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Our view on the health and social service reform proposed by the Finnish Government

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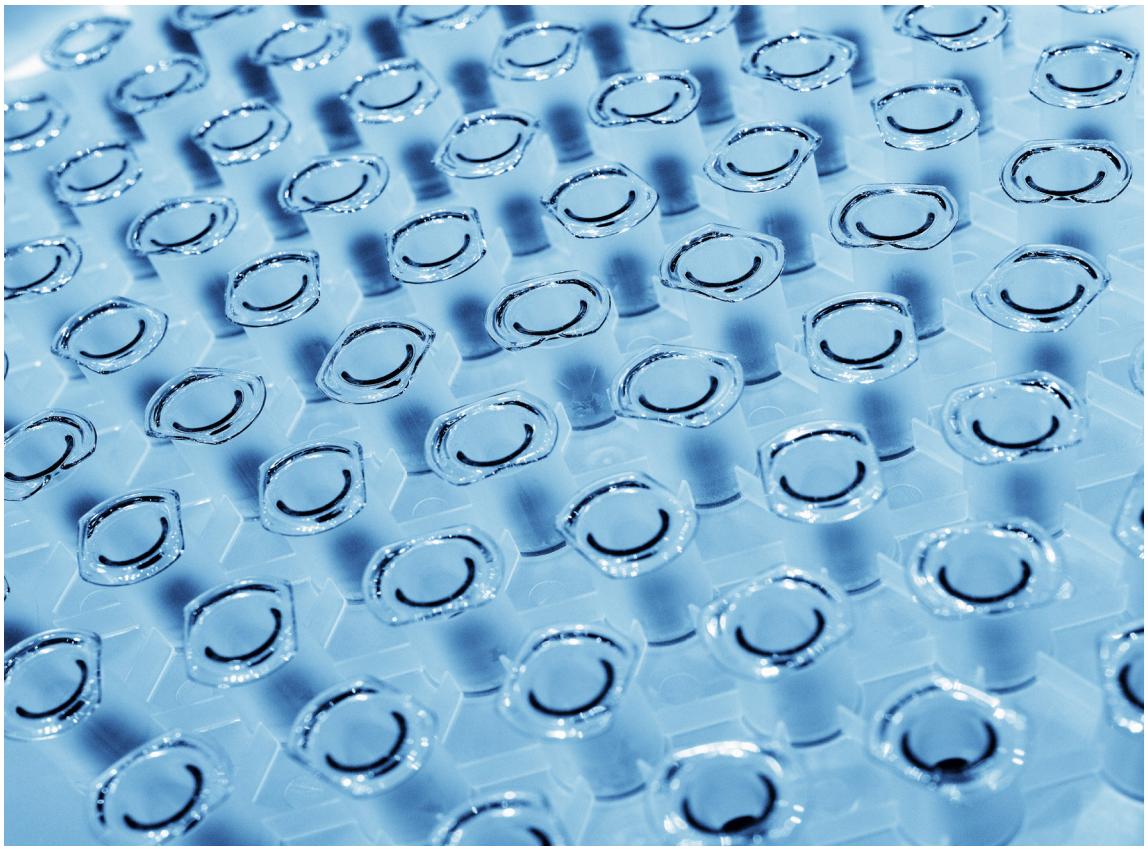

1. Background

In June 2020, the Finnish Government published its draft legislative proposal for implementing the reform of healthcare, social and rescue services (the **SOTE reform** or the **reform**). In brief, the reform would entail transferring the responsibility for organizing social and healthcare services as well as rescue services from municipalities to larger autonomous regions (to be called counties).

The SOTE reform has been long in the making, with several successive governments trying but ultimately failing to secure the passage of the legislation implementing the reform. The current Government is expected to submit its legislative proposal to the Finnish Parliament in December 2020, while hoping to secure the Parliament's approval for the proposed legislation prior to the summer of 2021.

