JUDGMENT OF THE GENERAL COURT (Second Chamber)
5 February 2018 (*)
(State aid — Health insurance bodies — Capital increase, debt repayment, subsidies and Risk Equalisation Scheme — Decision finding no State aid — Concept of State aid — Concept of undertaking and economic activity — Principle of solidarity — State supervision — Activity that is economic in nature — Competition on quality — Presence of operators seeking to make a profit — Pursuit, use and distribution of profits — Error of law — Error of assessment)

In Case T-216/15

**Dôvera zdravotná poist'ovňa, a.s.,** established in Bratislava (Slovakia), represented by O. Brouwer and A. Pliego Selie, lawyers,

applicant,

supported by

**Union zdravotná poist'ovňa a.s.,** established in Bratislava, represented initially by E. Pijnacker Hordijk and A. ter Haar, and subsequently by A. ter Haar, lawyers,

intervener,

v

**European Commission,** represented by P.-J. Loewenthal and L. Armati, acting as Agents,

defendant,

supported by

**Slovak Republic,** represented by B. Ricziová, acting as Agent,

intervener,

APPLICATION pursuant to Article 263 TFEU for annulment of Commission Decision (EU) 2015/248 of 15 October 2014 on the measures SA.23008 (2013/C) (ex 2013/NN) granted by the Slovak Republic to Spoločná zdravotná poisťovňa, a.s. (SZP) and Všeobecná zdravotná poisťovňa, a.s. (VšZP) (OJ 2015 L 41, p. 25),

THE GENERAL COURT (Second Chamber),

composed of M. Prek, President, F. Schalin and M. J. Costeira (Rapporteur), Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 3 April 2017,

gives the following

**Judgment**

**Background to the dispute**

In 1994 the Slovak health insurance system changed from a unitary system, with just one State-owned health insurance company, to a pluralistic model in which public and private bodies coexist.

All health insurance bodies, public and private alike, provide coverage for compulsory health insurance to Slovak residents.

In accordance with Slovak legislation, all health insurance bodies are public limited companies with their registered office in national territory, established to provide compulsory health insurance, carrying on their activity subject to authorisation granted by the Úrad pre dohľad nad zdravotnou starostlivosťou (Healthcare Surveillance Authority, Slovakia) and allowing both State and private sector entities to be shareholders.

Slovak residents can choose between three health insurance bodies:

the State-owned insurance companies Všeobecná zdravotná poisťovňa, a.s. ('VšZP') and Spoločná zdravotná poisťovňa, a.s. ('SZP'), which merged on 1 January 2010 pursuant to Law No 533/2009;

the applicant, the private insurance company Dôvera zdravotná poisťovňa, a.s.;

the intervener, the private insurance company Union zdravotná poist'ovňa, a.s. ('Union Insurance Company').

By letter of 2 April 2007, the applicant lodged a complaint with the Commission of the European Communities concerning State aid allegedly granted to SZP by the Slovak Republic.

The alleged aid took the form of a capital increase in SZP of approximately EUR 15 million between 28 November 2005 and 18 January 2006 which was linked to the healthcare and health insurance reform.

On 21 August 2009, the Commission sent a request for information to the Slovak Republic.

On 24 September 2009, after an extension of the deadline to reply, the Slovak authorities sent the requested information to the Commission.

By letter of 26 February 2010, the Commission asked the Slovak Republic for additional information concerning SZP's capital increase and for explanations regarding the Risk Equalisation Scheme in place in the country, another measure capable of being classified as State aid.

By letter of 25 March 2010, the Slovak authorities requested an extension of the deadline to reply to this request, which was granted by the Commission by letter of 31 March 2010.

By letter of 9 July 2010, the Slovak authorities provided the requested information to the Commission.

