Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 18 April 2024[1]

Case C-447/22 P

**Republic of Slovenia,
European Commission
v
Petra Flašker**

(Appeal – State aid – Articles 107 and 108 TFEU – Aid measures granted by the Republic of Slovenia before accession to the European Union – Preliminary examination phase – Decision of the European Commission finding no State aid – Failure to initiate the formal investigation procedure – Concept of 'serious difficulties' as regards the existence of aid or its compatibility with the internal market – Scope of the Commission's obligations of due diligence and investigation – Burden of proof on the party relying on the existence of 'serious difficulties')

I. Introduction

1. By its appeal, the Republic of Slovenia seeks to have set aside the judgment of the General Court of the European Union of 27 April 2022, *Flašker* v *Commission* (T-392/20, EU:T:2022:245; 'the judgment under appeal'), by which the General Court annulled Commission Decision C(2020) 1724 final of 24 March 2020 closing the examination of measures concerning the public pharmacy chain Lekarna Ljubljana in the light of the State aid rules in Articles 107 and 108 TFEU (Case SA.43546 (2016/FC) – Slovenia) ('the decision at issue'), in so far as it concerns the 'assets under management' of Lekarna Ljubljana.

2. This case has its origin in a complaint lodged with the Commission, in 2016, by Petra Flašker ('PF'), the operator of a private pharmacy, complaining of the existence of State aid in favour of Lekarna Ljubljana, a competitor, in the form, inter alia, of grants of assets under management, such as business premises, on terms which do not correspond to market conditions. By the decision at issue, the Commission closed the examination of that complaint without initiating the in-depth investigation procedure provided for in Article 108(2) TFEU. The Commission stated, in essence, that, at the end of the preliminary examination phase under Article 108(3) TFEU, it was sufficiently convinced that the measures at issue did not constitute State aid, whilst specifying that, even if the grant of assets under management could have constituted such aid, then it would be 'existing aid'. Hearing an action for annulment, the General Court, in the judgment under appeal, upheld PF's plea alleging that the Commission could not lawfully adopt the decision at

[1] Original language: French.

issue without having initiated the investigation procedure provided for in Article 108(2) TFEU, and annulled the decision at issue in so far as it concerns the assets under management of Lekarna Ljubljana.

3. On appeal, the Republic of Slovenia, supported by the Commission, claims, in the context of its first two grounds of appeal, that the judgment under appeal is vitiated by an error of law in the interpretation and application of Article 108(2) and (3) TFEU and of Article 4(2) and (3) of Regulation (EU) 2015/1589,[2] as well as of the concept of 'serious difficulties' resulting in the obligation to initiate the formal investigation procedure. In accordance with the Court's request, the present Opinion will focus on analysing those first two grounds of appeal.

4. This case is a continuation of many others that have given rise to the settled case-law of the Courts of the European Union and follows in the wake of a series of other cases leading to more recent judgments concerning the failure to initiate the formal investigation procedure.[3] It therefore gives the Court the opportunity to clarify further, first, the concept of 'serious difficulties', the existence of which, at the end of a preliminary examination, means that the Commission is required to initiate the formal procedure and, second, the burden of proof and the scope of the obligations of due diligence and investigation on that institution when it is faced with a situation of uncertainty.

II. Legal context

A. The Accession Treaty and the Act of Accession

5. The Treaty concerning the accession of the Republic of Slovenia to the European Union[4] was signed by the Republic of Slovenia on 16 April 2003 and entered into force on 1 May 2004 ('the Accession Treaty').

6. Pursuant to Article 1(2) of the Accession Treaty, the conditions of admission and the adjustments to the Treaties on which the European Union is founded are set out in the Act concerning the conditions of accession to the European Union and the adjustments to the Treaties on which the European Union is founded ('the Act of Accession').[5]

7. Article 22 of the Act of Accession which, on the same basis as the other provisions of that act, is an integral part of the Accession Treaty, states that the measures listed in Annex IV to the Act are to be applied under the conditions laid down in that annex.

[2] Council Regulation of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9).

[3] See, inter alia, of 29 April 2021, *Achemos Grupė and Achema* v *Commission* (C-847/19 P, EU:C:2021:343, paragraph 44; 'the judgment in *Achemos Grupė*').; of 2 September 2021, *Commission* v *Tempus Energy and Tempus Energy Technology* (C-57/19 P, EU:C:2021:663; 'the judgment in *Tempus Energy*'); of 6 October 2021, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (C-174/19 P and C-175/19 P, EU:C:2021:801; 'the judgment in *Scandlines*'); of 17 November 2022, *Irish Wind Farmers' Association and Others* v *Commission* (C-578/21 P, EU:C:2022:898; 'the judgment in *Irish Wind Farmers' Association*'); of 14 September 2023, *Commission and IGG* v *Dansk Erhverv* (C-508/21 P and C-509/21 P, EU:C:2023:669; 'the judgment in *IGG* v *Dansk Erhverv*'); of 23 November 2023, *Ryanair* v *Commission* (C-209/21 P, EU:C:2023:905; 'the judgment in *Ryanair*'); and of 11 January 2024, *Wizz Air Hungary* v *Commission* (C-440/22 P, EU:C:2024:26; 'the judgment in *Wizz Air*').

[4] OJ 2003 L 236, p. 17.

[5] OJ 2003 L 236, p. 33.

8. Paragraph 1 of point 3 of Annex IV to the Act of Accession provides:

'The following aid schemes and individual aid put into effect in a new Member State before the date of accession and still applicable after that date shall be regarded upon accession as existing aid within the meaning of Article [108(1) TFEU]:

(a) aid measures put into effect before 10 December 1994;

(b) aid measures listed in the Appendix to this Annex;

(c) aid measures which prior to the date of accession were assessed by the State aid monitoring authority of the new Member State and found to be compatible with the acquis, and to which the [European] Commission did not raise an objection on the ground of serious doubts as to the compatibility of the measure with the common market, pursuant to the procedure set out in paragraph 2.

All measures still applicable after the date of accession which constitute State aid and which do not fulfil the conditions set out above shall be considered as new aid upon accession for the purpose of the application of Article [108(3) TFEU].'

B. Regulation (EU) 2015/1589

9. Article 1 of Regulation 2015/1589, entitled 'Definitions', reads as follows:

'For the purposes of this Regulation, the following definitions shall apply:

(a) "aid" means any measure fulfilling all the criteria laid down in Article 107(1) TFEU;

(b) "existing aid" means:

(i) without prejudice … to point 3 and the Appendix of Annex IV to the Act of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia …, all aid which existed prior to the entry into force of the [FEU Treaty] in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the [FEU Treaty] in the respective Member States;

…

(c) "new aid" means all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

…'

10. Article 4 of that regulation, which is entitled 'Preliminary examination of the notification and decisions of the Commission', provides, in paragraphs 2 to 5 thereof:

'2. Where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the internal market of a notified measure, in so far as it falls within the scope of Article 107(1) TFEU, it shall decide that the measure is compatible with the internal market ("decision not to raise objections"). The decision shall specify which exception under the TFEU has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the internal market of a notified measure, it shall decide to initiate proceedings pursuant to Article 108(2) TFEU ("decision to initiate the formal investigation procedure").

