



EUROPEAN COMMISSION

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**Subject: State aid SA.43546 (2016/FC) – Slovenia
Alleged State aid to Lekarna Ljubljana**

Sir,

1. PROCEDURE

- (1) On 27 April 2016, the Commission received a complaint from a private pharmacy operator concerning alleged State aid measures granted in favour of Javni Zavod Lekarna Ljubljana (“Lekarna Ljubljana”), a public pharmacy set up by the municipality of Ljubljana. The complainant is a competitor of Lekarna Ljubljana.
- (2) The Commission has invited the Slovenian authorities to comment on the allegations formulated in the complaint by letters of 27 June 2016, 3 March 2017, 19 April and 2 October 2018, and 6 August and 27 November 2019. The Slovene authorities replied to these letters by submissions of 25 July 2016, 14 April 2017, 24 May and 30 October 2018, and 6 September and 12 December 2019.
- (3) By letters dated 29 September 2016 and 30 November 2017, the Commission submitted its preliminary assessment to the complainant, finding that the alleged State aid measures do not seem to constitute State aid. The complainant, in its letters dated 13 October 2016 and 12 January 2018, upheld its complaint and submitted additional information.
- (4) Sixteen other private pharmacy operators informed the Commission of their support for the complaint between 16 July 2018 and 7 December 2018.

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2. DESCRIPTION

2.1. Complainant

- (5) The sixteen private pharmacies that support the complaint (see previous recitals) did not bring forward any additional arguments. In what follows, the term “complainant” is used to refer to the private pharmacy that lodged the complaint on 27 April 2016.
- (6) The complainant operates a private pharmacy called Kosobrin in Grosuplje, opened in 2012. The complainant does not operate any other private pharmacies and the only other pharmacies active in Grosuplje are two pharmacies operated by Lekarna Ljubljana. Kosobrin is one of around 100 private pharmacies active in Slovenia.

2.2. Alleged beneficiary

- (7) Lekarna Ljubljana is a pharmacy chain established and wholly owned by the municipality of Ljubljana. Lekarna Ljubljana currently operates over 50 pharmacies, predominantly in Ljubljana but also in more than 15 other municipalities. In total there are around 230 public pharmacy institutes in Slovenia.
- (8) Lekarna Ljubljana was established by the municipality of Ljubljana in 1997 under the Ordinance establishing Lekarna Ljubljana¹, which stated that it was the legal successor of Lekarna Ljubljana p.o., and assumed all of its rights and obligations. Lekarna Ljubljana p.o. in turn was entered in the court register on 31 May 1979².

2.3. Legal Framework

- (9) The purpose, content and conditions for the provision of pharmacy services are regulated by the Pharmacy Services Act (“Pharmacy Act”). Between March 1992 and 27 January 2017 the Pharmacy Act in force was the “ZLD”³. On 27 January 2017 it was replaced by a new Act, the “ZLD1”⁴. Pursuant to Articles 9 and 13 of the ZLD (Article 5 ZLD1) municipalities are responsible for the provision of pharmacy services on their territory. The Pharmacy Act distinguishes between public pharmacy institutes (ZLD: Articles 9-12; ZLD1: Articles 27-38), such as Lekarna Ljubljana, and private pharmacies (ZLD: Articles 13-20; ZLD1: Articles 39 – 61), such as Lekarna Kosobrin.
- (10) Private pharmacies receive authorisation to operate through a concession granted on the basis of a public tender, typically by a municipality, as per Article 13 and 43 of the ZLD and ZLD1 respectively. Besides the Pharmacy Act more broadly, private pharmacies are governed in particular by a concession contract, in line with Article 16 and 51 of the ZLD and ZLD1 respectively.

¹ Official Gazette No. 51/97.

² No. 1577/00.

³ Official Gazette No. 36/04. See: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO215>.

⁴ Official Gazette No. 85/16, 77/17, and 73/19. See: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7375>.

