Belgian municipalities where the patients reside.

28 Belgisch Staatsblad/Moniteur Belge of 29 December 1973, p. 15027.

29 Originally this was the Royal Decree of 8 December 1986 (Belgisch Staatsblad/Moniteur Belge of 12 December 1986, p. 17023), amended by Royal Decree of 10 November 1989, and replaced by the Royal Decree of 8 March 2006 (Belgisch Staatsblad/Moniteur Belge of 12 April 2006, p. 20232).

30 In this context it has to be noted that until 1982, the municipalities even had to cover the entire deficit caused by the hospital activities.

31 The FRBRTC was established by the Ordonnance of 8 April 1993, Belgisch Staatsblad/Moniteur Belge of 12 May 1993, p. 10889 (modified by Ordonnance of 2 May 2002).

32 These special subsidies were awarded on the basis of the Ordonnance of 13 February 2003 (Belgisch Staatsblad/Moniteur Belge of 5 May 2003, p. 24098).

merely financing mechanisms which operate between the Brussels Capital Region and the Brussels municipalities.

2.2.3. General Accounting Requirements

(18) All hospitals (i.e. public and private) are subject to certain requirements concerning accounting and transparency. In particular, each hospital must keep a set of accounts that allow determining the cost of each service and that respect certain elements of the Law of 17 July 1975[33] on accounting.[34] It is mandatory to record non-hospital activities on separate accounts, since these cannot be covered by the financing mechanisms foreseen by the LCH. Hospitals are also obliged to appoint an auditor who certifies the hospital's accounts and financial statements.[35] Finally, hospitals are required to submit certain (financial) information to the Federal Minister responsible for public health[36] and this Ministry also monitors compliance with the LCH.[37]

2.3. LEGAL FRAMEWORK UNDER WHICH THE IRIS-H OPERATE

(19) As public hospitals, the legal framework under which the IRIS hospitals operate is determined by two organic laws and the related implementing decrees. In particular, these are, on the one hand, the LCH and, on the other hand, the Loi CPAS. While the former is applicable to both public and private hospitals, the latter only applies to public hospitals.

2.3.1. The LCH

(20) Under the LCH, all Belgian hospitals (with the exception of military hospitals) are entrusted with certain public service obligations.[38] Article 2 LCH states:

> *With a view to the application of this coordinated law, the following are considered as hospitals: health institutions where at any moment appropriate specialized medical examinations and / or treatments in the field of medicine, surgery and possibly obstetrics can be provided in a multidisciplinary context, within the necessary and appropriate medical, medical-technical, nursing, paramedical and logistical framework, to (patients) who are admitted and can stay there, because their health requires this care to combat the disease in the shortest possible time or to relieve, restore health or improve or stabilize lesions.*

(21) This law among others also describes the types of hospitals that can be formally authorised[39], the conditions for the management of a hospital and the structure of the medical activity[40], the hospital programming[41], the conditions for authorisation of

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[33] Belgisch Staatsblad/Moniteur Belge of 4 September 1975, p. 10847.
[34] See Articles 77 and 78 of the Law of 7 August 1987.
[35] See Articles 80 until 85 of the Law of 7 August 1987.
[36] See Articles 86 until 86ter of the Law of 7 August 1987.
[37] See Article 115 of the Law of 7 August 1987.
[38] This law which was adopted on 7 August 1987 became applicable on 17 October 1987, and was amended and replaced by the coordinated Law of 10 July 2008 (which did not change the content of Article 2).
[39] See Articles 2 to 7 of the Law of 7 August 1987.
[40] See Articles 10 to 17 of the Law of 7 August 1987.
[41] See Articles 23 to 45 of the Law of 7 August 1987.

hospitals and hospital services[42], the legal relationship between a hospital and the hospital doctors, the financial statute of the hospital doctors including among others the collecting and setting of the fees, what the fees cover, and the allocation of the centrally collected fees[43].

(22) Hospitals that meet the requirements laid out in the LCH are considered by the Belgian State to be entrusted with a service of general economic interest (hereinafter "SGEI"), i.e. the provision of hospital services, and are therefore entitled to State compensation (for a description of the types of compensation see above paragraph (13)).[44] This **"basic hospital mission"** is the basic public service mission which both the public and private hospitals are entrusted with.

2.3.2. The Loi CPAS

(23) Since the IRIS hospitals are controlled by the CPAS and their respective municipalities, they are also subject to the Loi CPAS[45]. The Belgian authorities explain that for such public hospitals, the "basic hospital mission" is part of, or complementary to, a larger SGEI, namely the obligation to provide social aid as required by the Loi CPAS. In essence, they consider that the "basic hospital mission" as defined by the LCH is a minimum requirement for public hospitals, which can however be complemented at the level of each individual Belgian municipality with additional SGEI on the basis of the Loi CPAS.

(24) Article 1 of the Loi CPAS determines that every person is entitled to social aid and establishes the CPAS to ensure that this aid is provided. Article 57 of that same law specifies that the social aid can consist of financial aid, assistance in kind (e.g. meals, clothing, etc.), social and job market assistance, and medical assistance. Article 60(6) of the Loi CPAS mandates that where necessary, the CPAS establishes services or institutions with a social, curative or preventive character. It is on this basis that the CPAS can establish a public hospital (provided that certain conditions are met).

(25) In this context, the Belgian authorities note that when a CPAS wishes to establish a hospital (or any other institution necessary to perform its duties) it must meet the conditions laid down in Article 60(6) of the Loi CPAS. In particular, the CPAS must establish the need to set up a facility (in this case a hospital), taking into account, among others, the needs of the municipality and/or region and any facilities or similar service providers already in operation. According to the Belgian authorities, this in practice means that if a CPAS decides that privately operated facilities are insufficient, given the geographical distribution of health care provision, physical and social needs and the freedom of choice of patients, this CPAS is free to decide to set up a hospital. The same reasons that justify opening a hospital are then, according to the Belgian authorities, a constraint on the CPAS: if it wished to close the hospital, the CPAS would have to then

[42] See Articles 68 to 76sexies of the Law of 7 August 1987.
[43] See Articles 130 to 142 of the Law of 7 August 1987.
[44] Whether the hospitals are in fact entrusted with activities that constitute services of general economic interest in the sense of Article 106(2) TFEU will be assessed below (section 3.4).
[45] Indeed, Article 147 of the LCH explicitly mentions that the LCH complements the Loi CPAS for hospitals managed by a CPAS (which is the case for the IRIS hospitals).

demonstrate, in the same way, that the reasons justifying the original decision to set up the hospital no longer exist[46].

(26) It is not entirely clear to the Commission at this point how the requirement for the CPAS to establish the need to set up a hospital is different from the Belgian hospital programming mechanism of the LCH, which applies to both public and private hospitals. The programming mechanism consists of determining the maximum number of hospital beds per geographic region based on the needs identified by the Federal Government. It follows that unless the demand for hospital beds increases, new hospital beds (and in this sense, a new hospital) can only be created if existing beds are simultaneously removed elsewhere. The Belgian authorities claim a CPAS' decision to close a hospital must necessarily flow from the determination that the previously established need for that hospital is satisfied elsewhere. On the basis of the elements in the LCH and the Loi CPAS, they conclude that, unlike a private hospital, a public hospital will not close unless an equivalent health care service (either public or private) is established to replace it. The Commission seeks clarification on the exact nature of the requirement of Article 60(6) of the Loi CPAS, the possibilities for a public hospital to close down, and the difference with the hospital programming mechanism.