5. The decisions referred to in paragraphs 2, 3 and 4 of this Article shall be taken within 2 months. …'

C. Regulation (EC) No 794/2004

11. Article 4 of Regulation (EC) No 794/2004,[6] entitled 'Simplified notification procedure for certain alterations to existing aid', provides in the first sentence of paragraph 1 thereof, that, for the purposes of Article 1(c) of Regulation 2015/1589, 'an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the [internal] market. However, an increase in the original budget of an existing aid scheme by up to 20% shall not be considered an alteration to existing aid'.

III. Background to the dispute

12. The background to the dispute and the content of the decision at issue are set out in paragraphs 2 to 13 of the judgment under appeal and can, for the purposes of this Opinion, be summarised as follows.

13. In 1979, an entity called Lekarna Ljubljana o.p. was established in Ljubljana (Slovenia), then part of the Socialist Federal Republic of Yugoslavia, which was responsible for the distribution of pharmaceutical products through pharmacies. According to the information provided by the Slovenian authorities, that entity had been provided with assets enabling it to fulfil its function. According to PF, currently a professional dispensing pharmacist, that entity was an 'organisation of associated labour', which did not have a market economic activity and did not have capacity to own property.

14. Following Slovenia's independence, the Institutes Act, which covers, inter alia, public institutions entrusted with services of general economic interest, was adopted in 1991. Article 48 of that law provides: 'The Institute shall acquire the resources for its work from the funds of the founder, the sale of goods and services, and from other sources laid down in this Act'.

15. The following year, the Pharmacies Act was also adopted. That act provides for the coexistence of public pharmacy institutes and private pharmacies, and for municipalities to be responsible for the provision of pharmacy services in their territory. Private pharmacies receive

[6] Commission Regulation of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2004 L 140, p. 1), as amended by Commission Regulation (EU) 2015/2282 of 27 November 2015 (OJ 2015 L 325, p. 1).

authorisation to operate through a concession granted by the municipality concerned following calls for tenders. Public pharmacy institutes are established by the municipalities which participate in their management, and they are governed by their founding acts. There are now, according to the Commission, approximately 25 public pharmacy institutes in Slovenia, operating nearly 200 pharmacies, and 100 private pharmacies.

16. On the basis of those two acts, in 1997, the Municipality of Ljubljana created, by ordinance, the public pharmacy institute Javni Zavod Lekarna Ljubljana ('Lekarna Ljubljana'), stipulating that it was the legal successor of Lekarna Ljubljana o.p. and that it assumed the rights and obligations of the latter.

17. Lekarna Ljubljana now operates approximately 50 public pharmacies in Slovenia, predominantly in Ljubljana, but also in around 15 other municipalities. In Grosuplje (Slovenia), the town in which PF operates her private pharmacy, two pharmacies of Lekarna Ljubljana are established.

18. By an official complaint lodged with the Commission on 27 April 2016 following prior contact with its services, PF complained of the existence of State aid, within the meaning of Article 107 TFEU, in favour of Lekarna Ljubljana. The measures identified during the investigation of that complaint include 'the granting of assets under management' on terms which, according to PF, do not correspond to market conditions. PF mentions business premises as such assets.

19. Numerous exchanges took place between the Commission and the Slovenian authorities, on the one hand, and PF, on the other. On two occasions, the Commission sent PF a preliminary assessment to the effect that the measures identified did not constitute State aid. PF maintained her complaint each time by providing additional information, and was supported in 2018 by 16 other private pharmacies in Slovenia.

20. On 24 March 2020, the Commission sent to the Republic of Slovenia the decision at issue. That decision was adopted without the Commission having initiated the formal investigation period provided for in Article 108(2) TFEU. The Commission concluded in recital 73 of the decision at issue that the examination of the four measures in favour of Lekarna Ljubljana, identified as follows by PF during the investigation, namely (i) the benefit of a long-term lease granted by the Municipality of Skofljica (Slovenia) free of charge, (ii) the grant of assets under management by the Municipality of Ljubljana, (iii) the exemption from concession fees granted by several municipalities and (iv) the relief of its obligation to share profits with several municipalities, did not reveal the existence of State aid. However, as regards the grant of assets under management, the Commission states, in recitals 37 to 40 of the decision at issue, that, if the grant of such assets could have constituted State aid, then it would be 'existing aid'.

21. The reasons given in those recitals are as follows. After recalling the provisions of Article 48 of the Institutes Act and stating, first, that the Municipality of Ljubljana, on that basis, had to provide Lekarna Ljubljana with assets for its establishment and initial operation and, second, that any asset acquired by Lekarna Ljubljana, including by its own means, is registered as an 'asset under management' in accordance with the public accounting rules, the Commission stated that, according to the Slovenian authorities, in 1979, the Municipality of Ljubljana provided Lekarna Ljubljana o.p. with the necessary assets to commence its operation, that in 1997 those assets were transferred to Lekarna Ljubljana upon its legal succession and that all other assets acquired thereafter by both entities since 1979 were acquired by themselves on the market on market

terms. The only assets under management, the granting of which could constitute State aid, are therefore those from the initial provision of assets to Lekarna Ljubljana o.p., transferred in 1997 to Lekarna Ljubljana.

22. The Commission then made reference to Annex IV to the Act of Accession, in particular point 3 thereof on competition policy. It stated that, under paragraph 1 of point 3, 'the following aid schemes and individual aid put into effect in a new Member State before the date of accession and still applicable after that date shall be regarded upon accession as existing aid within the meaning of Article [108(1) TFEU]: (a) aid measures put into effect before 10 December 1994'.

23. Furthermore, the Commission recalled that Article 1(c) of Regulation 2015/1589 defines 'new aid' as 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'. It also stated that, under Article 4(1) of Regulation No 794/2004 'an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the [internal] market'.

24. The Commission concluded that, in so far as the grant of assets under management gave rise to State aid, it would then be existing aid, since that aid was granted when Lekarna Ljubljana o.p. was set up in 1979. The latter's replacement by Lekarna Ljubljana in 1997 is purely administrative in nature, since the legal context has not changed, nor has the use and conditions of use of the assets concerned. That replacement cannot therefore constitute an alteration to existing aid and the aid in question is therefore still aid of that type.

IV. The procedure before the General Court and the judgment under appeal

25. By application lodged at the Registry of the General Court on 19 June 2020, PF brought an action seeking annulment of the decision at issue and an order that the Commission pay the costs of the proceedings.

26. In support of that action, PF raised three pleas in law, alleging, first, infringement of the obligation to state reasons for the decision at issue; second, an incorrect assessment of the facts and an error in the legal characterisation of the facts concerning the grant of assets under management, resulting in an infringement of Articles 107 and 108 TFEU; and, third, that the Commission could not lawfully adopt the decision at issue without initiating the investigation procedure provided for in Article 108(2) TFEU.[7]

27. By the judgment under appeal, the General Court upheld the third plea, which it considered appropriate to examine in the first place, and allowed the action, annulling the contested decision in so far as it concerned the assessment, in the light of the rules on State aid, of the grant of assets under management to Lekarna Ljubljana, there being no need, in its view, to examine the first and second pleas.[8]

28. More specifically, after having limited the scope of the action to the assessment solely of those measures relating to the 'assets under management',[9] and having explained that it was appropriate to examine the third plea of the action in the light, inter alia, of the arguments put forward by PF

[7] Judgment under appeal, paragraphs 18 to 20.

