



## EUROPEAN COMMISSION

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**PUBLIC VERSION**

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**Subject: State Aid SA.39913 (2017/NN) – Italy  
Alleged compensation of public hospitals in Lazio**

Sir,

### **1. PROCEDURE**

- (1) On 4 November 2014, the Commission received a complaint from the religious congregation Casa Regina Apostolorum della Pia Società Figlie di San Paolo ("Complainant"), which owns a private hospital (Ospedale Regina Apostolorum) that provides healthcare services in the Lazio Region. The complaint concerns alleged State aid to public hospitals in the Lazio Region in Italy.
- (2) By letter of 27 March 2015, the Commission informed the Complainant that it lacked sufficient information to evaluate the alleged State aid and requested the Complainant to provide more information, also inviting it to fill in a formal complaint form. On 28 April 2015 and 30 April 2015, the Complainant submitted further information.
- (3) On 17 June 2015, the Commission informed Italy about the complaint and sought Italy's comments thereon. Italy submitted its comments by letter dated 26 October 2015, registered on the same day.
- (4) On 4 and 13 November 2015, the Complainant submitted a large number of documents to complement its original submission.
- (5) On 18 July 2016, the Italian authorities confirmed that their reply of 26 October 2015 did not contain confidential information and could be shared with the Complainant.

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- (6) By letter of 19 July 2016, the Commission informed the Complainant of its preliminary assessment explaining that, after review of the information submitted and taking into account the comments of the Italian authorities which were enclosed to the letter, it had preliminarily concluded that the measures did not amount to State aid within the meaning of Article 107(1) of the Treaty of the Functioning of the European Union ("TFEU"). The Complainant was given the opportunity to comment thereon.
- (7) The Complainant objected to the Commission's preliminary assessment and submitted further information by letters of 8 August 2016, 19 August 2016 and 16 September 2016.
- (8) Subsequently, on 17 November 2016, the Commission sent a request for further information to Italy. Italy submitted its comments on 13 February 2017. The Complainant submitted further comments by letter of 19 April 2017, registered on 20 April 2017.
- (9) By letter of 21 April 2017, the Commission forwarded to the Complainant Italy's submission of 13 February 2017, and reiterated its preliminary view that the measures did not amount to State aid. The Complainant was given the opportunity to comment thereon.
- (10) On 23 May 2017, the Complainant submitted further information objecting again to the preliminary conclusions of the Commission. On 10 July 2017, the Complainant made a new submission. Upon request, on 11 July 2017, the Commission held a teleconference with the Complainant to discuss its preliminary conclusions.

## **2. THE COMPLAINT**

- (11) The complaint concerns alleged State aid to public hospitals in the Lazio Region in Italy. In particular, the Complainant argued that public funds that would have been paid to public healthcare facilities part of the Italian health care system ("SSN") to cover their financial deficits without verification of their costs and in breach of the principles of freedom of choice of the patient and competition, to the detriment of accredited private hospitals also providing healthcare services for the SSN.
- (12) For the Complainant, the payments to public hospitals would amount to State aid because the services provided by the SSN are economic in nature. In its view, the SSN would not be universal or based on the principle of solidarity. Rather, the SSN would be based on the principle of "freedom of choice of the patient", by means of which the Italian authorities would have introduced competition in the SSN system and made the services economic in nature.
- (13) In particular, the Complainant indicated that the healthcare reforms introduced by Legislative Decrees No. 502/1992 and No. 229/1999 (i) converted the public healthcare facilities (e.g. public hospitals) into corporations subject to managerial principles, and (ii) introduced competition between public and private healthcare providers acting for the SSN, because citizens were able to choose between facilities pursuant to the principle of "freedom of choice of the patient", within the constraints of accreditation of medical facilities, healthcare planning and cost control.

- (14) Furthermore, the Complainant claimed that the SSN does not cover all health services for all citizens, and therefore would not be universal or based on solidarity, because approximately one third of the overall annual costs for the provision of all healthcare services in Italy would be paid by the citizens, directly (out of pocket) or indirectly (through insurance coverage). This would show in its view that some citizens also use the private medical services (in addition to or instead of the free SSN services), and that there is one single market for healthcare services.
- (15) Finally, the Complainant argued that, pursuant to the said reforms, public hospitals are also entitled to provide private health care services within the public facilities (so-called ALPI or *intramoenia* services). For the Complainant, the fact that these public facilities provide services under the ALPI system (which are paid by the users), would demonstrate that the system is neither based on solidarity, nor universal in nature.
- (16) Therefore, according to the Complainant, the 1992 and 1999 healthcare reforms introduced competition between public and private healthcare facilities when providing healthcare services on behalf of the SSN, or when providing services at the request of private individuals.<sup>1</sup> Hence, there would be a market with economic operators competing with each other based on the principle of freedom of choice by the users. As a result, the Italian health care system would have been changed in such a way that the activities provided on its behalf must be considered economic in nature.<sup>2</sup>
- (17) In this context, the Complainant argued that the healthcare services provided on behalf of the Italian SSN in the Lazio Region would not be remunerated correctly, with the result that, first, public hospitals in the Lazio Region receive public funds to cover their deficit which would be at least in part unrelated to the healthcare services provided to citizens; and second, private hospitals, like the one owned by the Complainant, would not be remunerated for the costs of providing the services. This in turn would result in an infringement of the principle of freedom of choice of the patients, because the accredited private hospitals would not be able to invest in improving the efficacy and efficiency of their healthcare services.
- (18) In particular, the Complainant stated that, according to Legislative Decree No. 229/1999, remuneration of public healthcare services should be based on the number of medical services provided which would be then multiplied by tariffs set by the different regions for each specific performance. The initial tariffs,

