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Mr Hoefner, Mr Elser, Please Welcome to Poland. Some Comments on the Polish Healthcare System Reform from the Perspective of State Aid Law

by

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CONTENTS

- I. Introductory remarks
- II. The nature of the activities performed by commercial companies created from the transformation of IPHFs
 1. Types of activity pursued by IPHFs and companies created from their transformation
 2. The notion of economic activity in the jurisprudence of European courts
 - 3 The nature of the activity of Polish public hospitals
- III. Waiver of debt of IPHFs and the distortion or threat of distortion of competition
- IV. Waiver of debt of IPHFs and the effect on trade between Member States
- V. Conclusions

Abstract

The purpose of this paper is to verify the hypothesis that a debt write-off implemented recently by Polish authorities in favour of public hospitals constitutes State aid within the meaning of Article 107(1) of the Treaty of the Functioning of the European Union. The paper contains a detailed description of the nature of the measure – its historical background, regulatory context, as well as its construction. It presents an in-depth analysis of the fulfilment by the measure of the conditions

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stipulated in Article 107(1) TFEU. As a preliminary issue, the analysis addresses the problem whether Polish public hospitals can be considered as undertakings within the meaning of EU competition law, particularly, as to their activity financed by the sickness fund organized under the principle of social solidarity. The answer to this question seems to be affirmative and in line with the landmark *Hoefner and Elser* judgments where the ECJ held that the way in which an entity is financed is irrelevant for its classification as an undertaking. The paper argues in favour of the thesis that the debt write-off must be considered as affecting trade between Member States and competition. Consequently, and contrary to the official position of the Polish government, the measure in question is classified as State aid.

Résumé

Le but de cet article est de vérifier l'hypothèse selon laquelle l'amortissement total des dettes effectué récemment par les autorités polonaises en faveur des hôpitaux publics constitue une aide publique au sens de l'Article 107(1) TFUE. L'article contient une description détaillée de la nature de cette mesure – son histoire, contexte législatif aussi que sa construction. Il présente une analyse profonde de l'accomplissement par cette mesure des conditions indiquées par l'Article 107(1) TFUE. Comme question préliminaire, l'analyse a pour objectif de vérifier si les hôpitaux publics polonais peuvent être considérés comme entreprises au sens de la loi de concurrence de l'EU par rapport à son activité financée par le fonds de maladie organisé en accord avec le principe de la solidarité sociale.

Classifications and key words: Poland; healthcare services; hospital services; state aid; notion of state aid; write-off of the debts of an undertaking; notion of undertaking in the EU competition law; public undertakings; social solidarity; cross-subsidization; effect on trade between Member States; adverse effect on competition; notification of state aid; services of general economic interest.

I. Introductory remarks

The Polish healthcare system has been experiencing serious difficulties for many years. Independent Public Healthcare Facilities (hereafter, IPHF), which form the backbone of the Polish hospital services sector, are in a particularly difficult financial situation. According to data provided by the Ministry of Health, the amount of overdue debt of Polish IPHF's has reached 2.372.282 thousand zlotys (approximately 550.000 thousand EUR)¹ at the end of the first quarter of 2011. This situation results not only in high costs of healthcare

¹ http://www.mz.gov.pl/wwwfiles/ma_struktura/docs/zal_zobowiazania_04072011.pdf

provision by these entities, but it is also a threat to their provision in the future. The bad diagnosis of the situation of Polish hospitals has prompted the government to develop a new concept of healthcare reform. The resulting Act of 15 April 2011 on healthcare activities (hereafter, Act) came into force on 1 July 2011². The new legal framework refers to the fundamental causes of the difficulties of the Polish healthcare system as identified by the government. According to the authors of the Act, these causes include:

- 1) imperfect, inefficient legal form in which healthcare facilities operate,
- 2) inadequate qualifications of managers of public healthcare units,
- 3) limited liability of its establishing entities for the obligations of IPHF³.

The reform of the Polish healthcare system puts emphasis not on the modification of the manner in which healthcare activities are financed but instead, on a change in the legal form of those providing healthcare as well as on establishing new legal framework for providing healthcare activity. The basic principle of the reform is to change the current *status quo* in which IPHFs constitute the dominant legal form for conducting healthcare activities, particularly so in hospital services. The crucial expected result of the reform is to replace IPHFs by commercial companies controlled by those public bodies, which had previously had the status of IPHFs' establishing entities. The Act introduces strong incentives for the transformation of IPHFs into commercial companies overturning at the same time their current status whereby they are not subject to Polish bankruptcy law. This in turn should contribute to enhancing their economic efficiency. Freeing the newly created companies from debt is, however, fundamental for the success of the reform because the ballast of debts incurred in the past by IPHFs would inevitably put into question the long-term viability of the new companies. Consequently, the Act introduces the possibility to waiver the overdue debt of existing IPHFs in the course of their transformation process into commercial companies.

The Act lays down a new list of legal forms for the provision of healthcare services in Poland renouncing the dichotomy, which has so far divided all healthcare providers into: Non-Public Healthcare Facilities and IPHFs⁴. In the new organizational framework, healthcare is to be undertaken by a number

² With the exception of certain provisions that will come into force on 1 January 2012.

³ Explanatory Memorandum to the Draft Act of 15 April 2011 on Healthcare Activity, p. 1.

⁴ So far, in accordance with the Act of 30 August 1992 on Healthcare Facilities (Journal of Laws 1991 No. 91, item 408) healthcare activity could be conducted in the form of a Healthcare Facility – Independent Public (IPHF) and Non-Public (NPHF). IPHFs are facilities established by public bodies, NPHFs are entities which may be established by private law bodies including: companies, employers, churches, foundations and associations as well as, other national and foreign legal and natural persons.

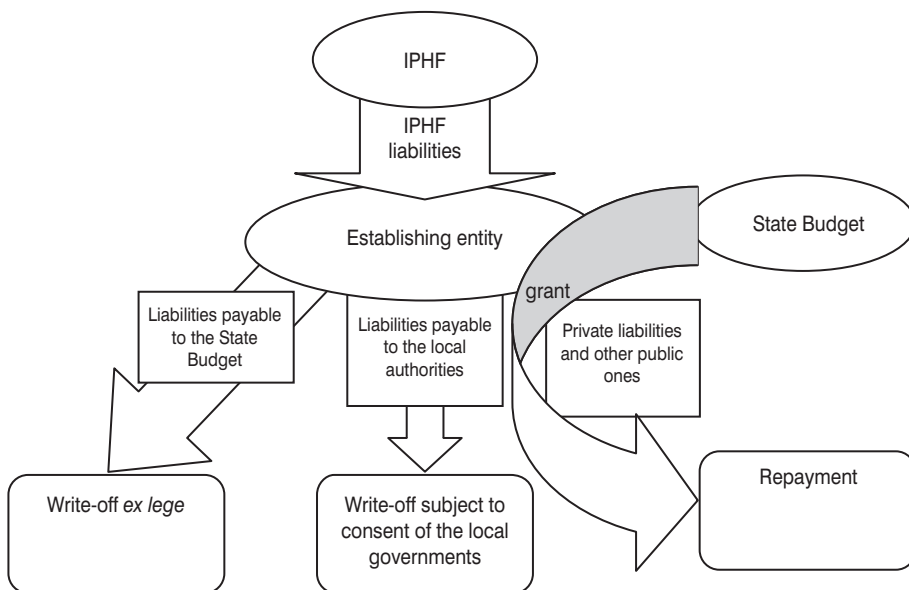
of enumerated categories of entities including: entrepreneurs within the meaning of the Act on the freedom of Economic Activity⁵, IPHFs, budgetary units, research institutes and foundations. Healthcare services may also be provided by doctors or by nurses within the scope of their professional practice (individual or group). The legislator has not discarded the legal form of IPHFs. Nevertheless, the new Act does not provide the legal possibility of establishing new IPHFs and, with regard to existing ones, introduces strong incentives to transform them into commercial companies.