[8] Judgment under appeal, paragraph 57.

[9] Judgment under appeal, paragraph 17.

in the context of the second plea,[10] the General Court divided into two parts its examination regarding the assets under management according to whether they were granted in 1979, when Lekarna Ljubljana o.p. was set up in order to allow it to commence its activities ('the assets under management in 1979'), or incorporated after that date by Lekarna Ljubljana o.p. and Lekarna Ljubljana ('the assets under management after 1979').[11]

29. The General Court held that, after the preliminary examination which it had carried out pursuant to Article 108(3) TFEU, the Commission had not dispelled the doubts as to whether, first, the assets granted under management to Lekarna Ljubljana o.p. and transferred in 1997 to Lekarna Ljubljana, in so far as they may be characterised as State aid, constituted existing aid or new aid within the meaning of Article 1(b) of Regulation 2015/1589,[12] and, second, whether all the assets under management incorporated by Lekarna Ljubljana o.p. and Lekarna Ljubljana after 1979 were indeed incorporated by those institutes under market conditions, as the Slovenian authorities asserted, and, consequently, whether State aid was not provided to those entities through those assets.[13]

30. On the basis of those two findings, the General Court concluded that the Commission was 'faced with serious difficulties which should have led it to initiate the procedure provided for in Article 108(2) TFEU … The detailed examination involved in that procedure would, moreover, have enabled the Commission, where necessary, to take an informed decision on the following questions: the very presence of State aid, within the meaning of Article 107 TFEU, in the case of the grant to Lekarna Ljubljana of assets under management free of charge or preferentially by the Municipality of Ljubljana, the classification of such assets as existing aid or new aid and their classification as individual aid or aid coming under an aid scheme. That would have enabled the Commission to provide informed guidance for the subsequent procedure, if necessary, in order to assess the compatibility with the internal market of the measures which turned out to be aid, whether existing or new, and which require such an assessment'.[14]

V. The procedure before the Court and the forms of order sought

31. On 6 July 2022, the Republic of Slovenia lodged an appeal against the judgment under appeal. It claims that the Court should set aside the judgment under appeal and, primarily, dismiss the action brought at first instance; in the alternative, if the state of proceedings does not permit final judgment to be given, the Court should refer the case back to the General Court and order PF to pay the costs.

32. For its part, the Commission claims that the Court should set aside the judgment under appeal and, primarily, dismiss the action brought at first instance, if the state of proceedings permits final judgment to be given, and order PF to pay the costs; in the alternative, it should refer the case back to the General Court and the costs should be reserved.

33. PF contends that the Court should dismiss the appeal and order the Republic of Slovenia to pay the costs.

[10] Judgment under appeal, paragraph 22.

[11] See, respectively, judgment under appeal, paragraphs 51 to 57 and paragraphs 40 to 50. With regard to the General Court's analysis relating to the assets under management in 1979 and those after 1979, see, respectively, points 58 to 60 and points 79 to 83 of this Opinion.

[12] Judgment under appeal, paragraph 55.

[13] Judgment under appeal, paragraph 50.

[14] Judgment under appeal, paragraph 56.

34. The parties presented oral argument and answered the questions put by the Court at the hearing on 31 January 2024.

VI. Analysis

35. In support of its appeal, the Republic of Slovenia, supported by the Commission, relies on four grounds of appeal, alleging, first, errors of law in the interpretation and application of Article 108(2) and (3) TFEU, Article 4(2) and (3) of Regulation 2015/1589, as well as errors in the interpretation of the concept of 'serious difficulties' as regards the classification as State aid, in relation to the assets under management after 1979; second, a misinterpretation of the facts and errors of law as regards the existence of such serious difficulties vis-à-vis the classification of the assets under management in 1979 as 'existing aid'; third, infringement of the obligation to state reasons incumbent on the General Court; and, fourth, infringement of the Commission's right to an effective remedy and a fair hearing, within the meaning of Article 47 of the Charter of Fundamental Rights of the European Union.

36. At the request of the Court, this Opinion will be limited to analysing the first two grounds of appeal.

37. Since those two grounds concern the obligation on the Commission to examine a complaint concerning the existence of alleged aid or its compatibility with the internal market, I consider it appropriate, first of all, to examine the scope of the Commission's obligation to initiate the formal investigation procedure pursuant to Article 108(2) TFEU, as established in the case-law of the Court (A), and then, second, to analyse the General Court's reasoning whilst examining the various complaints raised by the Republic of Slovenia, and supported by the Commission, in the context of the first ground of appeal, which concerns the assets under management after 1979 (B), and in the context of the second ground of appeal, which relates to the assets under management in 1979 (C).

A. The obligation on the Commission to initiate the formal investigation procedure pursuant to Article 108(2) TFEU

38. I consider it appropriate, at this stage, to recall the relevant rules of the State aid control system established by the FEU Treaty and the obligations on the Commission in the context of the investigation procedure into State aid pursuant to Article 108 TFEU.

39. First of all, I would observe that the assessment of the compatibility of aid measures with the internal market falls within the exclusive competence of the Commission.[15] For the purpose of applying Articles 93 and 107 TFEU, the Commission is afforded specific and exclusive competence under Article 108 TFEU to decide on the compatibility of State aid with the internal market when reviewing existing aid, when taking decisions on new or altered aid and when taking action regarding non-compliance with its decisions or with the requirement as to notification.[16] That exclusive power encompasses, inter alia, being able to apply Article 107 TFEU effectively and uniformly throughout the European Union, in an entirely foreseeable and transparent manner.[17]

[15] See judgment of 24 November 2020, *Viasat Broadcasting UK* (C-445/19, EU:C:2020:952, paragraph 17).

[16] Regulation 2015/1589, recital 2.

[17] Regulation 2015/1589, recital 3.

40. In the context of the procedure for reviewing State aid provided for in Article 108 TFEU, the preliminary stage of the procedure for reviewing aid under Article 108(3) TFEU, which is intended merely to allow the Commission to form a prima facie opinion on the existence or the partial or complete compatibility of aid, must be distinguished from the review stage under Article 108(2) TFEU, which is intended to enable the Commission to be fully informed of all the facts of the case. The main distinguishing feature between those two stages is that, during the preliminary stage, the Commission is not obliged to give the parties concerned notice to submit their comments before taking its decision. [18] Accordingly, the structure of that system is based on the idea that the Commissions services must not be obliged to carry out a procedure that places a heavy burden on their resources where a State measure does not, prima facie, raise difficulties as to its classification or its compatibility with the internal market. This also explains why decisions closing the preliminary stage are taken, in principle, within two months. [19]

41. In that regard, it is apparent from the wording of Article 4(4) of Regulation 2015/1589 and from settled case-law of the Court that, if the Commission is unable to conclude, following an initial examination in the context of the procedure under Article 108(3) TFEU, that the State measure in question either is not ‘aid’ within the meaning of Article 107(1) TFEU or, if classified as aid, is compatible with the Treaty, or where that procedure does not enable it to overcome all the difficulties involved in determining whether the measure under consideration is compatible with the internal market, the Commission is under a duty to initiate the procedure under Article 108(2) TFEU ‘without having discretion in that regard’. [20] The procedure under Article 108(2) TFEU is therefore essential whenever the Commission has serious difficulties in determining whether aid exists or is compatible with the internal market. In other words, the Commission may therefore confine itself to the preliminary examination phase under Article 108(3) TFEU when taking a decision in favour of aid only if it is able to satisfy itself, after an initial examination, that that aid is compatible with the internal market. If, on the other hand, that initial examination leads the Commission to the opposite conclusion or if it does not enable it to overcome all the difficulties involved in determining whether aid exists or whether that aid is compatible with the internal market, the Commission is under a duty to obtain all the requisite opinions and, for that purpose, to initiate the procedure provided for in Article 108(2) TFEU. [21]