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<sup>1</sup> See in particular, submission of the Complainant of 23 May 2017 citing judgment of the Italian Constitutional Court No. 200/2005, and judgment of the Italian State Council No. 2605/2010. The Complainant refers also to opinions published in various contexts by the Italian Competition Authority (Opinion of 26.6.1998, Opinion of 20.5.1999 (AS175 "Norme per la razionalizzazione del servizio sanitario nazionale"), document concerning the opening and closure of a fact-finding investigation on the healthcare services of 18.6.2015 (IC30, provvedimento n. 25524), Opinion to ASL Cagliari n. 8 of 12.8.2014 (AS1142 – "Distribuzione del tetto di spesa per il triennio 2013/2015 tra le diverse strutture sanitarie private"), and Opinion of 24.12.2014 regarding the decree of the Commissario *ad acta* n. 68 of 20.10.2014 (AS1181 – Regione Calabria – "Determinazione dei tetti di spesa per le prestazioni di assistenza specialistica da privato" -anno 2014-).

<sup>2</sup> Proof of such nature would be the inclusion of the description of the health system in the Italian SGEI reports of 2006-2008 and 2009-2011

which had to be subject to adjustment by each region, were fixed by a 1994 Ministerial Decree.

- (19) However, the Complainant claimed that the Lazio Region never used the system based on the number of medical services provided. Rather, contrary to its legal obligations, the Lazio Region would be simply applying the 1994 tariffs and maximum compensation ceilings for the compensation of each healthcare service provider. The Complainant argued that, as a result, the remuneration does not reflect the actual costs borne by the healthcare facilities to provide the services and, in particular, the increased labour costs of private hospitals resulting from the review of the national collective contracts.
- (20) At the same time, the Lazio Region would have been covering the economic deficits of public hospitals. According to the Complainant, the funds covering the deficits of public hospitals would fall under the scope of the State aid rules and, in particular, within the scope of the rules on services of general economic interest (SGEI).
- (21) In this regard, the Complainant requested the Commission to audit the public service compensations and to check whether the compensation was set according to the principle of a typical well-run undertaking laid down in *Altmark*.<sup>3</sup>
- (22) The Complainant referred to litigation before the regional administrative court in the Lazio Region. For the Complainant, the information would show that the budget allocated to its private hospital (Ospedale Regina Apostolorum) would not reflect, *inter alia*, the parameters of the costs of a typical well-run undertaking or the higher costs of personnel deriving from the collective bargaining agreements (*Contratto Collettivo Nazionale Di Lavoro*).

### **3. POSITION OF THE ITALIAN AUTHORITIES**

#### **3.1. Health as a fundamental right**

- (23) According to the Italian authorities, in implementation of Article 32 of the Italian Constitution, Law No. 833/1978<sup>4</sup> created the SSN following the principles of universality, equality of treatment of citizens, equal access to services and solidarity.
- (24) According to the Italian authorities, the SSN is universal in that it guarantees the safekeeping of the health of all citizens without prejudice to individual or social conditions as well as equality of all citizens. Moreover, the SSN is based on the principle of solidarity since it is fully financed through State resources and the services are provided free of charge or patients are charged a symbolic fee which cover only a fraction of the costs of the service.

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<sup>3</sup> Judgment of 24 July 2003, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, case C-280/00, ECLI:EU:C:2003:415, paragraph 93.

<sup>4</sup> Law of 23.12.1978, n. 83, *Istituzione del servizio sanitario nazionale* (G.U. Serie Generale n.360 of 28.12.1978 - Suppl. Ordinario).