In this brief memorandum, we have provided our critical comments on the SOTE reform proposed by the Government. Our main concerns with respect to the Government's SOTE reform, discussed in more depth below, can be divided into three categories:

1. *By emphasizing the primary role of the counties' own service provision, the SOTE reform will marginalize the role of private service providers in the provision of publicly funded healthcare services. We instead believe that a more prominent role for private service providers would benefit both individual Finnish patients and the future development of the Finnish public healthcare system as a whole.*

2. *Partly as a consequence of the marginalization of private service providers, the SOTE reform will not introduce sufficient incentives for developing and adopting new innovative technologies and service concepts in healthcare or for the systematic monitoring of services' effectiveness in terms of citizens' improved health and well-being.*

3. *The SOTE reform does not support a patient's right to choose his/her preferred service provider. In this respect, it is noteworthy that the reform fails to address the incorrect national transposition of EU's cross-border healthcare directive, which gives Finnish patients' the right to seek healthcare from other EU Member States and be reimbursed for the costs resulting from the use of this right.*

The views expressed in this memorandum are based on several years of experience from advising clients operating in the social and healthcare sector. For the sake of transparency, it should be disclosed that we also currently represent several clients active in this sector.

2. The role of private service providers marginalized

Municipalities and municipal federations currently have a broad range of discretion when it comes to deciding on the way publicly funded healthcare services are provided. Municipalities have exercised this discretion, *inter alia*, by outsourcing service provision to private healthcare providers through long-term service contracts. These outsourcing arrangements have enabled municipalities to control the rise in public healthcare expenditure, while safeguarding the availability of necessary services. The outsourcing contracts typically include strict provisions enabling the municipalities to monitor service provision and effectively intervene in case of any deficiencies in the performance of the services.

When compared to the current situation, the proposed SOTE reform would substantially restrict the future counties' ability to resolve on the provision of social and healthcare services within their geographic area. The new legislation would require that the counties predominantly produce the services themselves, with private service providers only having a supplementing role. The new legislation would thus effectively prevent any larger outsourcing arrangements by the counties in the social and healthcare sector.

The most striking example of the marginalization of private service providers as a part of the SOTE reform is the retroactive annulment of certain outsourcing contracts between municipalities and private service providers proposed by the Government. The proposed retroactive annulment of lawful contracts would be highly unusual under the Finnish legal system and in apparent contradiction with the right to property guaranteed by the Finnish Constitution. The Government has argued that the proposed annulment is necessary in order to guarantee the counties' ability to meet their legal responsibility to organize social and healthcare services after the reform has been implemented. However, this argument is apparently not based on a careful analysis of the outsourcing arrangements' actual effects on the

availability of services or, in fact, the content of the contracts to be annulled. As noted already above, the latter provide the party responsible for organizing the services with extensive rights to ensure that the outsourced services are duly performed in accordance with the requirements of applicable legislation.

3. No incentives for developing innovative solutions in healthcare

Future advances in the health and wellbeing of patients rest essentially on the development and adoption of new innovative technologies and digital services in healthcare. To foster the development and adoption of such technologies and services, a publicly funded healthcare system should provide service providers with incentives encouraging such activities. However, such incentives would appear to be largely missing from the proposed SOTE reform, which, as noted already above, emphasizes the primary role of public service provision and discourages any competition for patients between service providers.

Finnish private healthcare providers have made substantial investments in the development of their digital healthcare services, certain of which have raised substantial interest also outside Finland. Through the outsourcing of publicly funded healthcare services, these new digital services have benefitted also patients within the Finnish public healthcare system. Should outsourcing arrangements cease as a result of the SOTE reform, the adoption of these new services within the public healthcare system would be severely restricted. Moreover, private service providers would have less incentives to develop such services further as a result of their marginalized position in the provision of healthcare services in Finland.