42. It also follows from that same case-law that the concept of ‘serious difficulties’ is objective in nature [22] and that proof of the existence of such difficulties, which must be looked for both in the circumstances in which the decision was adopted after the preliminary examination and in its content, must be furnished by the applicant seeking the annulment of that decision, by reference to a body of consistent evidence. [23] Thus, the insufficient or incomplete nature of the examination carried out by the Commission during the preliminary examination procedure is an indication

[18] See Regulation 2015/1589, Article 6. See also judgments of 20 March 1984, *Germany* v *Commission* (84/82, EU:C:1984:117, paragraphs 11 and 13); of 2 April 1998, *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraphs 33 to 42); of 3 May 2001, *Portugal* v *Commission* (C-204/97, EU:C:2001:233, paragraphs 27 to 35); of 17 September 2015, *Mory and Others* v *Commission* (C-33/14 P, EU:C:2015:609, paragraph 94); and of 20 January 2022, *Deutsche Lufthansa* v *Commission* (C-594/19 P, EU:C:2022:40, paragraph 33).

[19] See Regulation 2015/1589, Article 4(5).

[20] See judgment of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 113 and the case-law cited).

[21] See judgments of 20 March 1984, *Germany* v *Commission* (84/82, EU:C:1984:117, paragraph 13); in *Irish Wind Farmers' Association* (paragraph 53 and the case-law cited); and in *IGG* v *Dansk Erhverv* (paragraph 69).

[22] On the concepts of ‘serious difficulties’ and ‘doubts’, see the Opinion of Advocate General Tanchev in *Commission* v *Tempus Energy and Tempus Energy Technology* (C-57/19 P, EU:C:2021:451, point 73), in which those two terms are found to be used interchangeably in the case-law of the Court.

[23] See judgments of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission* (C-131/15 P, EU:C:2016:989, paragraph 31; ‘the judgment in *Club Hotel Loutraki*’); in *Tempus Energy* (paragraph 40); in *Irish Wind Farmers' Association* (paragraph 54); in *IGG* v *Dansk Erhverv* (paragraph 70); in *Ryanair* (paragraph 109); and in *Wizz Air* (paragraph 95).

that the Commission was faced with serious difficulties in assessing the compatibility of the notified measure with the internal market, which should have led it to initiate the formal investigation procedure.[24]

43. Accordingly, when an interested party seeks the annulment of a decision of the Commission not to raise objections in relation to State aid, it essentially contests the fact that that institution adopted that decision without initiating the formal investigation procedure, thereby infringing that party's procedural rights. In order to have its action for annulment upheld, the interested party may invoke any plea to show that the assessment of the information and evidence which the Commission had at its disposal during the preliminary examination phase of the measure notified should have raised doubts as to the compatibility of the measure in question with the internal market. The use of such arguments cannot, however, have the consequence of changing the subject matter of the application or altering the conditions of its admissibility. On the contrary, the existence of doubts concerning that compatibility is precisely the evidence which must be adduced in order to show that the Commission was required to initiate the formal investigation procedure under Article 108(2) TFEU and Article 6(1) of Regulation 2015/1589.[25]

44. It follows that the lawfulness of a decision not to raise objections, based on Article 4(3) of Regulation 2015/1589, depends on the question whether the assessment of the information and evidence which the Commission had at its disposal during the preliminary examination phase of the measure notified should objectively have raised doubts both as to the classification of that measure as 'aid' and to its compatibility with the internal market, given that such doubts must lead to the initiation of a formal investigation procedure in which the 'interested parties' referred to in Article 1(h) of that regulation may participate.[26]

45. In addition, the lawfulness of a decision taken at the end of the preliminary examination procedure, such as that referred to in Article 4(2) of Regulation 2015/1589, falls to be assessed by the Courts of the European Union, in the light not only of the information available to the Commission at the time when the decision was adopted, but also of the information which 'could have been available' to the Commission, which includes information which seemed relevant and which could have been obtained, upon request by the Commission, during the administrative procedure.[27]

46. The Commission is required, in the interests of sound administration of the rules relating to State aid, to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision establishing the existence and, as the case may be, the incompatibility or unlawfulness of the aid, the most complete and reliable information possible for that purpose.[28]

[24] See judgments of 12 October 2016, *Land Hessen* v *Pollmeier Massivholz* (C-242/15 P, EU:C:2016:765, paragraph 38); in *Achemos Grupė* (paragraph 44); in *Tempus Energy* (paragraph 41); in *Ryanair* (paragraph 110); and in *Wizz Air* (paragraph 96).

[25] See judgments of 24 May 2011, *Commission* v *Kronoply and Kronotex* (C-83/09 P, EU:C:2011:341, paragraph 59); in *Ryanair* (paragraph 108); and in *Wizz Air* (paragraph 94 and the case-law cited).

[26] See, to that effect, judgments in *Club Hotel Loutraki* (paragraphs 32 and 33); in *Irish Wind Farmers' Association* (paragraph 55); and in *IGG* v *Dansk Erhverv* (paragraph 71).

[27] See judgments of 10 July 1986, *Belgium* v *Commission* (234/84, EU:C:1986:302, paragraph 16); in *Achemos Grupė* (paragraph 42); in *Tempus Energy* (paragraphs 42 and 43); and in *Irish Wind Farmers' Association* (paragraph 56).

[28] See judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraph 62); in *Achemos Grupė* (paragraph 43); and in *Tempus Energy* (paragraph 44).

47. In that regard, in the judgment in *Tempus Energy*, the Court clarified that, although, when the existence and legality of State aid is being examined, it may be necessary for the Commission, where appropriate, to go beyond a mere examination of the facts and points of law brought to its notice, it is not however for the Commission, on its own initiative and in the absence of any evidence to that effect, to seek all information which might be connected with the case before it, even where such information is in the public domain.[29] Thus, the mere existence of a potentially relevant piece of information of which the Commission was not aware and which it was not required to investigate, in the light of information that was actually in its possession, cannot demonstrate that there were serious difficulties obliging the Commission to initiate the formal investigation procedure.[30]

48. As for the obligation on the Commission to state reasons for its decisions pursuant to the second paragraph of Article 296 TFEU, the Court has clarified that, as regards a decision under Article 108(3) TFEU not to raise objections in respect of an aid measure, such a decision must simply set out the reasons why the Commission takes the view that it is not faced with serious difficulties in assessing the compatibility of the aid at issue with the internal market, and that even a succinct statement of reasons for that decision must be regarded as sufficient for the purpose of satisfying the requirement to state adequate reasons laid down in the second paragraph of Article 296 TFEU, provided that it discloses in a clear and unequivocal fashion the reasons why the Commission considered that it was not faced with serious difficulties, the question whether the reasoning is well founded being a separate matter.[31]

49. Lastly, it must be borne in mind that, while the principles enshrined in the case-law cited in points 41 to 47 of this Opinion have been developed primarily in relation to decisions not to raise objections as referred to in Article 4(3) of Regulation 2015/1589, they also apply to decisions, such as the decision at issue, finding that the measure ‘does not constitute aid’, which are referred to in Article 4(2) of that regulation.[32]

50. It is in the light of those requirements that it is necessary to determine whether the General Court erred in law in holding, in the judgment under appeal, that the Commission had not dispelled, at the end of the preliminary examination which it had carried out pursuant to Article 108(3) TFEU, the doubts related to the assets under management, that is to say by determining, first, whether the assets under management incorporated by Lekarna Ljubljana o.p. and Lekarna Ljubljana after 1979 had indeed been incorporated under market conditions and, therefore, whether aid had not been provided through those assets (first ground of appeal), and, second, whether the assets granted under management in 1979 to Lekarna Ljubljana o.p. and transferred in 1997 to Lekarna Ljubljana, in so far as they could be classified as State aid, constituted existing aid or new aid (second ground of appeal).