On 15 July 2011, the applicant provided additional information on the health insurance sector in Slovakia and extended its complaint to cover the following three new measures:

first, a discharge, in 2003 and 2006, of two of SZP's debts, in the sum of EUR 52.7 million and EUR 28 million respectively, by the public undertaking Veritel', a.s.;

second, a subsidy of approximately EUR 7.6 million granted to SZP by the Slovak Ministry of Health in 2006;

third, an increase of EUR 65.1 million in VšZP's capital, through the services of the Slovak Ministry of Health, in 2010.

The Commission invited the Slovak authorities to submit their comments concerning the extension of the complaint.

By letter of 11 November 2011, after an extension of the deadline to reply, the Slovak authorities submitted their comments.

By letter of 2 July 2013, the Commission notified the Slovak Republic of its decision to open a formal investigation procedure under Article 108(2) TFEU.

That decision was published in the *Official Journal of the European Union* on 26 September 2013. The Commission invited the parties concerned to submit their comments.

By letter of 27 August 2013, the Slovak Republic submitted its comments concerning the decision to initiate the formal investigation procedure.

The Commission also received comments on that decision from:

the Inštitút pre ekonomické a sociálne reformy (Institute for Economic and Social Reforms, Slovakia), by letter dated 15 October 2013;

Union Insurance Company, by letter of 25 October 2013;

the Health Policy Institute (HPI) (Slovakia), by letter of 28 October 2013;

the Asociácia zdravotných poisťovní Slovenskej republiky (Slovak Association of Health Insurance Companies), by letter of 28 October 2013;

the applicant, by letter of 11 November 2013.

By letters of 20 November and 20 December 2013, those comments were sent to the Slovak authorities.

By letter of 29 January 2014, after an extension of the deadline, the Slovak authorities responded to the comments of the parties concerned.

By Decision (EU) 2015/248 of 15 October 2014 on the measures SA.23008 (2013/C) (ex 2013/NN) implemented by the Slovak Republic for SZP and VšZP (OJ 2015 L 41, p. 25) ('the contested decision'), the Commission considered, in essence, that the measures at issue did not constitute State aid, on the ground that the activity of compulsory health insurance, as organised and carried out in the Slovak Republic, cannot be regarded as an economic activity and that, therefore, SZP and VšZP, as the beneficiaries of those measures, cannot be classified as undertakings, within the meaning of Article 107 (1) TFEU.

The operative part of the contested decision reads as follows:

*'Article 1*

The following measures granted by the Slovak Republic to [SZP] and/or [VšZP] do not constitute aid within the meaning of Article 107(1) of the Treaty:

the capital increase in SZP of SKK 450 million made between 28 November 2005 and 18 January 2006;

the discharge of SZP's debts through Veritel' a.s. from 2003 to 2006;

the subsidy granted to SZP by the Ministry of Health in 2006;

the capital increase in [VšZP] of EUR 65.1 million on 1 January 2010;

the Risk Equalisation Scheme set up by Part 3 of Act No 580/2004; and

the transfer of portfolios of liquidated health insurance companies, in particular of the company Družstevná zdravotná poisťovňa to [VšZP] and of the company Európská zdravotná poisťovňa to SZP.

*Article 2*

This Decision is addressed to the Slovak Republic.'

**Procedure and forms of order sought**

By application lodged at the Court Registry on 24 April 2015, the applicant brought the present action.

By document lodged at the Court Registry on 27 August 2015, the Slovak Republic sought leave to intervene in the present proceedings in support of the form of order sought by the Commission.

On 11 September 2015, the Commission's response was lodged at the Court Registry.

By document lodged at the Court Registry on 30 September 2015, Union Insurance Company sought leave to intervene in support of the applicant.

By decision of 13 November 2015, the President of the Fifth Chamber of the Court granted the Slovak Republic leave to intervene.

On 16 November 2015, the reply was lodged at the Court Registry.

By decision of 19 January 2016, the President of the Fifth Chamber of the Court granted the Union Insurance Company leave to intervene.

On 21 January 2016, the Slovak Republic's statement in intervention was lodged at the Court Registry.

On 25 January 2016, the rejoinder was lodged at the Court Registry.

On 11 March 2016, the statement in intervention of Union Insurance Company was lodged at the Court Registry.

