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Subject: State aid SA.38920 (2014/NN) – Alleged State aid to Santa Casa de Misericórdia de Tomar (SCMT)

Sir,

1. PROCEDURE

- (1) On 16 June 2014, the Commission received a complaint from Companhia de Bem Estar, Assistência e Serviços para Seniores, Lda (hereafter: 'ABES') concerning an alleged State aid granted by the Portuguese authorities to Santa Casa de Misericórdia de Tomar (hereafter: 'SCMT'), an entity providing social support services to elderly people.
- (2) The non-confidential version of the complaint was forwarded to the Portuguese authorities, who submitted their comments on 15 January 2015. On 4 March 2015, the Commission services wrote to the complainant, expressing their preliminary view that the measure did not involve State aid since it does not affect trade between Member States. On 7 April 2015, the complainant replied to this letter. On 11 January 2016, upon request from the Commission services, the Portuguese authorities submitted further information.
- (3) On 12 February 2016, the Commission wrote a second letter to the complainant, maintaining its preliminary view that the measure did not involve State aid, since it does not affect trade between Member States. On 3 April 2016, the complainant replied to this letter and requested that the preliminary findings of the Commission be recorded in a formal decision.

S. Ex.^a o Ministro dos Negócios Estrangeiros
Augusto Santos Silva
Largo do Rilvas
P – 1399-030 – Lisboa

2. DESCRIPTION OF THE MEASURE ADDRESSED BY THE COMPLAINT

2.1. DESCRIPTION OF THE BENEFICIARY

- (4) The beneficiary, SCMT, is a non-profit, private social solidarity institution founded by King Manuel I on 8 December 1510 in the municipality of Tomar, a town in the Santarém District in Portugal. SCMT provides social support services to elderly people, disabled people, children, and other long-term care services in Tomar, on the basis of a Cooperation Agreement with the Portuguese State. These services are generally provided at lower prices due to the greater need of the people the facilities serve.
- (5) According to Article 2 of its Statute¹, SCMT pursues its operations locally, in the city of Tomar, although branches can be set up in other places provided they remain in the Municipality of Tomar.
- (6) SCMT is a relatively small operator which does not generate (significant) profit from its activities. The following table provides the operational revenues and profit of Tomar between 2010 and 2014.

Table 1: Operational revenues and profit of SCMT

| K€ | 2010 | 2011 | 2012 | 2013 | 2014 |
|-------------------------|-------|------|------|------|-------|
| Operational revenues | 3619 | 3539 | 3367 | 3348 | 3299 |
| Operational Profit | - 373 | -253 | -211 | -230 | -117 |
| Operational Profit rate | - 10% | - 7% | - 6% | - 7% | -3.5% |

2.2. THE SOCIAL CARE HOME PROJECT

- (7) The purpose of the project is the construction of an assisted living facility (hereafter: the 'facility') for the elderly by the integration of a group of existing buildings, which includes a unit consisting of 35 appropriately equipped rooms, a dining room and lounges.
- (8) The Portuguese authorities have indicated that the maximum capacity of the facility is 60 residents, with the 35 rooms made up of 22 doubles, 11 singles and 3 twins. The investment project is targeted at elderly people who can live autonomously and do not require ongoing special care. The elderly can use the services provided within the facility such as meals.

2.3. DESCRIPTION OF THE MEASURE

- (9) The measure consists in the subsidy of 80% of the eligible costs of the above mentioned investment project from the European Regional Development Fund (ERDF). The subsidy is granted by the Comissão de Coordenação e Desenvolvimento da Região do Centro (CCDRC, the Regional Development and Coordination Committee for Central Portugal), a decentralised body under the joint authority of Prime Minister's Office and the Ministry of Environment, Spatial Planning and Energy.

¹ Santa Casa da Misericórdia de Tomar, *Compromiso Da Irmandade*, Tomar 1999.

- (10) The total project costs amount to EUR 2 674 504.89 and the eligible costs amount to EUR 2 340 019.28. The 80 % ERDF contribution will therefore be EUR 1 872 015.42.
- (11) The subsidy has been approved in the context of the Action Programme "Integrated Programme for the Urban Development of Tomar", with the underlying aim of tailoring facilities to local needs. The Action Programme is part of the general framework of the Specific Regulation on "Partnership for Urban Regeneration", a public policy instrument for the "Cities Policies" within the Regional Operational Programmes for Mainland Portugal.