- (11) Public pharmacy institutes are established by a municipality, which participates in the management of the institution, pursuant to Articles 9 and 11 and Article 27 of the ZLD and ZLD1 respectively. Besides the Pharmacy Act more broadly, public pharmacy institutes are governed in particular by a Founding Act, adopted at the time of the establishment of the pharmacy concerned, as per Articles 11 and 31 of the ZLD and ZLD1 respectively.
- (12) Public and private pharmacies fundamentally offer the same services, as defined in Articles 6-7 of the ZLD1. This includes dispensing medicinal products and other products that support treatment and health maintenance, pharmaceutical patient care such as advice on self-medication, conducting self-diagnostic tests, and preventive and health education activities. They are both subject to a number of the same rules, such as restrictions on where a pharmacy can be established (Article 8 ZLD1), a requirement to maintain sufficient quantities and types of medicinal products (Article 14 ZLD1), and a prohibition on advertising with the purpose of increasing sales of medicinal products (Article 18 ZLD1). Public pharmacies are subject to some additional rules, in particular as regards the use of profits, which, to the extent that solvency or liquidity are not compromised, must be intended for investments in pharmacy facilities and equipment (Article 38 ZLD1).

2.4. Alleged State aid measures

- (13) The complainant considers that Lekarna Ljubljana received incompatible State aid through four different measures: (i) the free lease of land from the municipality of Škofljica; (ii) assets granted “under management” and for free by the municipality of Ljubljana; (iii) the exemption from the payment of concession fees to several municipalities; and (iv) the relief of its obligation to share profits with several municipalities.

2.4.1. Free lease of land

- (14) According to the complainant, in 2010 the municipality of Škofljica granted a 25-year lease for a parcel of land to Lekarna Ljubljana without the payment of any consideration by Lekarna Ljubljana. The complainant has estimated the value of this lease to be EUR 0.5 million, later revised to “approximately” EUR 1 million.

2.4.2. Assets granted under management

- (15) According to the complainant, the municipality of Ljubljana granted assets “under management” (i.e. the use of assets, while the municipality retains ownership) to Lekarna Ljubljana the value of which was EUR 35 036 742, without the payment of any consideration by Lekarna Ljubljana. The date(s) of granting of these assets is “not known” to the complainant, who further alleges that the value of the assets allegedly transferred increased to EUR 42 790 897 in 2015.
- (16) The complainant has acknowledged that it is not aware of the conditions under which the assets are transferred to Lekarna Ljubljana, but considers that they are “most likely” not granted on market conditions. The complainant considers it most likely that the value of the assets transferred corresponds to cumulated profits generated by Lekarna Ljubljana.

2.4.3. *Exemption from concession fees*

- (17) According to the complainant, a total of 20 municipalities have each granted State aid to Lekarna Ljubljana by exempting it from the payment of concession fees in return for its respective operating licenses.⁵ According to the complainant, these exemptions have been granted “in most cases in the last 10 years or more” (as of 27 April 2016). The complainant has not quantified the amount of this alleged measure.
- (18) The complainant levels specific allegations only at Grosuplje, Cerknica and Ivančna Gorica. In Grosuplje, where the complainant is active, Lekarna Ljubljana allegedly pays “the same or lower concession fee” than the complainant, even though “to [the complainant’s] information, Lekarna Ljubljana has 3-4 times higher yearly turnover”. In Cerknica and Ivančna Gorica, the complainant states specifically that private pharmacies have to pay a concession fee whereas public pharmacies do not. For the other municipalities, the complainant’s allegation is limited to the assertion that “most private pharmacies” pay concession fees, without elaborating on the payment, or lack thereof, of fees by public pharmacies or Lekarna Ljubljana.