(27) Chapter XII of the Loi CPAS[47] also allows the CPAS to form an association with one or more other CPAS, with other public authorities and/or with non-profit legal persons. The IRIS umbrella organisation and the IRIS hospitals qualify as such associations (see paragraph (11)). The Loi CPAS continues[48] that the bylaws of such associations must, among others, specify the purpose(s) for which they are established. In addition, Article 135 *quinquies* of the Loi CPAS specifies that umbrella organisations (such as IRIS) must draw up strategic plans, which are binding for the IRIS hospitals (who in turn have to draw up management and financial plans). The Belgian authorities argue that the Loi CPAS, the bylaws of IRIS and the strategic plans of IRIS, and the bylaws of the IRIS-H entrust[49] the IRIS hospitals with additional SGEI on top of the "basic hospital SGEI" (as defined by the LCH, see above paragraph (22)). The Commission observes in this context that the CPAS and IRIS-H have also concluded so-called *domicile de secours* conventions (in 1996 and also in 1998) which could be considered as delegating some CPAS tasks to these hospitals.

(28) According to the Belgian authorities, the respective Brussels municipalities and CPAS have chosen to entrust the IRIS-H with the following **additional SGEI**[50] that contribute

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[46] The Belgian authorities refer in this context to a judgment of the Belgian *Conseil d'Etat* of 9.12.2002 which annulled the transfer of a public CPAS nursing home to private owners. The *Conseil d'Etat* held that the decision to close or transfer a CPAS establishment must necessarily follow an assessment of the need for the provision of (health) care. This assessment cannot ignore the assessment made in line with Article 60(6) of the Loi CPAS when the CPAS establishment was set up.

[47] In particular its Article 118 (of the version of the Loi CPAS that applies in the Brussels Capital Region).

[48] See Article 120 of this law (idem).

[49] The bylaws and strategic plans of IRIS and the bylaws of the IRIS-H can be considered as acts of the public authority because both the IRIS association and each of the IRIS-H are controlled by the local and regional authorities (i.e. the Brussels Capital Region, the municipalities and the CPAS jointly hold the majority of the votes in the decision bodies). See in this context also Case T-137/10 *CBI v Commission,* [2012] ECR (not yet reported), paragraphs 114 – 118. Whether the hospitals have been properly entrusted will be assessed below (section 3.4).

[50] Whether these activities in fact constitute services of general economic interest in the sense of Article 106(2) TFEU and whether the hospitals have been properly entrusted will be assessed below (section 3.4).

to the fulfilment of the obligation to provide social aid in line with the Loi CPAS (see above paragraph (23) for more details):

a) Obligation to offer medical assistance to all patients in all circumstances (hereinafter **"universal care mission"**): the IRIS-H cannot refuse to treat patients that are not able to pay, even if they do not require urgent medical care. Private hospitals allegedly are only obliged to treat patients that need urgent medical care, but would not have such an obligation in non-urgent situations.

b) Obligation to offer a full range of hospital services at multiple sites (hereinafter **"multi-site mission"**): The municipalities and the CPAS have made the deliberate choice to maintain multiple hospital sites that offer a full range of treatments in order to ensure accessibility for patients. The alternative option of regrouping the beds and accompanying services at fewer locations and hence to save costs was deliberately dismissed. This choice is especially relevant for disadvantaged patients and their families, since the IRIS hospitals are mainly located close to or in neighbourhoods with a large disadvantaged population.

c) Obligation to provide social services to patients and their families (hereinafter **"additional social mission"**): social workers assist the disadvantaged patients and their families in solving and managing financial, administrative, interpersonal and social difficulties. In addition, the social workers draw up prior social reports to facilitate a financial intervention by the CPAS. While all public and private hospitals are required to employ social workers for certain hospital services (such as geriatrics and psychiatry), the Belgian authorities claim that the IRIS hospitals have a specific additional obligation which results in much larger social services and higher costs than are compensated pursuant to the LCH.

(29) It can be summarized that according to the Belgian authorities, all public and private hospitals are charged, under the LCH, with a "basic hospital mission". In addition, only the public hospitals are said to be charged with further hospital missions, namely the "universal care mission" and the "multi-site mission". Together with the "basic hospital mission", these additional hospital missions constitute the public hospitals' **"extended hospital mission"**. The public hospitals are also said to be entrusted with an "additional social mission", which the private hospitals allegedly have no obligation to carry out.

(30) Finally, for the sake of completeness it must be mentioned that the public hospitals also have a number of non-hospital activities (e.g. ambulance transport of patients between hospitals; nursing and elderly homes; nursing schools; renting of rooms; assisted living; and psychiatric care institutions; hereinafter **"non-hospital activities"**), the performance of which does not amount to a public service obligation. These non-hospital activities include certain economic / commercial activities such as selling drinks to visitors, renting of TVs to patients, renting of rooms to third parties, operating a canteen and a parking. It has to be noted that all hospitals (i.e. both public and private) have the possibility to perform such activities and that these normally represent only a very limited percentage of their revenues. In any event, Belgian law requires that the costs and revenues of these activities are recorded on separate accounts (see also paragraph (18)).

2.4. SUPPORT FOR THE 1995 RESTRUCTURING

(31) As described above (see section 2.1) the restructuring of the Brussels public hospitals that were supervised and managed by the CPAS consisted of a structural and financial part. The purpose of the public financial intervention was to reduce the public hospitals' liabilities (as they existed on 31 December 1995) and in particular to cover the deficits generated during the period of 1989-1995. This intervention took the form of a loan of 4 billion Belgian francs (about EUR 100 million) over a period of 20 years.[51] The loan was granted by the Brussels Capital Region via the abovementioned FRBRTC to those municipalities that managed a public hospital (via their respective CPAS). In turn, the municipalities awarded these funds to their public hospitals to cover part of their financial liabilities (the amount of EUR 100 million was not sufficient to cover the hospitals' total financial liabilities).

(32) On 6 June 1996, the Brussels Capital Region decided not to demand repayment of the loan and interests, on the condition that the hospital restructuring agreements were fully implemented and the financial plans respected. On that same day, these conditions were laid down in six agreements between the Brussels Capital Region, the six relevant municipalities[52] and their respective CPAS, as well as the public hospitals. In 1999, the Brussels Capital Regional Government observed that the municipalities had respected the financial plans and therefore confirmed that the loan of circa EUR 100 million would not be recovered. The public hospitals contributed to the restructuring and consolidation by reducing their cumulated deficit of initially almost EUR 200 million[53] (in late 1995) to almost balanced budgets by the end of 1999.

3. PRELIMINARY ASSESSMENT

3.1. THE LIMITATION PERIOD OF TEN YEARS

(33) Article 15 (1) and (2) of Council Regulation (EC) 659/1999 as amended stipulates that the powers of the Commission to recover aid are subject to a limitation period of ten years. This limitation period affects the exercise of powers of the Commission for a potential recovery of unlawful aid.

(34) Furthermore, according to Article 15 (3) of Council Regulation (EC) 659/1999 as amended, any aid with regard to which the limitation period has expired, shall be deemed to be existing aid.

(35) The limitation period begins on the day on which the unlawful aid is awarded to the beneficiaries as individual aid or as aid under an aid scheme. Any action taken by the Commission with regard to the alleged aid measure interrupts the limitation period and starts time running afresh.

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[51] See the Cooperation agreement of 19 May 1994 concluded between the Federal State, the Brussels Capital Region and the *Commission Communautaire commune* and the Decision of 23 November 1995 of the Brussels Capital Regional Government.

[52] See footnote 15 for these municipalities.

[53] This is an estimate from 2001 since the final deficits for the Brussels public hospitals over the period 1989-1995 were not yet available at that time.

(36) The restructuring aid was granted on 6 June 1996 (see paragraphs (31)-(32)). The first action which the Commission took in regard to this aid, took place on 26 October 2006[54], i.e. after the limitation period for this aid had expired on 6 June 2006.

