Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

5 September 2024*

(Appeal – State aid – Articles 107 and 108 TFEU – Measures granted by the Republic of Slovenia to a municipal network of dispensing pharmacies before its accession to the European Union – Preliminary examination phase – Failure to initiate the formal investigation procedure – Concept of 'serious difficulties' – Extent of the European Commission's investigative duty – Burden of proof on the party relying on the existence of 'serious difficulties' – Scope)

In Case C-447/22 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 6 July 2022,

Republic of Slovenia, represented by B. Jovin Hrastnik, J. Morela and N. Pintar Gosenca, acting as Agents,

appellant,

the other parties to the proceedings being:

Petra Flašker, residing in Grosuplje (Slovenia), represented by K. Zdolšek, odvetnica,

applicant at first instance,

European Commission, represented by M. Farley and C. Georgieva, acting as Agents,

defendant at first instance,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, T. von Danwitz, P.G. Xuereb (Rapporteur), A. Kumin and I. Ziemele, Judges,

Advocate General: A. Rantos,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 31 January 2024,

* Language of the case: English.

EN

after hearing the Opinion of the Advocate General at the sitting on 18 April 2024,

gives the following

Judgment

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 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 that decision concerns the assets under management of that public pharmacy.

Legal framework

European Union law

The Treaty of Accession and the Act of Accession

2 The Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (OJ 2003 L 236, p. 17), was signed by the Republic of Slovenia on 16 April 2003 and entered into force on 1 May 2004 ('the Treaty of Accession').

3 Pursuant to Article 1(2) of the Treaty of Accession, 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 of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33; 'the Act of Accession'), which act is annexed to the Treaty of Accession, the provisions of which form an integral part of the latter.

4 Article 22 of the Act of Accession provides that the measures listed in Annex IV to the act are to be applied under the conditions laid down in that annex.

5 Point 3 of Annex IV to the Act of Accession, entitled 'Competition Policy', provides in paragraph 1:

'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].'

Regulation (EU) 2015/1589

6 Under the heading 'Definitions', Article 1 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 1) is worded 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 … all aid which existed prior to the entry into force of the TFEU 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 TFEU 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;

…'

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

'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 [FEU Treaty] 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. …'

Regulation (EC) No 794/2004

8 Article 4 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation 2015/1589 (OJ 2004 L 140, p. 1), as amended by Commission Regulation (EU) 2015/2282 of 27 November 2015 (OJ 2015 L 325, p. 1) ('Regulation No 794/2004'), entitled 'Simplified notification procedure for certain alterations to existing aid', provides in the first sentence of paragraph 1 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'.

The background to the dispute and the decision at issue

9 The background to the dispute is set out in paragraphs 2 to 13 of the judgment under appeal as follows:

'2 In 1979, an entity called Lekarna Ljubljana p.o. 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 what the Slovenian authorities told the … Commission, that entity had been provided with "assets" enabling it to fulfil its function. According to [Ms Petra Flašker, the applicant at first instance], 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.

3 Following [the Republic of] Slovenia's independence, the [Zakon o zavodih (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."

4 The following year, the [Zakon o lekarniški dejavnosti (Pharmacies Act)] was 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 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.

5 On the basis of the acts referred to in paragraphs 3 and 4 above, in 1997, the Municipality of Ljubljana, by ordinance, created the public pharmacy institute Javni Zavod Lekarna Ljubljana ("Lekarna Ljubljana"), stipulating that it was the legal successor of Lekarna Ljubljana p.o. and that it assumed the rights and obligations of the latter.

6 Lekarna Ljubljana now operates approximately 50 public pharmacies in Slovenia, predominantly in Ljubljana, but also in around 15 other municipalities. In Grosuplje, where the applicant [at first instance] operates her private pharmacy, two pharmacies of Lekarna Ljubljana are established.

7 By an official complaint lodged with the Commission on 27 April 2016 following prior contact with its services, the applicant [at first instance] 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 the applicant [at first instance], do not correspond to market conditions. The applicant [at first instance] mentions business premises as such assets.

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

9 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 procedure provided for in Article 108(2) TFEU. The Commission concluded in recital 73 of that decision that the examination of the four measures in favour of Lekarna Ljubljana, identified below by the applicant [at first instance] during the investigation, namely the benefit of a long-term lease granted by the Municipality of Skofljica (Slovenia) free of charge, the grant of assets under management by the Municipality of Ljubljana, the exemption from concession fees by several municipalities and 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, previously 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".

10 The reasons given in those recitals are set out below. After recalling the provisions of Article 48 of the Institutes Act, cited in paragraph 3 above, 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, secondly, 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, it is stated that, according to the Slovenian authorities, in 1979, the Municipality of Ljubljana provided Lekarna Ljubljana p.o. with the

necessary assets for its operation, that in 1997 those assets were transferred to Lekarna Ljubljana upon its succession and that all other assets acquired successively by both entities since 1979 were acquired by themselves on the market on market terms. The only assets under management which could constitute State aid are therefore those from the initial provision of assets to Lekarna Ljubljana p.o., transferred in 1997 to Lekarna Ljubljana.

11 Reference is then made to Annex IV to the Act of Accession … in particular point 3 on competition policy. It is 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 …"

12 It is also 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 is also recalled that Article 4(1) of [Regulation No 794/2004] provides 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".

13 It is concluded from this 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 p.o. 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 [have] the use and conditions of use of the assets concerned. That substitution cannot therefore constitute an alteration to existing aid and the aid in question is therefore still aid of that type.'

The procedure before the General Court and the judgment under appeal

10 By application lodged at the Registry of the General Court on 19 June 2020, Ms Petra Flašker brought an action under Article 263 TFEU for annulment of the decision at issue.

11 In support of her action, the applicant at first instance relied on three pleas in law, alleging, first, infringement of the obligation to state reasons; second, an incorrect assessment of the facts and an error in the legal characterisation of the facts relating to 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 having opened the investigation procedure provided for in Article 108(2) TFEU.

12 By the judgment under appeal, the General Court upheld the third plea in law and annulled the decision at issue in so far as it concerned the assets under management of Lekarna Ljubljana.

13 After limiting, in paragraph 17 of the judgment under appeal, the scope of the action solely to measures concerning 'assets under management' and stating, in paragraph 22 of that judgment, that it was necessary to analyse the third plea in law of the action in the light, inter alia, of the arguments put forward by the applicant at first instance in the context of the second plea, as summarised in paragraph 19 of that judgment, the General Court carried out an analysis concerning the assets under management at issue by distinguishing those granted to Lekarna Ljubljana p.o. at the time of its creation in 1979, and those granted to Lekarna Ljubljana p.o. and to Lekarna Ljubljana after 1979.