On 11 May 2016, the applicant's and the Commission's observations on the statements in intervention of the Slovak Republic and Union Insurance Company were lodged at the Court Registry.

On 4 October 2016, as the composition of the Chambers of the General Court had been altered, the present case was reassigned to the Second Chamber, in which a new Judge-Rapporteur was designated.

The applicant and Union Insurance Company claim that the Court should:

annul the contested decision;

order the Commission to pay the costs, including those of Union Insurance Company.

The Commission and the Slovak Republic contend that the Court should:

dismiss the action as unfounded;

order the applicant to pay the costs.

**Law**

In support of its action for annulment, the applicant, supported by Union Insurance Company, puts forward two pleas in law. The first plea in law alleges that the Commission erred in law in its interpretation of the concept of an undertaking, within the meaning of Article 107(1) TFEU. That plea consists in essence of two complaints. The first complaint relates to the concept of an undertaking within the meaning of Article 107(1) TFEU, according to which the Commission interpreted the concept too narrowly when it limited its review to the activities carried out by SZP and VšZP in the context of the single compulsory health insurance system, whereas it should have examined whether SZP and VšZP cannot be considered to be exercising any economic activity, including outside the domain of the compulsory health insurance system.The second complaint relates to the concept of economic activity which the Commission allegedly misinterpreted by concluding that the activity of providing compulsory health insurance in Slovakia was not an economic activity and, consequently, that SZP and VšZP cannot be categorised as undertakings.

The second plea alleges, first, errors of law and of assessment made by the Commission when it concluded, after having established and applied the criteria for determining the nature of the insurance scheme, that it could not be considered that SZP and VšZP were carrying out an economic activity and, second, inadequate reasoning in the contested decision.

The Court considers it appropriate to begin its examination of the action with the second plea in the application, alleging, inter alia, an error of assessment by the Commission as to the non-economic nature of the activity of providing compulsory health insurance in Slovakia.

At the outset, it must be borne in mind that State aid, as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the judicature of the European Union must, in principle, having regard both to the specific features of the case before it and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU (see judgment of 1 July 2008, *Chronopost* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 141 and the case-law cited).

In the contested decision the Commission concluded that the measures at issue did not constitute State aid, on the ground that the activity of compulsory health insurance, as organised and carried out in the Slovak Republic, cannot be regarded as an economic activity and that, therefore, SZP and VšZP, as the beneficiaries of those measures, cannot be classified as undertakings, within the meaning of Article 107(1) TFEU.

The applicant's argument consists of two complaints. The first complaint alleges an error of law and an error of assessment by the Commission as to the economic nature of the activity of compulsory health insurance companies in Slovakia. The second complaint relates to the inadequate reasoning of the contested decision.

As regards the first complaint, the applicant, supported by the Union Insurance Company, submits that the Commission was wrong to find that the activities performed within the Slovak compulsory health insurance scheme were non-economic rather than economic in nature. The various characteristics of the scheme identified by the Commission should have enabled it to conclude, notwithstanding the social and solidarity aspects of the scheme, that the activities pursued were economic in nature and, accordingly, to categorise SZP and VšZP as business entities.

The Commission, supported by the Slovak Republic, disputes the applicant's argument that its conclusion as to the non-economic nature of the activities performed within the Slovak compulsory health insurance scheme was erroneous. The Commission is of the opinion that several factors demonstrated that the social, solidarity and regulatory aspects of the scheme were predominant, which proves the non-economic nature of those activities.

In the first place, it must be recalled that the Court has consistently held that categorisation as 'State aid' within the meaning of Article 107(1) TFEU requires all the conditions set out in that provision to be satisfied. First, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective

advantage on the recipient. Fourth, it must distort or threaten to distort competition (see judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 40 and the case-law cited, and of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53 and the case-law cited).