(37) With regard to the recurring deficit financing (see paragraphs (14)-(16)) of which the IRIS-H have benefited, the Commission first took action on 22 March 2006.[55] Therefore, a potential recovery of unlawful aid could only cover the time period starting on 22 March 1996.

(38) In the framework of its formal investigation procedure, the Commission will therefore only investigate the public funding received by the five general public Brussels hospitals identified in the complaint and listed in paragraph (8), excluding the restructuring aid of 1995 with a view to assessing whether they amount to State aid and, if so, whether they are compatible with the internal market.

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

(39) Article 107(1) TFEU provides that "*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*". Accordingly, a measure constitutes State aid if the following four cumulative conditions are met[56]:

a) The measure must give a selective economic advantage to an undertaking.
b) The measure must be financed through State resources.
c) The measure must distort or threaten to distort competition.
d) The measure must have the potential to affect trade between Member States.

3.2.1. Selective Economic Advantage to an Undertaking

3.2.1.1. The Notion of Undertaking

General Principles

(40) Public funding granted to an entity can only qualify as State aid if that entity is an "undertaking" in the sense of Article 107(1) TFEU. The Court of Justice has consistently defined undertakings as entities engaged in economic activity.[57] The qualification of an entity as an undertaking thus depends on the nature of its activity, with no regard to the entity's legal status or the way in which it is financed.[58] An activity must generally be

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[54] On 26 October 2006, the Commission for the first time informed the Belgian authorities about the elements of the complaint referring to this restructuring and requested them to comment.

[55] The Commission first took action towards the Belgian authorities by sending them a request for information with regard to the recurring deficit financing on 22 March 2006.

[56] Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA* [2006] ECR I-289, paragraph 129.

[57] Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, paragraph 74.

[58] Case C-41/90 *Höfner & Fritz Elser v Macrotron GmbH* [2000] ECR 1991 I-1979, paragraph 21 and Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, paragraph 74.

considered to be economic in nature where it consists in offering goods and services on a market.[59] An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former.[60] The mere fact that an entity does not pursue a profit does not necessarily mean that its operations are not of an economic nature.[61]

Extended Hospital Mission (as defined above in paragraph (29))

(41) Where health care is provided by hospitals and other health care providers against remuneration[62], be it directly from the patients or from other sources, it must generally be considered to constitute an economic activity.[63] The financing which the IRIS-H receive through various allowances from the federal or local authorities (e.g., see paragraph (13) a, b, d, e as regards public financing available to all hospitals and paragraphs (14)-(17) as regards additional financing for the IRIS-H), together with direct payments by patients (see paragraph (13) c) remunerates the IRIS-H for the medical services rendered and can therefore, in this context, be considered as constituting the economic consideration for the hospital services provided. In such a system, there is a certain degree of competition between hospitals concerning the provision of health care services. The fact that a hospital providing such services against remuneration is public does not render that hospital's activities non-economic in nature.

(42) In the present case, the main activities of the IRIS-H are hospital activities consisting of the provision of health care services. These hospital activities carried out by the IRIS-H are also provided by other types of bodies or entities, in particular clinics, private hospitals and other specialised centres, including the private hospitals of the complainants. Therefore, these hospital activities carried out by the IRIS-H against remuneration and in a competitive environment must be regarded as economic in nature.

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[59] Case C-118/85 *Commission of the European Communities v Italian Republic* [1987] ECR 2599, paragraph 7.

[60] Case C-82/01 P *Aéroports de Paris v Commission of the European Communities* [2002] ECR I-9297, paragraph 74 and Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] I-4863, paragraph 25. See also 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/C 8/02), paragraph 9.

[61] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008], paragraph 27 and Case C-244/94 *Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013, paragraph 21.

[62] Case C-157/99 *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473, paragraph 58, where the ECJ ruled that the fact that a medical treatment in a hospital is financed directly by the sickness insurance funds on the basis of conventions and pre-established rates is not such as to remove that treatment from the field of economic activities within the meaning of the TFEU and that payments by the sickness insurance funds "*albeit set at a flat rate, are indeed the consideration for the hospital services and unquestionably represent remuneration for the hospital which receives them and which is engaged in an activity of an economic character*". The ECJ also added in this context that it is not necessary that such remuneration is paid by those benefiting of the service.

[63] Case C-157/99 *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473, paragraph 53, Joined cases 286/82 and 26/83 *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro* [1984] ECR 377, paragraph 16, Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1999] ECR I-4685, paragraph 18, Case c-368/98 *Abdon Vanbraekel and Others v Alliance nationale des mutualités chrétiennes (ANMC)* [2001] ECR I-5363, paragraph 43 and T-167/04 *Asklepios Kliniken GmbH v Commission of the European Communities*,[2007] ECR II-2379, paragraphs 49-55.

(43) The solidarity aspects underpinning the Belgian national health care system do not call into question the economic nature of such hospital activities. Indeed, it is recalled that with regard to a national health system, which is managed by ministries and other bodies and operates "*according to the principle of solidarity in that it is funded from social security contributions and other State funding and in that it provides services free of charge to its members on the basis of universal cover"*, the CFI held that the management bodies in question were not acting as undertakings in their management of that national health system.[64] However, the Commission considers that there is a need to differentiate between the management of the national health system, carried out by public bodies implementing for this purpose the prerogatives of the State, and the provision of hospital care against remuneration in a competitive environment (which is at stake in the case at hand, as outlined in paragraphs (41)-(42) above).

(44) Accordingly, as far as the provision of health care services and the performance of directly related activities (i.e. the extended hospital mission and also the non-hospital activities, see above paragraphs (29) and (30)) is concerned, the IRIS-H have to be considered to constitute undertakings in the sense of Article 107(1) TFEU.

Additional Social Mission

(45) As explained in paragraphs (23) and (28)-(29) above, the Belgian authorities consider that the IRIS-H have an obligation to provide and do in fact provide services going beyond the remit of the "extended hospital mission". In particular, on the basis of the Loi CPAS, the IRIS-H are said to contribute to the objective of the CPAS to provide social aid to those citizens that need it. Outside their hospital activities, the IRIS-H therefore allegedly carry out also non-hospital activities of a social nature to give patients and their relatives, according to their needs, assistance of psycho-social, socio-administrative or socio-material character in addition to medical assistance. The specific nature of these additional services requires that operators eligible to exercise them have specific resources such as specially trained staff.

(46) It is undeniable that the additional social mission that the IRIS-H are allegedly under an obligation to perform serves an exclusively social purpose. Nevertheless, as the European Court of Justice (hereinafter "ECJ") stated in its case law, a purely social function of a system under which an organisation is allocated specific tasks, is not in itself sufficient to generally exclude the economic nature of these tasks.[65]

(47) In the specific case at hand, the Commission, however, seeks clarification whether the performance of the mentioned additional social activities can properly be qualified as "offering goods and services on a market". While it seems theoretically possible that the additional social services allegedly provided by the IRIS-H could conceivably be offered on a competitive market, the particular regulatory context (i.e. the Loi CPAS) in which they are provided would seem to render the existence of such a market unlikely. In particular, the CPAS have to offer these services for free which seems to leave little prospect of profits for any undertaking possibly interested in delivering similar services.

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[64] Case T-319/99 *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities* [2003] ECR II-357, paragraph 39.

[65] See to that effect Case C-355/00 *Freskot AE v Elliniko Dimosio* [2003] ECR I-5263, paragraph 53. In this case, the ECJ also referred to the fact that the services and contributions on the basis of a compulsory insurance scheme at hand were established in detail by the national legislator.

(48) In conclusion, the potential specificities of the Belgian system of social services and of the regulatory environment require an in-depth analysis of the nature (economic or not) of the additional social services carried out by the IRIS-H. On the basis of the information available at this stage, the Commission has doubts in determining the economic or non-economic nature of the activities concerned. The Commission would therefore like to examine this question in a formal investigation procedure. The Commission accordingly invites the Belgian authorities and any interested third parties to submit any information and comments concerning the nature (economic or non-economic) of the additional services.