### 3.2. The health reforms

- (25) Furthermore, the Italian authorities have explained that the purpose of the changes introduced by Legislative Decrees No. 502/1992 and No. 229/1999 was not to alter the fundamental guiding principles of the right to health protection laid down by Law No. 833/1978.
- (26) Rather, the 1992 reform changed the institutional set-up and organisation of the SSN with a view to ensure a more rational use of the public resources dedicated to the deployment of universal public health services, the control of the healthcare expenditure, and the re-organisation of the SSN by giving regions and provinces responsibility for planning and organisation of healthcare, while the State maintained responsibility for the national health programming and the determination of uniform levels of care.
- (27) In fact, the Italian authorities state, first, that Article 1, paragraphs 1 to 3, as well as Article 11 of Legislative Decree No. 502/1992 lay down the universal coverage of all citizens, the free of charge (or almost) of the assistance, as well as the solidarity of the system.
- (28) Second, for the Italian authorities, the regionalisation of the system would not have altered the universal or solidarity nature of the system in connection with the essential levels of assistance that must be guaranteed throughout the national territory.
- (29) Third, according to the Italian authorities, the conversion ("corporatisation") of existing local health units into legal corporations and the setting up of autonomous hospital entities, did not impact the main universal and solidarity principles of the SSN system. The purpose of the corporatisation was to ensure that public healthcare facilities were better managed in order to achieve the objectives set in the national and regional health programmes.
- (30) Fourth, the Italian authorities have further stated that, pursuant to the same principles, the 1999 reform was aimed at completing the regionalisation and corporatisation of the system and at continuing working on the efficiency of the system.
- (31) Within the criteria foreseen in the Legislative Decree No. 502/1992 and based on the main principles of solidarity and universality, the 1999 reform also introduced the freedom of choice of the user which is the right of the citizens to choose freely a doctor or the place of care among those accredited with the SSN<sup>5</sup>.
- (32) Nevertheless, the Italian authorities indicated that, following these reforms, there is national jurisprudence that has repeatedly stated that the healthcare legislation has progressively imposed the principle of planning ("*programmazione sanitaria*"), this is, the drafting of tri-annual national healthcare plans and of the so-called LEAs or list of uniform "essential level of assistance" services.
- (33) In this respect, the Italian authorities refer to a judgment of the State Council that would affirm that the principle of freedom of choice (i) does not have an absolute

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<sup>5</sup> Article 8-bis of Legislative Decree No. 502/1992.

value, (ii) it is subject to specific regulatory provisions aimed at not altering the overall balance of the health system, and (ii) must be reconciled with other interests guaranteed by the Italian Constitution and identified in the healthcare laws, such as the principle of planning.<sup>6</sup>

- (34) Furthermore, according to the Italian authorities, the Constitutional Court has also concluded that the principle of freedom of choice is not absolute. For the Constitutional Court, the principle of freedom of choice, which resulted from the definition of parity between public and private facilities for the provision of healthcare for the SSN, was gradually overtaken by the principle of programming.<sup>7</sup>
- (35) In a 2009 judgment, the Constitutional Court further analysed the system outlined in Legislative Decree No. 229/1999 and concluded that the principle of planning (including, *inter alia*, the accreditation of the facilities, the remuneration on the basis of tariffs and maximum volume of service, etc.) aimed at ensuring an effective use of the public facilities and containing public expenses.<sup>8</sup>
- (36) Therefore, the Italian authorities confirm that the introduction of the freedom of choice of the user did not distort the nature of the Italian health care system as set by Law No 833 of 23 December 1978, which is based on the principles of universality and solidarity since it is still accessible to all the citizens, free (or almost free) of charge and financed through general taxation, in particular from social security contributions.

### **3.3. The organisation of the Italian SSN: public and private health care providers**

- (37) The Italian authorities have explained that hospitals and other public undertakings of the SSN are funded directly by social security contributions and other State and regional resources, and provide services to citizens based on universal coverage. The Italian authorities have submitted that when performing these services they are not acting as undertakings within the meaning of Article 107(1) TFEU.
- (38) Remuneration of the accredited private hospitals is based on the signature of contractual agreements with the Regions<sup>9</sup> that lay down the amount of funding based on the care functions and the activities performed for the SSN. Within the maximum financial limits laid out in the different Regional programmes, the contracts with the Regions indicate, *inter alia*, the health objectives, the maximum volume of services that the bodies undertake to provide, the budgeted fee for the activities agreed on, the quality of the care provided, etc.
- (39) The Italian authorities have further submitted that, according to current legislation,<sup>10</sup> for the purpose of determining the overall financing of individual entities, the care functions (i.e., global assistance services such as care for

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<sup>6</sup> See, judgment of the State Council, Sec. III. No. 6135 of 12.12.2014.

<sup>7</sup> Judgment No. 200/2005 of 23.5.2005 (G.U. of 1.6.2005), judgment No. /2009 of 1.4.2009 (G.U. of 8.4.2009) (section 7.1), and judgment No. 248/2011 of 20.7.2011 (G.U. of 3.8.2011).