14 In the first place, in paragraphs 40 to 50 of the judgment under appeal, the General Court analysed the assets under management incorporated by Lekarna Ljubljana p.o. and Lekarna Ljubljana after 1979 (‘the first measure at issue’).

15 In that regard, the General Court found at the outset, in paragraph 40 of that judgment, that the Commission had confined itself, as is apparent from recital 36 of the decision at issue, to referring to the Slovenian authorities’ assertion that all the assets under management acquired by Lekarna Ljubljana p.o. and by Lekarna Ljubljana after 1979 had been acquired under market conditions and without any public support, even though no concrete evidence had been provided by the Slovenian authorities in support of that assertion.

16 The General Court then examined the various documents submitted by the applicant at first instance, seeking to establish the existence of ‘serious difficulties’ in determining whether State aid had been granted under the first measure at issue. In that respect, with regard to an extract from Lekarna Ljubljana’s annual report for 2012, mentioned in paragraph 45 of the judgment under appeal, referring to two properties which had been transferred to the latter by the Municipality of Ljubljana as assets under management, the General Court considered that it was not evident that that transfer had been carried out under market conditions or, at that time, free of charge or on preferential terms. Furthermore, after finding, in paragraph 47 of that judgment, that Lekarna Ljubljana fell, prima facie, within the category of beneficiaries provided for in Article 24 of the Zakon o stvarnem premoženju države in samoupravnih lokalnih skupnosti (Physical Assets of the State and Local Government Act), in accordance with which the State and 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 examined, in paragraph 48 of that judgment, the various public account statements provided by the applicant at first instance, which highlighted certain discrepancies between the figures of the Municipality of Ljubljana relating to the value of the assets granted under management to Lekarna Ljubljana and the figures shown in the latter’s public accounts. In that regard, the General Court stated in paragraph 48 of the judgment under appeal that ‘it [was] not possible to know by merely looking at those public accounts, what, among the assets granted under management to Lekarna Ljubljana, [corresponded] 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 conditions by Lekarna Ljubljana or to financial or monetary assets’.

17 In view of the above factors, the General Court found, in essence, in paragraphs 49 and 50 of the judgment under appeal, that the Commission had not dispelled the doubts, which it should have done, as to whether the assets under management incorporated by Lekarna Ljubljana after 1979 had been obtained under market conditions. According to the General Court, although the evidence put forward by the applicant at first instance during the administrative procedure, as set out in paragraphs 45 to 48 of that judgment, revealed the existence of a ‘situation that is unclear’ as to the nature and status of those assets under management, it was for the Commission, in such a situation of uncertainty, to carry out more thorough investigations in order to determine whether those assets under management included assets corresponding to State aid, since that determination could not be regarded as falling within the burden of proof borne by the applicant at first instance.

18 In the second place, in paragraphs 51 to 57 of the judgment under appeal, the General Court analysed the assets granted to Lekarna Ljubljana p.o. in 1979 in order to commence its activities and which were transferred to Lekarna Ljubljana in 1997 (‘the second measure at issue’).

19 As a preliminary point, the General Court noted, in paragraphs 38 and 39 of the judgment under appeal, that the Commission considered, both in the decision at issue and in its reply to a written question, that, even if the second measure at issue were State aid, it would constitute existing aid of an individual character and not a system of aid within the scope of the constant review provided for in Article 108(1) TFEU, with the result that it did not rule on the compatibility with the internal market of any existing aid.

20 The General Court then referred, in paragraphs 51, 52 and 54 of the judgment under appeal, first, to the various matters put forward by the applicant at first instance, which were not contradicted by the Commission, seeking to show that Lekarna Ljubljana operated in different circumstances compared with the entity which it had succeeded in 1997, and, second, to the main changes which had occurred on the Slovenian market between the initial date of the grant of the assets under management at issue and the date of the adoption of the decision at issue. Those changes concerned, inter alia, the opening up of the Slovenian pharmaceutical market to competition as a result of the adoption in 1992 of the Pharmacies Act, which had opened up that sector to the market economy and, subsequently, the accession of the Republic of Slovenia to the European Union on 1 May 2004. Although those various matters related to the legal and economic context which the Commission should have understood in order to be able to reach a decision in full knowledge of the facts as part of its investigations which led to the adoption of the decision at issue, the General Court stated that the Commission had merely indicated, as is apparent from recital 39 of that decision, and without sufficiently substantiating that assertion, that the succession in 1997 between Lekarna Ljubljana p.o. and Lekarna Ljubljana was purely administrative and that the legal context, as well as the use and conditions for use of the assets in question, had not changed, so that the existing aid in place at that time had not been altered and remained aid of that type.

21 The General Court also examined, in paragraphs 53 to 55 of the judgment under appeal, the question whether the various matters referred to in the preceding paragraph of the present judgment might suggest, as argued by the applicant at first instance, that the second measure at issue, assuming that it constituted existing aid, could be regarded, on account of alterations which had occurred in the meantime, as new aid within the meaning of Article 1(c) of Regulation 2015/1589. In that regard, the General Court stated the following in paragraph 54 of the judgment under appeal:

‘It is common ground that on 10 December 1994 Lekarna Ljubljana p.o. still existed, that the Municipality of Ljubljana had just been created and that the Pharmacies Act of 1992, opening up the sector to the market economy, had already been adopted. However, there is no information in the [decision at issue] as to whether private pharmacies had already obtained municipal concessions on that date and whether Lekarna Ljubljana p.o. still held a monopoly in its area of activity. The “starting point” is therefore uncertain. According to the applicant [at first instance], in 1997, when Lekarna Ljubljana p.o. was replaced by Lekarna Ljubljana, the market was competitive. Bearing in mind the information provided by the applicant [at first instance], which has not been refuted, Lekarna Ljubljana may show some fairly considerable differences compared with the entity which it succeeded in 1997: it has the capacity to acquire properties, and, according to recital 36 of the [decision at issue], it does so, which also raises the question whether, therefore, continuing to make immovable assets under management available without property can still be justified; since at least 2007, it aims to make a profit seeking to generate resources to finance activities other than its own; in addition, since 2007, it may also extend its activity beyond the territory of the Municipality of Ljubljana, which it has done. Moreover, its financial results, as highlighted by the applicant [at first instance] in her reply to the Commission’s first preliminary assessment, may reflect an activity which is experiencing net growth. …’

22 In the light of those factors, the General Court held, in essence, in paragraphs 54 and 55 of the judgment under appeal, that, since the Commission had not carried out, on its own initiative, a more detailed examination of the development of the legal and economic context of pharmaceutical activity in Slovenia, there could be no certainty that there would be no alteration, after 10 December 1994, to the existing aid at issue, with the result that it had to be concluded that the Commission had not dispelled the existing doubts in that regard.

