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Subject: State Aid SA.42028 (2017/NN) – Finland
Alleged illegal State aid awarded to Yliopiston Apteekki Oy (UHP)

Sir,

1. PROCEDURE

- (1) On 28 May 2015 the Commission received a formal complaint concerning the granting of alleged State aid by Finland to *Yliopiston Apteekki Oy* (University of Helsinki Pharmacy, "UHP").
- (2) On 16 July 2015, the Commission forwarded the non-confidential version of the complaint to the Finnish authorities with a request for further information.
- (3) On 28 September 2015, the Finnish authorities submitted their response. In addition, the Commission received a submission from UHP on 21 October 2015.
- (4) By letter of 1 December 2015 the Commission sent a letter to the complainant with its preliminary assessment of the measures and explained that it preliminarily considered the indicated measures not to constitute State aid within the meaning of Article 107(1) of the Treaty of the Functioning of the European Union (TFEU).

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- (5) On 31 December 2015 and 18 January 2016, the complainant replied to the preliminary assessment letter, maintaining its position that UHP would have benefited from State aid. The complainant provided an additional submission on 31 August 2016.
- (6) The Commission forwarded the non-confidential versions of all three above mentioned submissions of the complainant to the Finnish authorities on 7 October 2016 with an additional request for further information.
- (7) The Finnish authorities submitted their response on 19 December 2016. In addition, on the same date, the Commission received a submission from UHP, which provided additional submissions on 29 and 30 March 2017.
- (8) By letter of 28 April 2017 the Commission sent to the complainant a second preliminary assessment letter, to which the complainant replied on 8 June 2017, maintaining its position that UHP would have received State aid.
- (9) Between 2015 and 2017 meetings and teleconferences took place with the complainant, as well as with the Finnish authorities and the alleged beneficiary.

2. DESCRIPTION OF THE MEASURES

2.1 Licencing system to operate branch pharmacies

- (10) The system for branch pharmacy licences in Finland can be summarized as follows.
- (11) Section 52(1) of the Finnish Medicines Act 395/1987 ("the Medicines Act") *inter alia* provides that the Finnish Medicines Agency ("FIMEA") may authorise a licensed pharmacist to keep up to maximum three branch pharmacies. By contrast, Section 52(3) of the Medicines Act establishes that UHP, a pharmacy owned by the University of Helsinki, may keep up to sixteen branch pharmacies.
- (12) The objective¹ of the Medicines Act is to promote public health, and in particular to maintain and promote the safety of medicinal products and their safe and proper use. A further objective of the Medicines Act is to ensure the appropriate manufacture and availability of medicinal products in Finland.
- (13) Licences to operate a branch pharmacy are granted against a fee, which is set to cover the costs incurred by FIMEA for processing the licence application. In 2015 the fee was EUR 2 500 per application. The fee is the same for all pharmacies, including UHP, when applying for a licence to operate a branch pharmacy in Finland.

2.2 Taxation measure

- (14) According to the Finnish authorities UHP is, in principle, subject to the same taxation regime as any other pharmacy in Finland. This means that the provisions on corporation tax and on the inter-pharmacy profit balancing charge (*apteekimaksu*, "pharmacy fee") apply equally to UHP and all other pharmacies.

¹ As set out in Section 1 of the Medicines Act.

- (15) Under Section 75(3) of the Finnish Universities Act 558/2009 ("the Universities Act"), Finland used to refund the corporation tax and pharmacy fee paid by UHP to the University of Helsinki, i.e. to the parent of UHP. This tax reimbursement system was abolished on 1 January 2017.