3. ASSESSMENT OF THE MEASURE

3.1. EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU

- (12) According to Article 107(1) of the TFEU, *"save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market"*.
- (13) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.
- (14) In view of the characteristics of the social care home project and the nature of the measure, the Commission will first examine whether such measure is liable to affect trade between Member States.

3.2. EFFECT ON INTRA-UNION TRADE

- (15) Public support to undertakings is prohibited under Article 107(1) TFEU if it "distorts or threatens to distort competition" and only insofar as it "affects trade between Member States". In that respect, the Union courts have ruled that *"where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-[Union] trade, the latter must be regarded as affected by the aid"*.²
- (16) It is settled case-law that the Commission is not required to carry out an economic analysis of the actual situation on the relevant markets, of the market share of the undertakings in receipt of the aid, of the position of competing undertakings or of trade flows between Member States.³ In the case of aid granted unlawfully, the Commission is not required to demonstrate the actual effect which that aid has had on competition and on trade.
- (17) Nevertheless such an effect cannot be merely hypothetical or presumed. It must be established why the measure distorts or threatens to distort competition and

² Case T-288/97 *Regione autonoma Friuli-Venezia Giulia v Commission* ECLI:EU:T:1999:125, paragraph 41.

³ See for instance Case C-279/08 P *Commission v Netherlands* ECLI:EU:C:2011:551, paragraph 131.

is liable to have an effect on trade between Member States. It must also, however, be explained how competition is affected or liable to be affected by the aid, based on the foreseeable effects of the measure.⁴

- (18) In that respect, the Commission has in several cases⁵ considered that certain activities, due to their specific features, have a purely local impact and no such effect. In this regard the Commission has assessed in particular whether the beneficiary supplies goods or services to a limited area within a Member State and is unlikely to attract customers from other Member States (customer perspective), and whether it can be foreseen that the measure will have more than a marginal effect on the conditions of cross-border investments or establishment (provider perspective) (see also paragraphs 196-197 of the Commission Notice on the Notion of Aid⁶).
- (19) In the present case, the Commission notes first that the services provided by SCMT are purely local in nature and available only within a limited geographic area⁷: Article 2 of the Statute of SCMT stipulates that “*The Institution (...) has its headquarters in the city of Tomar and carries out its work in the municipality of Tomar and bordering municipalities*” The municipality of Tomar itself is not located in a border region and not particularly accessible as the closest airport is at 2hours 30’ distance by train.
- (20) Moreover, the services offered by SCMT for elderly people do not present unique, nor highly specialized characteristics that could be particularly attractive for citizens from other Member States.
- (21) Furthermore, SCMT provides its services for elderly people in Portuguese only and it is well established that the choice of a provider of social services is strongly influenced by the language in which the service is being provided. It can therefore be considered that the fact that the SCMT’s service is not delivered in their language would constitute a significant disincentive for citizens from other Member States to use these services, assuming that they would consider it.
- (22) Finally, SCMT has not promoted its services in other Members States, and its only paper communication is a two-page leaflet in Portuguese. Furthermore, while SCMT does have an internet website, the latter is only available in Portuguese. According to the Portuguese authorities, given the high local demand for the service, and the limited capacity offered (60 residents at maximum, corresponding to only 0.58% of the population of municipality of Tomar aged 65 and older), SCMT is hardly able to satisfy all the requests it receives, hence the absence of promotion efforts as regards the social care home.

⁴ See Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and others v Commission* ECLI:EU:T:1995:130, paragraph 141.

⁵ See for instance, the Commission decisions in State aid cases SA.34576 Portugal – Jean Piaget North-east Continuing Care Unit, OJ C 73, 13.03.2013, p. 1; N 258/2000 Leisure Pool Dorsten, OJ C 172, 16.6.2001, p. 16; C10/2003 Netherlands – Non-profit harbours for recreational crafts, OJ L 34, 06.02.2004, p. 63; N 458/2004 Editorial Andaluza Holding OJ C 131, 28.5.2005, p. 12; SA.33243 Jornal de Madeira, OJ C 131, 28.05.2005, p. 12; and N 543/2001 Ireland – Capital allowances for hospitals, OJ C 154, 28.6.2002, p. 4.