2.4.4. *Failure to share Lekarna Ljubljana’s profits*

- (19) According to the complainant, the same 20 municipalities as per the previous measure (see footnote 5), have granted State aid to Lekarna Ljubljana since 27 April 2006 at least, by not respecting their obligation to collect the profits generated by Lekarna Ljubljana on their territory, in contravention of the Pharmacy Act. According to the complainant, the aid thus granted amounts to at least EUR 6 million, later revised to an “estimated” EUR 15 million.
- (20) Article 9 of the Pharmacy Act in force at the time of the complaint (ZLD) stipulates that municipalities can establish public pharmacy institutes for the provision of pharmacy services on their territory only. According to the complainant, the 20 listed municipalities, excluding Ljubljana, did not respect this provision and allowed Lekarna Ljubljana to operate on their territory. The complainant considers that all 20 municipalities failed to exercise their obligation to share in the profits generated by Lekarna Ljubljana on their territory.
- (21) The complainant considers that as a result all these 20 municipalities are granting State aid to Lekarna Ljubljana.

3. ASSESSMENT

3.1. Existence of aid

- (22) According to Article 107(1) TFEU, “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”.

⁵ The municipalities are: Bloke, Borovnica, Brezovica, Cerknica, Cerkno, Grosuplje, Horjul, Idrija, Ivančna Gorica, Logatec, Loška Dolina, Lukovica, Medvode, Postojna, Škofljica, Trzin, Velike lašče, Videm Dobropolje, Vrhnika and Ljubljana.

- (23) A measure therefore qualifies as State aid if the following cumulative conditions are met: (i) the measure is granted by Member States through State resources, (ii) it confers a selective economic advantage to certain undertakings or the production of certain goods, (iii) the advantage distorts or threatens to distort competition, and (iv) the measure affects intra-EU trade.

3.1.1. Free lease of land

- (24) The municipality of Škofljica granted a 25-year lease for a piece of land to Lekarna Ljubljana through a contract dated 5 December 2011. However, the Slovene authorities provided evidence that Lekarna Ljubljana did pay for the lease granted to it.
- (25) Article 3 of the lease contract stipulates that the holder of the construction permit (Lekarna Ljubljana) shall bear all the costs of designing and constructing the building. Article 6 stipulates that upon termination of this contract the parties agree that in addition to the right to use the land being returned to the owner, the holder of the construction permit shall transfer gratuitously to it also facilities which were constructed on the basis of this contract (the pharmacy). The complainant has acknowledged that the municipality of Škofljica after 25 years will receive the “ownership of the building”, which it estimated to be worth EUR 30 000.
- (26) This is therefore not a typical contract or a typical lease. Lekarna Ljubljana receives free use of a land parcel for 25 years, but the municipality thereafter becomes the owner of the pharmacy that Lekarna Ljubljana has constructed on the land at its own expense.

3.1.1.1. Advantage

- (27) An advantage for the purposes of Article 107(1) TFEU is any economic benefit that an undertaking would not have obtained under normal market conditions, i.e. in the absence of State intervention.⁶ Only the effect of the measure on the undertaking is relevant, neither the cause nor the objective of the State intervention.⁷ Whenever the financial situation of the undertaking is improved as a result of State intervention, an advantage is present.
- (28) Economic transactions carried out by public bodies do not confer an advantage, and therefore do not constitute aid, if they are carried out in line with normal market conditions.⁸ To that effect, the behaviour of public bodies should be compared to that of similar private economic operators under normal market conditions. Whether a State intervention is in line with market conditions should be examined on an ex-ante basis, having regard to the information available at the time the intervention was decided upon.⁹

⁶ Case C-39/94, *Syndicat français de l'Express international (SFEI) and others v La Poste and others*, EU:C:1996:285, paragraph 60; and Case C-342/96 *Kingdom of Spain v Commission of the European Communities* EU:C:1999:210, paragraph 41.

⁷ Case C-173/73, *Italian Republic v Commission of the European Communities*, EU:C:1974:71, paragraph 13.

⁸ Case C-39/94, *SFEI and others*, ECLI:EU:C:1996:285, paragraphs 60-61.