Finland lags behind many peer countries when it comes to systematically measuring the effectiveness of publicly funded healthcare services. This is partly the result of the current fragmented structure for organizing the services, but partly also the system's basic operating principles, which do not encourage the systematic monitoring of the services' effectiveness or the adoption of best practices from other service providers. By marginalizing the role of private service providers in Finland (some of which have been forerunners in the development of indicators for monitoring the provided treatment's effectiveness), the proposed reform would not encourage the adoption of systematic practices for monitoring the effectiveness of publicly funded healthcare services.

4. The rights of patients not promoted

A patient's right to receive high-quality and effective healthcare according to his/her personal needs does not feature prominently in the SOTE reform proposed by the Government. This is largely the result of the reform's guiding principles, which, instead of emphasizing individual patient's rights, underscore the equal availability of services throughout the country and the need to level out existing differences in health and wellbeing between citizens.

Due to the problematic aspects of the reform described above, it is questionable whether the reform is well-fitted to achieve these aims. The reform does not create functioning incentives to develop new innovative services or to systematically monitor the effectiveness of provided care. Moreover, by marginalizing the role of private service providers, the reform is likely to reduce the range of alternative service providers available to patients. Besides the transfer of the administrative responsibility for organizing the services from municipalities to larger counties, the proposed reform would thus not seem to promote material improvements in Finnish patients' timely access to high-quality healthcare.

In this respect, it is noteworthy that the reform fails to address the issue of amending Finland's national transposition of the EU's cross-border healthcare directive, which lays down a patient's right to choose to receive healthcare in another Member State and to claim reimbursement for such healthcare when returning back home. As to the level of the reimbursement, the directive states clearly that it must be up to the level of the costs that would have been calculated by the patient's Member State of residence, without exceeding the actual costs. Under current Finnish law, such reimbursement to Finnish patients is, however, calculated according to the private healthcare scheme, meaning that the reimbursement received by the patient is substantially lower than the cost of providing a corresponding treatment within the Finnish public healthcare system. The current reimbursement model effectively restricts Finnish patients' ability to seek healthcare services from another Member State.

The European Commission considers that the Finnish legislation does not conform with the requirements of the cross-border healthcare directive and has already in 2015 commenced infringement proceedings concerning Finland's national transposition of the directive. According to the Commission, Finnish patients treated abroad should be reimbursed according to the costs of the Finnish public healthcare system. The level of reimbursement should not be a disincentive to receive healthcare abroad.

We understand that the Commission has so far waited for Finland to implement the overall reform of its public social and healthcare system before advancing further with the infringement proceedings. However, the Finnish Government has to date not published any plans to address the issue as a part of the ongoing SOTE-reform. Consequently, it is highly likely that Finland's apparent non-compliance with its obligations under the cross-border healthcare directive will be subject to further scrutiny by the Commission and, ultimately, the EU courts.

5. Conclusions

Universally available healthcare services are a fundamental aspect of any well-functioning modern society. The Finnish Constitution imposes on the public authorities a specific obligation to guarantee these services to everyone and to promote the health of the population. The identity and form of ownership of the unit providing these services should, however, in our view be immaterial for the fulfilment of this constitutional obligation. What should matter instead is that Finnish patients have access to high-quality and effective healthcare in a timely matter and that the design of the healthcare system provides incentives for continuously developing service provision and monitoring its effectiveness from the patients' perspective.

From this perspective, we consider the SOTE-reform proposed by the Government severely lacking. By removing any form of competition between public and private service providers, the reform effectively disincentives service providers from continuously developing their services. The marginalization of the private service providers' role in the provision of publicly funded healthcare services restricts Finnish patients' access to new innovative treatments and services. Moreover, the reform does not support a patient's right to choose his/her preferred service provider. The fact that the Government's legislative proposal omits entirely the need to ensure that Finnish patients are able to enjoy fully from the rights provided to them by the EU's cross-border healthcare directive is a striking example of this.