The Act specifies in detail the procedure to be followed in order to transform IPHFs into commercial companies. In the course of the transformation, a new commercial company enters into the rights and obligations of the original IPHF. The transformation is conducted by the governing body of the entity which originally established the IPHF in question (hereinafter: the establishing entity). The establishing entity must determine before the transformation process is commenced the debt ratio of the IPHF in question on the basis of its financial statements for the last year. This is the ratio of the total liabilities and short-term obligations of the given IPHF, less its short-term investments, to the sum of its revenues. If on the day before the transformation the ratio is more than 0.5, the establishing entity takes over, *ex lege*, the obligations of that IPHF up to such value as to ensure that the debt ratio for the new commercial company does not exceed 0.5. If the IPHF's debt ratio is from the outset 0.5 or lower, the new entity may acquire the obligations of the IPHF in question as they stand. At the same time, certain categories of obligations acquired by the establishing entity, which transformed the IPHF into a commercial company before 31 December 2013, shall be waived *ex lege*. This rule applies to certain enumerated categories of liabilities (including interest) payable to the State budget, known on the 31 December 2009. They include, *inter alia*, tax liabilities, social security contributions and environmental fees. Some other categories of public liabilities, including those resulting from local taxes, may be waived upon a resolution of the constituting organ of the relevant local government unit.

To repay other obligations taken over by the establishing entity, the latter may receive a grant directly from the State budget. This, however, requires the fulfilment of certain additional conditions including a settlement with private creditors. According to the Act, the total amount of 1.400.000 thousand zlotys (approximately 320.000 thousand EUR) has been provided in the State budget for such grants.

The following diagram presents the construction of the measure in question:

⁵ Act of 2 July 2004 (Journal of Laws 2004 No. 173, item 1807).



At this point, the question arises whether the aforementioned measure can be classified as State aid within the meaning of Article 107(1) TFEU. It must be noted in this context that the measure has not been notified to the European Commission pursuant to the Article 108(3) TFEU.

According to settled ECJ jurisprudence, the classification of a measure as State aid requires the fulfilment of the following criteria:

1. there must be an intervention by the State or through State resources,
2. the intervention must be liable to affect trade between Member States,
3. it must confer an advantage on the recipient; in other words – Article 107(1) TFEU covers measures which, whatever their form, are likely to directly or indirectly favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions,
4. it must distort or threaten to distort competition⁶.

A preliminary assessment of the measure in question leads to the conclusion that it confers an economic advantage upon IPHFs which they would not have obtained under normal market conditions. As a result of its implementation, the recipients will be in whole or in part freed from debt. As the ECJ expressed in one of its classic cases: ‘the concept of aid is (...) wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate

⁶ C-280/00 *Altmark Trans*, ECR [2003] I-07747, para. 75, 84.

the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect⁷. The size of the benefit granted to a particular IPHF will depend on the amount of its outstanding liabilities as of 31 December 2009. It will also depend on the decision of its establishing entity, which can determine the takeover of all or part of those obligations.

There is no doubt that the measure in question fulfils the first condition of the EU notion of State aid. The advantage conferred on IPHFs as a result of the reduction of their debts is financed directly from the resources of public authorities and/or other public bodies. Depending on the type of obligation in question, public funding derives from:

1. State budget – in relation to public liabilities constituting budgetary revenues as well as in relation to liabilities subject to government subsidies;
2. Local Government Units (hereafter, LGUs) – in relation to liabilities taken over by the establishing entities and waived pursuant to a resolution of the constituting organs of the LGUs;
3. Establishing entities – in relation to repayable liabilities taken over by them which are not subject to budgetary grants⁸.

Clearly therefore, the measure in question involves a transfer of State resources to IPHFs as they remain under the control of public authorities and/or other public bodies. As established in the legally binding act issued by the Polish parliament, the measure is as well, without any doubts, imputable to the State. The fulfilment by the measure in question of the remaining three conditions of the EU notion of State aid requires an in-depth analysis.

The Explanatory Memorandum attached to the Draft Act provides for a very laconic assessment of the compliance of the measure with State aid rules: ‘the proposed solutions (...) do not breach State aid provisions. This statement is justified by the assumption that these entities (debt-waived independent public healthcare facilities and resulting from their transformation commercial

⁷ 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg*, ECR [1961] 95, para. 3, 20; also T-366/00 *Scott SA*, ECR [2007] II-797, para. 92; C-128-129/03 *AEM SpA*, ECR [2005] I-2861, para. 38; T-274/01 *Valmont Nederland*, ECR [2004] II-3145, para. 44; C-276/02 *Spain v. Commission*, ECR [2004] I-8091, para. 24; C-501/00 *Spain v. Commission*, ECR [2004] I-6717, para. 90; C-328/99 and C-399/00 *SIM 2 Multimedia*, ECR [2003] I-4035, para. 35; C-5/01 *Belgium v. Commission*, ECR [2002] I-11991, para. 32; C-143/99 *Adria-Wien Pipeline*, ECR [2001] I-8365, para. 38; C-387/92 *Banco Exterior de España*, ECR [1994] I-877, para. 13; C-256/97 *DM Transport*, ECR [1999] I-3913, para. 19.

⁸ IPHF establishing entities are all public bodies: ministers and governing bodies of central authorities, voivodes, LGUs, public medical schools or public universities engaged in teaching and research in medical science as well as the Medical Centre of Postgraduate Education.

companies) will provide healthcare services financed from public funds, [while they will provide] other services only incidentally. Therefore, there is no threat of distortion of competition rules.’

It is clear from the above statement that the concept adopted by the Polish legislator is based on two assumptions. First, that medical services financed from public funds are not conducted under the conditions of market competition. What is not clear, however, is if this statement amounts to depriving healthcare activity of the status of an economic activity. Second, the statement assumes that aid granted to an undertaking conducting simultaneously commercial activities and an activity not performed under the conditions of market competition, does not constitute State aid if the former is merely incidental to the latter.