(49) The Commission notes in this context that, for reasons of procedural economy, the doubts concerning one of the constitutive State aid elements of a part of the measure under assessment do not prevent the Commission from simultaneously collecting and examining, in its formal investigation procedure, all information about the remaining elements of State aid as well as information relevant for the assessment of the compatibility with the internal market of such possible State aid.

3.2.1.2. Economic Advantage

General Assessment

(50) An advantage within the meaning of Article 107(1) TFEU is any economic benefit which an undertaking would not have obtained under normal market conditions, i.e. in the absence of State intervention.[66] Only the effect of the measure on the undertaking is relevant, neither the cause nor the objective of the State intervention.[67] Whenever the financial situation of the undertaking is improved as a result of State intervention, an advantage is present.

(51) In the present case, to the extent that the IRIS-H constitute undertakings in the sense of Article 107(1) TFEU, it has to be noted that the various public financing systems covering the general hospital and additional activities, among which is also the deficit financing, allowed the IRIS-H to benefit from a package of measures designed to reduce the burdens normally borne by the providers of such activities. Therefore, the various public financing measures that form the subject of this decision must be considered to grant the IRIS-H an economic advantage they would not have obtained under normal market conditions, i.e. without State intervention.

Altmark

(52) The Commission notes that the public financing of the IRIS-H would not grant any advantage to them where it merely amounted to compensation for services provided by the IRIS-H on the basis of public service obligations, which are entrusted to them, and to the extent that this complied with the conditions set out in the *Altmark* case law.

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[66] Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* [1996] ECR I-3547, paragraph 60 and Case C-342/96 *Kingdom of Spain v Commission of the European Communities* [1999] ECR I-2459, paragraph 41.

[67] Case 173/73 *Italian Republic v Commission of the European Communities* [1974] ECR 709, paragraph 13.

(53) In its *Altmark* judgment, the ECJ made clear that compensation granted from State resources for costs incurred to provide a service of general economic interest does not amount to granting an advantage where four cumulative conditions are met:[68]

a) The recipient undertaking must actually be required to discharge public service obligations and those obligations must be clearly defined;

b) The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner;

c) The compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant revenues and a reasonable profit;

d) In case an undertaking entrusted to carry out public service obligations is not chosen pursuant to a public procurement procedure, which allows for selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred.

(54) The principles and considerations laid down in the *Altmark* judgment are applicable *ex tunc*, i.e. also to those legal relations originating from times before the judgment in question.[69] Consequently, the assessment criteria set out in the *Altmark* judgment are fully applicable to the factual and legal situation of the present case, even as regards support granted to the IRIS-H before the date of the *Altmark* judgment.[70]

(55) For the present purposes, the Commission has decided first to analyse the fourth *Altmark* criterion (i.e. whether the selection of an undertaking providing an SGEI was based on a public tender procedure or, alternatively, whether the SGEI compensation granted is based on the analysis of the costs of a typical, well-run undertaking). The Commission notes that the IRIS-H have not been selected via public procurement procedures for any of the public service obligations with which they are entrusted according to the Belgian authorities. Indeed, the public service obligations were entrusted to the public hospitals at hand through an accreditation procedure (as specified in the LCH) or by means of agreements and other documents (such as e.g. strategic

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[68] Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-7747, paragraphs 87-95.

[69] Case T-289/03 *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v Commission of the European Communities* [2008] ECR II-81, paragraph 159. The Court held that

> *"… the interpretation which the Court of Justice gives of a provision of Community law is 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 follows that the provision as thus interpreted may, and must, be applied even to legal relationships which arose and were established before the judgment in question and it is only exceptionally that, in application of a general principle of legal certainty which is inherent in the Community legal order, the Court may decide to restrict the right to rely upon a provision, which it has interpreted, with a view to calling in question legal relationships established in good faith."*

[70] Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119, paragraphs 66 and 67, and Case C-292/04 *Wienand Meilicke, Heidi Christa Weyde and Marina Stöffler v Finanzamt Bonn-Innenstadt [2007]* ECR I-1835, paragraphs 34 to 36.

plans). It can thus be concluded that the first part of the criterion in question is not met in the present case.

(56) Concerning the second part of the criterion under assessment, the Commission notes that the information provided by both the Belgian authorities and the complainants is not sufficient to establish that the systems of compensation for the public service obligations allegedly entrusted to the IRIS-H comply with the criterion of the efficient operator within the meaning of the fourth *Altmark* condition. There is no indication that the compensation awarded is based on an analysis of the costs of a typical undertaking with the characteristics required by the EU case law. There is also no sufficient information demonstrating that the IRIS-H (or, for that matter, the private hospitals that lodged the complaint) can themselves be considered to constitute typical undertakings, well-run and sufficiently equipped. In determining the compensation awarded, no considerations of sound management or the adequacy of equipment appear to have been taken into account. Finally, it must be noted that a compensation mechanism covering the IRIS-H's deficit, without regard to the efficiency with which these hospitals are run, cannot fulfil the fourth *Altmark* criterion.

(57) Consequently, the Commission considers that the fourth criterion of the Altmark judgment is not complied with in this case. As the conditions set out in the *Altmark* judgment are cumulative, failure to comply with any one of the four conditions necessarily leads to the conclusion that the financing measures under review grant an economic advantage in the sense of Article 107(1) TFEU.

3.2.1.3. Selectivity

(58) To fall within the scope of Article 107(1) TFEU, a State measure must favour "certain undertakings or the production of certain goods". Hence, only those measures favouring undertakings which grant an advantage in a selective way fall under the notion of aid.

(59) The Commission notes that the public financing measures aimed at covering the costs related to the performance of general hospital activities (i.e. the basic hospital mission) is addressed only to health establishments defined as “hospitals” within the meaning of the relevant legislation (notably the LCH), thus excluding any other healthcare providers, and operators belonging to other sectors of activity. These measures are therefore by their nature selective. Public financing measures concerning the additional SGEI with which the IRIS-H are allegedly entrusted (see above paragraph (28)) are also selective, given that only public hospitals can benefit therefrom. Moreover, the financing mechanism set up to cover the losses of public hospitals, but not of private ones, must also be regarded as being selective in nature.

3.2.2. State Resources

(60) For a measure to constitute State aid within the meaning of Article 107(1) TFEU, it must be granted by the State or through State resources. State resources include all

resources of the public sector[71], including resources of intra-State entities (decentralised, federated, regional or other).[72]

(61) In the present case, all financing measures under scrutiny are granted by the public authorities, in accordance with their respective competences, from public resources and are imputable to the State. As already indicated above, the public service activities required by the Federal law are mainly financed, for both public and private hospitals, through the offsetting of the operating costs via the BMF granted by the State, by the amounts received from the social security via the INAMI[73], as well as from other compensations and investment subsidies granted by the State or by local authorities. The funds that public hospitals, including the IRIS-H, may additionally receive from their respective municipalities in order to cover deficits resulting from the performance of public service activities of a hospital nature (financing based on Article 109 LCH, now Article 125 LCH) also stem from public resources. The social tasks delegated by the CPAS to the IRIS-H, are allegedly (partially) funded by means of a special annual grant of up to EUR 10 million on the part of the respective municipalities (who received special subsidies by the Brussels Capital Region to finance this) and which may be part of the deficit compensation mechanism (see below paragraph (92)).

3.2.3. Distortion of Competition and Effect on Trade

(62) Public support to undertakings only amounts to State aid in the sense of Article 107(1) TFEU if it "distorts or threatens to distort competition" and only insofar as it "affects trade between Member States".