It must be added that the prohibition laid down in Article 107(1) TFEU applies to the activities of undertakings (see, to that effect, judgment of 5 March 2015, *Commission and Others* v *Versalis and Others*, C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 88). In the context of EU competition law, any entity engaging in an economic activity, regardless of its legal status and the way in which it is financed, is an undertaking (see, to that effect, judgment of 23 April 1991, *Höfner and Elser*, C-41/90, EU:C:1991:161, paragraph 21; see, also, to that effect, judgments of 17 February 1993, *Poucet and Pistre*, C-159/91 and C-160/91, EU:C:1993:63, paragraph 17 and the case-law cited, and of 19 January 1994, *SAT Fluggesellschaft*, C-364/92, EU:C:1994:7, paragraph 18 and the case-law cited).

According to case-law, any activity consisting in offering goods or services on a given market is an economic activity (see judgment of 12 September 2013, *Germany* v *Commission*, T-347/09, not published, EU:T:2013:418, paragraph 26 and the case-law cited).

Furthermore, it should be noted that the fact that the offer of goods or services is made without profit motive does not prevent the entity which carries out those operations on the market from being considered an undertaking where that offer exists in competition with that of other operators which do seek to make a profit (judgment of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraph 27; see, to that effect, judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraphs 122 and 123).

In the second place, it must more specifically be noted that, in the field of social security, the Court of Justice has held that certain bodies entrusted with the management of statutory health insurance and old-age insurance schemes pursued an exclusively social objective and did not engage in economic activity. The Court of Justice found that was so in the case of sickness funds which merely applied the law and could not influence the amount of the contributions, the use of assets and the fixing of the level of benefits. Their activity, based on the principle of national solidarity, was entirely non-profit-making and the benefits paid were statutory benefits bearing no relation to the amount of the contributions (judgment of 16 March 2004, *AOK Bundesverband and Others*, C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150, paragraph 47).

However, the Court has held that non-profit-making organisations, contributing to the management of the social security system and subject to the solidarity principle, could be considered to be carrying out an economic activity (see, to that effect, judgments of 16 November 1995, *Fédération française des sociétés d'assurance and Others*, C-244/94, EU:C:1995:392, paragraph 22, and of 21 September 1999, *Albany*, C-67/96, EU:C:1999:430, paragraphs 84 to 87).

It is therefore clear from the case-law that the social aim of a health insurance scheme is not in itself sufficient to exclude classification as an economic activity. It must also be examined whether that scheme can be regarded as applying the principle of solidarity and is subject to the supervision of the State which established it. Those factors are liable to preclude a given activity from being regarded as economic (see judgment of 3 March 2011, *AG2R Prévoyance*, C-437/09, EU:C:2011:112, paragraphs 45 and 46 and the case-law cited).

For the purposes of that assessment, first, it must be noted that characteristics of social security schemes applying the principle of solidarity include, inter alia, an obligation on health insurance bodies to be affiliated with the scheme, a lack of any direct link between contributions paid and benefits received, compulsory and identical benefits for all insured persons, contributions proportional to the income of insured persons and application of the pay-as-you-go principle (see, to that effect, judgments of 17 February 1993, *Poucet and Pistre*, C-159/91 and C-160/91, EU:C:1993:63, paragraphs 9 to 12; of 22 January 2002, *Cisal*, C-218/00, EU:C:2002:36, paragraphs 34 to 43, and of 16 March 2004, *AOK Bundesverband and Others*, C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150, paragraphs 52 and 53).

Second, characteristics of social security schemes subject to State supervision include, inter alia, an obligation for health insurance bodies to offer compulsory benefits to insured persons and an impossibility for health insurance bodies to influence the nature and level of the benefits set by law or the amount of the contributions paid by insured persons (see, to that effect, judgments of 22 January 2002, *Cisal*, C-218/00, EU:C:2002:36, paragraphs 43 and 44; of 22 May 2003, *Freskot*, C-355/00, EU:C:2003:298, paragraph 78, and of 16 March 2004, *AOK Bundesverband and Others*, C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150, paragraph 52).