23 The General Court then concluded in paragraph 56 of the judgment under appeal:

'The Commission was faced with serious difficulties which should have led it to initiate the procedure provided for in Article 108(2) TFEU in the present case. 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 system. 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.'

Forms of order sought by the parties

24 The Republic of Slovenia claims that the Court should:

– set aside the judgment under appeal;

– primarily, if the state of the proceedings so permits, dismiss the action at first instance and;

– order the applicant at first instance to pay the costs incurred both at first instance and on appeal, and

– in the alternative, refer the case back to the General Court.

25 The Commission claims that the Court should:

– set aside the judgment under appeal;

– primarily, if the state of the proceedings so permits, dismiss the action at first instance and order the applicant at first instance to pay the costs, and

– in the alternative, refer the case back to the General Court and reserve the costs.

26 The applicant at first instance contends that the Court should:

– dismiss the appeal and

– order the Republic of Slovenia to pay the costs.

The appeal

27 In support of its appeal, the Republic of Slovenia 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 of law in the interpretation of the concept of 'serious difficulties' in relation to the first measure at issue; 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 second measure at issue 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.

28 It is appropriate to examine together the first and second grounds of appeal, which concern, in essence, errors of law allegedly committed by the General Court as regards the concept of 'serious difficulties'.

First and second grounds of appeal

Arguments of the parties

29 By the first ground of appeal, the Republic of Slovenia complains, in essence, that the General Court, as regards the first measure at issue, incorrectly defined the extent of the burden of proof borne by the Commission during the preliminary examination phase, and adopted an incorrect legal standard as regards the determination of the existence of 'serious difficulties' capable of justifying the initiation of the formal investigation procedure under Article 108(2) TFEU. More particularly, the General Court was wrong to find in paragraph 49 of the judgment under appeal that the situation relating to the nature and status of the assets under management granted to Lekarna Ljubljana p.o. and to Lekarna Ljubljana after 1979 was 'unclear'. It also wrongly concluded, in paragraph 50 of that judgment, that the Commission had not dispelled the doubts as to whether those entities had acquired all their assets under management, after 1979, under market conditions.

30 In the first place, the Republic of Slovenia claims, in essence, that none of the documents and evidence provided by the applicant at first instance, as analysed by the General Court in paragraphs 45 to 48 of the judgment under appeal, were capable of objectively establishing the existence of any State aid.

31 Thus, the General Court was wrong to hold, in paragraph 47 of the judgment under appeal, that Lekarna Ljubljana was one of the beneficiaries to which, in accordance with Article 24 of the Physical Assets of the State and Local Government Act, the State or local authorities could provide physical assets free of charge, if that proved to be in the public interest. Although that provision provides for the transfer of the right of ownership to persons governed by public law, such a transfer is not provided for as regards public institutes such as Lekarna Ljubljana. In that regard, Article 71 of the Pravilnik o enotnem kontnem načrtu za proračun, proračunske uporabnike in druge Osebe javnega prava (Rules on the single chart of accounts for the budget, budget users and other entities under public law) provides that the right to ownership of an asset of the State or of an administration may be transferred to a public institute, since such assets may be entrusted to them only under 'management'. Furthermore, the Republic of Slovenia recalls, in that context, that, in accordance with Article 71 of those rules, any asset acquired by Lekarna

Ljubljana in its capacity as a public institute, whether by itself or through the Municipality of Ljubljana, is an 'asset obtained under management', with the result that the very existence of a contract relating to assets transferred to it by the Municipality of Ljubljana cannot be regarded as constituting evidence that such a transfer was made free of charge or under more favourable conditions than those of the market.

32 The General Court was also wrong to hold, in paragraph 48 of the judgment under appeal, that the alleged discrepancies between the figures of the Municipality of Ljubljana relating to the value of the assets granted under management to Lekarna Ljubljana and the figures shown in the latter's public accounts, or the increase in the value of its assets under management could be regarded as evidence that such assets under management corresponded to State aid. More specifically, as regards the increase in the value of the assets under management of Lekarna Ljubljana, the Republic of Slovenia submits that, even if the latter were entitled to invest its profits in the pharmaceutical business, including for the acquisition of real estate appearing in the accounts for the category of 'assets under management', that does not, however, mean that such assets were provided to it free of charge.

33 Next, the Republic of Slovenia complains that the General Court took the view in paragraph 48 of the judgment under appeal that it was not for the applicant at first instance to prove beyond all doubt that the assets under management of Lekarna Ljubljana constituted 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 that was inappropriate and manifestly too low for the applicant at first instance 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.

34 The approach taken, which is, moreover, at odds with the standard established by the Court of Justice in the judgment of 2 September 2021, *Commission* v *Tempus Energy and Tempus Energy Technology* (C-57/19 P, EU:C:2021:663, paragraphs 40, 45 and 49 to 51), results in any distinction between the preliminary phase and the formal investigation procedure being eliminated, and has the effect of forcing the Commission to initiate the latter procedure on every occasion that one party, in the course of the first of those phases, expresses concerns over alleged State aid, even where that party has not submitted the slightest plausible evidence in support of its claims.

35 In the present case, in the absence of any evidence or proof, provided by the applicant at first instance, which might have suggested that the Municipality of Ljubljana had transferred to Lekarna Ljubljana assets under management free of charge or on terms more favourable than those on the market, the Commission was not required to seek, on its own initiative, information relevant to the finding of any State aid. Thus, the General Court erred in finding that the Commission could not rely on the assurances given by the Slovenian authorities that the assets under management that Lekarna Ljubljana p.o. and Lekarna Ljubljana had acquired after 1979 had been acquired under market conditions.

36 The Commission agrees with the arguments of the Republic of Slovenia.

37 In addition, the Commission notes, first, that, contrary to what the General Court stated in paragraphs 40, 49 and 50 of the judgment under appeal, the confirmation of the Slovenian authorities that, after 1979, all the assets under management acquired by Lekarna Ljubljana p.o. and by Lekarna Ljubljana were acquired under market conditions, without public aid, is not the

only factor on which it relied in the decision at issue. That decision was also based on the applicable legal and economic framework, in particular on the provisions referred to in paragraph 30 above, and on other factors, such as, first, the legal status of Lekarna Ljubljana and its capacity to make profits and to acquire property; second, the fact that any property acquired had to be recorded as 'assets under management'; third, the fact that any profit generated had to be invested in the undertaking or transferred to the State; and, fourth, the confirmation by the Republic of Slovenia that it had not granted assets to Lekarna Ljubljana after 1979, that confirmation having been given in the context of that Member State's duty of sincere cooperation under Article 4(3) TEU.