<sup>8</sup> Judgment No. 94/2009, cited above.

<sup>9</sup> Article 8 quinquies of Legislative Decree No. 502/1992.

<sup>10</sup> Article 8 sexies of Legislative Decree No. 502/1992.

emergencies and accidents, prevention schemes, etc.) are remunerated on the basis of the standard cost of producing the care programme, while the care activities (i.e., hospital treatments) are remunerated on the basis of pre-defined rates for each service (Diagnosis Related Groups - DRG).

- (40) On this basis, the contracts determine *ex ante* a maximum compensation amount and no other compensation can be sought. This means in particular that accredited private facilities cannot request the remuneration of the factors of production used in the provision of those services. In contrast, the financing by the State of the SSN includes the increased costs of personnel deriving from the renewal of the national collective bargaining agreements for the staff of the SSN and does not include the cost of the staff of the private facilities accredited with the SSN.
- (41) Furthermore, the Italian authorities also submit that the fact that private hospitals such as the Complainant provide services on behalf of the SSN does not alter the legal status of these entities. They are not public entities and their inclusion in the national health system has a mere operational function. They fulfil the services within the limits of the accreditation and the agreement with the Region. In this respect, the Italian authorities cite Article 79 of Law No. 133/2008<sup>11</sup> that states that the activities of those facilities are exercised exclusively within the limits set out in the specific agreements referred to in Article 8 quinquies of Legislative Decree No. 502/1992.
- (42) In particular, Article 8 quinquies, c.2. quarter of Legislative Decree No. 502/1992 indicates that, in fact, the agreements entered into by the Regions with the accredited private providers provide that care activities implemented in accordance with regional health planning are funded based on spending limits and volumes of activities pre-determined annually by the regional programming in the respect of budgetary constraints, excluding the right to remuneration of benefits rendered outside the forecasts of the planning.
- (43) As a result, the Italian authorities explain that the higher costs incurred for the personnel employed (production factor) by accredited private healthcare providers could not be compensated under the contracts.

### 3.4. ALPI Services

- (44) The Italian authorities submit that Article 15 quinquies of Legislative Decree No. 502/1992 as modified by Legislative Decree No. 229/1999 recognizes the right of the doctors working exclusively for SSN hospitals to provide services outside the normal working hours in the regime of *intramoenia*, this is within the public facilities and using hospital outpatient and diagnostic structures. These services also called ALPI ("*Attività libero professionale in regime di intramoenia*") are paid directly by the patients.
- (45) In any event, the Italian authorities submit that, in order to guarantee a correct balance between the public and the private services, and to help to reduce the

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<sup>11</sup> Law No. 133, of 6 August 2008, "*Conversione in legge, con modificazioni, del decreto-legge 25 giugno 2008, n. 112, recante disposizioni urgenti per lo sviluppo economico, la semplificazione, la competitività, la stabilizzazione della finanza pubblica e la perequazione tributaria*" (G.U. n. 195 of 21.08.08, Supplemento ordinario n. 196)".

waiting lists, the volume of private services cannot be higher than those provided within the public service system, and that the business plan of the regional health programmes and of the ASLs must be respected.<sup>12</sup> Controls and penalties are in place to verify compliance by the doctors.

- (46) Furthermore, the Italian authorities have confirmed the existence of a separate (analytical) accounting to determine and impute all the direct and indirect costs of the ALPI services and the fact that, pursuant to the law, the activities cannot generate deficit. In particular, the patient fees must be calculated so that all the costs are compensated including the doctor's and the team's services, the pro-rata costs of amortisation and maintenance of the machinery, as well as all direct and indirect costs borne by the hospital. In addition, an amount equal to 5% of the doctor's remuneration for the provision of private services is also due to the hospitals concerned.<sup>13</sup>

#### 4. ASSESSMENT OF THE MEASURE

##### 4.1. Introduction

- (47) Article 168(7) TFEU provides that "*Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them.*"
- (48) Pursuant to Article 168(7) TFEU, Member States are responsible for the definition of their health policy and for the organisation and delivery of health services and medical care, as well as for the allocation of resources for healthcare services. Member States enjoy a wide discretion in the organisation of their national health system and may decide on how best to allocate resources.
- (49) A measure concerning the organisation or the financing of a Member State's healthcare system will not fall within the scope of the EU State aid rules, if it does not meet the conditions of Article 107(1) TFEU.
- (50) According to Article 107(1) TFEU, State aid is any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings, in so far as it affects trade between Member States.
- (51) The conditions laid down by the provision for a finding of State aid are cumulative. Accordingly, a State measure constitutes State aid if the following four cumulative conditions are met:
- i. The measure is financed through State resources.
  - ii. The measure gives a selective economic advantage to an undertaking.