Distortion of Competition

(63) A measure granted by a State is considered to distort or to threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes.[74] For all practical purposes, a distortion of competition is thus assumed as soon as a State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.

(64) Considering that a certain amount of competition exists between public hospitals, private hospitals, and other health care establishments, public financing granted to certain health establishments (including the IRIS-H) to finance the hospital activities they carry out under their public service obligations, is liable to distort competition. The same applies to the additional social activities of the IRIS-H (to the extent that they amount to an economic activity).

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[71] Case T-358/94 *Compagnie nationale Air France v Commission of the European Communities* [1996] ECR II-2109, paragraph 56.

[72] Case 248/84 *Federal Republic of Germany v Commission of the European Communities* [1987] ECR 4013, paragraph 17 and Joined Cases T-92/00 and T-103/00 *Territorio Histórico de Álava - Diputación Foral de Álava (T-92/00), Ramondín, SA and Ramondín Cápsulas, SA (T-103/00) v Commission of the European Communities* [2002] ECR II-1385, paragraph 57.

[73] The INAMI is a federal institution under the supervision of the Federal Minister of Social Affairs.

[74] Case 730/79 *Philip Morris Holland BV v Commission of the European Communities* [1980] ECR 267, paragraph 11 and Joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Mauro and others v Commission of the European Communities* [2000] ECR II-2325, paragraph 80.

Effect on Trade between Member States

(65) The case law of the European Courts has established that any grant of aid to an undertaking exercising its activities in the internal market can be liable to affect trade between Member States.[75] In the field of State aid rules, an effect on trade is not *a priori* precluded by the local or regional character of the service provided. While there is no strict threshold or percentage below which it may be considered that trade between Member States is not affected, the limited scope of the economic activity, as may be evidenced by a very low turnover, renders the presence of an effect on trade less likely.

(66) As regards the present case, the Commission observes that the sector of health care in general and in-patient health care provided by hospitals in particular is subject to intra-EU trade. Hospital operators and private health practitioners from other Member States may enter the market in which the IRIS-H are active. As a consequence, any measure that improves the competitive position of the IRIS-H is liable to reduce the opportunities for undertakings established in other Member States to enter the market in which the IRIS-H are active in Belgium, thereby having an effect on trade between Member States.

(67) The Commission also notes that the cross-border mobility of patients is increasing. It is, of course, true that health care remains a competence of the Member States and the mobility of patients is being governed by strict provisions regulating interventions by national social security systems. Indeed, in practice, in-patient treatment is generally provided near the place of residence of the patient in a cultural environment familiar to him and which enables him to establish relationships of trust with the treating physicians. The cross-border movement of patients occurs especially in border regions or to obtain highly specialised treatment for specific conditions. It is finally not clear to what extent the aid measures benefiting the public hospitals under assessment can cause cross-border movement of patients. Nevertheless, considering that the IRIS-H include highly specialised hospitals with an international reputation[76] and that the Brussels Capital Region is home to a large number of citizens from other Member States that typically have a choice regarding where to obtain medical services, the Commission considers that patient mobility may contribute to any effect on trade that the measures under investigation are liable to have.

(68) In conclusion, the Commission cannot exclude an effect on trade between Member States in the present case of those measures that finance the IRIS-H's hospital activities.

(69) Finally, as far as the additional social activities of the IRIS hospitals are concerned, i.e. the social tasks delegated by the CPAS, the Commission observes that to the extent that these activities may be of an economic nature, and taking into account how closely they are related to the general hospital activities of the IRIS-H, it must be assumed that these activities are carried out on a market that is open to undertakings from other Member States. On this basis, any public support measures favouring the IRIS-H in performing these activities are therefore liable to have an effect on trade between Member States.

[75] Case 730/79 *Philip Morris Holland BV v Commission of the European Communities* [1980], ECR 2671, paragraphs 11 and 12 and Case T-214/95 *Het Vlaamse Gewest (Flemish Region) v Commission of the European Communities [1998]* ECR II-717, paragraphs 48-50.

[76] In particular *Queen Fabiola Children's University Hospital* and *Bordet Institute* (which specialises in cancer treatment).

3.2.4. Conclusion

(70) On the basis of the foregoing considerations, the Commission considers that, as regards the compensations granted with respect to the hospital activities carried out by the IRIS-H, the cumulative State aid criteria are fulfilled and this part of the financing of the IRIS-H thus constitutes State aid within the meaning of Article 107(1) TFEU.

(71) As described above (see paragraph (48)), as for the additional social mission provided by the IRIS-H, the Commission, on the basis of the information available at this stage, seeks further clarification enabling it to determine whether they are of an economic or non-economic nature. The Commission thus invites the Belgian authorities and any interested third parties to submit any relevant information and comments in order to determine the economic or non-economic character of these activities.

3.3. LAWFULNESS OF THE AID MEASURES

(72) The Commission notes that the measures covered by this Decision, to the extent that they constitute State aid within the meaning of Article 107(1) TFEU have not been subject to notification under Article 108(3) TFEU. Some of them might nevertheless be covered by a Decision of exemption, as further explained hereafter (see section 3.4.1).

3.4. COMPATIBILITY WITH THE INTERNAL MARKET

3.4.1. Legal Basis

General Remarks

(73) Insofar as the public financing of the IRIS-H amounts to State aid in the sense of Article 107(1) TFEU, its compatibility with the internal market needs to be assessed. The grounds on which a State aid measure can or must be declared compatible with the internal market are listed in Articles 106(2), 107(2), and 107(3) TFEU.

(74) Considering that the Belgian authorities have consistently asserted that the public financing of the IRIS-H constitutes compensation for carrying out services of general economic interest (SGEI), the compatibility of the financing measures with the internal market has to be primarily assessed on the basis of Article 106(2) TFEU. This Article 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."*

Application of Article 106(2) TFEU over time

(75) The Commission has laid down the precise conditions according to which it applies Article 106(2) in a series of instruments, most recently, inter alia, the 2012 SGEI

Framework[77] and the 2012 SGEI Decision[78] (hereinafter together: "the 2012 SGEI package"); previously, the Commission had issued and applied the 2005 SGEI Framework[79] and the 2005 SGEI Decision[80]. Any aid measure that complies with the criteria laid down in the 2012 SGEI Decision is considered compatible with the internal market and exempted from notification. Aid measures which do not fall within the scope of application of the 2012 SGEI Decision because they do not fulfil all the criteria enshrined therein are to be assessed according to the 2012 SGEI Framework upon notification.

(76) In the present case, the public financing of the IRIS-H under investigation dates back as far as 1996, thus pre-dating the 2012 SGEI Decision and Framework. However, the 2012 SGEI package – in Article 10 of the 2012 SGEI Decision and paragraph 69 of the 2012 SGEI Framework – contains rules that provide for its application also to aid granted before the entry into force of the 2012 SGEI package on 31 January 2012. Pursuant to these provisions, three different situations have to be distinguished, as set out in the following paragraphs.

(77) First, aid that was granted before 19 December 2005: According to Article 10(b) of the 2012 SGEI Decision,

> *"any aid put into effect before the entry into force of this Decision [i.e., before 31 January 2012] that was not compatible with the internal market nor exempted from the notification requirement in accordance with [the 2005 SGEI Decision] but fulfils the conditions laid down in this Decision shall be compatible with the internal market and exempted from the requirement of prior notification."*

Aid measures that were granted before 19 December 2005, the date on which the 2005 SGEI Decision entered into force, cannot be found to be compatible with the internal market or exempted from notification pursuant to the 2005 SGEI Decision as the 2005 Decision does not apply retroactively. To be considered compatible with the internal market and exempted from notification, these measures must therefore fulfil all the conditions laid down in the 2012 SGEI Decision which includes provisions on retroactive application. If they do not fulfil the conditions of the 2012 Decision, the measures can still be found compatible with the internal market – but not exempted from notification – pursuant to the 2012 SGEI Framework, in light of its paragraphs 61 and 69.