38 In that regard, the Commission considers, moreover, that, in the light of the Republic of Slovenia's obligation of sincere cooperation and in the absence of evidence to the contrary provided by the applicant at first instance, it was entitled to rely on the confirmation from the Slovenian authorities that the assets under management which Lekarna Ljubljana p.o. and Lekarna Ljubljana had acquired after 1979 had been acquired under market conditions. Thus, the General Court was wrong, in paragraph 40 of the judgment under appeal, to call into question the veracity of that confirmation on the ground that no evidence had been provided by the Slovenian authorities in support of that confirmation. Any inference to the contrary which the General Court sought to draw in that regard would be beside the point, since it would have required those authorities to prove a negative, in other words that they positively prove that the Republic of Slovenia had stopped providing assets to Lekarna Ljubljana p.o. and to Lekarna Ljubljana after 1979. Such an approach would amount, in essence, to reversing the burden of proof defined by the Court of Justice in the case-law on State aid, in particular in the judgment of 2 September 2021, *Commission* v *Tempus Energy and Tempus Energy Technology* (C-57/19 P, EU:C:2021:663).

39 Second, according to the Commission, the General Court erred in law by exceeding the limits of its judicial review, in that, instead of confining itself to ascertaining whether the applicant at first instance had demonstrated, on the basis of a body of consistent evidence, the existence of serious doubts, the General Court itself assessed whether there was any conclusive evidence capable of supporting the existence of such doubts.

40 By the second ground of appeal, the Republic of Slovenia, supported by the Commission, in essence criticises the General Court for holding, in relation to the second measure at issue, that the Commission was faced with serious difficulties as to whether that measure, in so far as it may be regarded as being State aid, constituted 'existing' aid, within the meaning of Article 1(b) of Regulation 2015/1589, or whether it had in the meantime been 'altered', within the meaning of Article 4(1) of Regulation No 794/2004, with the result that, in that second scenario, it had to be classified as 'new aid' within the meaning of Article 1(c) of Regulation 2015/1589.

41 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 was unequivocally clear from recital 39 of the decision at issue that the Commission had clearly indicated that the assets under management, with which Lekarna Ljubljana p.o. had been endowed in 1979 when it was set up, 'in so far as that the measure [constituted] State aid, [was] at most existing aid'.

42 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, was uncertain, on the ground that there was no information in the decision at issue to clarify whether, on that date, private pharmacies had already obtained municipal concessions or

whether Lekarna Ljubljana p.o. still held a monopoly in its area of activity. The Republic of Slovenia argues that the views expressed by the General Court are incorrect, given that it is apparent from the actual information which the General Court 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 p.o., namely in 1997, the same legal framework applied, since the various national rules governing, inter alia, the opening of the Slovenian market to competition had already been adopted before 10 December 1994. In addition, that aspect is decisive for the assessment of the alteration of the second measure at issue, classified as existing aid, into '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 initially was not State aid, could have become State aid, that change occurred in any event before 10 December 1994. Thus the Commission did not err when it concluded, in recital 39 of the decision at issue, that, since 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 p.o., that succession was of a purely administrative nature, and therefore it could not constitute an alteration of any existing aid into new aid.

43 Moreover, the General Court was wrong to take the view, in paragraphs 51 to 54 of the judgment under appeal, that Lekarna Ljubljana operated on different terms from Lekarna Ljubljana p.o. In particular, it is wrong to consider, as the General Court indicated in paragraph 54 of that judgment, that the two entities were characterised by considerable differences, since, unlike its predecessor, Lekarna Ljubljana had the capacity to acquire assets, including property, and therefore the question had to be asked whether continuing to make real assets under management available without ownership could still be justified. According to the Republic of Slovenia, like Lekarna Ljubljana, Lekarna Ljubljana p.o. also had the capacity to acquire such assets under management, at least since the entry into force of the Institutes Act, which took place in 1991.

44 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. The General Court's concern as to whether it is still justified to facilitate assets under management is unfounded. It is merely a way of ensuring that a public institute can use the assets, since all the assets held by an institution are held as assets under management. However, that does not in any way imply the grant of assets under management free of charge.

45 Lastly, the Republic of Slovenia refutes the various complaints raised by the applicant at first instance during the administrative procedure, in particular those alleging, first, that the Commission had failed to dispel the doubts as to whether the second measure at issue had possibly been altered after 1 May 2004, the date of accession of the Republic of Slovenia to the European Union, and, second, that the Commission had failed to verify the compatibility of that measure with the internal market. With regard to the first of those complaints, the Republic of Slovenia claims, in essence, that, in so far as the General Court's finding in paragraph 54 of the judgment under appeal that Lekarna Ljubljana showed considerable differences compared with the entity which it succeeded in 1997 was incorrect, that complaint raised by the applicant at first instance is baseless. As for the second of those complaints, the Republic of Slovenia submits that it is irrelevant from a legal perspective, on the ground that, as the Commission stated before the General Court, which is apparent from paragraph 38 of the judgment under appeal, 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 concerned individual aid. The General Court, however, accepted that legal argument, since it did not state any grounds for rejecting it.

46 Thus the Republic of Slovenia submits 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 at its disposal during the preliminary examination phase, no substantive or legal basis enabled it to conclude that 'serious difficulties' existed. Furthermore, contrary to what the General Court stated in the judgment under appeal, adequate reasons were provided in that decision.

47 The applicant at first instance submits that the first and second grounds of appeal should be dismissed as partly inadmissible and partly unfounded.

Findings of the Court

– *Preliminary observations*

48 According to settled case-law, the procedure under Article 108(2) TFEU is essential where the Commission has serious difficulties in determining whether aid is compatible with the internal market. The Commission may therefore confine itself to the preliminary examination under Article 108(3) TFEU when taking a decision in favour of aid only if it is able to satisfy itself after the preliminary examination that that aid is compatible with the internal market. If, by contrast, the initial examination leads the Commission to the opposite conclusion or even if it does not enable it to resolve all the difficulties involved in determining whether the aid is compatible with the internal market, the Commission is under a duty to carry out all the requisite consultations and for that purpose to initiate the procedure under Article 108(2) TFEU (judgment of 14 September 2023, *Commission and IGG* v *Dansk Erhverv*, C-508/21 P and C-509/21 P, EU:C:2023:669, paragraph 69 and the case-law cited).