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<sup>12</sup> See, Article 15 quinquies 3) of Legislative Decree No. 502/1992.

<sup>13</sup> See, Article 5, sub-paragraph 5, of Legislative Decree No. 502/1992, Article 3, sub-paragraph 6, of Law 724/1994 and Article 2.1.e) of Law 13 September 2012 modifying Article 1.4.c) of Law 120/2007 of 3.8.2007 "*Disposizioni in materia di attivita' libero-professionale intramuraria e altre norme in materia sanitaria*"(GU N. 181 of 6 August 2007).



- iii. The measure distorts or threatens to distort competition.
  - iv. The measure affects trade between Member States.
- (52) Pursuant to Article 107(1) TFEU, a measure may constitute State aid only if its beneficiary is an undertaking. In this case, the question whether the compensations granted by the Lazio Region to public hospitals may constitute State aid depends in the first place on whether the public hospitals exercise an economic activity when they provide hospital services on behalf of the national health system and can thus be considered as undertakings.
- (53) The jurisprudence of the Union Courts defines undertakings as all entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.<sup>14</sup> The classification of a particular entity as an undertaking depends entirely on the economic or non-economic nature of its activities and is always relative to a specific activity.<sup>15</sup>
- (54) An economic activity is an activity consisting in offering goods and services on a market.<sup>16</sup> Activities that are not performed in a market are therefore not considered as economic in nature. As the existence of a market environment may depend on the way an activity is organised in a particular Member State, the economic nature of that activity can differ from one Member State to another and vary over time.<sup>17</sup>
- (55) As regards hospital activities, in some Member States, public hospitals are an integral part of a national health service and are almost entirely based on the principle of solidarity.<sup>18</sup> Such hospitals are directly funded from social security contributions and other State resources and provide their services free of charge to affiliated persons on the basis of universal coverage.<sup>19</sup>
- (56) In other Member States, hospitals and other healthcare providers offer their services for remuneration, be it directly from patients or from their insurance. In such systems, there is a certain degree of competition between hospitals concerning the provision of healthcare services. Where this is the case, the fact that a health service is provided by a public hospital is not sufficient for the activity to be classified as non-economic in nature.

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<sup>14</sup> Judgment of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74; 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, OJ C8, 11.01.2012, p. 4-14, paragraph 9. ("SGEI Communication")

<sup>15</sup> SGEI Communication, paragraph 9. See also, Communication from the Commission, Commission Notice in the notion of state aid pursuant to Article 107(1) TFEU, paragraph 24. ("Notice on the notion of State aid")

<sup>16</sup> Judgment of 16 June 1987, *Commission v Italy*, Case 118/85, ECLI:EU:C:1987:283, paragraph 7; Judgement of 18 June 1998, *Commission v Italy*, case C-35/96, ECLI:EU:C:1998:303, paragraph 36; see also, judgement in *Pavlov and Others*, cited above, paragraph 75.

<sup>17</sup> SGEI Communication, paragraph 12.

<sup>18</sup> SGEI Communication, paragraph 22. See also, Notice on the notion of State aid, paragraph 24.

<sup>19</sup> Depending on the overall characteristics of the system, charges that only cover a small fraction of the true cost of the service may not affect its classification as non-economic.

- (57) The Union Courts have confirmed that in those systems where services are directly funded from social security contributions and other State resources, and provided free of charge, or for a small fraction of the costs, to affiliated persons on the basis of universal coverage, the relevant organisations do not exercise activities of an economic nature. Therefore, they do not act as undertakings within the meaning of Article 107(1) TFEU.<sup>20</sup> Accordingly, a healthcare system that is based on those principles can be considered non-economic in nature.
- (58) The Union Courts have clarified that universality means that the service is offered at uniform and non-discriminatory rates and on similar quality conditions for all customers.<sup>21</sup>
- (59) In connection with the Italian SSN system, in the *ICI-IMU* Decision of 19 December 2012,<sup>22</sup> the Commission noted, based on the Union case-law<sup>23</sup> that health care services in Italy are provided on a non-commercial basis if (i) the activities are accredited by the State and performed under a contract or an agreement with the State, the Regions or local authorities; (ii) the activities are part of or complementary to the public national health system, and (iii) the services are provided to users free of charge or for a low fee which covers only a small fraction of the actual cost of the service. In that case, the Commission concluded that the Italian national health system provides universal cover and is based on the principle of solidarity. The Commission also concluded that non-public hospitals which fulfil the conditions above did not qualify as undertakings.<sup>24</sup>

#### 4.2. Assessment of the Italian health care system

- (60) Following the submissions of the Complainant and taking into account all the information provided by the Italian authorities, the Commission has carefully assessed the nature of the Italian national healthcare system to determine whether it is still based on the principles of solidarity and universal coverage and, and therefore, whether it is still not economic in nature.
- (61) The Commission has concluded that the system is still not economic in nature because, contrary to the allegations of the Complainant, the Commission is of the view that the 1992 and 1999 reforms (Legislative Decrees No 502/1992 and No

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<sup>20</sup> Judgment of 4 March 2003, *FENIN v Commission*, Case T-319/99, ECLI:EU:T:2003:50, paragraph 39, and judgment of 11 July 2006, *FENIN v Commission*, Case C-205/03 P, ECLI:EU:C:2006:453, paragraphs 25-28..