[77] 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.

[78] Commission Decision of 20 December 2011 on the application of Article 106(2) 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.

[79] Community framework for State aid in the form of public service compensation, OJ C 297, 29.11.2005, p. 4-7.

[80] Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 312, 29.11.2005, p. 67-73.

(78) Secondly, aid that was granted in the period from 19 December 2005 onwards and before 31 January 2012: According to Article 10(a) of the 2012 SGEI Decision,

> *"any aid scheme put into effect before the entry into force of this Decision that was compatible with the internal market and exempted for the notification requirement in accordance with [the 2005 SGEI Decision] shall continue to be compatible with the internal market and exempted from the notification requirement for a further period of 2 years".*

Aid measures that were granted in the period from 19 December 2005 (the date of entry into force of the 2005 SGEI Decision) onwards and before 31 January 2012 (the date of entry into force of the 2012 SGEI Decision) will therefore primarily be assessed pursuant to the 2005 SGEI Decision. If the measures in question fulfil the conditions of the 2005 SGEI Decision, they will be considered compatible with the internal market and exempted from notification, but only from the date on which they were granted until 30 January 2014 included (for the time from 31 January 2014 onwards, the measure must be assessed pursuant to the 2012 SGEI Decision). If the measures in question do not fulfil the conditions of the 2005 SGEI Decision, they will be assessed in accordance with Article 10(b) of the 2012 SGEI Decision or, if not all conditions of the latter Decision are fulfilled, the 2012 SGEI Framework, in light of its paragraphs 61 and 69.

(79) Thirdly, aid that was granted in the period from 31 January 2012 onwards: all aid measures that were granted after the date on which the 2012 SGEI package entered into force will be assessed primarily on the basis of the 2012 SGEI Decision and, if not all conditions of that Decision are fulfilled, the 2012 SGEI Framework, in light of its paragraph 61.

Applicability of Article 106(2) TFEU and the SGEI Decisions

(80) Article 106(2) TFEU and the SGEI packages based thereon are only applicable to compensation paid to an undertaking that is entrusted with the operation of a *genuine service of general economic interest*. The Commission *prima facie* finds that the activities of the IRIS-H that benefit from public funding (i.e., the "extended hospital mission" and the "additional social mission") qualify as genuine services of general economic interest, as argued by the Belgian authorities.

(81) The Commission further considers that the public SGEI financing granted to the IRIS-H *prima facie* also appears to fall within the material scope of the 2012 and 2005 SGEI Decisions, as set out in Article 2 of these Decisions. According to Article 2(1)(b) and (c) of the 2012 SGEI Decision, this Decision applies to State aid in the form of SGEI compensation granted to hospitals providing medical care (including the pursuit of directly related ancillary activities) and undertakings providing SGEI meeting social needs as regards, *inter alia*, health and social inclusion of vulnerable groups. Similarly, according Article 2(1)(b) of the 2005 SGEI Decision that Decision applies to State aid in the form of SGEI compensation granted to hospitals, including a compensation for the provision of ancillary services.[81] As the publically financed SGEI carried out by the IRIS-H all could be covered by these categories of activities, the Commission finds that the financing measures under investigation in the case at hand *prima facie* appear to fall

[81] Ibid, recital 16.

within the material scope of the 2012 and 2005 SGEI Decision, as set out in the mentioned provisions of the Articles 2 of these Decisions.

Further Remarks

(82) Before embarking on the assessment of whether or not the public financing of the IRIS-H is compatible State aid under Article 106(2) TFEU, the Commission recalls the General Court's statement concerning the specific nature of the hospital public service. It states inter alia that *"the Member States organise their national health systems according to principles which they choose; in particular, hospital public service obligations may include both obligations imposed on all hospitals and additional obligations imposed only on public hospitals, in view of their greater importance for the proper running of the national health service*."[82]

(83) The Commission also recalls the General Court's preliminary observation that "where different requirements are imposed on the public and private bodies entrusted with the same public service, which presupposes a different level of costs and compensation, those differences must be clearly shown in their respective mandates".[83] The General Court also observed that "State aid, certain of the conditions of which contravene the general principles of EU law, such as the principle of equal treatment, cannot be declared by the Commission to be compatible with the internal market".[84]

3.4.2. Compatibility pursuant to the 2012 SGEI package

(84) As was determined above (see above paragraph (81)) the public financing of the IRIS-H falls, in principle, within the material scope of the 2005 and 2012 SGEI Decisions. If this public financing does not comply with all compatibility criteria set out in these two Decisions, it may still be declared compatible with the internal market on the basis of the 2012 SGEI Framework (taking account of paragraph 61 of this Framework), provided that 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.

(85) Among the basic compatibility conditions underlying Article 106(2) TFEU, that can be found in the 2005 and 2012 SGEI Decisions as well as in the 2012 SGEI Framework, are:

a) 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; and the nature of any exclusive or special rights assigned to the undertaking (see Article 4(a)-(c) of the 2005 and 2012 SGEI Decisions; paragraph 16(a)-(c) of the 2012 SGEI Framework);

b) the entrustment act must contain a description of the compensation mechanism and the parameters for calculating, monitoring and reviewing the compensation

[82] Case T-137/10 *CBI v Commission-,* [2012] ECR (not yet reported), paragraph 93.
[83] Ibid, paragraph 95.
[84] Ibid, paragraph 95.

(see Article 4(d) of the 2005 and 2012 SGEI Decisions; paragraph 16(d) of the 2012 SGEI Framework);

c) there must be arrangements in place for avoiding and recovering any overcompensation, and no overcompensation must in fact be granted (see Articles 4(e) and 5 of the 2005 and 2012 SGEI Decisions; paragraph 16(e) and section 2.8 of the 2012 SGEI Framework).

(86) In the light of the GC's conclusions[85] that serious doubts exist as to the compatibility with the internal market of the disputed public financing granted to the IRIS hospitals on the basis of Article 106(2) TFEU, the Commission is required to initiate the formal investigation procedure. Therefore, on the basis of the doubts expressed by the GC[86], the Commission invites the Belgian authorities, the complainants and any other interested parties to provide all relevant information for verifying the compatibility of the disputed public financing and in particular concerning the following key conditions of the 2005 and 2012 SGEI Decisions and the 2012 SGEI Framework:

1. The existence of entrustment acts clearly defining the additional SGEI of the IRIS-H

(87) The basic hospital mission is defined clearly by Article 2 of the LCH (see paragraph (20)) and the related LCH requirements (see paragraph (21)). Indeed, the LCH provides the relevant framework for the organisation of the Belgian hospital sector. It includes the hospital programming which sets limits to the number of hospital beds, hospital services and medical devices (such as scanners) that can be put and kept in operation. In addition, there are detailed conditions for the authorisation of hospitals and hospital services. Only authorised hospital services that meet the programming conditions are eligible for public financing. Furthermore, neither the complainants nor the GC raised any doubts about this basic hospital mission[87] (i.e. neither about its definition, its entrustment, or its compensation by public financing). However, in the context of the doubts pointed out by the GC in its judgment, the Commission currently still seeks further clarification concerning the entrustment acts for the additional SGEI of the IRIS-H (see above paragraph (28)).

