
RECOVERING UNLAWFUL STATE AID AFTER RECIPIENTS' TRANSFER OF BUSINESS: NEW DEVELOPMENTS

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1. INTRODUCTION

State aid rules have a significant role in the EU internal market to safeguard functional markets and competition. The goal of the rules is to ensure that there are no distortions in competition between undertakings. Even though Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) obligates Member States to abolish or alter incompatible aids within a period determined by the Commission, there are no rules in the TFEU stating that an incompatible aid shall be recovered from its beneficiary. However, the Court of Justice of the European Union (ECJ) has confirmed in its settled case-law that abolishing unlawful aid by means of recovery is the logical consequence of a finding that the aid is unlawful.¹ This obligation is logical since the main purpose of the repayment of unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage afforded.² Hence, the beneficiary loses the unlawfully gained benefit it enjoys over its competitors. A recovered benefit can be, for example, an interest aid or a debt relief. In some situations, defining the amount of recovery and beneficiaries can be very difficult. After the approval of the aid, a merger or a transaction may have taken place or the Member State may have broadened its aid system in the field of taxation. In these situations, there are many beneficiaries and the amount of received aid varies between them.

The current recovery mechanism has not received unreserved approval in legal literature. *Hartikainen* points out that there is some inconsistency when

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¹ See e.g. Joined Cases C-164/15 P and C-165/15 P *Aer Lingus*, EU:C:2016:990, para. 116.

² See e.g. Case C-127/16 P *SNCF Mobilités v Commission*, EU:C:2018:165, para. 104.

applying State aid regulations; the beneficiary might already have carried out the project to which it had received the aid but the authority that gave the aid gets the aid back with interest. Hence, it is mainly the beneficiary that suffers from the recovery of an aid. However, according to *Hartikainen*, a model where the unlawfully paid aid would be reimbursed to the EU, is not possible due to political reasons.³

The purpose of this article is to examine in which circumstances the recovery may be extended to an undertaking to which an undertaking that originally received the aid has transferred or sold part of its assets. Before that we briefly look into the main legal principles and doctrines behind the recovery process. Furthermore, this article tries to examine the specifications and limits of these principles and doctrines, especially when the recovery is extended to another undertaking than the original beneficiary.

In chapter 2, we will look at the requirement of immediate and effective recovery that is the starting point for the recovery of unlawful State aid. In chapter 3, we will examine extension of the recovery order in a situation where an original beneficiary has transferred its assets to another undertaking. We will be focusing especially on cases concerning Finnish bus services (*Helsingin Bus-siliikenne*) and Slovakian chemical industry (*Fortischem*). Lastly, in chapter 4, we will present some conclusions based on our study.

2. REQUIREMENT OF IMMEDIATE AND EFFECTIVE RECOVERY

Legal rules and principles on the recovery of unlawful State aid are primarily formed as a result of case-law. In 1973, the ECJ stated for the first time that the Commission has the right to require a Member State to recover an unlawful State aid and that the Commission may, in the absence of measures for recovery, bring the matter before the ECJ.⁴ Council regulations and Commission notices mainly codify this constantly developing case-law of the ECJ on recovery of unlawful aids.

Article 16(3) of the Council's Procedural Regulation⁵ (Procedural Regulation) obliges Member States to recover unlawful aid immediately and effectively. Firstly, the Commission sets a deadline for a Member State to inform

³ Hartikainen, Sami: Sääntöjenvastainen valtiontuki ja takaisinperintä, *Defensor Legis* 3/2008, p. 395–396, (Hartikainen 2008). See also Monti, Giorgio: Recovery Orders in State Aid Proceedings: Lessons from Antitrust, *European State Aid Law Quarterly (ESTAL)* 2011(3), p. 416, (Monti 2011).

⁴ Case 70/72 *Commission v Germany*, EU:C:1973:87.