⁹ Case C 124/10 P, *Commission v EDF*, ECLI:EU:C:2012:318, paragraphs 83-85 and 105; case C-482/99, *France v Commission*, ECLI:EU:C:2002:294, paragraphs 71-72; case T-16/96, *Cityflyer Express v Commission*, ECLI:EU:T:1998:78, paragraph 76.

- (29) To assess whether Lekarna Ljubljana benefited from an advantage, the value of the use of the land parcel for a duration of 25 years should therefore be compared to the value of the pharmacy that Lekarna Ljubljana built on it, and it should be assessed whether a private operator might have taken a similar decision in those circumstances.
- (30) The lease was awarded under the Physical Assets of the State and Local Government Act (ZSPDSLS)¹⁰ and the Decree on the physical assets of general and local government units.¹¹ Under these legal acts, the value of assets of the State must be estimated before being disposed of, and they cannot be sold or exchanged below the estimated value (see Articles 17 and 16 respectively).
- (31) Before the lease was awarded on 5 December 2011, an independent expert (in a report dated 5 December 2011) estimated the value of the use of the land parcel for a period of 25 years to be EUR 102 212 (EUR 112.8 per square meter). At that time the municipality confirmed Lekarna Ljubljana's preliminary design for the construction of a pharmacy, the value of which, according to the Slovene authorities, would be at least EUR 310 000. In December 2016, after construction of the pharmacy was completed, the same expert estimated it to be worth EUR 322 751.95.
- (32) It follows that the terms of the lease of the land granted by the municipality of Škofljica are favourable to the municipality, and that a market operator would have agreed to those terms. As a result, Škofljica acted in line with the market economy operator principle and Lekarna Ljubljana did not receive any advantage under this measure.

3.1.1.2. Conclusion

- (33) In light of the above, the Commission considers that the lease of land granted by the municipality of Škofljica to Lekarna Ljubljana does not constitute State aid within the meaning of Article 107(1) TFEU.

3.1.2. Assets granted under management

- (34) The Institutes Act¹² provides in Article 48 that “[t]he Institute shall acquire the resources for work from the funds of the founder, the sale of goods and services and from other sources [as] laid down in this Act [...].”
- (35) The municipality of Ljubljana, as the founder of Lekarna Ljubljana, is obliged under the Institutes Act to provide it with assets for its establishment and initial operation. It is to be noted, however, that any asset acquired by Lekarna Ljubljana (including by its own means) is registered as an “asset

¹⁰ Official Gazette No. 86/10, 75/12, 47/13, 50/14, 90/14, 14/15, 76/15, and 11/18. See: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5974>.

¹¹ Official Gazette No. 34/11, 42/12, 24/13, 10/14, 58/16, 11/18, and 31/18. See: <http://pisrs.si/Pis.web/pregledPredpisa?id=URED5516>.

¹² Official Gazette No. 12/91, 8/96, 36/00, 127/06. See: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO10>.

under management”, pursuant to Article 71 of the Rules on the single chart of accounts for the budget, budget users and other entities under public law¹³.

- (36) According to the Slovene authorities, the municipality of Ljubljana provided the necessary assets for its operation to Lekarna Ljubljana p.o., Lekarna Ljubljana’s legal predecessor, upon its establishment in 1979 (see recital (8)). In 1997, these were transferred to Lekarna Ljubljana upon its succession. Lekarna Ljubljana or its predecessor has purchased any assets under management acquired since 1979 on the private market itself on market terms, and since 1979 it has not received any assets, under any conditions, from the municipality of Ljubljana or any other State entity. To the extent that the complainant refers to assets received without the payment of any consideration, it should therefore be held that reference is made to the assets granted to Lekarna Ljubljana p.o. upon its establishment.