⁶ Communication from the Commission, Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU, available at: http://ec.europa.eu/competition/state_aid/modernisation/notice_of_aid_en.pdf.

⁷ See also, SA.34576 Portugal – Jean Piaget North-east Continuing Care Unit, OJ C 73, 13.03.2013, p. 1

- (23) It can be noted that ABES claims that "*a number of foreigners are already enrolled in Santa Casa da Misericórdia assisted residence facilities*" referring to other residence facilities. However, ABES only relies on a press article which merely refers to the interest of two couples (one French, one Belgian) in a project in Alcobaça which is 50 kms distance from Tomar and close to the seaside. Such evidence, assuming that it is accurate, is totally insufficient to prove that foreigners might be interested in the SCMT facility. Notably, Alcobaça facility is close to the seaside and might be considered as much more attractive than SCMT located midland.
- (24) All the elements above render very unlikely that the services envisaged to be provided by SCMT in the social care home would be considered sufficiently attractive by citizens from other Member States to motivate them to move to Tomar to benefit of these services.
- (25) As a matter of fact, the Portuguese authorities have confirmed that so far, SCMT's assisted living facilities have not hosted citizens from other Member States, nor are there any citizens from other Member States on the social home care waiting lists. That situation which is perfectly consistent with the objectives of the Action Programme 'Integrated Programme for the Urban Development of Tomar' to address primarily local needs (see recital (11) above) is moreover unlikely to evolve in the medium term. Indeed, the Portuguese authorities explained that a low turnover in occupation is to be expected as it is highly likely that the social care home will be used by residents for their entire lifetime.
- (26) Finally, with regard to the potential effect of the aid measure on the cross-border investments or establishment of undertakings from other Member States in the assisted residence sector in the region concerned, there is no indication of relevant cross-border investments in the facilities similar to the ones provided by SCMT in the municipality of Tomar. Therefore the measure cannot be expected to have an effect on cross-border investment in that region.
- (27) In this respect, ABES claims that, according to two press articles, the management company of an investment fund decided to invest in the assisted residence sector in 2008 in other areas of Portugal not in the vicinity of Tomar, or that another company opened two units of assisted living facilities in Lisbon in 2003 and 2009, and eventually, that an assisted living facility from Lisbon has transferred its customers to two other units in the North of Portugal and respectively, in the Lisbon area. The evidence provided by the complainant does not show in any way that the assisted living sector in the Tomar municipality is likely to attract foreign investments.
- (28) The low profitability of SCMT's activities (see table 1) also renders rather unlikely that these activities could attract significant investments from other Member States. In addition, according to the information provided by Tomar Municipal Authority in the submission of 11 January 2015, no requests for permits have been made by any foreign investors to provide this type of service in the area.
- (29) For these reasons, the Commission concludes that:
- i. the services provided by SCMT in Tomar are of a purely local nature and are attractive to local elderly population within the geographically limited area of the municipality of Tomar; and

- ii. the impact of the measure at hand cannot be regarded, with a sufficient degree of probability, to have more than a marginal effect, if any, on the conditions of cross-border investments or establishment.
- (30) Therefore, in light of the above, the Commission considers that the public funding granted to SCMT for the investment project in an assisted living facility in Tomar is not liable to affect trade between Member States. Consequently, as the conditions for the existence of State aid within the meaning of Article 107(1) TFEU are cumulative, the Commission accordingly finds that the measure described in the complaint does not constitute State aid within the meaning of Article 107(1) TFEU.

4. Decision

- (1) In light of the foregoing, the Commission finds that the measure described in the complaint does not constitute State aid within the meaning of Article 107(1) TFEU and in any event is compatible with the internal market on the basis of Article 107(3) (c) TFEU.

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<http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Registry
1049 Brussels
Belgium

Fax No: +32 2 29 61242

Yours faithfully,

For the Commission

Margrethe VESTAGER

Member of the Commission