⁵ 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), OJ, L 248/9, 24.9.2015.

the Commission on plans and already undertaken measures in order to fully recover the aid. The deadline for giving this information is usually two months from the notification of the Commission's recovery decision. Furthermore, the Commission sets a deadline for the Member State concerned to fulfil the recovery obligation, which is generally within four months of its service.⁶

The Commission may extend the recovery deadline if a Member State encounters unforeseen difficulties in executing the recovery decision within the recovery deadline. The Member State has to demonstrate with conclusive evidence that it cannot execute the recovery decision within the recovery deadline.⁷ In these cases, the Commission and the Member State concerned must work together in good faith to overcome the difficulties while fully complying with European Union law.⁸ The Member State must provide the Commission with all the necessary information to ensure the execution of the Commission's recovery decision. Requests for the extension of the recovery deadline are not granted where the delay in recovery is due to the ways and means chosen by the Member State, where faster options were available.⁹

In order to fulfil its recovery duty, the Member State must also recover an interest from the date when the aid was made available to the beneficiary until its recovery.¹⁰ The aim of recovering the interest is to take into account the economic advantage that the beneficiary has gained from receiving unlawful aid. If the grant has been in the possession of the beneficiary for a long period, the interest may form a substantial part of the recovered amount.¹¹

Preserving the effectiveness of the provisions (*effet utile*) of the Treaties concerning State aid is one of the leading principles in the area of State aid recovery.¹² Other general principles of EU law cannot be seen having as considerable role as *effet utile*. For instance, the Recovery Notice states that the ECJ has given a restrictive interpretation of the principle of legal certainty.¹³ Moreover, the beneficiary cannot rely on the doctrine of legitimate expectations by claiming that it had, usually as a result of assurances by national authority, reasonable grounds to trust that the received aid was lawfully granted.¹⁴ Otherwise, national author-

⁶ Commission Notice on the recovery of unlawful and incompatible State aid, OJ, C 247/1, 23.7.2019 (Recovery Notice), para. 72.

⁷ See e.g. Case C-481/16 Commission v Greece, EU:C:2017:845, para. 29.

⁸ See Case C-271/13 P Rouse Industry v Commission, EU:C:2014:175, para. 78.

⁹ Recovery Notice, para. 77.

¹⁰ Ibid., para. 110.

¹¹ See Alkio, Mikko – Hyvärinen, Olli: Valtiontuet, Helsinki: Alma Talent, 2016, p. 19.

¹² See e.g. Case C-385/18 Arriva Italia and Others, EU:C:2019:1121, para. 85.

¹³ Recovery Notice, para. 35.

¹⁴ See Voutilainen, Tomi: KHO 2013:128 – Valtionapuviranomaisen virheet takaisinperinnän kohtuullistamisperusteena, Lakimies 2014/1, p. 135–138 and Siikavirta, Kristian: Valtiontukisäädöksiä ja luottamuksensuojia tuen takaisinperinnässä – KHO 2009:45, Lakimies 2010/4, p. 633–637.

ities could circumvent the obligation to recover the aid by referring to the beneficiary's legitimate expectations.¹⁵

Application of an efficient recovery of an aid is limited by Article 17 of the Procedural Regulation, pursuant to which the powers of the Commission to recover aid are subject to a limitation period of ten years. The limitation period begins on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. From the beneficiaries' perspective, it is essential to make a comprehensive assessment of possible unlawfulness of the aid before receiving it. This can be, *in casu*, a very challenging and time-consuming process. Besides the limitation period, the requirement of effective recovery is only limited in a situation in which the recovery required by EU law is rendered practically impossible.¹⁶ This means that the national authorities and courts must do their utmost to find a way to ensure an effective and immediate recovery.¹⁷ Member States cannot refer to the legal, political or practical difficulties as their defence.¹⁸

In cases where the unlawful aid must be recovered from recipient undertakings which are in financial difficulties or are insolvent, such difficulties do not affect the obligation to recover. In this situation, the Member State is required to bring about the winding-up of the undertaking concerned, to have its claim registered as one of the undertaking's liabilities or to take any other measure enabling the aid to be recovered.¹⁹ The recovery is impossible when the undertaking has been liquidated and no assets are recoverable. In addition, an aid is impossible to recover where the beneficiary has already ceased to exist, without any legal and economic successor.²⁰ Hence, the recovery can, at worst, lead to cessation of the undertaking, but for the sake of effective recovery and full removal of anti-competitive effects, this is considered a permitted possibility and consequence.