[29] Judgment in *Tempus Energy* (paragraph 45).

[30] See judgments in *Tempus Energy* (paragraph 51) and in *Irish Wind Farmers’ Association* (paragraph 59).

[31] See judgments in *Tempus Energy* (paragraph 199) and in *Ryanair* (paragraph 95).

[32] See judgments in *Club Hotel Loutraki* (paragraph 33) and in *Irish Wind Farmers’ Association* (paragraph 60).

B. The first ground of appeal

1. Arguments of the parties

51. By the first ground of appeal, which concerns paragraphs 48 to 50 of the judgment under appeal relating to the analysis of the assets under management incorporated by Lekarna Ljubljana o.p. and Lekarna Ljubljana after 1979, the Republic of Slovenia, supported by the Commission, alleges, in essence, that the General Court incorrectly defined the scope of the Commission's obligations during the preliminary examination stage established by Article 108(3) TFEU, by adopting a standard of proof that was too low as regards determining the existence of 'serious difficulties' which could justify initiating the formal investigation procedure under Article 108(2) TFEU.

52. More specifically, the General Court was wrong to hold, in paragraph 49 of the judgment under appeal, that the situation was 'unclear' as to the nature and status of the assets under management after 1979. It also wrongly concluded, in paragraph 50 of that judgment, that the Commission had not dispelled the doubts as to whether the abovementioned undertakings had acquired all their assets under management, after 1979, under market conditions, and, consequently, whether State aid had not been provided to those entities through those assets.

53. In support of those considerations, the Republic of Slovenia begins by setting out its views on all seven of the documents and pieces of evidence produced by PF during the preliminary examination procedure and examined by the General Court in the judgment under appeal, claiming, in essence, that none of that evidence can, objectively, give rise to doubts as to the existence of any hypothetical State aid. Since PF has not adduced the slightest specific indication or evidence capable of objectively giving rise to a suspicion that the Municipality of Ljubljana transferred to Lekarna Ljubljana assets under management free of charge or on more favourable terms than market conditions, the Commission could legitimately rely on the assurances given by the Slovenian authorities that those assets under management were granted on market conditions, and it was not required to seek, on its own initiative, information which might have been relevant in determining the existence of hypothetical State aid.

54. Next, the Republic of Slovenia complains that the General Court took the view, as is apparent from paragraph 48 of the judgment under appeal, that it was not for PF to prove beyond all doubt that the assets under management of Lekarna Ljubljana included assets constituting State aid, but rather for the Commission, when faced with a situation of 'uncertainty', to carry out a more in-depth investigation. By taking that approach, the General Court incorrectly applied the legal standard of 'serious difficulties', since it applied a standard of proof that was inappropriate and manifestly too low for PF to demonstrate the existence of a doubt, without taking into account, in so doing, the discretion enjoyed by the Commission to initiate the formal investigation procedure under Article 108(3) TFEU. The approach taken, which – moreover – is at odds with the standard established by the Court in the judgment in *Tempus Energy*, thus resulted in any distinction between the preliminary stage and the formal investigation procedure being eliminated, thereby forcing the Commission to undertake the latter procedure on every occasion that one party, in the course of the first of those stages, expresses concerns in relation to alleged State aid, even where that same party has not submitted the slightest plausible evidence in support of its claims.

55. PF contends that the first ground of appeal should be dismissed as unfounded.

2. Assessment

56. As is apparent from the case-law of the Court, the lawfulness of a decision which, following a preliminary examination, finds that a measure does not constitute aid depends on whether the assessment of the information and evidence which the Commission had at its disposal during the preliminary examination period should objectively have raised doubts as to that classification, leading to the initiation of a formal investigation procedure.[33]

57. In order to carry out such a review of legality, and in so far as the content of paragraphs 48 to 50 of the judgment under appeal, to which the first ground of appeal expressly refers, mirror the analysis carried out in the preceding paragraphs of that judgment, I consider it appropriate to restate the reasoning followed by the General Court in paragraphs 40 to 50 of the judgment under appeal concerning the analysis of the assets under management acquired by Lekarna Ljubljana o.p. and Lekarna Ljubljana after 1979.[34]

58. In that regard, the General Court began by finding that the Commission's conclusion that those assets did not constitute State aid was based on the assertion by the Slovenian authorities that all those assets under management had acquired on the private market without any public support. However, in reaching that conclusion, the Commission simply relied on the assurances given to that effect by the Slovenian authorities, even though no specific evidence was adduced in support of that assertion.[35]

59. Next, in order to determine whether State aid had been granted in respect of the assets under management after 1979, the General Court examined the various documents produced by PF seeking to establish the existence of 'serious difficulties' with which the Commission was faced. First of all, the General Court set out its view on the extract from Lekarna Ljubljana's annual report for 2012, referring to two properties with a particular status which had been transferred under management to Lekarna Ljubljana by the Municipality of Ljubljana ('the two properties at issue'), without any indication of the terms of that transfer.[36] Having found that Lekarna Ljubljana belonged to the category of beneficiaries provided for in Article 24 of the Physical Assets of the State and Local Government Act, under which the State and the local authorities may provide physical assets, free of charge, to public entities other than public companies, if that is in the public interest, the General Court went on to find, in essence, that it cannot be ruled out that that type of transfer of physical assets may fall under the concept of 'State aid'.[37] Lastly, the General Court analysed the various extracts from the public accounts of Lekarna Ljubljana and the Municipality of Ljubljana relating to the 2010s, as provided by PF. Those extracts revealed certain discrepancies between the municipality's figures relating to the value of the assets granted under management to Lekarna Ljubljana and those contained in Lekarna Ljubljana's public accounts. In that regard, the General Court observed that 'it is not possible to know by merely looking at those public accounts, what, among the assets granted under management to Lekarna Ljubljana, corresponds respectively to real assets that would have been given to it free of charge or on preferential terms by the Municipality of Ljubljana, to real assets acquired under market terms by Lekarna Ljubljana or to financial or monetary assets' and that 'it was not for [PF] to prove

[33] See point 44 of this Opinion.

[34] Judgment under appeal, paragraph 38.

[35] Judgment under appeal, paragraph 40.

[36] Judgment under appeal, paragraph 45.