49 According to settled case-law, where the procedure under Article 108(3) TFEU does not enable it to overcome all the difficulties involved in determining whether the measure in question is compatible with the internal market, the Commission is under a duty to initiate the procedure under Article 108(2) TFEU, without having any discretion in that regard. Thus, in accordance with the objective of Article 108(3) TFEU and its duty of sound administration, the Commission must, in an endeavour to overcome, during the preliminary procedure, any difficulties encountered, employ the measures and verifications necessary to remove any doubts as to the compatibility of the measure in question with the internal market (see, to that effect, judgment of 3 September 2020, *Vereniging tot Behoud van Natuurmonumenten in Nederland and Others* v *Commission*, C-817/18 P, EU:C:2020:637, paragraphs 77 and 78 and the case-law cited).

50 Since the concept of 'serious difficulties' is objective in nature, 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 investigation and in its content, must be furnished by the applicant seeking the annulment of that decision, by reference to a body of consistent evidence (judgment of 14 September 2023, *Commission and IGG* v *Dansk Erhverv*, C-508/21 P and C-509/21 P, EU:C:2023:669, paragraph 70 and the case-law cited).

51 Where the applicant seeks annulment of a Commission decision not to initiate the formal investigation procedure referred to in Article 108(2) TFEU, that party may invoke any plea capable of showing 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 that measure with the internal market. The existence of doubts about its compatibility is precisely the evidence which must be adduced in order to show that the Commission was required to initiate the formal investigation procedure. It is for the person making an application for annulment to show that there were doubts concerning that compatibility, meaning that the Commission was required to initiate that formal investigation procedure. Such proof must be sought both in the circumstances in which that decision was adopted and in its content, on the basis of a body of consistent evidence (judgment of 28 September 2023, *Ryanair* v *Commission*, C-321/21 P, EU:C:2023:713, paragraph 131 and 132 and the case-law cited).

52 The Court has already held, in that regard, that the insufficient or incomplete nature of the examination carried out by the Commission during the preliminary examination procedure is an indication 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 (judgment of 28 September 2023, *Ryanair* v *Commission*, C-321/21 P, EU:C:2023:713, paragraph 133 and the case-law cited).

53 Accordingly, it is for the EU Courts, when they have before them an application for annulment of a Commission decision not to raise objections, to determine whether the assessment of the information and evidence which the Commission had at its disposal during the preliminary investigation phase of the national measure at issue should objectively have raised doubts as to the categorisation of that measure as aid, given that such doubts must lead to the initiation of a formal investigation procedure (judgment of 6 October 2021, *Scandlines Danmark and Scandlines Deutschland* v *Commission*, C-174/19 P and C-175/19 P, EU:C:2021:801, paragraph 67 and the case-law cited).

54 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 that seemed relevant and which could have been obtained, upon request by the Commission, during the administrative procedure (see, to that effect, judgment of 2 September 2021, *Commission* v *Tempus Energy and Tempus Energy Technology*, C-57/19 P, EU:C:2021:663, paragraphs 42 and 43 and the case-law cited).

55 The Commission is required 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 (judgment of 2 September 2021, *Commission* v *Tempus Energy and Tempus Energy Technology*, C-57/19 P, EU:C:2021:663, paragraph 44 and the case-law cited).

56 That being so, although it may be necessary, when the existence and legality of State aid is being examined, for the Commission 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 (see, to that effect, judgment of 2 September 2021, *Commission* v *Tempus Energy and Tempus Energy Technology*, C-57/19 P, EU:C:2021:663, paragraph 45 and the case-law cited).

57 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 the pieces of information that were actually in its possession, cannot demonstrate that there were serious difficulties obliging the Commission to initiate the formal investigation procedure (judgment of 2 September 2021, *Commission* v *Tempus Energy and Tempus Energy Technology*, C-57/19 P, EU:C:2021:663, paragraph 51 and the case-law cited).

58 Lastly, it must be borne in mind that, while the principles affirmed in the case-law cited in paragraphs 48 to 57 above were established inter alia in relation to decisions not to raise objections as referred to in Article 4(3) of Regulation 2015/1589, those principles also apply to decisions finding that the measure concerned does not constitute aid as referred to in Article 4(2) of that regulation, such as the decision at issue (see, to that effect, judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 33 and the case-law cited).

59 It is in the light of those principles that it will be necessary to examine whether the General Court erred in law in concluding, as regards the first and second measures at issue, that there were serious difficulties which should have led the Commission to initiate the formal investigation procedure under Article 108(2) TFEU.

– The existence of an error of law in the interpretation of the concept of 'serious difficulties' as regards the first measure at issue

60 In the first place, as regards the complaints of the Republic of Slovenia directed against paragraphs 45 to 48 of the judgment under appeal, as set out in paragraphs 30 to 32 above, it should be pointed out that, in accordance with the settled case-law of the Court of Justice, it follows from 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 that the General Court has exclusive jurisdiction, first, to establish the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and, second, to assess those facts. It follows that the appraisal of the facts by the General Court does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice (judgment of 11 January 2024, *Wizz Air Hungary* v *Commission*, C-440/22 P, EU:C:2024:26, paragraphs 57 and 58 and the case-law cited).

61 In particular, with respect to the assessment in the context of an appeal of the General Court's findings on national law, which, in the field of State aid, constitute findings of fact, the Court of Justice has jurisdiction only to determine whether that law was distorted (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 77 and the case-law cited).

62 In the present case, in so far as the Republic of Slovenia's complaints, set out in paragraphs 30 to 32 above, seek to call into question the assessment of national law and of the facts carried out by the General Court in paragraphs 45 to 48 of the judgment under appeal, without alleging any distortion in that regard, they must be rejected as inadmissible.

63 In the second place, as regards the complaints of the Republic of Slovenia challenging, in essence, the General Court's determination of the standard of the burden of proof borne by the Commission in the preliminary examination procedure referred to in Article 108(3) TFEU, it should be noted, first, that, as the Advocate General observed, in essence, in point 64 of his Opinion, in the context of the determination of the 'applicable rules and principles', the General Court referred, in paragraphs 35 and 36 of the judgment under appeal, to the applicable legal standard in a manner entirely consistent with the settled case-law cited in paragraphs 48 to 53 above. Specifically, in paragraph 35 of the judgment under appeal, the General Court rightly recalled 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'.