3. THE COMPLAINT

- (16) On 28 May 2015 an Estonian Pharmacies Association ("the complainant") submitted a formal complaint with the Commission concerning the two measures described under sections 2.1 and 2.2 above, by which UHP would receive State aid in Finland.
- (17) First, according to the complainant, the Finnish authorities would provide State aid to UHP within the meaning of Article 107(1) TFEU, by setting in the Medicines Act a higher limit on the number of branch pharmacies that UHP may keep (i.e. sixteen branches), as compared to the maximum number that private pharmacies are entitled to keep (i.e. three branches), without charging UHP for the use of the extra licences. The Complainant considers that Finland has forgone State resources solely due to the fact that it has granted UHP an un-proportional amount of branch pharmacy licences not inherently linked with the underlying policy objective claimed by the Finnish authorities. Finland has therefore conceded a number of licences which it alternately could have commercially exploited. According to the complainant, extra licences available to UHP are essentially a non-monetary subsidy for UHP for the provision of special tasks allocated to them.
- (18) Second, according to the complainant, UHP would have benefited from a preferential tax treatment, consisting in the reimbursement of taxes (i.e. corporation tax and pharmacy fee) by the Finnish authorities to the University of Helsinki, i.e. to the parent of UHP.
- (19) In conclusion, the complainant considers that, the measures would grant State aid to UHP in Finland. Since this aid would improve the competitive position of UHP, it would distort competition in the internal market by allowing UHP to enter foreign markets such as Estonia, by offering low prices and having enhanced financing opportunities.

4. POSITION OF THE FINNISH AUTHORITIES

4.1 Licencing system to operate branch pharmacies

- (20) The Finnish authorities consider that the system of licencing branch pharmacies does not constitute illegal State aid as the State resources criterion of Article 107 (1) of the TFEU is not satisfied. The Finnish authorities submit that they do not commercially exploit their position as a regulating authority and they do not have any commercial interest in UHP that would be significant regarding State aid regulation. The Finnish State acts as a regulator which aims at a policy goal – securing public health – and for this purpose applies criteria to the pharmacy system which are established in legislation in a transparent and non-discriminatory manner.
- (21) According to the Finnish authorities, the objective of UHP's distinct right to keep up to sixteen branch pharmacies is to ensure the provision of practical training

related to pharmacy degrees and pharmacists' qualifications, the development of pharmaceutical services, and the manufacture of rare pharmaceutical preparations².

- (22) The Finnish authorities explained that even though the Medicines Act no longer contains separate provisions concerning the specific tasks of UHP's branch pharmacies as a condition for granting licences, the duties of UHP's branch pharmacies include discharging the specific tasks laid down for UHP in Section 42(1) of the Medicines Act.³ UHP's right to keep an individual branch pharmacy is therefore contingent on whether the branch pharmacy in question participates in the accomplishment of the specific tasks of UHP.⁴ The specific tasks of UHP are to provide practical training in connection with pharmacy teaching, to conduct research on pharmaceutical services, and to manufacture rare pharmaceutical preparations.
- (23) While some private pharmacies participate in the teaching of students and offer them training places, they do so voluntarily rather than on the basis of a legal obligation.
- (24) Licences to operate private pharmacies are personal. The Finnish authorities explain that since the number of branch pharmacies operated by a private pharmacy has a direct impact on the workload of individual pharmacists, the need to ensure the appropriate operation of each branch mandates a limitation of the maximum number of branch pharmacies operated by private pharmacies to three. The licences of UHP are, in contrast, directly based on law and not personalised in the same manner.

4.2 *Taxation measure*

- (25) The Finnish authorities have explained that UHP is owned by the University of Helsinki but that they are two distinct legal entities. The assets and revenues of UHP are managed by the University of Helsinki Funds, which is separate from the University of Helsinki. University of Helsinki Funds manages all the economic statutory duties of the University of Helsinki.
- (26) The Finnish authorities further explained that Finland does not grant any funding to UHP or the University of Helsinki Funds. Accordingly, and in line with the repealed Section 75(3) of the Universities Act (abolished as of 1 January 2017), the refund of corporation tax and pharmacy fee paid by UHP was put at the disposal of the University of Helsinki, and not of UHP or the University of Helsinki Funds.
- (27) At the same time, the University of Helsinki is, according to the information provided by the Finnish authorities, only allowed to use the funding it receives from the State, including the funds received under the repealed Section 75(3) of the Universities Act, for its duties under the Universities Act, i.e. for its non-economic statutory activities. In other words, the University of Helsinki was not

² As laid down in Section 42(1) of the Medicines Act and, respectively, in the rationale for the Medicines Act.