(88) In particular, the Commission has so far identified three types of documents that could jointly or separately be regarded as relevant entrustment acts for the additional SGEI: the Loi CPAS, the strategic plans of IRIS, and the *domicile de secours* conventions.[88]

- As regards the universal care mission, the Commission notes that a part of that mission (in particular providing care for persons assisted by the CPAS and whose costs are met by the CPAS) appears to be entrusted by the *domicile de secours* convention. At the same time, the GC concluded that there were serious doubts concerning the existence of clearly defined public service obligations specific to

[85] See in this respect Case T-137/10 *CBI v Commission,* [2012] ECR (not yet reported), paragraphs 310 & 313.

[86] See in this respect Case T-137/10 *CBI v Commission,* [2012] ECR (not yet reported), paragraph 308.

[87] See in this respect Case T-137/10 *CBI v Commission,* [2012] ECR (not yet reported), paragraphs 119 – 120.

[88] In this context it must be recalled that the General Court accepted that the strategic plans of IRIS are acts of the public authority and binding on the IRIS-H (see Case T-137/10 *CBI v Commission,* [2012] ECR (not yet reported), paragraph 114).

the IRIS-H with respect to this mission.[89] Therefore, the Commission seeks further clarification concerning the entrustment of the universal care mission.

- With respect to the multi-site mission (the obligation to maintain hospitals at multiple sites), on the basis of the GC's observations[90], the Commission currently seeks clarifications on the precise definition of this mission in the strategic plans and any other relevant document defining this additional SGEI.

- As regards, finally, the additional social missions, and in the light of the GC's conclusions[91], the Commission seeks further explanations from the Belgian authorities as regards the precise content of the additional social missions and the legal provisions that entrust these missions to the IRIS-H.

(89) In summary, the Commission invites the Belgian authorities to provide further explanations concerning the exact definition of the universal care mission, the multi-site mission, and the additional social mission as entrusted to the IRIS-H. In addition, the Belgian authorities should clarify whether these entrustments can be based on the Loi CPAS, the strategic plans of IRIS, the *domicile de secours* conventions or on any other document if applicable (see paragraph (27)) and to provide detailed references to the provisions in which the missions are defined and entrusted.

2. The existence of clear pre-defined compensation parameters for the additional SGEI

(90) The different public financing mechanisms for the basic hospital mission are clearly laid out in the LCH and the related implementing legislation. In particular, the LCH sets out the main principles for the determination of the BMF (see paragraph (13) a) while more detailed conditions per type of cost are laid down in the Royal Decree of 25 April 2002. These precise rules allow the Federal Minister responsible for public health to calculate the BMF for each individual hospital. With respect to the INAMI financing (see paragraph (13) b), the Law of 14 July 1994 specifies how the *nomenclature* is determined which lists the medical services and medication that are eligible for compensation by the social security. This *nomenclature* which is published in the *Belgisch Staatsblad/Moniteur Belge* also allows determining the exact contribution by the social security for each medical treatment. As neither the complainants nor the GC put into doubt the BMF and INAMI public financing, the Commission does not seek further clarification concerning these measures.

(91) The Belgian authorities have argued that the additional SGEI entail costs that are not fully covered by the financing sources described in the LCH. As a result, they argue that the additional SGEI contribute to the deficit of the IRIS-H which the respective municipalities have to cover. As discussed above (see above paragraph (14)), Article 109 (now Article 125) of the LCH requires the municipalities to cover part of this deficit (as calculated by the Federal Minister of Public Health). The Belgian authorities have explained that in practice the respective Brussels municipalities cover the entire accounting deficit (even if this exceeds the 'Article 109 (now Article 125) LCH deficit')

[89] See in this respect Case T-137/10 *CBI v Commission,* [2012] ECR (not yet reported), paragraphs 123 – 151.
[90] See in this respect also ibid, paragraphs 152 – 159.
[91] See in this respect also ibid, paragraphs 180 – 186.

on the basis of the provisions in the bylaws[92] of each IRIS-H (in particular Article 46 which disposes that the hospital's accounting deficits are covered by the respective CPAS and municipalities). In addition, Article 61 of the Loi CPAS specifies that the CPAS can cooperate with institutions or services (regardless of whether they are public or private) to provide the required help to citizens. The Article adds that the CPAS can carry the costs of such cooperation if these are not covered on the basis of another law, regulation, agreement or court judgment. The Belgian authorities are invited to clarify on which of these bases (or any other basis if applicable) the deficits of the IRIS-H (to which the costs of each of the additional SGEI contribute) are compensated, and to provide precise references to the relevant provisions of the applicable legal bases that set out the precise modalities of this deficit compensation.

(92) As regards specifically the payments of up to EUR 10 million per year (see above paragraph (16)) apparently financing mainly the additional social missions, the Belgian authorities have argued that the municipalities use this amount to be able to fulfil their deficit compensation obligation (following from Article 46 of the bylaws of the IRIS-H and/or Article 109 LCH). As described above (see paragraph (17)) the Commission seeks clarification on whether these payments of up to EUR 10 million from the Brussels Capital Region to the communes can be considered as an intra-State transfer of funds. The Commission also seeks further clarification on whether or not the passing on of these funds by the municipalities to the IRIS-H can be considered as a separate transaction from the deficit coverage mechanism described above (see paragraph (91)). In case it is considered as a separate transaction, the Commission asks the Belgian authorities to provide the applicable legal basis that sets out its precise modalities.

(93) Finally, the Belgian authorities have indicated that in practice there is a long delay (i.e. up to ten years) between the moment when the accounting deficit is known and the determination of the hospital deficit on the basis of Article 109 (now Article 125) of the LCH by the Minister of Public Health. To avoid that the IRIS-H would have to wait so long, the relevant municipalities have decided to (partially) compensate their deficits in advance of the official letter by the Minister of Health which requires such payment. The Belgian authorities are invited to clarify whether they consider that this is a mechanism of repayable advance payments, as well as when, how, under which conditions and on what legal basis (e.g. Article 46 of the bylaws of the IRIS-H) such payments are (or have been) made (if any). The Belgian authorities are also asked to indicate whether or not such payments (if any) are considered as an aid measure separate from the deficit coverage mechanism (see above paragraph (91)) and to clarify whether such advances (if any) were funded via the FRBRTC (see above paragraph (17)).

3. The existence of mechanisms for avoiding overcompensation for the additional SGEI, the absence of overcompensation, and the obligation to repay overcompensation (if any)

(94) The Belgian authorities have provided several elements to demonstrate that the hospital financing via the BMF and the social security (INAMI) have been set up in such way as to reduce the risk of overcompensation. In particular, they explained that the BMF is mainly arranged as flat rate financing based on average actual figures. As those rates

[92] These bylaws were drawn up when the associations under public law that control the IRIS-H were created (see also paragraph (11) above). Since the government (i.e. the municipalities and the CPAS) has the majority of the votes in these associations, their bylaws can be considered as acts of the public authority.

were set on the basis of real hospital costs from prior years (without overcompensation) and have changed little over time, the risk of overcompensation is argued to be minimal. In addition, the Belgian authorities described the mechanisms that are in place to detect overcompensation and to ensure a repayment of overcompensation if any. Among others, it concerns checks by the *mutuelles*[93] and the INAMI itself for the INAMI funding, and checks and inspections by the Ministry of Public Health concerning the BMF financing. These mechanisms come on top of the IRIS hospitals' own obligations to set up a centralised hospital billing system and to provide several types of information in order to receive INAMI and BMF financing. Finally, there is a mandatory control of each hospital's accounts and financial statements by an independent auditor. Given these elements, the Commission has no doubts concerning the existence of mechanisms for avoiding overcompensation and the obligation to repay overcompensation with respect to the public financing of the basic hospital mission.

(95) On the basis of the GC's conclusions, the Commission however still seeks clarification whether (sufficient) similar measures are in place to avoid overcompensation of the additional SGEI, in particular via the deficit coverage mechanism in combination with the repayable advances (if any; see above paragraph (93)).[94] Hence, the Commission invites the Belgian authorities to submit additional information on provisions in place to avoid and recover any possible overcompensation, and in particular on whether or not the IRIS-H are under a legal obligation to repay any advances they may have received in order to avoid overcompensation.