<sup>21</sup> Judgment of 12 February 2008, *BUPA v Commission*, Case T-289/03, ECLI:EU:T:2008:29 paragraphs 201-203.

<sup>22</sup> Commission Decision 2013/284/EU of 19 December 2012 on State aid SA.20829 (C 26/2010, ex NN 43/2010 (ex CP 71/2006)) Scheme concerning the municipal real estate tax exemption granted to real estate used by non-commercial entities for specific purposes implemented by Italy (OJ 2013 L 166, p. 24), paragraph 169. (Commission Decision "*ICI-IMU*")

<sup>23</sup> See, judgment of 4 March 2003, *FENIN v Commission*, Case T-319/99, ECLI:EU:T:2003:50, paragraph 39, and judgment of 11 July 2006, *FENIN v Commission*, case C-205/03 P, ECLI:EU:C:2006:453, paragraphs 25-28. See also, judgment of 16 March 2004, *AOK Bundesverband and Others*, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, ECLI:EU:C:2004:150, paragraphs 45 to 55; and judgment of 7 November 2012, *CBI v Commission*, Case T-137/10, ECLI:EU:T:2012:584, paragraph 90.

<sup>24</sup> Commission Decision *ICI-IMU*, cited above, paragraph 170.

229/1999) did not change the SSN's guiding principles laid down by Law No. 833/1978..

- (62) In particular,, the reforms did not change the main characteristics that make the activities non-economic in nature, this is, the accessibility of all citizens to the same level of healthcare services, the obligation for all hospitals part of SSN system to provide medical care services free of charge (or almost free of charge) and the public financing of the services from the State budget, with citizens contributing to the financing, in particular via social security contributions.
- (63) Therefore, as the Italian authorities have submitted, the reforms (namely, corporatisation, accreditation, freedom of choice and programming and control of expenditure) aimed at guaranteeing the universality and solidarity of the system by ensuring a more rational use of the public resources, and a re-organisation of the SSN by giving regions and provinces responsibility for planning and organisation of healthcare.

*4.2.1. Corporatisation and accreditation do not compromise the universal coverage or the solidarity nature of the SSN*

- (64) More specifically, the Complainant's submission that the corporatisation of the system and the introduction of the accreditation procedure would compromise the principles of the SSN cannot be shared.
- (65) The Commission is of the opinion that the Complainant has not provided any evidence that would suggest that the conversion of healthcare units into corporations and the accreditation procedure, has changed the Italian SSN in a way that would no longer guarantee the safekeeping of the health of all citizens, or that the authorised and accredited hospitals do not provide free of charge services/or charge patients a symbolic fee which cover only a fraction of the costs of the service.
- (66) In this context, the Commission recalls that the Italian authorities have stated that the introduction of these changes had the objective of applying managerial principles to the SSN, and therefore, to make a more efficient use of the resources available and to achieve the objectives of the health plans. The Italian authorities indicate that the changes did not affect the vocation of solidarity and universal coverage of the healthcare system. In fact, the Commission acknowledges that the main principle of solidarity and the universal coverage are also proclaimed in Article 1 of Legislative Decree No. 502/1992, and have not been modified subsequently.
- (67) In addition, the Commission points out that in the *ICI-IMU* Commission Decision, the accreditation of the SSN providers, was mentioned as one of the characteristic elements of the Italian SSN, in addition to universal coverage and solidarity and the Commission concluded that the activities of the Italian SSN, as such organised, were non-economic in nature. The Commission recalls that the *ICI-IMU* Commission Decision was adopted well after the entry into force of the 1992 and 1999 reforms.