³ See Ruling Number KHO 2013:31 of the Supreme Administrative Court: "On the basis of other evidence presented in the course of the proceedings in the Supreme Administrative Court, the Court finds that, in addition to selling medicinal products and generating revenue for the University of Helsinki, the tasks of the University of Helsinki's branch pharmacies include contributing to the accomplishment of the specific tasks laid down for UHP in Section 42(1) of the Medicines Act."

⁴ See again Ruling Number KHO 2013:31 of the Supreme Administrative Court: "When evaluating whether the conditions laid down in the Medicines Act were satisfied when UHP was authorised to open a new branch pharmacy, the Court must therefore take into consideration not just Section 52(3) of the Medicines Act but also Section 42(1).

allowed to transfer any of the funding received from the State to support its economic activities. This means that the University of Helsinki was barred from returning the funds received under the repealed Section 75(3) of the Universities Act to UHP.

5. ASSESSMENT OF THE MEASURES

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

(29) It follows that, in order for a measure to be qualified as State aid within the meaning of Article 107(1) TFEU, the following cumulative conditions have to be met: i) the measure is imputable to the Member State and granted out of State resources, ii) it confers an economic advantage to undertakings, iii) it is selective, and iv) it distorts or threatens to distort competition and affects trade between Member States.

5.1 *Licencing system to operate branch pharmacies*

(30) The first part of the complaint revolves around the question of whether, by allowing UHP to maintain up to sixteen branch pharmacies instead of the three branch pharmacies allowed for private pharmacies, the Finnish State grants State aid to UHP i.e. whether the State has indeed foregone revenue and has granted a selective advantage to UHP. The privilege granted to UHP essentially amounts to a distinct right to maintain thirteen more branches than any private pharmacy. The question is thus whether, in granting UHP this right, Finland grants State aid to UHP.

a) No advantage granted from State resources

(31) The Commission notes that only advantages granted directly or indirectly through State resources can constitute State aid within the meaning of Article 107(1) of the TFEU. By issuing licences to pharmacies, Finland regulates and limits access to the Finnish pharmacy market, in order to promote public health, and in particular to maintain and promote the safety of medicinal products and their safe and proper use.

(32) The Commission recalls that granting special or exclusive rights without adequate remuneration in line with market rates can constitute foregoing of State revenues (as well as the granting of an advantage). At the same time, when the State acts as a regulator, it can decide legitimately not to maximise the revenues which could otherwise have been achieved, without falling under the scope of State aid rules.⁵ In doing so, however, the State must "*act in a genuinely regulatory capacity*".⁶

(33) The Commission considers that, when issuing licences to UHP as well as to private pharmacies, Finland regulates and limits access to the Finnish pharmacy

⁵ *Eventech v The Parking Adjudicator*, Case C-518/13, ECLI:EU:C:2015:9, paragraphs 47-48, *Bouygues and Bouygues Télécome v Commission*, Case C-431/07 P, ECLI:EU:C:2009:223, paragraph 110.

⁶ See Opinion of General Advocate Wahl of 24 September 2014 in Case C-518/13, ECLI:EU:C:2014:2239 paragraph 32. That case was concerned with access to public infrastructure, but the principles set out therein can be transposed to other regulatory measures as well.

market. It is clear that Finland does not commercially exploit its position as regulator by "selling" licences to operate a (branch) pharmacy at market price. Rather, the licences are granted to both UHP and private pharmacies alike, without demanding a consideration corresponding to the economic value of the licences. The regulating authority FIMEA merely charges a uniform fee to cover the costs it incurs in processing licence applications. Whether the State would receive the licence fees from UHP or from any other company would not make a difference for the State budget. In addition, despite the fact that a licensed pharmacist may keep up to maximum three branch pharmacies, the overall number of (branch) pharmacy licences that can be granted country-wide in Finland is not limited; rather, licences can be granted as long as the conditions set out in Section 52 of the Medicines Act are fulfilled.