3. EXTENSION OF RECOVERY

3.1 General principles of extension

Article 16(1) of the Procedural Regulation requires that unlawful aid must be recovered from the beneficiary without defining what is meant by the beneficiary. *Gyarfas* has compared the different language versions of the Procedural

¹⁵ Joined Cases C-465/09 P to C-470/09 P *Diputación Foral de Vizcaya and Others v Commission*, EU:C:2011:372, para. 150.

¹⁶ See Case C-627/18 *Nelson Antunes da Cunha*, EU:C:2020:321, para. 41.

¹⁷ See *Hartikainen* 2008, p. 402–405.

¹⁸ Case C-331/09 *Commission v Poland*, EU:C:2011:250, para. 70.

¹⁹ Case C-363/16 *Commission v Greece*, EU:C:2018:12, para. 36.

²⁰ *Recovery Notice*, para. 53.

Regulation and found that the English term “beneficiary” implies that the beneficiary is the party that actually benefits from the unlawful aid. Instead, for example, German (“*Empfänger*”) and Finnish (“*tuensaaja*”) terms suggest that beneficiary could only be the person who originally received the aid.²¹

However, it is well-established case-law that the recovery of unlawful aid may require the recovery to be extended to an undertaking to which an undertaking that originally received the aid has transferred or sold part of its assets. For recovery to be extended, it must be possible to infer from the structure of the deal that there is economic continuity between the parties of the deal. Where recovery has been described as a logical consequence of a finding that aid has been declared unlawful, the possibility of extending recovery to a party other than the one who originally received the aid is a logical continuum for this.²²

There are two means to transfer the activities of an undertaking. Firstly, the assets of the undertaking may be sold fully or partly (“asset deal”), following which the activity is no longer carried out by the same legal entity. The second option is the sale of the shares (“share deal”), following which the undertaking which has benefitted from the aid retains its legal personality and continues to carry out its activities. The ECJ has drawn a distinction between these two means in its case-law.²³ With regard to asset deals, the Commission may assess the existence of economic continuity in the light of the following criteria:

- i. the scope of the transfer (assets and liabilities, maintenance of the workforce and/or management);
- ii. the price of the transfer;
- iii. the identity of the shareholders or the owners of the seller and of the buyer;
- iv. the time at which the transfer takes place (during the preliminary investigation pursuant to Article 4 of the Procedural Regulation or the formal investigation pursuant to Article 6 of the Regulation, or after adoption of the recovery decision) and;
- v. the economic logic of the operation.²⁴

²¹ Gyrfas, Juraj: Looking for the beneficiary: state aid recovery after a share deal, E.C.L.R. 2012 33(11), p. 40–46, (Gyrfas 2012).

²² See Opinion of AG Van Gerven in Case C-305/89 *Italy v Commission*, EU:C:1991:4, paras 22–23.

²³ See Recovery Notice, para. 90. For the extension of the recovery in share deals, see paras 93–94 and e.g. Gyrfas 2012, p. 40–46.

²⁴ Recovery Notice, para. 92. These criteria differ from so-called Spijkers criteria, which concerned the transfer of a business under employment law. In *Spijkers*, the ECJ stated that whether the business was disposed of as a going concern the following factors should be included in the evaluation: (i) the type of undertaking/business concerned; (ii) whether the undertaking's tangible assets (such as buildings and equipment) transferred; (iii) the value of its intangible assets at the time of the transfer; (iv) whether the majority of its employees were taken over by the new employer; (v) whether its customers were transferred; (vi) the degree of similarity between the activities carried on before and after the transfer; and (vii) the period, if any, for which those activities were suspended. The ECJ pointed out that all these

In *Ryanair*, the General Court confirmed that the Commission is not required to take into account all of the above criteria in its case-by-case assessment.²⁵ We will next examine the application of the criteria, especially in the light of the cases concerning Finnish bus services (*Helsingin Bussiliikenne*) and Slovakian chemical industry (*Fortischem*). When examining these cases, it is noteworthy that in the *Helsingin Bussiliikenne* decision, the Commission refers to its decision concerning the Slovak chemical industry from 2014, which it has also codified as part of the current Recovery Notice.