The Court must examine, in the light of those considerations, whether the Commission committed an error of assessment in concluding, in recital 95 of the contested decision, that the profit-making objective pursued by health insurance companies and the competition elements present in the Slovak compulsory health insurance sector did not call into question the predominant social, solidarity and regulatory features indicating the non-economic nature of the activities performed by health insurance companies.

It should be noted that the Commission found, in essence, in recitals 84 to 88 of the contested decision, that the Slovak compulsory health insurance scheme had significant social, solidarity and regulatory characteristics.

As regards, first, evidence of the scheme's social and solidarity characteristics, it is apparent from the case file and, in particular, from recitals 23 to 28 of the contested decision that the health insurance companies have a legal obligation to register every Slovak resident who so requests. Thus, they cannot refuse to insure a person on the grounds of his age, state of health or risk of illness. Next, the health insurance scheme is based on a system of compulsory contributions, which are fixed by law in proportion to the income of the insured persons, but independently of the benefits received or of the risk resulting from, inter alia, the age or state of health of the insured person. Furthermore, all insured persons have the right to the same minimum level of benefits. Finally, there is a Risk Equalisation Scheme, whereby health insurance bodies insuring high-risk individuals receive funding from health insurance bodies with a portfolio composed of persons presenting lower risks.

As regards, second, the strict State supervision to which health insurance bodies are subject, it is apparent from the case file and, in particular, from recital 32 of the contested decision that they are subject to special regulations. In addition to identical status, rights and obligations, each health insurance body is established with the purpose of executing public health insurance and cannot carry out activities other than those provided for by law. Moreover, the activities of health insurance bodies are subject to supervision by a regulatory office, which ensures that those companies adhere to the aforementioned legislative framework and intervenes when violations occur.

In the light of those various factors, it is necessary to uphold the Commission's conclusion that, in essence, the Slovak compulsory health insurance scheme had predominant social, solidarity and regulatory features. Moreover, that finding is not challenged by the applicant.

However, it should also be noted that, as is apparent from recitals 92 and 94 of the contested decision, the law allows health insurance companies, first, to make, use and distribute profits and, second, to compete to a certain degree in terms of quality and services offered.

While the parties agree on the presence of those factors within the Slovak compulsory health insurance scheme, they do not, however, agree on the consequences that result from them as to the classification as economic or non-economic of the activity of providing compulsory health insurance.

The applicant maintains that the presence of those factors within the regime ought to have enabled the Commission to conclude, notwithstanding the social and solidarity nature of certain features, that the activity at issue is economic and, therefore, compulsory health insurance companies are to be classified as undertakings.

For its part, the Commission contends that neither the existence of competition as to quality within the regime, nor the possibility of making, using and distributing profits, nor even the presence of profit-making private providers offering health insurance services are sufficient to call into question the fact that, in the light of its predominant social, solidarity and regulatory features, the Slovak compulsory health insurance scheme is non-economic in nature.

In the first place, it must be held that the health insurance companies' ability to make, use and distribute part of their profits does call into question the non-economic nature of their activity, contrary to what the Commission found in recital 94 of the contested decision.

Indeed, the Commission rightly states that the ability to use and distribute profits is regulated more strictly than in normal commercial sectors, since that power is, in the present case, subject to the fulfilment of requirements intended to ensure the continuity of the scheme and the attainment of the social and solidarity objectives underpinning it. However, that becomes irrelevant for the purposes of excluding the economic nature of the activity, once the market operators in question seek to make a profit. In any event, the fact that Slovak health insurance companies are freely able to seek and make a profit shows that, regardless of the performance of their public health insurance task and of State supervision, they are pursuing financial gains and, consequently, their activities in the sector fall within the economic sphere. Therefore, the strict conditions framing the subsequent use and distribution of profits which may result from those activities does not call into question the economic nature of such activities.

In the second place, it must be held that the existence of a certain amount of competition as to the quality and scope of services provided by the various bodies within the Slovak compulsory health insurance scheme also has a bearing on the economic nature of the activity, contrary to what the Commission found, in essence, in recitals 92 and 93 of the contested decision.