- (34) It must be assessed whether the decision of the Finnish authorities not to charge UHP for its exclusive right is inherently linked with the policy objective behind that exclusive right. In this regard, the European Court of Justice observed that *"the identification of the objective pursued is, in principle, a matter within the prerogative of the competent national public authorities alone. They must have a degree of discretion both as regards whether it is necessary, in order to achieve the regulatory objective pursued, to forgo possible revenue and also as regards how the appropriate criteria for the granting of the right, which must be determined in advance in a transparent and non-discriminatory manner, are to be identified."*⁷
- (35) First, the Commission notes that the objectives and tasks of the branch pharmacy system were laid down in the Medicines Act⁸ and in the works preceding it⁹, so that the criteria were therefore established in a transparent manner.
- (36) Second, the Commission recalls that the overarching objective of the Medicines Act is to protect public health, in particular to maintain and promote the safety of medicinal products and their use and appropriate use of pharmaceuticals. UHP has certain specific tasks, laid down in Section 42(1) of the Medicines Act, pursuant to which UHP has to provide practical training in connection with pharmacy teaching and to conduct research on pharmaceutical services. Additionally, UHP has the obligation to manufacture certain rare pharmaceutical preparations, as mentioned in the rationale for the Medicines Act. As the judgment of Finland's Supreme Administrative Court confirmed, when processing an application by UHP to open a branch pharmacy, FIMEA needs to consider whether that branch actually contributes to the fulfilment of UHP's specific tasks.¹⁰
- (37) Third, the CJEU had already the opportunity to declare that a logical connection exists between the objectives of the Medicines Act, the special tasks of UHP and the pharmacy right of UHP. According to the CJEU, a system like the current one

⁷ Judgement of 14 January 2015, *Eventech v The Parking Adjudicator*, Case C-518/13, ECLI:EU:C:2015:9, paragraph 49.

⁸ Section 1 of the Medicines Act reads: *"The purpose of this Act is to maintain and promote the safety of medicinal products and their use and appropriate use of pharmaceuticals. The intention of the Act is also to ensure the proper manufacture and availability of medicinal products in the country"*. According to Section 39 *"There must be a sufficient number of pharmacies in Finland to allow the general public, wherever possible, to obtain medicinal products without difficulty"*. According to Section 42(1) of the Medicines Act *"The University of Helsinki is entitled to maintain one pharmacy in the city of Helsinki, and the University of Eastern Finland one pharmacy in the city of Kuopio. Besides selling medicinal products, the function of these pharmacies is to provide practical training in connection with pharmacy teaching and to conduct research on pharmaceutical services."*

⁹ According to the Government Bill No HE 87/1986 vp, p. 23 *"The UHP, in addition to dispensing medicines, must undertake teaching and research duties and special services relating to the manufacture of certain rare medicinal products"*.

¹⁰ Ruling Number KHO 2013:31 of the Supreme Administrative Court.

is required to carry out the special tasks of UHP, as far as its branch pharmacies participate in the realisation of the special tasks.¹¹

- (38) Concretely, the information provided by the Finnish authorities shows that: (i) regarding the provision of practical training in connection with pharmacy teaching, all UHP branches provided practical training to pharmacy students, their total number varying between 72 and 86 per year during the years 2009-2015¹²; (ii) regarding the research on pharmaceutical services, it has been shown that UHP pharmacists also get involved in teaching activities within the University of Pharmacy and that UHP has also financed¹³ and participated¹⁴ in the organisation of research and advanced studies in pharmacy and related disciplines; (iii) regarding the manufacturing of rare pharmaceutical preparations, UHP is the sole producer¹⁵ of a number of rare medicines in Finland; it manufactures¹⁶ certain life-saving pharmaceutical products that are not manufactured by the industry¹⁷ and would not be available from other sources.
- (39) In this context, the Commission considers that the Finnish authorities could reasonably take the view that charging UHP for the right to maintain up to thirteen branches more than private pharmacies might jeopardise the achievement of the objective, at least in part, since it might deter UHP from opening or maintaining branch pharmacies. In the same vein, the Commission considers that the Finnish authorities could reasonably take the view that the criterion for granting the right in question, namely being entrusted with specific pharmacy tasks, would allow UHP to achieve the objective of ensuring the fulfilment of those specific tasks.
- (40) Fourth, given that UHP is subject to specific obligations laid down in the law, this differentiates it from the private pharmacies operating in Finland. UHP can thus not be said to be in a comparable legal and factual situation with private pharmacies in Finland, which are not subject to such obligations. This conclusion is in line with the findings of the Court of Justice in its judgment in Case C-84/11¹⁸.