64 Similarly, in paragraph 36 of that judgment, the General Court considered 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 Second, it should be noted that, as the General Court stated in paragraph 49 of the judgment under appeal, the decision at issue merely referred, in relation to the assets under management incorporated by Lekarna Ljubljana p.o. and Lekarna Ljubljana after 1979, to the Slovenian authorities' assertion that all those assets were acquired by those entities under market conditions.

66 In that regard, it should be recalled that, although a Member State is effectively bound, in accordance with Article 4(3) TEU, by a duty of sincere cooperation throughout the procedure for the examination of a measure by reference to the provisions of EU law on State aid (judgment of 5 December 2023, *Luxembourg and Others* v *Commission*, C-451/21 P and C-454/21 P, EU:C:2023:948, paragraph 122 and the case-law cited), that fact cannot, however, preclude, as the Advocate General observed, in essence, in point 67 of his Opinion, the existence of 'serious difficulties' or 'doubts' which the Commission might face, as the case may be, following the preliminary examination of a measure brought to its attention by means of a complaint. Any other interpretation would mean, by implication but necessarily, that the Commission's doubts could automatically be dispelled solely on the basis of the national authorities' assertions, with the result that a procedure initiated under Article 108 TFEU could be closed in the absence of any evidence adduced by those authorities to counter the evidence put forward by the complainant in order to establish the existence of serious difficulties. 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.

67 As the Advocate General observed, in essence, in point 68 of his Opinion, apart from the fact that it is much more difficult for a complainant to obtain the relevant information from the public authorities which may have granted State aid, than for the Commission, which has extensive powers for that purpose, it is necessary to bear in mind, first, the fact that the complainants' difficulty in obtaining evidence is all the more significant in a case such as the present one, the

origin of which dates back to the 1970s and which was marked by the transition from a planned economy to a market economy and by a competitive relationship between public and private pharmacies. Such a context inevitably made it even more difficult for the applicant at first instance to access the relevant information concerning the conditions under which Lekarna Ljubljana p.o. and Lekarna Ljubljana were granted assets under management.

68 Second, it should be pointed out that the Commission has significant powers, deriving both from the FEU Treaty and from Regulation 2015/1589, enabling it to request, if necessary, additional information from the Member States, the latter being, as a general rule, better placed than complainants to dispel any doubts that may exist on the part of the Commission.

69 It follows from all the foregoing considerations that the General Court did not err in law in finding, in paragraph 48 of the judgment under appeal, that it was not for the applicant at first instance to prove beyond all doubt that the assets under management of Lekarna Ljubljana p.o. and Lekarna Ljubljana included assets corresponding to State aid, but for the Commission, faced with a situation of uncertainty in that regard, to carry out a more thorough investigation.

70 Accordingly, the General Court cannot be said to have applied a standard that is manifestly too low as regards the evidential requirements needed to trigger the Commission's obligation to initiate the formal investigation procedure provided for in Article 108(2) TFEU.

71 In the third place, the argument of the Republic of Slovenia, set out in paragraph 33 above, that the Commission has a discretion to initiate that procedure must also be rejected. It is unequivocally clear from the case-law referred to in paragraph 49 of that judgment that, where the preliminary examination carried out under Article 108(3) TFEU has not enabled it to dispel all the doubts that exist with regard to a given measure, the Commission is under an obligation to initiate the formal investigation procedure, without having any discretion in that regard.

72 In the fourth place, as regards the complaints of the Republic of Slovenia referred to in paragraph 35 above, alleging that, in the absence of any evidence adduced by the applicant at first instance to establish the existence of serious difficulties, it was not for the Commission to seek, on its own initiative, information that might have been relevant for the purposes of establishing possible State aid, they must be rejected as unfounded. It is unequivocally clear from paragraphs 45 to 48 of the judgment under appeal that the General Court made its assessments in paragraphs 49 and 50 of that judgment solely on the basis of the documents and evidence specifically put forward by the applicant at first instance.

73 In the fifth place, contrary to what is claimed by the Republic of Slovenia, it is apparent both from the judgment under appeal and from the file submitted to the Court of Justice that the evidence provided by the applicant at first instance in the action before the General Court, as set out in paragraphs 44 to 48 of the judgment under appeal, is the same as the evidence which it had communicated to the Commission during the administrative procedure which led to the adoption of the decision at issue. However, as is apparent from the judgment under appeal, no reference was made in the decision at issue to those various items of evidence.

74 In the sixth and last place, as regards the Commission's line of argument, as set out in paragraph 39 above, alleging that the General Court exceeded the limits of its power of judicial review, this must be rejected as unfounded, given that it is apparent from paragraphs 44 to 50 of the judgment under appeal that the General Court carried out that review in a manner consistent with the case-law referred to in paragraph 53 above.

75 In the light of the foregoing considerations, the first ground of appeal must be dismissed as being in part inadmissible and in part unfounded.

– *The existence of an error of law in the interpretation of the concept of 'serious difficulties' as regards the second measure at issue*

76 In the first place, in so far as, by the complaints set out in paragraphs 40, 41 and 46 above, the Republic of Slovenia in essence disputes the standard applied by the General Court to assess the existence of 'serious difficulties' with regard to the assessment of the second measure at issue, it must be held, as stated in paragraph 63 above, that, in determining the 'applicable rules and principles', the General Court referred, in paragraphs 35 and 36 of the judgment under appeal, to the legal standard applicable in a manner entirely consistent with the settled case-law cited in paragraphs 48 to 53 above.

77 More specifically, in accordance with the case-law cited in paragraph 58 above, the General Court was right to hold that the principles referred to in the second part of paragraph 63 above must also apply where the Commission entertains doubts as to the actual classification of the measure under examination as State aid, within the meaning of Article 107(1) TFEU.

78 The General Court also rightly concluded in paragraph 36 of the judgment under appeal 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'.

79 It follows that, as the Advocate General observed, in essence, in point 86 of his Opinion, the General Court cannot be criticised for having erred in law in the definition of the applicable legal standard as regards the determination of the existence of 'serious difficulties'.

80 Accordingly, the complaints referred to in paragraph 76 above must be rejected as unfounded.

81 In the second place, it should be recalled that, in the context of the State aid control system, established in Articles 107 and 108 TFEU, 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 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 (judgment of 28 October 2021, *Eco Fox and Others*, C-915/19 to C-917/19, EU:C:2021:887, paragraph 36 and the case-law cited).

82 Under Article 1(b)(i) of Regulation 2015/1589, 'existing aid' is to be understood, inter alia, as 'all aid which existed prior to the entry into force of the TFEU 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 TFEU in the respective Member States'. For its part, point 3(1)(a) of Annex IV to the Act of Accession states that, upon the accession of the States concerned by that act, 'aid measures put into effect before 10 December 1994' are to be regarded as existing aid within the meaning of Article 108(1) TFEU.