A different standpoint can be found in the Comments submitted to the draft Act (hereafter, Comments on the Draft Act) by the President of the Polish Office for Competition and Consumer Protection (in Polish: *Urząd Ochrony Konkurencji i Konsumentów*; hereafter, UOKiK). According to the UOKiK President, IPHFs are undertakings within the meaning of EU Competition Law – this conclusion arises inevitably from the ECJ judgements in *Vanbraekel*⁹ and *Smits*¹⁰. The UOKiK Presidents noted that the funding provided to IPHFs does not, as a general rule, satisfy the requirement to distort or threaten to distort competition nor does it normally affect trade between Member States. According to the UOKiK President, this conclusion is valid insofar as IPHFs, within the public healthcare system, are not entitled to ‘charge insured persons for the provided services, if such services are vested under health insurance and are free.’ This observation does not apply, therefore, to a relatively small range of services which IPHFs provide wholly or partly for remuneration. Moreover, recipients of healthcare services provided by IPHFs within the public healthcare system are generally Polish citizens. Providing them to citizens of other Member States is an exception and takes place only in strictly defined situations (life threatening conditions or with the consent of a competent body of another Member State). Thus, as the UOKiK President pointed out, ‘the principal objective of public healthcare facilities is to meet the needs of Polish citizens in healthcare within healthcare services guaranteed by the State in a continuous and permanent way.’ Notwithstanding the above, and as emphasized by the UOKiK President, it cannot be excluded that the measure in question will affect competition. This is a consequence of the legal possibility of providing, by the newly created commercial companies, of healthcare services for remuneration to not insured patients alongside its publicly funded activities. Hence, in the opinion of the UOKiK President, the

⁹ C-368/98 *Abdon Vanbraekel*, ECR [2001] I-5363.

¹⁰ C-157/99 *B.S.M. Geraets-Smits and Peerbooms*, ECR [2001] I-5363.

measure in question should be classified as State aid within the meaning of Article 107(1) TFEU and notified to the European Commission.

The opinions expressed in the Explanatory Memorandum to the Draft Act and in the Comments submitted by the UOKiK President must be verified in the light of European jurisprudence. The starting, and indeed crucial point of this assessment should be on the evaluation of whether, and if so, to what an extent, do the healthcare activities provided by the beneficiaries of the measure have an economic nature. In other words, it is necessary to determine first whether the commercial companies created from the transformation of IPHFs will have the status of an ‘undertaking’. This issue is subject of an analysis conducted in section II below, in which two basic juridical concepts of the EU notion of an undertaking are confronted: the wide definition developed by the ECJ in *Hoefner and Elser* and the narrow one, related to the concept of the so called ‘social exclusion’.

Section III contains the evaluation of the effect of the measure on competition. This analysis is preceded by a description of the types of activity normally conducted by IPHFs and the manner of their financing by patients and the Polish public sickness fund. Finally, section IV addresses the question whether the analysed debt write-off has an effect on trade between Member States.

II. The nature of the activities performed by the commercial companies created from the transformation of IPHFs

1. Types of activity pursued by IPHFs and companies created from their transformation

Both IPHFs and the companies created as a result of their transformation can potentially provide two types of healthcare activities: those within the public healthcare system and those outside of its scope. Healthcare services conducted within the former are provided with universal coverage. As a general rule, they are provided without remuneration to those insured by the sickness fund, organized under the principle of social solidarity, and to certain categories of other entitled persons. These types of services are financed from the resources of the National Health Fund (hereafter, NHF) – a State fund established specifically to manage national healthcare contributions. The NHF, acting pursuant to the Act on healthcare services financed from public funds¹¹, contracts out the provision of healthcare services to a variety of healthcare

¹¹ The Act of 27 August 2004 (Journal of Laws 2004 No. 210, item 2135).

providers, both private and public. Specific procedures for the conclusion of such contracts are set out in this Act and applied instead of general public procurement rules. The Act on healthcare services financed from public funds generally provides for the selection of healthcare providers in public tenders. In their course, the NHF is obliged to ensure equal treatment and fair competition between the participants of the tender. The contract is ultimately concluded with the candidate with the best offer, irrespective of its legal form and status.

An entity that has concluded a contract with the NHF may also provide medical services for remuneration, alongside those covered by that contract. However, charging insured patients for service covered by a contract concluded with the NHF is subject to a fine. This rule applies equally to all categories of healthcare providers. Typically therefore, in terms of hospital services, IPHFs conduct both types of activities: those provided to patients free of charge (covered by a contract with the NHF) and healthcare services provided for remuneration (not covered by such contract). The vast majority of IPHFs derive most of their revenues from their activities within the public healthcare system; revenue from commercial healthcare services tends to be of marginal importance¹². This situation may, however, vary significantly from one IPHF to another. It is also likely that the revenue structure of the companies created from the transformation of IPHFs will, at least in the short run, remain unchanged. In the longer perspective, however, the range of healthcare activities provided for remuneration by the new entities should grow alongside the efforts placed into increasing their efficiency.

The economic nature of healthcare activities provided by IPHFs for remuneration does not raise objections. This position is confirmed by numerous judgments of European courts, including the *Pavlov* case¹³. This concept is also widely commented on in literature¹⁴ even though the commentators have yet to reach a unified position on the nature of such activities within the overall public healthcare system.

¹² According to the Report on the financial situation of public hospitals in Poland of 2010 prepared by Magellan S.A. approximately 92,10% of the revenues of Polish public hospitals comes from NHF payments.

¹³ C-180/98 to 184/98 *Pavlov*, ECR [2000] I-6451; C-172/03 *Wolfgang Heiser*, ECR [2005] I-1627.

¹⁴ V. Hatzopoulos, 'Killing National Health and Insurance Systems but Healing Patients? The European Market for Health Care Services after the Judgments of the ECJ in *Vanbraekel* and *Peerbooms*' (2002) 39 *C.M.L.Rev.* 683-729, at 707; J. Temple Lang, 'Privatisation of Social Welfare: European Union Competition Law Rules' [in:] M. Dougan, E. Spaventa (eds.), *Social Welfare and EU Law: Essays in European Law*, Oxford 2005, 45-77 at 65; E. Szyszczak, *Modernising Healthcare: Pilgrimage for the Holy Grail* [in:] M. Krajewski, U. Neergaard, J. W. Van de Gronden, *The Changing Legal Framework for Services of General Interest in Europe*, The Hague, 2009, 191-213 at 197-198.

2. The notion of economic activity in the jurisprudence of European courts

Assessing the nature of the activities conducted by the IPHFs within the Polish public healthcare system must begin with quoting the classic definition formulated in the landmark *Hoefner* case¹⁵. Accordingly, ‘every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed’¹⁶ should be seen as an undertaking. At the same time, according to settled ECJ case law ‘any activity consisting in offering goods and services on a given market is an economic activity’¹⁷.