In an article written before the General Court's judgement in *Fortischem*, *Nicolaidēs* criticised the General Court and the ECJ for failing in their judgements to specify which of the five criteria laid down in the Recovery Notice are the most important and which are less relevant.²⁶ According to *Nicolaidēs*, the General Court would have the opportunity to clarify the matter in *Fortischem* and to correct the Commission's view²⁷ that the larger the part of the original business that is transferred to the new owner, the more likely it is that the business continues to benefit from the incompatible aid. *Nicolaidēs* hoped that the General Court would clarify that the market price was the main criterion and that other criteria should only be taken into account if the purchase price was not the market price.²⁸

3.2 Case Helsingin Bussiliikenne

The Commission found that Helsingin Bussiliikenne had received EUR 54 million in unlawful State aid from the City of Helsinki and ordered the aid to be recovered with interest in June 2019.²⁹ This is the largest recovery decision in the history of Finland. According to the Commission, the aid was received between 2002 and 2012 in the form of one vehicle loan and three capital loans.

circumstances are merely single factors in the overall assessment. See Case C-24/85 *Spijkers v Benedik*, EU:C:1986:127, para. 13.

²⁵ Case T-123/09 *Ryanair v Commission*, EU:T:2012:164, paras 115–116.

²⁶ See *Nicolaidēs*, Phedon: How can incompatible state aid be passed on from one company to another to avoid recovery?, E.C.L.R. 2019 40(11), p. 518–520, (*Nicolaidēs* 2019). The case law does not seem to provide an unambiguous answer either as to how much the buyer can be held liable for the recovery of unlawful State aid if the purchase price has not corresponded to the market price. In this regard, see also Monti 2011, p. 421 and Säcker, Franz Jürgen – Montag, Frank (eds.): *European State Aid Law: A Commentary*, Oxford: Bloomsbury Publishing, 2016, p. 1044, (Säcker – Montag 2016).

²⁷ Commission Decision (EU) 2015/1826 of 15 October 2014 on the State aid SA.33797 – (2013/C) (ex 2013/NN) (ex 2011/CP) implemented by Slovakia for NCHZ, OJ, L 269/71, 15.10.2015, para. 149.

²⁸ See *Nicolaidēs* 2019, p. 524–525.

²⁹ Commission Decision (EU) 2020/1814 of 28 June 2019 ON THE STATE AID SA.33846 – (2015/C) (ex 2014/NN) (ex 2011/CP) implemented by Finland for Helsingin Bussiliikenne Oy, OJ, L 404/10, 2.12.2020.

After the opening of the formal investigation procedure, the bus group Koiviston Auto acquired Helsingin Bussiliikenne's business. Following the asset deal, the trade name of Helsingin Bussiliikenne Oy was transferred to Viikin Linja Oy, part of the Koiviston Auto Group, which changed its name to Helsingin Bussiliikenne Oy (the new HelB). The undertaking, which remained in the ownership of the City of Helsinki, changed its name to Helsingin kaupungin Linja-autotoiminta Oy (the old HelB).³⁰

In assessing the scope of the transfer, the Commission recalled that in order to avoid economic continuity, the assets and other elements of the business transferred need to represent only a part of the previous undertaking or its activities. The Commission noted that the transaction covered all the assets needed for business operations, all the employees, the brand name and all the contracts, with the exception of those loan agreements under which the State aid found to be unlawful was granted. According to the Commission, the parties intended to leave the old HelB as an 'empty shell', with liabilities exceeding more than twice the sale price and with no assets to cover these liabilities. Consequently, the Commission found that the parties had attempted to circumvent the recovery obligation, which indicated economic continuity between the old HelB and the new HelB.³¹

As regards the price of the transfer, the Commission emphasised that the sale without a public tender procedure, only by contacting certain operators in the sector, indicated that the sale price does not represent the market price. In its own calculations, the Commission concluded that the actual market price would have been around EUR 35–36 million. Accordingly, it considered that the sale of the business for EUR 24 million on the basis of the only bid received had not taken place at market price.³² As regards the time at which the transfer takes place, the Commission noted that the sale of HelB started very soon after the Commission had opened the formal investigation procedure. According to the Commission, this showed that the sale of the business was intended to avoid the consequences of a potential negative decision by the Commission.³³

As regards the economic logic of the transaction, the Commission considered that the Koiviston Auto Group did not integrate the assets it purchased into its own commercial strategy, but that the new HelB simply continued the business of the old HelB and used the old HelB's assets in the same way as the old HelB. In its assessment, the Commission drew attention, *inter alia*, to the fact that the new HelB used "the same buses on the same routes and even of the same colour" as the old HelB.³⁴

³⁰ Ibid., recitals 45–47.