¹¹ Judgment of the Court of Justice of 21 June 2012, Susisalo, C-84/11, ECLI:EU:C:2012:374, paragraph 41-42.

¹² The number of trainee students varies during the years and from one branch to another, according to the interest of students applying for such positions. UHP has the obligation to offer training positions to applicants expressing their interest, see recital (41).

¹³ UHP has funded three professorships within the University of Helsinki in the fields of social pharmacy (*sosiaalifarmasia*), pharmacogenetics (*farmakogenetiikka*) and pharmaco-economics (*farmakoekonomia*).

¹⁴ UHP has supervised and guided pharmacy students in the advanced studies of pharmacy including providing them access to UHP's information and databases. These projects included e.g. research into complex medication of elder patients, quality in pharmacy services, research into pharmacy management, risks associated with medication and adverse effects caused by the interaction of different medicines.

¹⁵ According to the Finnish authorities UHP concentrates the manufacturing of rare pharmaceutical products in one single location, for reasons of economic efficiency; however, it is mentioned that all sixteen UHP branches participate at the task of manufacturing rare pharmaceutical products by financially supporting this loss-making activity and by regularly temporarily deploying trainee students from their branches to the location performing this activity.

¹⁶ The manufacturing of rare pharmaceutical products is loss-making due to the high costs involved and to the existence of capped prices of medicines, as regulated by the Finnish authorities.

¹⁷ According to the information provided by the Finnish authorities, there are two other private pharmacies that engage in the manufacturing of medicines; however, they manufacture rare medicines only to a limited extent.

¹⁸ Judgment of the Court of Justice of 21 June 2012, Susisalo, C-84/11, ECLI:EU:C:2012:374. In this case the Finnish Court (Korkein hallinto-oikeus) referred for a preliminary ruling to the Court of Justice questions on the compatibility of the Finnish Medicines Act 395/1987, and particularly art. 52(1) and 52(3), with Article 49 TFEU, dealing with the freedom of establishment. The Court noted that "Article 49 TFEU must be interpreted as meaning that it does not preclude a national law, such as that at issue in the main proceedings, which provides for a licensing scheme for the operation of branch pharmacies specific to the Helsingin yliopiston apteekki [UHP] which is more favourable than that applicable to private pharmacies, provided that — which is for the referring court to verify — the branches of the Helsingin yliopiston apteekki [UHP] actually participate in the accomplishment of the specific tasks relating to the teaching of pharmacy students, research on pharmaceutical services and the manufacture of rare pharmaceutical preparations conferred on the latter by national law".

- (41) The fact that some private pharmacies may in practice carry out to some extent similar tasks to those specific to UHP is not relevant in this regard, since, contrary to UHP, they do not have a legal obligation to do so, but they do so on a purely voluntary basis. In this regard, the Court of Justice stated in Case C-84/11 that: *“The fact that private pharmacies also participate in practice, [...] inter alia, in the teaching of students and offering them training places does not change that assessment. Unlike the UHP, private pharmacies offer students training places on an optional basis and are free to do so according to their own interests. Furthermore, the teaching dispensed to students is only one of the tasks imposed on the UHP”*.¹⁹
- (42) It follows that the system as such does not seek through its objective and general structure to create an advantage through State resources. In reality, the foregone revenue claimed by the complainant relates to the sum that should be paid by UHP for the additional profit, generated through the extra licences. The higher number of licences that UHP has is inherent to the system which aims at achieving a public policy objective, and cannot be considered to involve State resources.²⁰
- (43) Furthermore, by granting more than three licences to UHP, the State does not forego state resources. In fact the same applicable fees for the additional thirteen licences as for the up to three licences granted to private pharmacies have been applied. Thus if it had granted those licences to the latter, no higher fees could have been obtained by the Finnish State.
- (44) The Commission therefore considers that, the right of UHP to maintain up to sixteen branch pharmacies does not involve an advantage from State resources, thus there is no need to analyse whether the remaining conditions of Article 107(1) of the TFEU are met, since these conditions are cumulative.
- (45) Finally, the Commission cannot accept the complainant’s argument that, when comparing the position of UHP with its competitors, one should take into account also pharmacies on foreign markets, given UHP's expansion on such markets (e.g. on the Estonian market). The comparison can only be made with pharmacies which are subject to the measure at stake and the territorial applicability of the Medicines Act is limited to the Finnish territory, so only pharmacies operating on that market can be taken into account. Equally, the Commission cannot accept to examine the complainant's argument that UHP would not actually carry out its specific tasks in practice. The Commission notes that what is relevant for the State aid assessment is that UHP is assigned by law to carry out these specific tasks. Concerns of the complainant about a possible infringement of the national legislation would be a matter of national law.