This ‘functional’ concept of an undertaking has been perfectly illustrated by the words of Advocate General F. Jacobs: ‘the Court’s general approach to whether a given entity is an undertaking within the meaning of the Community competition rules can be described as functional, in that it focuses on the type of activity performed rather than on the characteristics of the actors which perform it, the social objectives associated with it, or the regulatory or funding arrangements to which it is subject in a particular Member State’¹⁸.

The concept of an undertaking has not, however, been interpreted uniformly in the entire course of the development of European case law. As pointed out by Advocate General Poiares Maduro in his opinion to the *FENIN* case, European courts have generally applied two different criteria for the classification of an entity’s activity as an economic one – a comparative and a market criterion¹⁹. The comparative criterion derives directly from the concept of an undertaking formulated in *Hoefner*²⁰. The ECJ based its conclusion therein on the economic nature of the activity of German public recruitment agencies because of the argument that such activity ‘has not always been and not necessarily is conducted by public entities’²¹. This statement became the grounds for a number of instances where the comparative criterion was adopted by the ECJ²². According to this approach, the fact that the activity

¹⁵ C-41/90 *Hoefner and Elser v Macrotron*, ECR [1991] I-1979.

¹⁶ *Ibidem*, para. 21 and C-237/04 *Enirisorse*, ECR [2006] I-2843.

¹⁷ 118/85 *Commission v Italy*, ECR [1987] 2599, para. 7; C-35/96 *Commission v Italy*, ECR [1998] I-3851, para. 36; C-180-184/98 *Pavlov*, ECR [2000] I-6451 and C-218/00 *Cisal di Battistello Venanzio*, ECR [2002] I-691, para. 22, 23; C-475/99 *Ambulanz Glöckner*, ECR [2001] I-9089, para. 19.

¹⁸ Opinion of AG Jacobs in joint cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband*, ECR [2004] I-2493.

¹⁹ Opinion of AG Poiares Maduro in case C-205/03P *FENIN*, ECR [2006] II-6295, para. 11–15.

²⁰ C-41/90 *Hoefner and Elser*.

²¹ *Ibidem*, para. 22.

²² C-475/99 *Ambulanz Glöckner*, para. 20; T-128/98 *Aéroports de Paris*, ECR [2000] II-3929, para.124 and T-115/04 *SELEX*, ECR [2006] II-4797, para. 92.

in question is also provided by private entities (more precisely: private profit entities), or even the mere possibility of its provision by such entities, determines its economic nature²³. Moreover, decisive here is not so much the potential profitability of that activity in a specific legal regime, but rather that mere possibility resulting from the nature of the activity in question²⁴.

The market criterion, on the other hand, tends to associate the economic nature of an activity with the participation in a market. As pointed out by Poiares Maduro in this context, in recognising the economic nature of an activity it is not ‘the mere fact that the activity may, in theory, be carried on by private operators which is decisive, but the fact that the activity is carried on under market conditions’²⁵. Hence, the status of an economic activity should be associated with an activity the results of which, in the form of goods or services, may be subject to a market exchange. Some authors equate this relation with the possibility of obtaining, in exchange for goods or services, remuneration that at least covers their costs²⁶. Alternatively, they equate it with the profit-making potential of the service or product in question²⁷ seeing as the mere possibility of making such profit presupposes the emergence of a market in economic terms. However, the fact that the specific entity operates at a profit or for profit remains irrelevant to the question of the nature of a given activity²⁸. Accordingly, the existence of competition among market players, or even the mere possibility of its existence (disregarding any possible exclusive rights), is an important indicator of the economic nature of an activity. This view corresponds with the well known statement expressed by AG Jacobs that ‘the underlying question is whether that entity is in a position to generate the effects which the competition rules seek to prevent’²⁹.

²³ C-475/99 *Ambulanz Glöckner*, para. 20; T-128/98 *Aéroports de Paris*, para. 124.

²⁴ Also O. Odudu, ‘Are State-owned health-care providers undertakings subject to competition law?’ (2011) 5 *E.C.L.R.* 231–241, at 235; however differently M. Kleis, P. Nicolaidis, ‘The Concept of Undertaking in Education and Public Health Systems’ (2006) 3 *EStAL* 505–508, at 505, who link lack of classification of certain activity as economic one, with reservation of its exclusivity by the State; similarly J. Baquero Cruz refers to criteria of possibility of performing certain activity in legal reality of a certain country – J. Baquero Cruz, *Service of General Interest and EC Law* [in:] G. De Burca (ed.), *EU Law and the Welfare State: In Search of Solidarity*, Oxford 2005, 169–212, at 179–185.

²⁵ Opinion of AG Poiares Maduro in C-205/03P *FENIN*, para. 13.

²⁶ M. Kleis, P. Nicolaidis, *The Concept...*, p. 505.

²⁷ O. Odudu, *Are State-owned...*, p. 235.

²⁸ C-67/96 *Albany*, ECR [1999] I-5751, para. 80-87; C-244/94 *FFSA*, ECR [1995] I-4013, para. 17–22; 209–215 and 218/78 *van Landewyck*, ECR [1980] 3125; S. Dudzik, *Pomoc państwa dla przedsiębiorców publicznych w prawie Wspólnoty Europejskiej. Między neutralnością a zaangażowaniem*, Kraków 2002, pp. 149–150.

²⁹ Opinion of AG Jacobs in C-218/00 *Cisal*, ECR [2002] I-691, para. 71.

EU jurisprudence takes a different view of undertakings operating on the principles of social solidarity. European courts have recognised the activities of so-organised health or social insurance funds as not fulfilling the criteria of an economic activity in a series of judgments³⁰. In *AOK*, the Court held that the activities of German sickness funds do not carry the characteristics of an economic activity because they are conducted within the public health insurance system, subject to the principle of social solidarity. As a result, they have an exclusively social nature. The ECJ took into consideration: the non-profit purpose of their activity and the lack of a relationship between the costs of the services provided to the insured and the amount of their insurance contributions³¹. Amazingly, this conclusion was not influenced by the significant level of discretion available to German sickness funds with respect to the determination of the value of healthcare contributions, nor by the existing, albeit small, degree of competition between the funds. Following the approach developed in *AOK*, the General Court found in *FENIN* the activity of the Spanish sickness fund to be deprived of an economic nature³².

Some commentators considered the aforementioned approach as inconsistent with the purely functional concept of an economic activity, based on the criterion of the existence of a market and competition³³. Some authors took the view that EU courts have developed a *sui generis* sectorial exemption from EU competition rules with respect to undertakings whose activity is subject to the principle of social solidarity³⁴. M. Krajewski and M. Farley went even further in their assessments by claiming that EU courts have in the *FENIN* case virtually excluded the entire public healthcare sector from the application of EU competition rules³⁵.

³⁰ C-159/91 and C-160/91 *Poucet*, ECR [1993] I-637; C-218/00 *Cisal*; C-264/01, C-306/01, C-354-355/01 *AOK*; T-319/99 *FENIN* and C-205/03P *FENIN*.

³¹ C-264/01, C-306/01, C-354/01 and C-355/01 *AOK*; C-205/03P *FENIN*, para. 54.