83 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 stipulates in that regard 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'.

84 Thus, the Court of Justice has already held that it is necessary to determine whether the changes made entail a substantial alteration to the existing aid at issue or whether those changes are confined to making an alteration of a purely formal or administrative nature which cannot affect the compatibility of the aid measure with the internal market (see, to that effect, judgment of 13 December 2018, *Rittinger and Others*, C-492/17, EU:C:2018:1019, paragraph 57). In that context, an alteration cannot be classified as purely formal or administrative, within the meaning of Article 4(1) of Regulation No 794/2004, where it is capable of influencing the assessment of the compatibility of the aid measure with the internal market (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).

85 In the present case, as regards the complaints of the Republic of Slovenia set out in paragraphs 42 to 45 above, in so far as they seek to call into question the General Court's assessment of national law and of the facts, without any distortion having been alleged in that regard, they must be rejected as inadmissible in accordance with the case-law referred to in paragraphs 60 and 61 above.

86 As to the remainder, it should be noted that, as the General Court found in paragraph 52 of the judgment under appeal, the Commission merely stated, in recital 39 of the decision at issue, that the succession that took place in 1997 between Lekarna Ljubljana p.o. and Lekarna Ljubljana had been of a purely administrative nature and that, moreover, neither the legal context nor the conditions of use of the assets under management at issue had changed, with the result that the view had to be taken that that measure had not been altered to such an extent that it had become new aid, within the meaning of Article 1(c) of Regulation 2015/1589.

87 Having regard to the nature and the extent of the uncertainties identified by the General Court in paragraph 54 of the judgment under appeal, concerning factors capable of affecting the compatibility of the aid measure with the internal market, within the meaning of the case-law referred to in paragraph 84 above, the General Court cannot be criticised for finding in paragraphs 54 to 56 of that judgment that, since the Commission failed to carry out a more detailed examination in the light of the development of the legal and economic context of pharmaceutical activity in Slovenia, it was faced with serious difficulties which should have led it to initiate the formal investigation procedure under Article 108(2) TFEU.

88 In the light of the foregoing considerations, the second ground of appeal must be dismissed as being in part inadmissible and in part unfounded.

Third ground of appeal

Arguments of the parties

89 By the third ground of appeal, the Republic of Slovenia complains that the General Court gave insufficient reasons for the judgment under appeal. In support of that ground of appeal, after recalling that, in accordance with the case-law resulting, inter alia, from the judgment of 26 May 2016, *Rose Vision* v *Commission* (C-224/15 P, EU:C:2016:358, paragraphs 24 and 26), a complaint alleging an inadequate statement of reasons is a question of law which may therefore be raised in an appeal, the Republic of Slovenia submits that, although, in the introductory part of paragraph 48 of the judgment under appeal, the General Court found that the applicant at first instance, in response to the Commission's first preliminary assessment, had submitted, and commented on, a number of extracts from the public accounts of Lekarna Ljubljana and the Municipality of Ljubljana for the period 2010-2019, it did not, however, refer to the content of those extracts and comments. Furthermore, they cannot be established on the basis of the assertions of the applicant at first instance, since the latter did not refer to the content of those extracts in its application. In paragraph 49 of the judgment under appeal, the General Court relied on those extracts from the public accounts of Lekarna Ljubljana and the Municipality of Ljubljana and, without mentioning their content, held on that factual basis that the situation regarding the nature and status of the assets which Lekarna Ljubljana p.o. and Lekarna Ljubljana had obtained under management after 1979 was unclear. Thus, since it is not possible to examine whether those documents actually revealed information which, objectively, was such as to give rise to doubt as to the existence of State aid, the grounds of the judgment under appeal do not enable the persons concerned to ascertain the reasons for the decision taken by the General Court or the Court of Justice to exercise its power of review.

90 The applicant at first instance submits that the third ground of appeal must be dismissed as inadmissible or, in any event, as unfounded.

Findings of the Court

91 It should be noted that, in paragraph 48 of the judgment under appeal, the General Court stated that the applicant at first instance reproduced a number of extracts from the public accounts of Lekarna Ljubljana and the Municipality of Ljubljana relating to 2010 and commented on them. The General Court stated, in that paragraph, first, that the applicant at first instance had complained of discrepancies between that municipality's figures relating to the value of the assets granted under management to Lekarna Ljubljana (for example, EUR 35 036 742 on 31 December 2014) and Lekarna Ljubljana's own figures relating to the value of its long-term assets and its assets granted under management (EUR 26 976 187 on the same date, that is to say, a lower sum, even though it appears to relate to a broader scope); second, that it had highlighted the size of the increase in those assets in the accounts of Lekarna Ljubljana from one year to the next (for example, the increase from EUR 26 976 187 on 31 December 2014 to EUR 31 973 809 one year later), as well as the increase in the municipality's accounts in the value of the assets granted under management to Lekarna Ljubljana (from EUR 35 036 742 to EUR 42 790 897 for the same period); and, third, that it had observed that a table drawn up by that municipality explaining the variations in the value of the assets granted under management to Lekarna Ljubljana from one year to the next indicated on numerous occasions that the increase was due to surplus income for the institute, which suggested that the assets granted under management included

not only physical assets, but also monetary assets, even though Lekarna Ljubljana normally had to pass on to the Municipality of Ljubljana its annual surplus income, after a deduction for investment needs.

92 It follows from those findings that, contrary to what the Republic of Slovenia claims, the General Court referred to the content of the extracts from the public accounts of Lekarna Ljubljana and the Municipality of Ljubljana relating to 2010, as relied on by the applicant at first instance before the General Court.

93 Furthermore, it is apparent from paragraph 49 of the judgment under appeal that the General Court did not rely solely on those extracts in order to find that the situation relating to the nature and status of the assets which Lekarna Ljubljana p.o. and Lekarna Ljubljana had obtained under management after 1979 was unclear. In paragraph 49, the General Court referred to the evidence put forward by the applicant at first instance during the administrative procedure, as referred to in paragraphs 45 to 48 of the judgment under appeal. That evidence included an extract from Lekarna Ljubljana's annual report for 2012.

94 It follows from the foregoing considerations that the arguments relied on in support of the third ground of appeal are based on an erroneous reading of the judgment under appeal.