³¹ Ibid., recitals 219–225.

³² Ibid., recitals 226–241.

³³ Ibid., recitals 244–248.

³⁴ Ibid., recitals 249–252.

The Commission found that there were no links between the original and new owners of the business,³⁵ but that other criteria indicated that there was economic continuity between the old and the new HelB. For this reason, the Commission considered that the recovery was to be extended to the new HelB, as it still benefitted from the aid and continued to distort the market.³⁶

An interesting feature of the case is a full indemnity clause included in the terms of the transaction, which fully indemnifies the new HelB from any State aid recovery claims. For this purpose, part of the sale price was deposited in an escrow account.³⁷ The Commission stated that the indemnity clause was not assessed by the Commission in its decision, but stressed that, according to settled case-law, such clauses may be qualified as separate State aid measures *per se*. The exercise of such clauses may be qualified as a circumvention of the recovery of unlawful aid.³⁸

Both the City of Helsinki and Helsingin Bussiliikenne Oy brought actions for annulment before the General Court in the autumn of 2019.³⁹ In its application, the new HelB claims, *inter alia*, that it should have been granted the possibility of being heard during the formal investigation procedure, as the Commission designated it as the beneficiary of the aid in the recovery decision. According to the new HelB, it could have legitimately believed that the investigation carried out by the Commission concerned only the persons identified in the decision to open the formal investigation procedure, as the Commission did not extend the decision relating to the formal examination procedure.⁴⁰

A special feature of the State aid investigation procedure is that the procedure is not initiated against the undertaking receiving aid but solely against the Member State concerned. Instead, the undertaking receiving aid is regarded solely as “an interested party”. Thus, undertakings cannot themselves seek to engage in an adversarial debate with the Commission in the same way as is offered to the Member States.⁴¹ Hence, the rights of defence of undertakings during the Commission’s investigation procedure are mainly limited to the

³⁵ Ibid., recitals 242–243.

³⁶ Ibid., recitals 253–257.

³⁷ Ibid., recital 46.

³⁸ Ibid., recitals 269–270. However, there was no references to case-law in the decision, so see e.g. Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award Micula v Romania of 11 December 2013 (notified under document C(2015) 2112), OJ L 232, 4.9.2015, p. 43–70, recital 38. For indemnity clauses in this context, see e.g. Säcker – Montag 2016, p. 1043–1044 and Bacon QC, Kelyn: European Union Law of State Aid, Oxford: Oxford University Press, 2017, p. 37.

³⁹ Case T-597/19 Helsingin kaupunki v Commission, application 6.9.2019, OJ, C 363/27, 28.10.2019 and T-603/19 Helsingin Bussiliikenne v Commission, application 9.9.2019, OJ, C 383/64, 11.11.2019.

⁴⁰ Case T-603/19 Helsingin Bussiliikenne v. komissio, application 9.9.2019, OJ, C 383/64, 11.11.2019.

⁴¹ See e.g. Case T-103/14 Frucona Košice v Commission, EU:T:2016:152, para. 52.

settled case-law of Article 108(2) TFEU, according to which the Commission must give interested parties the opportunity to submit their comments. The ECJ has ruled that the publication of a notice in the Official Journal is an appropriate means of notifying the persons concerned that the procedure is to be initiated.⁴²

However, in the absence of an indication that a party is a beneficiary of the aid in a dispute, either in the decision to open the procedure or at a later stage in the formal investigation procedure, that type of interested party cannot be regarded as having been duly called on to submit his comments. In this case, the party may have legitimately believed that such comments are not necessary, since it had not been named as the beneficiary of the aid to be recovered.⁴³ Such a possible procedural error may in itself lead to the annulment of the recovery decision. For instance, in *Componenta*, the first recovery decision concerning Finland, the recovery decision of the Commission was annulled due to a procedural error. The General Court found the reasoning of the Commission insufficient in so far as it did not contain sufficient information about the method used by the Commission to determine the amount of the aid.⁴⁴