³² T-319/99 *FENIN*.

³³ T. Prosser, *The Limits of Competition Law. Public Service and EC Law*, Oxford 2005, p. 130; likewise: J. Baquero-Cruz, 'Services of General Interest and EC Law' [in:] G. de Búrca (ed.), *EU Law and the Welfare State. In Search of Solidarity*, Oxford 2005, p. 184.

³⁴ Inter alia: M. Krajewski and M. Farley, who point to the existence of 'social exclusion' from the competition rules and - M. Krajewski, M. Farley, 'Limited Competition in National Health Systems and the Application of Competition Law: The AOK Bundesverband Case' (2004) 29(6) *E.L. Rev.* 842-851; J. L. Buendia Sierra, who uses the term 'doctrine of the protected area' - J. L. Buendia-Sierra, *Exclusive Rights and State Monopolies under EC Law*, Oxford 1999, p. 52-54 and N. Boeger, who points to 'solidarity exclusion' - see N. Boeger, 'Solidarity and EC Competition Law' (2007) 32(3) *E.L. Rev.* 319-340, at 319.

³⁵ Krajewski, M., Farley, M., 'Non-Economic Activities in Upstream and Downstream Markets and the Scope of Competition Law After Fenin' (2007) 32(1) *E.L. Rev.* 111-124, at 123.

European jurisprudence on internal market rules does not, however, confirm this view. In the *Smits* case, the ECJ rejected the claim of the German government that the ‘structural principles governing the provision of medical care are inherent in the organisation of the social security systems and do not come within the sphere of the fundamental economic freedoms guaranteed by the EC Treaty, since the persons concerned are unable to decide for themselves the content, type and extent of a service and the price they will pay’³⁶. The Court confirmed that healthcare services (including those financed by universal health insurance) are covered by Article 56 TFEU and ‘there is no need for diversification in this regard between care provided in a hospital environment and outside it’³⁷. The ECJ pointed out to the fact that for the classification of that activity as a service within the meaning of Article 56 TFEU (thus as an economic activity), it is not relevant whether the costs of these services are covered directly by patients, public authorities or health funds³⁸. The same approach was used in *Vanbraekel*³⁹.

What is clear is that the concept of services within the meaning of Article 56 TFEU is not equivalent to the analogous notion used on the grounds of EU competition rules. For Article 56 TFEU to apply, the classification of activities as services within the economic meaning is not sufficient, but must be complemented by an element of remuneration received in exchange for the activity in question. The latter aspect is not necessary to classify the provision of services as an economic activity on the grounds of competition rules⁴⁰. The classification of a service as falling within Article 56 TFEU should, therefore, be all the more decisive to consider them a manifestation of an economic activity under competition rules.

3. The nature of the activity of Polish public hospitals

The question arises of how to classify, in light of the aforementioned case law, the nature of those activities of Polish public hospitals which are financed by the NHF. The application of the comparative approach, as developed in *Hoefner*, would inevitably lead to the conclusion that such activities have an economic nature. It is apparent that under the Polish legal regime, private entities can provide, and indeed do provide, the same healthcare services as public ones. This refers both to the activity within the public healthcare

³⁶ C-157/99 *Smits and Peerbooms*, para. 53.

³⁷ *Ibidem*, para. 51.

³⁸ *Ibidem*, para. 55.

³⁹ C-368/98 *Vanbraekel*, ECR [2001] I-5363.

⁴⁰ C-41/90 *Hoefner and Elser*, para. 21; T -155/04 *SELEX*.

system and to services provided for remuneration. The comparative approach was applied by the ECJ in the *Ambulanz Glöckner* case that concerned the application of competition rules to ambulance transport services⁴¹. The ECJ held therein that both emergency transport services and patient transport services constitute an economic activity given that they ‘have not always been, and are not necessarily, carried on by such organisations (i.e. non-profit medical aid organizations) or by public authorities⁴²’.

The application of the market based approach will not lead to such clear conclusions. Some authors expressed the opinion that EU jurisprudence on sickness funds should be applied *per analogiam* to healthcare providers. According to their view, services provided by public hospitals without remuneration should be covered by a ‘social exclusion’ from competition rules. P. Nicolaides and M. Kleis claimed, on the basis of an analogy to *FENIN*, that ‘a public hospital that fulfils a social function (the implementation of a public health system belongs to an obligation which the State has towards its citizen) cannot be considered to be an undertaking because its operation is based on the principle of solidarity (...) and operates on a non-profit basis.’ They stipulated, however, that ‘we must be very careful not to over-generalise here because the case law is still evolving⁴³’. Similarly, J. Temple Lang indicated that: ‘Hospitals, clinic, ambulance services and self-employed doctors are all (undertakings) for the purpose of the competition rules. However, public hospitals which provide all their services free and which are financed by the State are not⁴⁴’.

Other authors took an opposite view. V. Hatzopoulos stressed that: ‘The position is less clear with regard to public hospitals, where health services are genuinely offered for free, being financed directly from the State budget and where the personnel has the status of civil servant. According to the broad definition of “undertaking” put forward by the Court, whereby any activity pursued or susceptible of being pursued for profit is to be considered as an economic activity, even these public hospitals should be treated as undertakings’. However, he pointed out that ‘this is not an unquestionable conclusion⁴⁵’.

E. Szyzszak reached a more straightforward conclusion: ‘the Court appears to assume, without much discussion, that healthcare services are economic in character focusing attention upon the possible justifications for the Member

⁴¹ C-475/99 *Ambulanz Glöckner*.

⁴² *Ibidem*, para. 20.

⁴³ M. Kleis, P. Nicolaides, *The Concept...*, p. 508.

⁴⁴ J. Temple Lang, *Privatisation of...*, p. 65.

⁴⁵ V. Hatzopoulos, *Killing National...*, p. 707.

States to evade the full force of the Internal Market rules⁴⁶. J. W. van de Gronden took a similar position emphasizing the differences between the situation of sickness funds and healthcare providers: ‘[I]t appears from the analysis of this case law [i.e. case law on State welfare schemes] that the ECJ uses the concept of undertaking as flexible jurisdictional tool to exclude solidarity-based health care systems from the ambit of European competition law, when it comes to managing bodies. Conversely, the role of this tool is neglected if the competition rules are applied to health care providers’. Consequently ‘the ECJ almost automatically regards health care providers as undertakings within the meaning of European competition law⁴⁷’.

Ch. Koenig and J. Paul stressed as well that ‘based on settled case law, health care providers do unequivocally fall under the scope of Article 107(1) TFEU. Therefore, public funding of hospitals is clearly subject to State aid law – with special privileges issued by the Courts’ decisions in *Altmark Trans* and *BUPA Ireland* and by the provisions of the Commission’s SGEI package⁴⁸. These authors have based their views on ECJ jurisprudent on the rules of the internal market.