95 Accordingly, the third ground of appeal must be dismissed as unfounded.

Fourth ground of appeal

Arguments of the parties

96 By the fourth ground of appeal, alleging infringement of Article 47 of the Charter of Fundamental Rights, the Republic of Slovenia complains, in essence, first, that the General Court clarified the general complaints put forward by the applicant at first instance beyond her mere assertions and, second, that it failed to take account of certain information provided by the Commission. In so doing, the General Court infringed that institution's right to an effective remedy and to an impartial judge, thereby also undermining the interests of the Republic of Slovenia.

97 As regards the complaint that the General Court made findings in the judgment under appeal that could not be based solely on the content of the action at first instance, the Republic of Slovenia states, in essence, first, that the applicant at first instance did not refer in its action to the provisions of the Physical Assets of the State and Local Government Act, whereas the General Court took them into account in paragraphs 47 and 49 of the judgment under appeal. Second, although it pointed to an increase in the assets granted under management in 2015 and referred in a very general manner to the annual report of Lekarna Ljubljana and to the data in the annual reports of the Municipality of Ljubljana, the General Court, in paragraph 48 of that judgment, relied on the extracts from the public accounts of Lekarna Ljubljana and of the Municipality of Ljubljana for 2010 and, in paragraph 49 of that judgment, based its conclusion on those data. Third, even though the applicant at first instance had not claimed in its action that there were discrepancies between the figures of the Municipality of Ljubljana as regards the value of the assets granted under management to Lekarna Ljubljana and the figures of Lekarna Ljubljana as regards the value of its long-term assets and of the assets granted under management, the General Court nevertheless dealt with that complaint in paragraphs 48 and 49 of the judgment under appeal. Fourth, while the applicant at first instance made a very general reference to the

increase in the assets under management in the accounts of Lekarna Ljubljana, the General Court based its conclusions on that complaint in paragraphs 48 and 49 of that judgment. Fifth, the applicant at first instance did not rely in her action on the table of variations in the value of the assets under management which the municipality prepared, and yet the General Court relied on those data in paragraphs 48 and 49 of that judgment. Sixth, the General Court found in paragraph 51 of that judgment that, according to the information provided by the applicant at first instance, the Pharmacies Act had been amended in 2007 in order to allow municipal pharmacy institutes to operate outside the territory of the municipality of origin even though that is not apparent from that information.

98 As regards the complaint that the General Court did not take account of the information provided by the Commission in its defence pleading, the Republic of Slovenia submits, in essence, first, that the Commission stated that the applicant at first instance had referred to an extract from the annual report of Lekarna Ljubljana for 2012, but only in connection with a document submitted by the Mayor of Ljubljana to the Municipal Council of Ljubljana in 2013. However, the General Court treated that extract as independent evidence. Second, the Commission expressly stated that the increase in the value of the assets under management did not demonstrate the existence of State aid, but the General Court did not rule on that legally decisive argument and largely based its decision on the fact that the Commission had serious difficulties as regards the existence of State aid, specifically on the data relating to the simple increase in the value of the assets under management.

99 The applicant at first instance submits that the fourth ground of appeal must be dismissed as unfounded.

Findings of the Court

100 As regards the various complaints raised by the Republic of Slovenia, set out in paragraph 97 above, they seek, in essence, to call into question the General Court's assessment of national law and of the facts, without any distortion being alleged in that regard. In those circumstances, it is necessary, in accordance with the case-law referred to in paragraphs 60 and 61 above, to reject them as inadmissible.

101 As regards the complaints set out in paragraph 98 above, they are worded in a confused manner. Although the Republic of Slovenia does not formally criticise the General Court for having breached its duty to state reasons, it does appear to complain that it did not respond to all the arguments which the Commission had raised in its defence pleading at first instance.

102 Thus, in so far as that ground of appeal could be understood as alleging a breach by the General Court of its duty to state reasons, it should be noted, first, that, in the context of an appeal, the purpose of review by the Court of Justice is, inter alia, to consider whether the General Court addressed, to the requisite legal standard, all the arguments raised by the appellant and, second, that the plea alleging that the General Court failed to respond to arguments relied on at first instance amounts essentially to pleading a breach of the obligation to state reasons which derives from Article 36 of the Statute of the Court of Justice of the European Union, applicable to the General Court by virtue of the first paragraph of Article 53 of that statute, and from Article 117 of the Rules of Procedure of the General Court (judgment of 28 September 2023, *Changmao Biochemical Engineering* v *Commission*, C-123/21 P, EU:C:2023:708, paragraph 185 and the case-law cited).

103 Moreover, the obligation to state reasons does not require the General Court to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case, the General Court's reasoning may therefore be implicit on condition that it enables the persons concerned to know why it has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review (judgment of 28 September 2023, *Changmao Biochemical Engineering* v *Commission*, C-123/21 P, EU:C:2023:708, paragraph 86 and the case-law cited).

104 In the present case, the complaints referred to in paragraph 98 above overlap, in essence, with arguments which had already been raised by the Republic of Slovenia in the context of the various pleas relied on at first instance and on which the General Court ruled when examining those pleas. Moreover, the grounds of the judgment under appeal in response to those pleas are clear and unequivocal and make it possible to understand the factors on which the General Court based its decision. The fact that the latter reached a result on the merits other than that referred to by the Republic of Slovenia cannot, of itself, vitiate the judgment under appeal by a failure to state reasons (see, by analogy, judgment 28 September 2023, *Changmao Biochemical Engineering* v *Commission*, C-123/21 P, EU:C:2023:708, paragraph 187 and the case-law cited).

105 Thus, in so far as the republic of Slovenia complains that the General Court breached its duty to state reasons, the arguments which it puts forward in that respect must be rejected as unfounded.

106 In the light of the foregoing, the fourth ground of appeal must be dismissed as being in part inadmissible and in part unfounded.

107 Since none of the grounds of appeal has been upheld, the action must be dismissed in its entirety.

Costs

108 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

109 Since the Republic of Slovenia has been unsuccessful, it must, in accordance with the form of order sought by the applicant at first instance, be ordered to bear its own costs and to pay those incurred by the latter.

110 In accordance with Article 140(1) of the Rules of Procedure of the Court of Justice, applicable to appeal proceedings by virtue of Article 184(1) thereof, under which Member States and institutions which have intervened in the proceedings are to bear their own costs, the Commission is to bear its own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders the Republic of Slovenia to bear its own costs and to pay those incurred by Ms Petra Flašker;**

3. Orders the European Commission to bear its own costs.

Arabadjiev	von Danwitz	Xuereb
Kumin		Ziemele

Delivered in open court in Luxembourg on 5 September 2024.

A. Calot Escobar	A. Arabadjiev
Registrar	President of the Chamber