In addition to the actions for annulment, both the City of Helsinki and Helsingin Bussiliikenne brought applications for interim relief, in which they claimed that the operation of the contested decision should be suspended, pending judgments in the main actions. In his orders, the President of the General Court held that the applicants had not satisfied the condition of urgency. As the new HelB is part of the Koiviston Auto Group, the applicants should have been able to prove that the group in question was also not in a position to repay the aid or to take out a loan for that purpose.⁴⁵

Following these orders, the Helsinki City Board decided that the aid with interest will be recovered primarily from the old HelB. To the extent that the aid with interest cannot be recovered from the old HelB, it will be recovered from the new HelB.⁴⁶ In June 2021, the new HelB filed an application for restructuring proceedings to the District Court of Helsinki to ensure the continuity of its activities during the recovery procedure.⁴⁷

⁴² Ibid., paras 53–56. Cf. Case T-778/17 *Autostrada Wielkopolska v Commission*, EU:T:2019:756, paras 57–70.

⁴³ See e.g. Case T-34/02 *Le Levant 001 and Others v Commission*, EU:T:2006:59, para. 83.

⁴⁴ Case T-455/05 *Componenta v Commission*, EU:T:2008:597, para. 129.

⁴⁵ Case T-597/19 *R Helsingin kaupunki v Commission*, EU:T:2020:109, paras 24–25 and Case T-603/19 *R Helsingin Bussiliikenne v Commission*, EU:T:2020:110, paras 25–36.

⁴⁶ Decision of the Helsinki City Board of 11 May 2020 § 293.

⁴⁷ The journal number of the HelB's application is HS 21/27911. Already on the same day, the District Court of Helsinki issued an order on the commencement of restructuring proceedings and appointed an administrator. See the District Court of Helsinki 16.6.2021 t. 21/30523.

3.3 Case Fortischem

In its 2014 decision, the Commission had found that Slovakia had granted unlawful State aid to an undertaking called NCHZ which was operating in the chemical industry, but which subsequently became the subject of insolvency proceedings. Via Chem Slovakia had acquired NCHZ's business, but it sold NCHZ's main business, the chemicals division, to Fortischem only one day after the transaction. The Commission had extended the recovery to Fortischem.⁴⁸

Fortischem challenged the Commission's decision by bringing an action for annulment before the General Court, which gave its negative decision in September 2019.⁴⁹ Fortischem continued to appeal to the ECJ, which dismissed the appeal in its entirety in April 2021.⁵⁰ As the General Court's ruling contains a more detailed assessment, we will look at the *Fortischem* case primarily through it in this and the following sub-chapter, but we will also cover the most remarkable parts of the ECJ's judgement.

As preliminary observations on economic continuity, the General Court emphasised that, although the market price criterion is one of the most significant, it is not a sufficient criterion for a finding that there is no economic continuity. The Commission does not either have to show that the purpose of the transaction was to avoid recovery.⁵¹

Fortischem had argued that the burden of proof concerning the sale price lies with the Commission. The General Court, however, noted that, in accordance with the case-law, as the sale price is just one of the factors to be taken into consideration in order to assess whether there was economic continuity, the Commission does not have to prove that a transaction took place below the market price in order to conclude that there was economic continuity.⁵²

The General Court did not accept Fortischem's argument that NCHZ's sale price corresponded to the market price by default, only due to the fact that the sale took place in the context of court-supervised insolvency proceedings. The key point was that the sale was organised as the sale of a going concern including all the assets. Hence, it was impossible to rule out that a sale of partial areas of NCHZ's business would not have led to a higher total sale price.⁵³

⁴⁸ Commission Decision (EU) 2015/1826 of 15 October 2014 on the State aid SA.33797 – (2013/C) (ex 2013/NN) (ex 2011/CP) implemented by Slovakia for NCHZ, OJ, L 269/71, 15.10.2015. For the extension of the recovery order, see recitals 130–170.