4.2.2. *The principle of freedom of choice does not compromise the universal coverage or solidarity nature of the SSN*

- (68) Moreover, the Complainant seems to question the non-economic nature of the SSN system by asserting that the principle of freedom of choice of the patients with the introduction of competition between the SSN providers and the principles of control and rationalisation of expenditure are in conflict with the principle of universality. To this purpose, the Complainant refers to, *inter alia*, various judgments of the Constitutional Court<sup>25</sup>, to a judgment of the State Council<sup>26</sup> or to various opinions of the Italian Competition Authority.<sup>27</sup>
- (69) Contrary to the arguments of the Complainant,<sup>28</sup> the Italian authorities have noted that the principle of "freedom of choice of the patient" was intended to guarantee that all citizens are free to choose the doctor or the accredited hospital where they wish to be treated. In this regard, the Italian authorities have referred to judgments of the Italian State Council that would have repeatedly stated that the "freedom of choice of the patient" does not influence the foundations of the Italian health care system. Such principle would not be absolute, but rather complementary to the modernisation of the SSN and the principle of programming that aims at containing public expenditure and at making it more efficient.<sup>29</sup> The same conclusion would have been reached by the Italian Constitutional Court.<sup>30</sup>
- (70) The Complainant argued that the interpretation given by the Italian authorities to the said judgments is wrong. The Commission is not convinced by the arguments of the Complainant.
- (71) First, a careful reading of the judgments of the Italian Constitutional Court and of the Italian State Council cited both by the Complainant<sup>31</sup> and the Italian authorities indicate that the principle of freedom of choice of the patient is limited.<sup>32</sup> Those judgements seem to indicate that the citizens do not have an

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<sup>25</sup> See, notably, judgments No. 200/2005 and No. 247/2007.

<sup>26</sup> Judgment No. 2605/2010.

<sup>27</sup> Cited above.

<sup>28</sup> See, in particular, submission of 23 May 2017, and references to judgment of the Constitutional Court No. 200/2005 and judgment of the State Council No. 2605/2010.

<sup>29</sup> See, judgment No. 6135 of 12.12.2014, cited above.

<sup>30</sup> See, judgments No. 200/2005, No. 94/2009, paragraph 7.4, and No.248/2011, paragraph 6.1., cited above.

<sup>31</sup> See, in particular reference to judgment No. 200/2005, cited in point 6 of the Complainant's submission of 8 August 2016, footnote 2.

<sup>32</sup> Judgment No. 200/2005 of the Constitutional Court states: "*right after the declaration of the principle of parity and competition between the public and private structures, with the subsequent right of choice by the patient, the principle of health planning imposed itself progressively in the health legislation, in order to contain public expenditure and rationalising the health system*". The judgment continues as follows: "*This has tempered the aforementioned competitive regime through the programming powers of the Regions and the conclusion of specific "contractual agreements" between the relevant USLs and the structures involved by the definition of objectives, maximum volume and fees for the services provided.*"

In addition, paragraph 7.4. of judgment No.94/2009 of the Italian Constitutional Court also states : "*The principle of freedom of choice is not absolute and must be conjugated with the other legally protected interests, in view of the objective limits that the same ordinary legislator encounters in relation to available financial resources.*"

absolute right to "choose" and that the choice of the patients would be limited to hospitals accredited with the SSN and subject to programming and expenditure control. Most significantly, the judgments do not suggest that the reforms, and in particular the freedom of choice of the patient or the limitations imposed by the programming or the control of expenditure, alter the universal coverage or solidarity character of the SSN system. The Commission is of the view that such characteristics of the system do not run against the definition of non-economic healthcare systems provided in the case-law of the European Courts.<sup>33</sup>

- (72) Second, the freedom of choice of the patient might have introduced a certain degree of competition intra-system, this is, between the SSN-accredited providers, but, still, within this system, the providers are financed through social security contributions and other State resources, and they offer their services free of charge to the affiliated persons on the basis of universal coverage.
- (73) Finally, there is no suggestion in the texts cited by the Complainant that the Italian Constitutional Court or the Italian State Council have concluded that the public healthcare services are in competition with private healthcare services for private healthcare services.
- (74) Moreover, the Commission is of the view that, contrary to the Complainant's allegations, the opinions of the Italian Competition Authority cited by the Complainant are not relevant to the questions at stake because they do not contest the principles of solidarity or universality.<sup>34</sup> In addition, the opinions have no authoritative or binding interpretative value for the Commission since national competition authorities have no competence to apply EU State aid rules.
- (75) In this framework, the Commission concludes that there is no evidence suggesting that the principle of "freedom of choice "of the user, distorts the nature of the SSN system as being based on solidarity and universal coverage. On the contrary,

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As cited by the Complainant himself (see, annex to Complainant's submission of 4 November 2015, ID 56, page 8, footnote 4), the decision of the third Plenary Assembly of 2012 also recognized that the principle of freedom of choice must be conjugated with the principle of programming of the services: "*The new national health service model, which has been outlined as from d. lgs. 30 December 1992, no. 502, and inspired by the conjugation of the principle of freedom of choice of the user and the principle of programming of the services provided by the public service*".