(96) As regards specifically the payments of up to EUR 10 million annually (see above paragraph (16)), the Commission has already asked for clarification as regards whether these payments can be seen as a transaction separate from the compensation of deficits of the IRIS-H (see above paragraph (92)). In the event that these payments are indeed to be considered as a separate transaction, the Commission also seeks further clarification as to whether there are sufficient measures in place to ensure that the compensation does not exceed what is necessary to cover the costs occasioned by the performance of public service obligations.[95]

(97) The Commission finally asks the Belgian authorities to clearly demonstrate that no overcompensation was in fact granted to the IRIS-H since they started operating as independent legal structures.

4. Other conditions of the 2012 SGEI Decision and the 2012 SGEI Framework

(98) In addition to the information requested above, the Commission invites the Belgian authorities to provide any further concrete, specific and detailed argumentation and documentation whether, why and to what extent the public financing measures for the IRIS-H fall under the 2012 SGEI Decision or the 2012 SGEI Framework and whether, why and to what extent all the compatibility criteria laid down therein would be fulfilled. Other interested parties are also invited to submit their observations in this respect.

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93 These are the private organisations that are responsible for the reimbursement of medical costs under the Belgian social security system (in particular the mandatory healthcare and invalidity insurance). The *mutuelles* are supervised by the INAMI and have to perform certain checks before they can reimburse costs.

94 See in particular Case T-137/10 *CBI v Commission,* [2012] ECR (not yet reported), paragraphs 256 – 265.

95 See ibid, paragraph 277.

3.4.3. Compatibility pursuant to the 2005 SGEI Decision

(99) The Commission notes that the 2005 SGEI Decision contains many of the same compatibility conditions as the 2012 SGEI packages, notably those listed in paragraph (85) above.[96] The Commission therefore finds that for the same reasons as expressed with reference to the 2012 SGEI package, it seeks clarification as to whether the public financing of the IRIS-H for the additional SGEI (as defined above in paragraph (28)) complies with all the conditions of the 2005 SGEI Decision.

(100) In addition to the information requested above, the Commission invites the Belgian authorities to provide any further concrete, specific and detailed argumentation and documentation whether, why and to what extent the public financing measures for the IRIS-H fall under the 2005 SGEI Decision and whether, why and to what extent all the compatibility criteria laid down therein would be fulfilled. Other interested parties are also invited to submit their observations in this respect.

3.5. Other considerations

(101) The Commission recalls the General Court's observation that the additional financing received by the IRIS-H may be "justified by considerations other than those linked to the existence of their additional obligations" and that "compensation for public hospital deficits may be necessary for health and social reasons in order to ensure the continuity and viability of the hospital system".[97]

(102) In this context, the Commission notes that the Belgian authorities have argued that the *pérennité* (i.e. the continuity and viability) of public hospitals should always be ensured. They argue that it is for this reason that once a local authority (such as a municipality) has decided to provide healthcare services (by establishing a public hospital in line with the Loi CPAS, see also paragraphs (24)-(25)), it is also obliged (on the basis of Article 109 LCH, see paragraph (14)) to cover the deficits of its public hospital in order to ensure the *pérennité* of its services. The Belgian authorities also pointed out that the primary objective of the creation of the IRIS-network was to ensure the *pérennité* of the supply of public hospital services in the Brussels Capital Region (see paragraph (10)).

(103) In this light, the Commission seeks further clarification on the concept of *pérennité*, its legal basis (in particular at the level of IRIS and the IRIS-H), its implications and how *pérennité* justifies the deficit compensation mechanisms that benefit the IRIS-H. In addition, the Commission asks the Belgian authorities and interested parties to comment on the existence (or not) of any reasons other than those mentioned above (i.e. the existence of additional SGEI missions and the *pérennité* of the public hospitals) that may justify the additional financing granted to the IRIS-H.

4. SUMMARY CONCLUSIONS

(104) On the basis of the currently available information, the conclusions of the GC (see paragraph (6)) and the elements described above, the Commission still seeks clarification and/or solicits comments, in particular, concerning the following elements:

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[96] See 2005 SGEI Decision, Articles 4-6.

[97] Case T-137/10 *CBI v Commission,* [2012] ECR (not yet reported), paragraph 162.

- Whether or not any FRBRTC funds respectively the special subsidies were directly transferred to the IRIS-H or whether the FRBRTC and the special subsidies are merely financing mechanisms between the Brussels Capital Region and the Brussels municipalities (see above paragraph (17));

- The exact nature of the requirement of Article 60(6) of the Loi CPAS, the possibilities for a public hospital to close down, and the difference with the hospital programming mechanism (see above paragraph (26));

- Whether or not the additional social services carried out by the IRIS-H are economic or non-economic in nature (see above paragraph (48));

- The exact definition of the additional SGEI of the IRIS-H (i.e. the universal care mission, the multi-site mission, and the additional social mission) and on what documents the entrustments of these additional SGEI are based (see above paragraphs (87)-(89));

- The legal basis for the compensation of the deficits of the IRIS-H (to which the costs of each of the additional SGEI contribute) (see above paragraph (91));

- Whether or not the passing on of the special subsidies (from the Brussels Capital Region to the municipalities) by the municipalities to the IRIS-H can be considered as a transaction separate from the deficit coverage mechanism (see above paragraph (92)) and if so the applicable legal basis that sets out its precise modalities;

- Whether or not there is a mechanism of advance payments, on what legal basis and how such payments are made (if any) and whether or not they are considered as an aid measure separate from the deficit coverage mechanism, and to clarify whether such advances (if any) were funded via the FRBRTC (see above paragraph (93));

- Whether there are (sufficient) measures in place to avoid overcompensation of the additional SGEI, in particular via the deficit compensation mechanism in combination with the repayable advances (if any), and whether the IRIS-H are under a legal obligation to repay any advances they may have received in order to avoid overcompensation (see above paragraph (95));

- In the event that the payments of up to EUR 10 million annually are to be considered as a transaction separate from the compensation of deficits of the IRIS-H, whether there are sufficient measures in place to ensure that the compensation does not exceed what is necessary to cover the costs occasioned by the performance of public service obligations (see above paragraph (96));

- Whether no overcompensation was in fact granted to the IRIS-H since they started operating as independent legal structures (see above paragraph (97));

- Any further concrete, specific and detailed argumentation and documentation whether, why and to what extent the public financing measures for the IRIS-H fall under the 2012 SGEI Decision or the 2012 SGEI Framework (see above paragraph (98)) respectively the 2005 SGEI Decision (see above paragraph (100)) and whether, why and to what extent all the compatibility criteria laid down therein would be fulfilled;

- Further clarification on the concept of *pérennité*, its legal basis (in particular at the level of IRIS and the IRIS-H), its implications and how *pérennité* justifies the deficit compensation mechanisms that benefit these hospitals (see above paragraphs (102)-(103));

- Whether there are any reasons other than those mentioned above (i.e. the existence of additional SGEI missions and the *pérennité* of the public hospitals) that may justify the additional financing for the IRIS-H (see above paragraph (103)).

(105) Therefore, the Commission is now under the duty to initiate the formal investigation procedure provided for in Article 108(2) TFEU in relation to the public financing received by the IRIS-H.

(106) The final conclusion as to these questions 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) has 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 Kingdom of Belgium 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 to the Kingdom of Belgium that Article 108(3) TFEU 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 Kingdom of Belgium 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
B-1049 Brussels
Fax: +32 2 296.12.42

Yours faithfully,

For the Commission

Joaquín *ALMUNIA*

Vice-President