3.1.2.1. Existing aid

- (37) Slovenia joined the EU on 1 May 2004. Pursuant to Annex IV, section 3, paragraph 1, of the Accession Treaty¹⁴: “[t]he 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 [...]: (a) aid measures put into effect before 10 December 1994.”
- (38) According to Article 1(c) of the Procedural Regulation¹⁵, “‘new aid’ means all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid”. According to Article 4(1) of Commission Regulation 794/2004¹⁶, “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 common market.”
- (39) To the extent that the measure would constitute State aid, it would be existing aid since it was granted only upon the establishment Lekarna Ljubljana’s predecessor, Lekarna Ljubljana p.o., in 1979. The establishment of Lekarna Ljubljana as Lekarna Ljubljana p.o.’s successor (see recital (8)) was of a purely administrative nature, and Lekarna Ljubljana was subject to the same legal framework. Neither the use of the assets nor the conditions of their use changed, and the establishment of Lekarna Ljubljana in 1997 was therefore not such as to constitute an alteration to existing aid.

3.1.2.2. Conclusion

- (40) In light of the above, the Commission considers that this measure constitutes existing aid.

¹³ Official Gazette No. 112/09. See: <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina?urlid=2009112&stevilka=5088>.

¹⁴ OJ L 236, 23.9.2003, p. 797.

¹⁵ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification).

¹⁶ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

3.1.3. *Exemption from concession fees*

- (41) According to the Slovene authorities, there is no act at national level that either obliges or prohibits the charging of fees to public or private pharmacies. Pursuant to the Pharmacy Act, it is at the level of municipalities that practical arrangements for carrying out pharmacy services are determined for private and public pharmacies (see section 2.3). The Commission has therefore conducted an assessment municipality by municipality.
- (42) To fall within the scope of Article 107(1) of the Treaty, a State measure must favour certain undertakings or the production of certain goods. By consequence, only measures favouring undertakings in a selective manner fall within the concept of aid.

3.1.3.1. Assessment of a selective advantage allegedly granted by the municipality of Ljubljana

- (43) While it is true that Lekarna Ljubljana does not pay concession fees to the municipality of Ljubljana, according to the Slovene authorities the same is true for all other active pharmacies, and their contracts do not stipulate that they should pay any concession fees. Lekarna Ljubljana has therefore not been treated differently either in law or in fact.
- (44) The Commission therefore considers that Ljubljana has not conferred any selective advantage on Lekarna Ljubljana through the alleged measure.

3.1.3.2. Assessment of a selective advantage allegedly granted by the municipality of Grosuplje

- (45) In the municipality of Grosuplje, there is an Ordinance on establishing a pharmacy (“The Ordinance”)¹⁷ dated 5 March 2010 that applies to both public and private pharmacies. In Article 12 of that Ordinance, it is stated that any private pharmacy shall pay an annual concession fee equal to 10% of the surplus of revenues over expenses of the concessionaire’s activities, and not less than EUR 1000. The same provision is laid down in Article 5 of the concession contract between Grosuplje and Lekarna Kosobrin, the pharmacy operated by the complainant.
- (46) The Ordinance does not stipulate any fees to be paid by public pharmacies. However, a contract between Lekarna Ljubljana and Grosuplje of 9 July 2010 stipulates in Article 3 that Lekarna Ljubljana will pay an annual fee equivalent to 10% of the surplus of revenues over expenses and not less than EUR 1000 - i.e., exactly the same as Lekarna Kosobrin. The municipality of Grosuplje has confirmed that the annual fee which providers of pharmacy services pay it is the same for all providers.
- (47) While the Ordinance differentiates between public and private pharmacies by exempting only the former from having to pay concession fees, in practice Lekarna Ljubljana is subject to the same obligation to pay fees under its contract with the municipality of Grosuplje, as private pharmacies under the

¹⁷ Official Gazette No 16/10. See: <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2010-01-0706/odlok-o-opravljanju-lekarniske-dejavnosti-na-obmocju-obcine-grosuplje>.

Ordinance. Lekarna Ljubljana has therefore not benefited from any selective exemption from the payment of concession fees in the municipality of Grosuplje.