More recently, in judgment No. 6135/2014 of 12.12.2014, the State Council also referred to the limits to the principle to the freedom of choice by the patient: "*With the emphasis of the authoritative nature of the health planning, the principle of freedom of choice has come not to be of absolute value, being subject to specific regulatory provisions aimed at not altering the overall balance of the healthcare system and being associated with the principle of programming of services provided by the public service.*"

<sup>33</sup> Cited above, footnote 20.

<sup>34</sup> The Commission notes that those advisory opinions of the Italian Competition Authority do not concern the matters at stake: (i) the opinion of 26.6.1998 discusses issues of implementation of the 1992 reform; (ii) the opinion of 20.5.1999 refers to the issue of the freedom to provide services and receive health care services in other Member States; and (iii) the opinion of the Italian Competition authority of 18.6.2015 only make some proposals for reform of the healthcare system which are not connected with the criteria of universality or solidarity. Finally, the opinions of 2014 to Cagliari and Calabria (Opinion to ASL Cagliari n. 8 of 12.8.2014 and Opinion of 24.12.2014 regarding the decree of the *Commissario ad acta* n. 68 of 20.10.2014, Calabria)<sup>34</sup> refer to the criteria to allocate the maximum budget among the different accredited providers in the regions.

it seems that, in Italy, all citizens would still benefit from healthcare services free (or almost free) of charge at the accredited hospital of their choice.

- (76) Finally, the Commission rejects the allegations of the Complainant concerning the inclusion of healthcare activities in the Italian SGEI Reports for years 2006-2009, 2009-2011 and 2011-2013. The Commission points out that the reporting of certain activities in the SGEI reports is not evidence of the economic nature of the activities. In any event, the Italian authorities have explained that the activities were included in the reports to describe better to the Commission the nature and workings of the SSN. Furthermore, within the SGEI Report for years 2012-2013 the Italian authorities explicitly explained that the organisation of the SSN does not fall within the scope of the SGEI rules.

#### 4.2.3. *ALPI services do not distort the non-economic nature of the SSN*

- (77) As indicated in Section 2 above, the Complainant has also submitted that the universality and solidarity of the SSN system was compromised by the so-called ALPI rules that allow doctors employed by public hospitals to provide private healthcare services *intramoenia* (i.e. within hospital facilities) that are paid by the citizens directly or through private insurances (out-of-pocket). For the Complainant, this would further confirm that the current healthcare system in Italy is a true market regulated by the competitive principle of freedom of choice by users.
- (78) The Commission cannot support such position. ALPI rules do not change the conclusion that the Italian SSN system is not economic in nature.
- (79) First, according to Article 5 of Legislative Decree No. 502/1992, ALPI services are not part of the public Italian SSN system. Rather, ALPI services are private healthcare services provided by some hospital doctors also working for the public SSN but outside normal working hours, and remunerated directly by the citizen. ALPI services are provided in competition with private healthcare services and would have an economic nature.
- (80) Second, there is a proper separation of accounts to distinguish public health services provided by these doctors from private health services, and to allow the correct attribution of all -direct and indirect- costs incurred in the provision of ALPI services. In addition, a levy of 5% over the gross revenues deriving from the provision of private services is paid by the doctors to the public hospitals concerned.
- (81) Thus, the Commission concludes that the Complainant's arguments do not put into question the universality or solidarity of the healthcare system in Italy.

### **4.3. Conclusion**

- (82) Based on the above, the Commission concludes that it has not been established that the reforms of 1992 and 1999 alter the main characteristics of the SSN, and hence, make the Italian healthcare system economic in nature. The activities of SSN cannot be regarded as being exercised by an undertaking, since they are based on the principle of universality and solidarity and offered to all citizens free of charge or subject to limited remuneration that covers only limited fraction of

the service costs. Therefore, the measures described by the Complainant do not constitute State aid within the meaning of Article 107(1) TFEU.

- (83) In this context, the Commission must dismiss as immaterial to the State aid assessment the Complainants' other arguments regarding the remuneration of the services provided on behalf of the Italian health care system (i.e., the use of public financing to cover the economic deficits of public hospitals or the failure by the Lazio Region to update its fees to remunerate (accredited) private hospitals providing services on behalf of the SSN for the increased costs of labour), or the request that the compensation of hospitals providing services for the SSN was based on the fourth *Altmark* criterion. As regards the fourth *Altmark* criterion, the Commission notes that this criterion is applicable to determine the existence of advantage, and, therefore, it is relevant for the notion of aid to the extent that the service in question is economic in nature, which is not the case here.

## 5. CONCLUSION

- (84) The Commission has accordingly decided that the measures do not constitute State aid within the meaning of Article 107(1) TFEU.

If this letter contains confidential information which should not be disclosed to third parties, 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 the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

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Yours faithfully  
For the Commission

Margrethe VESTAGER  
Member of the Commission