[37] Judgment under appeal, paragraph 47.

beyond all doubt that the assets under management of Lekarna Ljubljana included assets corresponding to State aid, but rather for the Commission, when faced with a situation of uncertainty in that regard, to carry out more thorough investigations'.[38]

60. In the light of the foregoing, the General Court concluded, in essence, that, at the end of the preliminary examination carried out under Article 108(3) TFEU, the Commission had not dispelled the doubts concerning whether the assets under management incorporated by Lekarna Ljubljana o.p. and Lekarna Ljubljana after 1979 had been incorporated under market conditions or, consequently, whether State aid had been not provided to those entities through those assets.[39] In the General Court's view, the Commission had failed to meet the burden of proof on it, since some of the evidence put forward by PF during the administrative procedure, such as that referred to in points 58 and 59 of this Opinion, pointed to a situation that was 'unclear' as regards the nature and status of the assets under management. The General Court added that, faced with such a situation, it was for the Commission to carry out more thorough investigations in order to determine – using the extensive powers at its disposal under the FEU Treaty and Regulation 2015/1589 – whether the assets under management of Lekarna Ljubljana included assets corresponding to State aid. The burden of proof in this respect could not be considered to lie with PF, for whom it may be much more difficult to obtain the relevant information in that regard from the public authorities which may have granted State aid.[40]

61. It is on the basis of that analysis that the various complaints put forward by the Republic of Slovenia and the Commission must be addressed.

62. In the first place, it should be recalled that, according to settled case-law of the Court of Justice, when the General Court has established or assessed the facts, the Court of Justice only has jurisdiction, pursuant to Article 256 TFEU, to review the legal characterisation of those facts and the legal consequences drawn from them. Accordingly, the assessment of the facts does not, save where the evidence produced before the General Court is distorted, constitute a question of law which is subject, as such, to review by the Court of Justice on appeal.[41] Here, regardless of whether the General Court was wrong to take the view, in paragraph 50 of the judgment under appeal, that the Commission had not dispelled the doubts as to whether the assets under management after 1979 constituted State aid, the complaints seeking to contest the value of the evidence adduced by PF in the course of the administrative procedure, and which the General Court examined in the judgment under appeal, must be dismissed as inadmissible, since, in reality, those complaints seek to obtain a fresh assessment of those points of fact, which falls outside the jurisdiction of the Court of Justice. Furthermore, at the hearing, the Republic of Slovenia and the Commission stated that they were not calling into question the substance of the facts established by the General Court by alleging a distortion of evidence. There is therefore no need to examine the specific arguments, of a factual nature, raised by the Republic of Slovenia and the Commission which relate to the various evidence adduced.

63. In the second place, as they likewise confirmed at the hearing, both the Republic of Slovenia and the Commission challenge the legal characterisation of the abovementioned facts, as evidence capable of establishing the presence of doubts vis-à-vis the existence or the compatibility of the measure at issue with the internal market. However, that alleged incorrect

[38] Judgment under appeal, paragraph 48.

[39] Judgment under appeal, paragraph 50.

[40] Judgment under appeal, paragraphs 48 and 49.

[41] See the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union. See also judgments in *Scandlines* (paragraph 86) and in *Wizz Air* (paragraphs 57 and 58 and the case-law cited).

legal characterisation presupposes that there must be an error in the definition of the standard of the burden of proof borne by PF where she pleads the existence of 'serious difficulties' which could justify the initiation of the formal investigation procedure.

64. In that regard, in the context of determining the 'applicable rules and principles',[42] the General Court referred to the applicable legal standard in paragraphs 35 and 36 of the judgment under appeal in a manner wholly consistent with the settled case-law cited in points 41 to 47 of this Opinion. Specifically, in paragraph 35 of the judgment under appeal, the General Court rightly recalls that, 'when the Commission examines aid measures in the light of Article 107 TFEU in order to determine whether they are compatible with the internal market, it is required to initiate [the formal investigation procedure] where, after the preliminary examination stage, it has not been able to overcome all the difficulties preventing a finding that those measures are compatible with the internal market', and that 'the same principles must apply where the Commission also has doubts as to whether the measure under examination is aid within the meaning of Article 107(1) TFEU'. Similarly, in paragraph 36 of the judgment under appeal, the General Court concluded that, 'where the Commission examines a measure in the light of Articles 107 and 108 TFEU and, following a preliminary examination …, it is faced with persistent difficulties or doubts, in other words serious difficulties, either as regards the classification of that measure as State aid or as regards its classification as existing aid or new aid, or as regards its compatibility with the internal market if it considers that there is new aid, it is required to initiate the procedure provided for in Article 108(2) TFEU'.

65. It follows that the General Court cannot be alleged to have applied a standard that is manifestly too as regards the evidential requirements needed to trigger the obligation to initiate the formal investigation procedure.

66. In the third place, while the evidential standard appears to be well defined, and at the risk of making a fresh assessment of the facts, the question arises of an alleged misapplication of that standard by the General Court, in particular with regard to paragraphs 48, 49 and 50 of the judgment under appeal, to which reference is expressly made in the appeal. As a reminder, in paragraph 49 of the judgment under appeal, the General Court came to the conclusion that, 'while the contested decision, as regards the assets under management incorporated … after 1979, merely [referred] to the Slovenian authorities' assertion that all of those assets were acquired [by those entities] under market conditions, the evidence put forward by the applicant during the administrative procedure … shows a situation that is *unclear* as regards the nature and status of the assets under management of Lekarna Ljubljana' (emphasis added). The Commission argues that such an assertion by the Slovenian authorities, in the light of the Member States' duty of sincere cooperation, should have sufficed to dispel any uncertainty as regards the existence of any hypothetical aid.

67. However, first, while it is true that, in accordance with Article 4(3) TEU, Member States are under an obligation to cooperate with the Commission and to provide it with all information required to allow the Commission to carry out its duties under Regulation 2015/1589,[43] this does not preclude, in itself, the existence of 'serious difficulties' or 'doubts' with which the Commission might have been faced at the end of the preliminary examination. It would be contrary to the very spirit of the complaint procedure before the Commission, and to its effectiveness, if 'doubts' could

[42] See judgment under appeal, paragraphs 23 to 37.

[43] Regulation 2015/1589, recital 6. On the reciprocal obligation of sincere cooperation incumbent on the Commission and the Member States in the implementation of the rules concerning State aid, see judgment of 28 July 2011, *Mediaset* v *Commission* (C-403/10 P, EU:C:2011:533, paragraph 126 and the case-law cited).

automatically be dispelled on the basis of mere assertions by national authorities. To accept that doubts as to the existence or the compatibility of an aid measure can be dispelled with such ease solely on the basis of mere assertions by national authorities would not only entirely defeat the purpose of the preliminary procedure under Article 108(2) TFEU, but it would also risk undermining the State aid control mechanism and the role entrusted to the Commission. It would thus be sufficient for a Member State to reject the claims made by complainants, without providing any evidence in that regard, to put an end to a procedure initiated under Article 108 TFEU. Moreover, in the present case, as is apparent from points 58 to 60 of this Opinion, it was only after an in-depth analysis of the various evidence put forward by PF during the administrative procedure that the General Court found the situation as regards the nature and status of the assets under management to be 'unclear'.