According to O. Odudu: ‘Rarely will medical service providers fall outside the scope of the concept of undertaking’. This could take place, fundamentally, only with regard to contractors of such healthcare services that, by their very nature, are not economically viable, that is, cannot generate profits. This concerns in particular the so called non-excludable services, i.e. when there is no possibility of preventing non-payers from enjoying the benefits of a good or service once it is produced. As stated by the author, ‘Recognition of State-operated and financed hospitals as undertakings is implicit in Commission action taken in the fields of State aids⁴⁹’.

An analysis of the accumulated EU case law and doctrine leads to the conclusion that strong arguments exist speaking in favour of associating an economic nature to the activities of public hospitals, regardless of whether they provide healthcare services for remuneration or free of charge (wholly financed by sickness funds). EU jurisprudence does not confirm, however, the view that its approach to the classification of the nature of the activity of health insurance funds could be applied *per analogiam* to healthcare providers. It would be also difficult to argue against the application in the

⁴⁶ E. Szyszczak, *Modernising Healthcare...*, p. 197–198

⁴⁷ J. W. van de Gronden, ‘Financing Health Care in EU Law: Do the European State Aid Rules Write Out an Effective Prescription for Integrating Competition Law with Health Care?’ (2009) 6(1) *The Competition Law Review* 5–29, at 10.

⁴⁸ Ch. Koenig, J. Paul, ‘State Aid Screening of Hospital Funding Exemplified by the German Case’ (2010) 4 *EStAL* 755–770 at 761.

⁴⁹ O. Odudu, *Are State-owned...*, p. 237.

area of competition rules of ECJ findings expressed in free movement cases.

The European Commission undoubtedly considers public hospital services financed by sickness funds as an economic activity on the basis of ECJ jurisprudence on free movement rules. In its 2009 State aid decision concerning the Brussels IRIS network of public hospitals, the Commission regarded their activities as economic⁵⁰. It stressed that the services provided by IRIS hospitals (i.e. healthcare, emergency and directly related ancillary services) 'are also provided by other types of organisations or institutions, including clinics, private hospitals and other specialized centres, including private hospitals of claimants⁵¹'. It noted that such classification cannot be undermined by the gratuitous character of the services provided by the recipient undertakings nor by the social solidarity principles, on which the activity of the Belgian healthcare system is based. It considered that it is 'appropriate to distinguish the activity within managing healthcare, pursued by public authorities in implementation of their prerogatives from the activity of hospital healthcare, which is economic in nature, even if its costs are partially or totally covered by the government⁵²'. The Commission decisively stated that the measures in question constituted State aid. The aid was seen, however, as compatible with the internal market on the grounds of Article 106(2) TFEU⁵³.

In light of the above, the activities of the Polish IPHF and the companies created from their transformation, either financed by the NHF or provided outside the scope of its contracts, should be regarded as economic in nature. EU competition law, and accordingly also its State aid rules, should thus be considered as fully applicable to the contested measure.

⁵⁰ Decision of 28 October 2009 nr NN 54/2009 (ex- CP 244/2005) – Aide d'État Belgique Financement des hôpitaux publics du réseau IRIS de la Région Bruxelles-Capitale.

⁵¹ Ibidem, para. 109.

⁵² Ibidem.

⁵³ Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) [EC] 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 [2005] L 312/67. It should be noted that the scope of Decision No 2005/842/EC covers SGEI compensations granted to hospitals. The decision makes no distinction between private and public hospitals nor between activities financed by medical health insurance funds or those financed by patients. The Decision on IRIS hospitals confirmed that compensations for the performance of SGEI addressed both to public and private hospitals fall under the scope of the application of Decision No. 2005/842/EC. This position, however, has already been expressed by the Commission in T-167/04 *Asklepios Kliniken*, ECR [2007] II-2379 at 69–74.

III. Waiver of debt of IPHFs and the distortion or threat of distortion of competition

The courts have so far been relatively reluctant to clarify the substance of the effect on competition condition. In the *Philip Morris* case⁵⁴, the ECJ has formulated a test for the two elements of Article 107(1) – effect on trade between Member States and effect on competition. The Court has explicitly called for the application of a wide approach to both of these conditions. It held that effect on competition within the meaning of Article 107(1) TFEU should be distinguished from competition violations resulting from anti-competitive practices. Assessment of the measure in terms of Article 107(1) TFEU does not require a relevant market definition nor an analysis of the real impact of the measure on the state of market competition. In fact, any measure which is capable of favouring the recipient with respect to its competitors almost automatically distorts potential or actual competition.

The ECJ has over the years established, in essence, the presumption of the fulfilment of the effect on competition condition when the contested measure favours its beneficiary as opposed to its competitors⁵⁵. The condition in question has thus been related to the concept of selectivity. As stated by the Court in *Het Vlaamse Gewest*, ‘Where a public authority favours an undertaking operating in a sector which is characterised by intense competition by granting it a benefit, there is a distortion of competition or a risk of such distortion’⁵⁶. Therefore, as pointed out by L. Hancher, under the ‘classic approach’ of the ECJ ‘as long as the measure is granted through State intervention or through State resources and has the effect of conferring a selective benefit, it falls prima facie within the scope of Art. 87(1) EC’⁵⁷. A merely grammatical interpretation of this provision leads to the conclusion that it refers to actual as well as potential

⁵⁴ 730/79 *Philip Morris v Commission*, ECR [1980] 2671.

⁵⁵ I. Postuła, A. Werner, *Pomoc państwa*, Warszawa 2006, p. 69; G. Schohe, C. Arholdt, ‘The Case-Law of the European Court of Justice and the Court of First Instance on State Aids in 2002/2003’ (2003) 2 *EStAL* 145-168, at 150.

⁵⁶ T-214/95 *Het Vlaamse Gewest*, ECR [1998] II-717, para. 46, see also T-217/02 *Ter Lembeek*, ECR [2006] II-4483, para. 178, the Court did not provide here a detailed analysis of the state of competition in the textile sector indicating only that it was characterized by intense competition because the market is completely open to competition; see also: B. Willemot, ‘Assessment of an Aid granted under the Form of a Debt Waiver. Note on case T-217/02 *Ter Lembeek International NV v. the Commission*’ (2007) 2 *EStAL* 370-380, at 374 as well as J.-D. Braun, J. Kühling, ‘Article 87 EC and the Community Courts: from Revolution to Evolution’ (2008) 45 *C.M.L. Rev.* 465–498, at 482.

⁵⁷ L. Hancher, ‘Towards a New Definition of a State Aid under European Law: Is there a New Concept of State Aid Emerging?’ (2003) 3 *EStAL* 365-373 at 365.

competition⁵⁸. Therefore, the assessment of possible distortions should focus not only on the current, but also future market situation. The competitors of the beneficiary of the measure, both present and likely to appear in the future, should thus be used as the reference point for this assessment⁵⁹.

In order to evaluate the planned debt write-off, it is necessary to consider whether IPHFs (as well as the companies created from their transformation) compete with each other, or indeed with any other market players, and if not, whether future market entry is possible.