- (48) In light of the above, the Commission found that the municipality of Grosuplje has not conferred any selective advantage on Lekarna Ljubljana through the alleged measure.

3.1.3.3. Assessment of a selective advantage allegedly granted by the municipality of Cerknica

- (49) The Ordinance on carrying out pharmacy activities in the municipality of Cerknica¹⁸ states in Article 10 that private pharmacies are obliged to pay an annual concession fee. The fee is not further specified. No similar provision applies to public pharmacies.
- (50) The municipality of Cerknica has confirmed that it has a contract with Lekarna Ljubljana by which the latter pays an annual fee equal to 15% of surplus revenues over expenses or EUR 10 000, whichever is higher.
- (51) Cerknica has not granted any concessions to private pharmacies.¹⁹ While the Ordinance for carrying out pharmacy activities of these municipalities stipulates that a fee should be paid only in the case of private pharmacies, the Commission found that Lekarna Ljubljana was not subject to different treatment given the fact that it did pay fees, despite the Ordinance containing no obligation for it to do so.
- (52) In light of the above, the Commission considers that the municipality of Cerknica has not conferred any selective advantage on Lekarna Ljubljana through the alleged measure.

3.1.3.4. Assessment of a selective advantage allegedly granted by the municipality of Ivančna Gorica

- (53) The Ordinance on carrying out pharmacy activities in the municipality of Ivančna Gorica states in Article 10 that private pharmacies are obliged to pay an annual concession fee. The fee is not further specified. No similar provision applies to public pharmacies, and Lekarna Ljubljana's contract with Ivančna Gorica contains no provisions on the payment of any fees.
- (54) The Slovene authorities argue that Article 10 does not stipulate a specific concession fee to be paid, and this concession fee, whether for a public or private pharmacy, is not established pursuant to the Ordinance. While the specific fee a private pharmacy would have to pay may not be established by the Ordinance, the Commission found that the Ordinance does establish that a fee would have to be paid. By being exempted from the payment of any concession fees, Lekarna Ljubljana might have benefited from a selective advantage granted by the municipality of Ivančna Gorica.

¹⁸ Official Gazette No 52/14. See: <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/118343#!/Odlok-o-opravljanju-lekarniske-dejavnosti-na-obmocju-Obcine-Cerknica>.

¹⁹ The establishment of pharmacies is strictly regulated in Slovenia. Pursuant to Articles 8 and 9 of the Pharmacy Act, for example, the distance between an existing and a new pharmacy in non-urban areas must be at least 5 km, and pharmacies can generally be established only if the number of inhabitants in a "catchment area" [such as a town or city] is at least 5000.

3.1.3.5. Distortion of competition in the municipality of Ivančna Gorica

- (55) Based on the latest financial information available (pertaining to the years 2017-2018), provided by the Slovene authorities, Lekarna Ljubljana turns an operating profit of around EUR 25 000 per year in Ivančna Gorica. This corresponds to a margin on sales of less than 1%. Without considering Lekarna Ljubljana's cost of capital, the Commission notes that the amount of this profit, even if considered in its entirety, is considerably below the ceiling referred to in Article 3(2) of Regulation 1407/2013²⁰, and therefore this measure, even if granted selectively to Lekarna Ljubljana, cannot be considered to distort or threaten to distort competition.

3.1.3.6. Assessment of a selective advantage allegedly granted by the municipalities of Cerklje ob Krki, Dobropolje, and Škofljica

- (56) According to the Slovene authorities, in the municipalities of Cerklje ob Krki, Dobropolje, and Škofljica, no fees are charged for the provision of pharmacy services whether they would be carried out by public or private pharmacies.
- (57) On the basis of the information available to the Commission, Lekarna Ljubljana has not benefited from any selective exemption from the payment of concession fees in Cerklje ob Krki, Dobropolje, and Škofljica. The Commission therefore found that these municipalities have not conferred any selective advantage on Lekarna Ljubljana through the alleged measure.