68. Second, the General Court was, in my view, right to find, in paragraph 49 of the judgment under appeal, that the Commission had not 'itself … clarified the issue on a documented basis, which it cannot criticise [PF] for failing to produce to it' and that 'it may indeed be much more difficult for a complainant to obtain the relevant information … than for the Commission, which has extensive powers to that effect, deriving directly from the TFEU, but also from Regulation 2015/1589'. On the one hand, complainants generally have limited access to relevant information, both public and private, thus preventing them from providing detailed information so that the Commission can take a decision on the basis of sufficiently complete and reliable evidence. That difficulty in accessing evidence is all the more apparent in the context of a case, such as that at issue, which dates back to the 1970s and which is a period marked by the transition from a planned economy to a free market economy, and in which public and private pharmacies are in competition (making it even more difficult for PF to access relevant information pertaining to Lekarna Ljubljana). On the other hand, it must be observed that the Commission has a significant arsenal of powers at its disposal which allow it to make additional requests for information from Member States, which, as a general rule, are better placed than the complainants to dispel any doubts that may exist.[44] Furthermore, the Commission is required to conduct the preliminary examination stage diligently and impartially, so that it has at its disposal, when adopting the final decision establishing the existence and the compatibility or lawfulness of the aid, the most complete and reliable information possible.[45] Accordingly, it does not appear to me to be excessive or unreasonable to consider that, in such a situation, it must launch the formal investigation procedure, since the initiation of an *inter partes* investigation means that the Commission is better informed before taking a decision.

69. Third, and, as such assessment is a matter for the General Court, for the sake of completeness, I would note that, since the existence of difficulties which 'objectively' should have raised doubts as to the classification of a measure as 'aid' gives rise to the obligation to initiate a formal investigation procedure, it must be observed, on the one hand, that a particular system, such as the Slovenian system, which allows a competitive relationship between public and private pharmacies, raises, in my view, in itself, and 'objectively', obvious questions concerning its compatibility with the rules relating to State aid. On the other hand, the fact that there was a transfer not of assets, as the Republic of Slovenia claims, but of 'assets under management' from the Municipality of Ljubljana, once again, objectively, does not preclude, in itself, the possibility of a transfer of an advantage constituting State aid which should have been examined further.

[44] See judgments of 18 September 1995, *SIDE* v *Commission* (T-49/93, EU:T:1995:166, paragraph 71), and of 28 September 1995, *Sytraval and Brink's France* v *Commission* (T-95/94, EU:T:1995:172, paragraph 77).

[45] See point 46 of this Opinion.

70. In the light of the foregoing, I consider that the first ground of appeal must be dismissed as unfounded.

C. The second ground of appeal

1. Arguments of the parties

71. By the second ground of appeal, which concerns paragraphs 51 to 55 of the judgment under appeal and relates to the grant of the assets under management in 1979, the Republic of Slovenia criticises, in essence, the General Court for holding that the Commission was faced with ‘serious difficulties’ as regards whether that measure, in so far as it may be regarded as constituting State aid, constitutes ‘existing’ aid, within the meaning of Article 1(b) of Regulation 2015/1589, or whether it has been ‘altered’ in the meantime, within the meaning of Article 4(1) of Regulation No 794/2004, such that it must be classified as ‘new aid’ within the meaning of Article 1(c) of Regulation 2015/1589.

72. According to the Republic of Slovenia, the General Court erred, in paragraphs 55 and 56 of the judgment under appeal, in finding there to be serious difficulties in respect of that measure, even though it is unequivocally clear from recital 39 of the decision at issue that the Commission had clearly decided that the measure granting the assets under management, provided to Lekarna Ljubljana o.p. in 1979 when it was set up, ‘to the extent that the measure would constitute State aid, would be existing aid’.

73. The General Court also erred when it took the view, in paragraph 54 of the judgment under appeal, that the ‘starting point’, that is to say, the situation existing on 10 December 1994,[46] was uncertain, since there was no information in the contested decision to clarify whether, on that date, private pharmacies had already obtained municipal concessions or whether Lekarna Ljubljana o.p. still held a monopoly in its area of activity.[47]

[46] This is, specifically, the date used in paragraph 1(a) of point 3 of Annex IV to the Act of Accession for the classification of aid granted by the Republic of Slovenia as ‘existing aid’.

[47] The Republic of Slovenia argues that these considerations by the General Court are incorrect, since it is apparent from the information set out in paragraph 51 of the judgment under appeal that, between 10 December 1994 and the date on which Lekarna Ljubljana succeeded Lekarna Ljubljana o.p., namely in 1997, the same legal framework applied, as the various national rules governing, inter alia, the opening of the Slovenian market to competition had already been introduced before 10 December 1994. In addition, that aspect is decisive when assessing whether the alteration of the second measure at issue, classified as ‘existing aid’, constitutes ‘new aid’, within the meaning of Article 1(c) of Regulation 2015/1589. Even assuming that, on account of its change in status, the second measure at issue, which, while it was not State aid when it was introduced, could have become State aid, that change occurred in any event before 10 December 1994. It follows that the Commission did not err when it concluded, in recital 39 of the decision at issue, that, in so far as neither the legal framework nor the conditions of use of the assets under management had changed between 10 December 1994 and the date on which Lekarna Ljubljana had succeeded Lekarna Ljubljana o.p., that that succession was of a purely administrative nature, and therefore it cannot constitute an alteration that converts existing aid into new aid.

74. Moreover, the General Court was wrong to take the view, in paragraphs 51 to 54 of the judgment under appeal, that Lekarna Ljubljana and Lekarna Ljubljana o.p. operated on different terms from Lekarna Ljubljana o.p., whereas, in the light of the legal and legislative changes which had occurred before 10 December 1994, Lekarna Ljubljana o.p. operated, in actual fact, on the same terms as its successor.[48]

75. Lastly, the Republic of Slovenia attempts, in that context, to refute the various complaints raised by PF during the administrative procedure, in particular those alleging, first, that the Commission failed to dispel the doubts as to whether the measure at issue had been altered after 1 May 2004, that is to say, the date of accession of the Republic of Slovenia to the European Union, and, second, that the Commission failed to verify the compatibility of that measure with the internal market. With regard to the first of those complaints, the appellant claims, in essence, that, in so far as the General Court erred in finding, in paragraph 54 of the judgment under appeal, that Lekarna Ljubljana showed considerable differences compared with the entity which it succeeded in 1997, that complaint raised by PF is baseless. As for the second of those complaints, the Republic of Slovenia takes the view that it is irrelevant from a legal perspective, on the ground that the compatibility of an aid measure can be required, under Article 108(1) TFEU, only in relation to aid schemes, whereas the measure at issue in the present case is individual aid. The General Court, however, accepted that legal argument, since it did not state any grounds whatsoever for its rejection.

76. In the light of the foregoing considerations, the Republic of Slovenia concludes that the Commission was not obliged to initiate the formal investigation procedure under Article 108(2) TFEU. In the light of the information which it had during the preliminary examination stage, it had no substantive or legal basis to find that ‘serious difficulties’ existed. Furthermore, contrary to what the General Court argued in the judgment under appeal, adequate reasons were stated in that regard.

77. PF proposes that this ground of appeal be dismissed as unfounded.

2. Assessment

78. In view of the specific and technical nature of the various complaints put forward by the Republic of Slovenia in the context of the second ground of appeal, the General Court’s reasoning as set out in paragraphs 51 to 55 of the judgment under appeal must be recalled in order to examine the complaints.