While it appears from the case file that health insurance bodies may not freely set the amount of the contributions or formally compete via their tariffs, the legislature did nevertheless introduce an element of competition as to quality, as the companies may freely supplement the compulsory statutory services with related free services, such as better coverage for certain complementary and preventive treatments in the context of the basic compulsory services or an enhanced assistance service for insured persons. They may therefore differentiate themselves in terms of quality and scope of services in order to attract insured persons, who, by law, are free to choose their health insurance company and switch company once a year. The latitude available to health insurance bodies to compete thus enables insured persons to benefit from better social protection for an equal contribution amount, as the additional services offered are free of charge. As the applicant points out, although Slovak health insurance companies are obliged to offer the same statutory benefits, they compete through the 'value for money' of the cover they offer and, therefore, on the quality and efficiency of the purchasing process, as the Commission itself acknowledges in recital 93 of the contested decision.

Thus, even if there is no competition within the Slovak compulsory health insurance system in respect of either the compulsory statutory benefits or formally on the amount of contributions, there is nevertheless intense and complex competition due to the market volatility resulting from insured persons' power freely to choose their health insurance provider and to switch insurance company once a year, and the fact that health insurance bodies are competing in terms of the quality of service, which is assessed individually by the insured persons.

It follows that, in view of the profit pursued by health insurance companies and the existence of intense competition as to quality and the services offered, the activity of providing compulsory health insurance in Slovakia is economic in nature.

That conclusion cannot be undermined, even if it were to be argued that SZP and VšZP were not seeking to make a profit. Admittedly, where the bodies whose activity is examined do not have such a goal, but have a degree of freedom to compete to a certain extent in order to attract persons seeking insurance, that competition does not automatically call into question the non-economic nature of their activity, particularly where that element of competition was introduced in order to encourage the sickness funds to operate in accordance with principles of sound management (judgment of 16 March 2004, *AOK Bundesverband and Others*, C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2004:150, paragraph 56). However, it is apparent from the case-law cited in paragraph 48 above that the fact that the offer of goods or services is made without seeking to make a profit does not prevent the entity which carries out those operations on the market from being regarded as an undertaking, provided that the offer exists in competition with that of other operators that are seeking to make a profit. It follows that it is not the mere fact of being in a position of competition on a given market which determines the economic nature of an activity, but rather the presence on that market of operators seeking to make a profit. That is the situation in the present case, since it is common ground between the parties that the other operators on the market in question are seeking to make a profit, so that SZP and VšZP, 'by contagion', would have to be considered to be undertakings.

Therefore, the Commission committed an error of assessment when it concluded that SZP and VšZP cannot be considered as undertakings within the meaning of Article 107(1) TFEU, on the ground that the activity carried out by health insurance bodies in the Slovak compulsory health insurance scheme is not economic in nature.

It follows that it is necessary to uphold this complaint and, accordingly, the present plea in law and the action in its entirety, without it being necessary to examine the other arguments and plea put forward by the applicant.

**Costs**

Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

Since the Commission has been unsuccessful, it must be ordered to bear its own costs and, having regard to the forms of order sought by the applicant and Union Insurance Company, to pay those incurred by those parties.

The Slovak Republic is to bear its own costs in accordance with Article 138(1) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

**Annuls Commission Decision (EU) 2015/248 of 15 October 2014 on the measures SA.23008 (2013/C) (ex 2013/NN) implemented by the Slovak Republic for Spoločná zdravotná poisťovňa, a.s. (SZP) and Všeobecná zdravotná poisťovňa, a.s. (VšZP);**

**Orders the European Commission to bear its own costs and to pay those incurred by Dôvera zdravotná poist'ovňa, a.s. and by Union zdravotná poist'ovňa a.s.;**

**Orders the Republic of Slovakia to bear its own costs.**

Prek Schalin Costeira

Delivered in open court in Luxembourg on 5 February 2018.

E. Coulon M. Prek

Registrar President

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* Language of the case: English.