3.1.3.7. The municipalities of Medvode and Postojna

- (58) According to the Slovene authorities, Lekarna Ljubljana is not active in the municipalities of Medvode and Postojna. There is thus no measure at all to assess.

3.1.3.8. Assessment of a selective advantage allegedly granted by the municipalities of Bloke, Borovnica, Brezovica, Horjul, Idrija, Logatec, Lukovica, Loška Dolina, Trzin, Velike lašče and Vrhnika

- (59) It is true that none of the municipalities mentioned have stipulated in their contracts with Lekarna Ljubljana that it should pay concession fees. However, according to the Slovene authorities none of these municipalities has any other pharmacies, public or private, operating on their territory, nor do they have an Ordinance that establishes general rules applicable to pharmacies.
- (60) Lekarna Ljubljana has therefore not been treated differently from any other pharmacies in any of these municipalities.
- (61) In light of the above, the Commission found that the municipalities of Bloke, Borovnica, Brezovica, Horjul, Idrija, Logatec, Lukovica, Loška Dolina, Trzin, Velike lašče and Vrhnika have not conferred any selective advantage on Lekarna Ljubljana through the alleged measure.

²⁰ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid.

3.1.3.9. Conclusion

- (62) Only measures favouring undertakings in a selective manner and distorting or threatening to distort competition fall within the concept of aid (see recital (23)). In light of the above considerations, the Commission found that the municipalities named by the complainant, with the exception of Ivančna Gorica, have not granted any selective advantage to Lekarna Ljubljana in their application of concession fees. In addition, the Commission found that the exemption from the payment of concession fees offered to Lekarna Ljubljana in Ivančna Gorica did not distort or threaten to distort competition.
- (63) In light of the above, the Commission considers that the alleged measure does not constitute State aid within the meaning of Article 107(1) TFEU.

3.1.4. Failure to share in Lekarna Ljubljana's profits

- (64) The Commission notes that the Slovenian authorities have acknowledged that under the Pharmacy Act (ZLD) “difficulty was exposed” when pharmacy activities were carried out in municipalities in which the institute was not established. If a municipality wished for a public pharmacy institute it did not establish to carry out pharmacy activities in its territory, according to the Slovenian authorities, it drew up an agreement with the pharmacy institute concerned. According to the Slovene authorities, the new Pharmacy Act (ZLD1) has clarified this matter, e.g. by allowing branches of a certain public pharmacy to operate in municipalities other than the establishing municipality.²¹
- (65) In so far as Lekarna Ljubljana would have been active in certain municipalities in contravention of the applicable national rules, this would not be a State aid matter and should be adjudicated by national courts. The Commission has already informed the complainant of its conclusion that the concerns expressed in this respect relate if anything to the application of the new Pharmacy Act (ZLD1), and not to the text of the Act itself, and that the complainant could take this up directly with national courts.²²
- (66) As to the alleged failure of the municipalities mentioned by the complainant to share in Lekarna Ljubljana's profits, it should be noted that the Founding Act of Lekarna Ljubljana of 17 June 1997 only states that Lekarna Ljubljana may use the profits it has generated from its pharmacy activities “*solely for the purpose and carrying out of that activity*”²³. The obligation to pay profits to the municipality of Ljubljana was introduced in an amendment of 5 March 2007, which states that “[t]he Institute shall pay into the budget – or into a dedicated budgetary fund of the City of Ljubljana – any surpluses of revenue over expenditure, minus the amount of approved investments and capital costs approved by the Institute's Board in the annual plan and the funds

²¹ See Article 10 of the Pharmacy Act (ZLD1).

²² Procedures CHAP(2014)03386 and CHAP(2015)01506.

²³ Official Gazette No.51/97, Article 10. See: <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/1997-01-2721/odlok-o-ustanovitvi-javnega-zavoda-lekarna-ljubljana>.