Hospital services provided for remuneration are definitely provided under the conditions of market competition. This argument was challenged neither by the UOKiK President nor by the authors of the Explanatory Memorandum to the Draft Act. Both private and public entities active on the market for commercial medical services compete with each other as to their prices and service quality. The planned debt write-off, which would benefit only those healthcare providers that possess the status of an IPHF, would clearly lead to their preferential treatment, particularly with respect to private operators. This would create a serious distortion of competition in the market for healthcare services and affect the competitiveness of downstream and/or upstream markets. Contrary to the assertions contained in the Explanatory Memorandum, this conclusion is not negated by the fact that the revenues deriving from commercial activities represent a marginal share only of the overall revenue structure of Polish IPHFs. In fact, granting public funds to an IPHF that derives even only a small share of its revenue from commercial activities could result, in specific market situations, in a significant weakening of the position of its competitors.

Similarly unpersuasive seems the argument expressed in the Explanatory Memorandum that the public funding of IPHFs' activities covered by NHF contracts had no impact on competition and the opinion expressed by the UOKiK President that the contested measure had, fundamentally, no such effect. It is indeed hard to agree with the aforementioned authorities that IPHFs do not compete with each other, as well as with private operators, within the scope of the activities covered by their contracts with the NHF.

⁵⁸ C. Baudenbacher, *A Brief Guide to European State Aid Law*, The Hague 1997, p. 22; A. Evans, *European Community Law of State Aid*, Oxford 1997, p. 79; I. Postuła, A. Werner, *Pomoc publiczna*, p. 69.

⁵⁹ See also the opinion of AG Tizzano in joined cases C-393/04 and C-41/05 *Air Liquide*, ECR [2006] I-5293. He held therein that a measure favoring undertakings in the distribution and marketing of natural gas sector distorts competition despite the fact that these entities operated on a monopoly basis. AG pointed out at para. 53 that they are not beneficiaries of exclusive rights and therefore the measure 'at least potentially, can cause distortions of competition in sectors where there is the normal game of competition, both on national and international level'.

It must be noted that the Polish healthcare system is based on the NHF contracting universal healthcare services in compliance with the principles of fair competition and equal treatment. In this context, IPHFs most certainly compete with private providers for NHF contracts and, more precisely, for the resulting payments. Granting significant economic benefits to those entities that possess the status of an IPHP only, would result in a substantial improvement of their competitive position as opposed to private operators in tenders organized by the NHF. Merely the conviction that its debts will be covered by public funds could persuade any given IPHF to cut its tender prices, even to a predatory level. This in turn would result in a distortion of competition in the market upstream to healthcare services⁶⁰.

This very reasoning was applied by the Commission in the IRIS decision⁶¹ where, however, a joint assessment of the selective nature of the measure in question and its effect on competition was performed⁶². The Commission stressed therein that the retroactive coverage of losses accumulated by public hospitals will bring an effect of mitigating the charges which are normally included in the budget of an undertaking. Thus, such measures are selective and, as a general rule, distort competition⁶³.

To sum up, the Polish measure under consideration here should undoubtedly be classified as fulfilling the condition of distorting or threatening to distort competition. It is irrelevant which of the two types of healthcare activity typically pursued by IPHFs would the measure concern. In other words, the condition in question would be satisfied even by the waiver of debt of an IPHF that only provides healthcare activities financed by the NHF.

Considered surprising must therefore be the position expressed by the UOKiK President in the Comments on the Draft Act that the public financing supporting the activities of the IPHFs conducted within the public healthcare system does not, in general, affect competition. This view seems to be based on an approach to the condition in question which is inconsistent with ECJ jurisprudence. As previously shown, the possibility of conducting a specific activity under the conditions of competition implies its economic nature. Amazingly, the concept used by the UOKiK President presupposes an

⁶⁰ As the Commission held in its Green Paper on SGEI of 21 May 2003, COM(2003)270 final at p. 44: 'Furthermore, while there may be no market for the provision of particular services to the public, there may nevertheless be an upstream market where undertakings contract with the public authorities to provide these services. The internal market, competition and state aid rules apply to such upstream markets'.

⁶¹ Decision of 28 October 2009 nr NN 54/2009 (ex- CP 244/2005) – Aide d'État Belgique Financement des hôpitaux publics du réseau IRIS de la Région Bruxelles-Capitale.

⁶² Ibidem, para. 122–126.

⁶³ Ibidem, para. 125.

economic nature of the activities of IPHF but considers, at the same time, that they are not performed under the conditions of market competition.

The views expressed in this context by the UOKiK President are the more surprising that the Polish competition authority has repeatedly found the Polish NHF to have abused its dominant position⁶⁴ in the relevant market defined as a national or local market for the organisation of healthcare services financed from public funds. In these decisions, the UOKiK President presented an in-depth analysis of the distortions of competition arising in the so-defined relevant markets. Moreover, in decisions on practices concerning the setting of tender criteria that favour current healthcare providers, the UOKiK President pointed out that such practices caused serious distortions of competition between tender participants⁶⁵. It is hard to understand why did the UOKiK President, while applying Polish antitrust law, recognise the distortion of competition resulting from the NHF favouring certain healthcare providers over others, while it did not, in general, see such effects on the grounds of State aid rules where the planned debt write-off would give preferential treatment to another group of services providers.

IV. Waiver of debt of the IPHF and effect on trade between Member States

The condition of the effect on trade between Member States is consistently being interpreted widely by EU courts. In *Philip Morris*, the ECJ held that it is satisfied ‘when the state financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade⁶⁶’. Crucial in this context is the existence of intra-European trade in goods or services offered by the recipient undertaking. In subsequent judgments, the courts emphasized that ‘the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected⁶⁷’. In *Hytasa*, the

⁶⁴ Decisions: of 10 July 2009, RWA-9/2009; of 7 March 2007, DOK-28/07; of 31 August 2006, RGD-20/2006; of 11 May 2006, RPZ-12/2006; of 31 May 2005, RPZ-14/2005; of 1 October 2004, RGD-18/2004; of 10 September 2004, RGD-13/2004; of 8 August 2003, RGD-13/2003; of 23 June 2003, RBG-6/2003.

⁶⁵ Decisions: of 10 July 2009, RWA-9/2009; of 31 August 2006, RGD-20/2006; of 23 June 2003, RBG-6/2003.

⁶⁶ 730/79 *Philip Morris*, para. 11.

⁶⁷ C-142/87 *Tubemeuse*, ECR [1990] I-959, para. 43 and C-278-280/92 *Hytasa*, ECR [1994] I-4103, para. 42; T-214/95 *Het Vlaamse Gewest*, ECR [1998] II-717, para. 48; C-280/00 *Altmark Trans*, para. 81–82; C-172/03 *Heiser*, ECR [2005] I-1627, para. 32–33.

Court concluded that ‘where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of exporting their products to the market in that Member State⁶⁸’.