79. First of all, it should be recalled that, in the context of the State aid control system, the procedure differs according to whether the aid is existing or new. Whereas existing aid may, in accordance with Article 108(1) TFEU, be lawfully implemented so long as the Commission has made no finding of incompatibility, Article 108(3) TFEU provides that plans to grant new aid or

[48] In particular, it is wrong to consider, as the General Court argued in paragraph 54 of the judgment under appeal, that the entities were characterised by considerable differences, since, unlike its predecessor, Lekarna Ljubljana had the capacity to acquire assets under management, including property, and therefore the question had to be asked whether continuing to make immovable assets under management available without property could still be justified. Like Lekarna Ljubljana, its predecessor also had, at the very least from 1991 when it had commenced operating as an institute, the capacity to acquire such assets under management. In that regard, the Republic of Slovenia explains that, like its predecessor, Lekarna Ljubljana can only use the assets which it obtains (formally) under management from the Municipality of Ljubljana, even if those assets are acquired with resources provided by Lekarna Ljubljana. It would be unfounded for the General Court to ask whether continuing to make the assets under management available is still justified. It is clear that this is solely a means of ensuring that a public institute can use assets (as has been stated, all assets at the disposal of such an institute are held as assets under management). Under no circumstances does that entail assets under management being granted free of charge.

alter existing aid must be notified, in due time, to the Commission and may not be put into effect until the procedure has resulted in a final decision. Measures taken after the entry into force of the FEU Treaty to grant or alter aid, whether the alterations relate to existing aid or initial plans notified to the Commission, must be regarded as new aid subject to the notification requirement.[49]

80. In that regard, the concept of 'new aid' is defined in Article 1(c) of Regulation 2015/1589 as 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'. The first sentence of Article 4(1) of Regulation No 794/2004 provides, in that connection, that 'an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the [internal] market'. The Court has held that an alteration cannot be characterised as being 'of a purely formal or administrative nature', within the meaning of that provision, where it is liable to affect the evaluation of the compatibility of the aid measure with the internal market.[50]

81. In that regard, the starting point for the General Court's analysis is the decision at issue. Thus, the General Court observed in paragraph 52 of the judgment under appeal that, in order to explain that the assets granted under management in 1979 and transferred to Lekarna Ljubljana in 1997 constituted, in so far as they may be classified as State aid, existing aid, the Commission simply stated, in recital 39 of the decision at issue, that the succession, in 1997, between Lekarna Ljubljana o.p. and Lekarna Ljubljana was of a purely administrative nature and that both the legal context and the use and conditions of use of the assets had not changed since, with the result that the existing aid as it stood in 1997 had not been altered and remained existing aid.

82. In paragraph 53 of the judgment under appeal, the General Court found that, in accordance with paragraph 1(a) of point 3 of Annex IV to the Act of Accession, individual aid put into effect before 10 December 1994 in the Republic of Slovenia and still applicable after the date of accession of that Member State, that is to say, on 1 May 2004, were regarded as existing aid at the time of accession. In the present case, the General Court therefore considered that aid put into effect in Slovenia before 10 December 1994 had to be regarded as existing aid on 1 May 2004, provided that it was not altered between those two dates, otherwise it had to be regarded as 'new aid' from that second date. Furthermore, an alteration of that aid after 1 May 2004 would also make it new aid. Accordingly, for the assets granted under management in 1979 to Lekarna Ljubljana o.p., then transferred in 1997 to Lekarna Ljubljana, to constitute 'existing aid', there would have to be no alteration to that alleged aid between 10 December 1994 and the date of adoption of the decision at issue. That framework of analysis, which is not – moreover – contested, is well founded.

83. In that context, in paragraphs 54 and 55 of the judgment under appeal, the General Court therefore rightly verified whether the various evidence put forward by PF could establish an 'alteration' of the nature of the 'existing aid' occurring after 10 December 1994 which converted it into 'new aid'.

84. In that regard, the General Court held, first of all, that, on 10 December 1994, the legislative context was 'uncertain' because none of the information contained in the decision at issue allowed it to be ascertained whether private pharmacies had already obtained municipal concessions on that date or whether Lekarna Ljubljana o.p. still held a monopoly in its area of activity. Next, on the basis of unrefuted information provided by PF, the General Court found

[49] See judgment of 28 October 2021, *Eco Fox and Others* (C-915/19 to C-917/19, EU:C:2021:887, paragraphs 36 to 38 and the case-law cited).

[50] See judgment of 28 October 2021, *Eco Fox and Others* (C-915/19 to C-917/19, EU:C:2021:887, paragraph 41 and the case-law cited).

that, in 1997, when Lekarna Ljubljana o.p. was replaced by Lekarna Ljubljana, the market was competitive, and that that gave rise to significant changes for the new entity, such as the capacity to acquire properties, the continuation – at least from 2007 onwards – of a profit-making purpose and the extension of its activity beyond the territory of the Municipality of Ljubljana. In the absence of a more detailed examination with regard to the development of the legal and economic context of the activity in question, which the Commission was required to carry out on its own initiative, in the light of its supervisory obligations, the General Court concluded that those factors 'prevent it from being certain that there was no alteration to the possible aid at issue since 10 December 1994'. That conclusion was not called into question by the Commission's assertion, according to which the succession in 1997 was purely administrative and the legal context, like the use and conditions of use of the assets in question, had not changed, which assertion was 'at the very least insufficiently substantiated in that regard'. It is for that reason that the General Court concluded, in paragraph 55 of the judgment under appeal, that the Commission had failed to dispel the doubts as to whether the grant of the assets at issue, in so far as they may be classified as 'State aid', constituted existing aid or new aid.

85. In the light of that analysis, I would observe, in the first place, that, for the same reasons as those set out in point 62 of this Opinion, the arguments put forward by the Republic of Slovenia in the context of the second ground of appeal, which seek in reality to call into question the factual assessments made by the General Court, must be dismissed as inadmissible.

86. In the second place, as I concluded in the context of the first ground of appeal, I would point out no error has been established in the definition of the legal standard for proving that serious difficulties exist, since the General Court's preliminary observations in paragraphs 35 and 36 of the judgment under appeal, which I have examined in point 64 of this Opinion, are equally valid and relevant to the analysis of the second ground of appeal. Furthermore, it is to those same paragraphs which the General Court referred, in paragraph 54 of the judgment under appeal, when it found that a more detailed examination was necessary with regard to the development of the legal and economic context of the activity in question.

87. In the third place, with regard to the more focused complaints relating to the legal characterisation of the facts, and at the risk of making a fresh assessment of the facts, it seems reasonable to me, in view of the nature and significance of the uncertainties in the legal and economic context identified by the General Court in paragraph 54 of the judgment under appeal, to conclude that those uncertainties should objectively have given rise to doubts as to the classification of the aid as existing aid, leading to the initiation of the formal investigation procedure. In the light of the case-law cited in point 80 of this Opinion, those uncertainties concern factors capable of 'affecting the evaluation of the compatibility of the measure with the internal market'.

88. I am therefore of the view that the second ground of appeal must also be dismissed as unfounded.

VII. Conclusion

89. In the light of the foregoing considerations, and in so far as this Opinion concerns the first two grounds of appeal, I propose that the Court dismiss those grounds of appeal as unfounded.