*earmarked for additional performance bonuses in accordance with the law”.*²⁴

- (67) The obligation introduced in the 2007 amendment was in force until the adoption on 15 October 2018 of the current Founding Act of Lekarna Ljubljana²⁵, which replaces the Founding Act of 1997 (as amended) and stipulates in Article 8 that “*the board of Lekarna Ljubljana proposes to the founder that a part of surplus income over expenses be returned to the founder, in accordance with the provisions of the Pharmacy Act.*”
- (68) A similar obligation was introduced in 2017 through Article 38 of the Pharmacy Act (ZLD1), on public institutions’ use of “surplus revenues” (profits), which provides that “*the institution board shall propose to the founder that a part of the public institution’s surplus revenues from private funds be returned to the founder if this does not compromise solvency or liquidity of the public institution. The founder shall use the funds exclusively to provide healthcare services.*” The previous Pharmacy Act, in force at the time of the complaint, did not regulate the use of profits.
- (69) The rules applicable to Lekarna Ljubljana pursuant both to the Pharmacy Act and its Founding Acts state that it should pay excess revenues to its founder, i.e. the municipality of Ljubljana, and not to any other municipalities where it is active. The complainant’s allegation that municipalities failed to share in Lekarna Ljubljana’s profits should therefore be assessed only in as far as it relates to the municipality of Ljubljana, since there exists no obligation by which Lekarna Ljubljana should share its profits with any other municipalities.

3.1.4.1. Advantage

- (70) An advantage for the purposes of Article 107(1) TFEU is any economic benefit which an undertaking would not have obtained under normal market conditions, i.e. in the absence of State intervention (see recital (27)). A relief from economic burdens can also constitute an advantage. This is a broad category, which comprises any mitigation of charges normally included in the budget of an undertaking.²⁶ This covers all situations in which economic operators are relieved of the inherent costs of their economic activities.²⁷
- (71) The Slovene authorities have confirmed that Lekarna Ljubljana has always complied with its obligation to transfer surpluses of revenue over expenditure to its founder, i.e. the municipality of Ljubljana. Lekarna Ljubljana has

²⁴ Official Gazette No. 25/07, Article 3 (amending Article 10 of the original Founding Act). See: <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2007-01-1271/odlok-o-spremembah-odloka-o-ustanovitvi-javnega-zavoda-lekarna-ljubljana>.

²⁵ Official Gazette No 70/18. See: <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2018-01-3457/odlok-o-uskladitvi-ustanovitvenega-akta-javnega-zavoda-lekarna-ljubljana>.

²⁶ Judgment of the Court of Justice of 15 March 1994, *Banco Exterior de España*, C-387/92, ECLI:EU:C:1994:100, paragraph 13; Judgment of the Court of Justice of 19 September 2000, *Germany v Commission*, C-156/98, ECLI:EU:C:2000:467, paragraph 25; Judgment of the Court of Justice of 19 May 1999, *Italy v Commission*, C-6/97, ECLI:EU:C:1999:251, paragraph 15; Judgment of the Court of Justice of 3 March 2005, *Heiser*, C-172/03, ECLI:EU:C:2005:130, paragraph 36.

²⁷ Judgment of the Court of Justice of 20 November 2003, *GEMO SA*, C-126/01, ECLI:EU:C:2003:622, paragraph 28 to 31.

therefore not been relieved of any economic burden placed on it and has not benefited from any advantage.

3.1.4.2. Conclusion

- (72) The Commission considers that this measure does not confer any advantage on Lekarna Ljubljana, and therefore does not constitute State aid within the meaning of Article 107(1) TFEU.

4. CONCLUSION

- (73) The Commission has accordingly decided to consider that the measures raised in the complaint do not constitute State aid within the meaning of Article 107 (1) TFEU.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:

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Your request should be sent electronically to the following address:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully,

For the Commission

Margrethe VESTAGER
Executive Vice-President