In *Altmark*, the ECJ pointed out that the condition in question ‘does not (...) depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned⁶⁹’. A given measure may constitute State aid even if it is granted to an undertaking which provides only local or regional services. The granting of a public subsidy to such an undertaking may, nevertheless, maintain or increase its service supply capacity to the detriment of undertakings established in other Member States. Such measure could therefore diminish their chances to provide services in the market of the Member State where the aid was granted⁷⁰. The ECJ concluded that ‘according to ECJ case law there is no threshold or percentage below which it may be considered that trade between Member States is not affected⁷¹’.

In *Heiser*, the ECJ upheld a Commission decision establishing that the aid granted to Austrian dentists may affect trade between Member States. The Court held therein that the effect on EU trade condition was met, given that local dentists might be in competition with their colleagues established in another Member State⁷².

A different approach was, nevertheless, applied by the Commission in numerous cases on certain types of services of a purely local nature. In the famous decision concerning aid to a swimming pool located in the German city of Dorsten⁷³, the Commission focused not on the possibility of new market entry, but on the territorial radius of potential customers of the beneficiary. The Commission considered therein that public funding granted to the scrutinised pool did not affect trade between Member States because only local residents were to be its users (residents of Dorsten and the surrounding area within 50km from the city). Thus, territorial impact of the measure did not go beyond German borders.

⁶⁸ C-278-280/92 *Hytasa*, para. 40; 102/87 *France v Commission*, ECR [1988] 4067, para. 19; this approach has been confirmed in *Maribel*, in which the Court indicated that it is not necessary for the beneficiary to provide export activity to fulfill the condition of effect on trade; see: C-75/97 *Maribel*, ECR [1999] I-3671, para. 47.

⁶⁹ C-280/00 *Altmark Trans*, para. 82.

⁷⁰ *Ibidem*, para. 77, 78.

⁷¹ *Ibidem*, para. 81.

⁷² *Ibidem*, para. 35.

⁷³ Decision N 258/00 – *Deutschland Freizeitbad Dorsten*.

The same approach was applied in subsequent decisions on recreational facilities⁷⁴, museums⁷⁵ and cultural activity⁷⁶. It has, however, never been applied to healthcare services. On the contrary, in the aforementioned Belgian hospitals decision, the Commission concluded that trade between Member States could indeed be affected by the aid given to the IRIS network⁷⁷. It stressed that the activity of public hospitals is subject to intra-Community trade as their public funding could result in the maintenance or improvement of their market position. It could, therefore, restrict the opportunities to develop a competing activity by operators from other Member States. Admittedly, the Commission noted that the limited extent of trans-border mobility of European patients, and the resulting small number of patients from other Member States using the services of the IRIS hospital network, meant that the impact of the measure in question on EU trade was very limited. Its existence could not, however, be ruled out⁷⁸.

Similarly, J. W. van de Gronden pointed out that due to the arrangements for cross-border provision of healthcare services made on the basis of ECJ jurisprudence on free movement rules, 'it is risky to assume that the trade between Member States is not influenced⁷⁹'. The author recognised at the same time the key role which the recently adopted Directive on patient mobility will have in opening national healthcare services markets to competition in the European dimension⁸⁰.

The analysis of the effect of the Polish measure on trade between Member States does not lead to straightforward conclusions. With respect to some public hospitals, in particular the very small ones and those in remote locations, the impact on EU trade of their debt write-off will be definitely small. Indeed, it cannot be excluded that EU trade will not be affected at all in some cases. It is difficult to expect that patients from other Member States would choose to use the services of small or remote Polish hospitals to the detriment of their own healthcare providers. Language and cultural barriers remain an effective obstacle to the use of healthcare services in other Member States.

However, such obstacles do not affect the activities of highly specialised hospitals including clinical ones and those located in metropolitan areas with

⁷⁴ Decision in case – *Funds for non-profit marinas in Holland*, OJ [2004] L 34/63.

⁷⁵ Decisions NN 136/A/2003, *France. Funds for Ecomusée d'Alsace*, OJ [2007] C 96; N 377/2007, *Holland. Support for Bataviawerf*, OJ [2008] C 35.

⁷⁶ Decision N 448/2005 – *Spain, aid for theatric, music and dance productions*.

⁷⁷ Decision NN 54/2009 (ex- CP 244/2005) – *Aide d'État Belgique Financement des hôpitaux publics du réseau IRIS de la Région Bruxelles-Capitale*.

⁷⁸ *Ibidem*, at 129–130.

⁷⁹ J. W. van de Gronden, *Financing Health...*, p. 21.

⁸⁰ *Ibidem*. Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ [2011] L 88/45.

well developed transport inter-connections. In their case, medical tourism definitely exists. The same refers to hospitals located near national borders. In their case, State aid would definitely result in a distortion of trade between neighbouring Member States.

The assessment of the effect on EU trade condition made from the supply side point of view leads to slightly different conclusions. There is no legal barrier to enter the Polish healthcare services market, hospitals included. Due to the relatively small funds allocated to healthcare, there are currently no strong incentives to enter the market for services financed by the NHF. However, even such development cannot be excluded, in particular, in relation to the so-called high-point medical procedures, that is to say, those for which the NHF is willing to pay relatively high rates. In this context, the measure in question could distort trade between Member States by weakening the incentives of potential foreign competitors to enter the Polish market for healthcare services.

It can still be argued that, as the UOKiK President pointed out, financing granted to some of the Polish public hospitals would not affect trade between Member States due to the completely localized nature of their activity. This argument loses its importance, however, as the measure in question is potentially directed to all IPHFs (specified in a general and abstract manner). Thus, the Act must be classified as establishing an aid scheme within the meaning of Article 1(d) of the procedural regulation⁸¹. Even if the localised effects argument remains valid for certain kinds of hospitals (small and/or rural ones), the measure in question does not differentiate between the different types of its beneficiaries. Thus, its implementation would inevitably cause an effect on EU trade with respect to a significant part of Polish public hospitals.

V. Conclusions

The above analysis leads to the clear conclusion that the measure in question should be classified as State aid within the meaning of Article 107(1) TFEU. It satisfies all the conditions of the EU notion of State aid and is thus subject to the notification obligation to the European Commission under Article 108(3) TFEU. Due to the failure to notify the contested measure, the debt write-off in question should be classified as unlawful aid within the meaning of Article 1(f) of the procedural regulation. Under the Commission's current

⁸¹ Council Regulation No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ [1999] L 83/1.

enforcement practice, state financing granted to public hospitals is, generally, considered as State aid, as illustrated by the Belgian decision.

The views expressed in the Explanatory Memorandum to the Draft Act find support neither in ECJ jurisprudence nor in the opinions of the doctrine. Moreover, in agreement with the prevailing views of the commentators and as confirmed by EU jurisprudence, providers of healthcare services, unlike public sickness funds, are not subject to a 'social exclusion'. This refers to the situation of Polish healthcare services operators as well. Clearly, they must be considered as being subject to the functional definition of an undertaking as developed in the Hoefner and Elser judgments. It follows from the above that Mr. Hoefner's and Mr. Elser's visit to Poland would definitely undermine the fundamentals of the recent Polish healthcare reform.

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