b) Complainant`s arguments referring to the compatibility of the measure

- (46) The complainant has also put forward that the Finnish authorities would have justified the measure mainly with public service obligations performed by UHP. In this regard, the complainant stated that the Finnish authorities made a manifest error in defining a public service obligation and failed to establish the parameters of compensation and how to avoid overcompensation. Subsequently, the

¹⁹ Judgment of the Court of Justice of 21 June 2012, *Susisalo*, C-84/11, ECLI:EU:C:2012:374, paragraph 43.

²⁰ Joined cases C-72/91 and C-73/91 of 17 March 1993, *Sloman Neptun Schiffahrts AG v Bodo Ziesemer*, ECLI:EU:C:1993:97, paragraph 21-22.

complainant concludes from this that the measure does not meet the *Altmark* criteria and constitutes illegal State aid. In the same vein, the complainant also referred to the overcompensation for the preferential right of UHP.

- (47) The Commission however notes that Finland has not argued that the specific tasks assigned to UHP are to be considered as a Service of General Economic Interest (SGEI) and that the right of UHP to obtain up to sixteen licences should be regarded as compensation for that SGEI.
- (48) The SGEI Decision²¹ and the SGEI Framework²² only define the conditions under which a measure qualified as State aid is or can be found compatible with the internal market on the basis of Article 106(2) TFEU. Given the lack of foregone State resources (see recital (43) above), and therefore the absence of State aid, the SGEI conditions which could in theory render the alleged State aid compatible are of no relevance for the case at hand.

5.2 *Taxation measure*

- (49) With regard to the tax reimbursement mechanism (see recital (15) above), the complainant argues that despite the fact that the reimbursement of taxes is transferred to the University of Helsinki, such reimbursement also indirectly benefits UHP, since it is the daughter company of the University of Helsinki and that the measure allows UHP to invest profits to fuel aggressive expansion, also in other Member States, which in turn increases the profits for the University of Helsinki.
- (50) In their submissions, the Finnish authorities reiterated that, the University of Helsinki can only use the tax reimbursements for non-commercial purposes. In this respect, the operation of a pharmacy (i.e. the activity that UHP performs) certainly qualifies as a commercial activity and therefore the University of Helsinki was barred by law from transferring to UHP any of the funding received from the State.
- (51) Additionally, the Finnish authorities explained that the tax measure complained about, allegedly amounting to State aid in favour of UHP, has been abolished since 1 January 2017. Furthermore, the Finnish authorities confirmed on the basis of audited reports that the University of Helsinki has indeed refrained from transferring to UHP any tax reimbursements received throughout the period during which the tax reimbursement system was in force²³.
- (52) On this basis, the Commission concludes that the tax measure did not confer any undue economic advantage to UHP in the sense of Article 107(1) TFEU.

6. CONCLUSION

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

²¹ Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (notified under document C(2011) 9380), OJ L 7/3, ELI: [http://data.europa.eu/eli/dec/2012/21\(1\)/oj](http://data.europa.eu/eli/dec/2012/21(1)/oj).

²² Communication from the Commission (2012/C 8/03) — European Union framework for State aid in the form of public service compensation (2011), OJ C 8/15, [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52012XC0111\(03\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52012XC0111(03)).

²³ (The tax reimbursement mechanism for the corporation tax was in force from 1 August 2010 to 1 January 2017 and for the amount of the pharmacy fee from 1 January 2011 to 1 January 2017).

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Your request should be sent electronically to the following address:

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Yours faithfully
For the Commission

Margrethe VESTAGER
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