⁴⁹ Case T-121/15 *Fortischem v Commission*, EU:T:2019:684.

⁵⁰ Case C-890/19 P *Fortischem v Commission*, EU:C:2021:345.

⁵¹ Case T-121/15 *Fortischem v Commission*, EU:T:2019:684, paras 209–211.

⁵² *Ibid.*, paras 219–221. For the ECJ's reasoning in this regard, see Case C-890/19 P *Fortischem v Commission*, EU:C:2021:345, paras 77–81.

⁵³ Case T-121/15 *Fortischem v Commission*, EU:T:2019:684, paras 222–234. Cf. Commission Decision (EU) 2016/151 of 1 October 2014 on the State aid SA.31550 (2012/C) (ex 2012/NN) implemented by Germany for Nürburgring, OJ, L 34/1, 10.2.2016, recital 234. The

Attention was also drawn to the fact that the insolvency administrator in charge of the sale of NCHZ did not take the view that the price represented the market price without a doubt, as it was, in particular, his role to have NCHZ sold within a sufficiently short timeframe. Therefore, the General Court found that the tender procedure did not allow for the presumption that the purpose of the sale was to obtain the highest possible price. For this reason, the Commission had been right to consider that there was no guarantee that the sale price was the market price.⁵⁴ In its overall assessment, the General Court thus concluded that it cannot be certain that the two successive sales were made at market price.⁵⁵

The General Court also sided with the Commission in assessing the criterion of the scope of transfer. The Commission had emphasised that the scope of the transaction is a particularly important criterion and stated in its decision that the larger the part of the original business that was transferred to a new entity, the higher the likelihood that the economic activity related to these assets continued to benefit from the incompatible aid.⁵⁶ The General Court stated that it was not clear from the case-law that economic continuity should be ruled out in the event that the transaction is small in scope.⁵⁷ The General Court considered it essential that Fortischem had the use of all the elements which enabled the continuation of NCHZ's operations.⁵⁸

As regards the economic logic of the transaction, the Commission had underlined that the purpose of this criterion was to ascertain whether the purchaser of the assets used the assets in the same way as the seller or, conversely, integrated them into its own commercial strategy thus generated synergies justifying its interest in acquiring these assets.⁵⁹ According to the General Court, the Commission's undisputed finding that Fortischem used the assets in the same way as NCHZ without changing its business strategy led to the conclusion

Commission drew attention to the fact that the assets had been split in 11 individual asset clusters and all bidders were allowed to bid for individual assets, as well as for one, several or all asset clusters.

⁵⁴ Case T-121/15 *Fortischem v Commission*, EU:T:2019:684, paras 245–246.

⁵⁵ *Ibid.*, para. 251.

⁵⁶ *Ibid.*, paras 253–254. Instead, in order to avoid economic continuity, the assets and other elements of the business transferred need to represent only a part of the previous undertaking or its activities. See Commission Decision (EU) 2015/1826 of 15 October 2014 on the State aid SA.33797 – (2013/C) (ex 2013/NN) (ex 2011/CP) implemented by Slovakia for NCHZ, OJ, L 269/71, 15.10.2015, recital 149.

⁵⁷ Case T-121/15 *Fortischem v Commission*, EU:T:2019:684, para. 256.

⁵⁸ *Ibid.*, para. 258.

⁵⁹ *Ibid.*, para. 261. The Commission has, however, concluded that there has been no economic continuity in cases where it has become apparent that there have been significant changes in operations or business strategy after the transaction. See e.g. Commission Decision (EU) 2016/151 of 1 October 2014 on the State aid SA.31550 (2012/C) (ex 2012/NN) implemented by Germany for Nürburgring, OJ, L 34/1, 10.2.2016, recitals 254–262.

that the economic logic for the sale was to continue NCHZ's operations. This contributed to the existence of economic continuity.⁶⁰

It was also common ground that there was no connection between the initial owner and the new owner of NCHZ and that the decision to sell NCHZ was taken before any indication that the Commission would examine possible State aid.⁶¹ Furthermore, the Commission had not considered in its own decision that the transaction was intended to evade the recovery.⁶²

However, in its overall assessment, the General Court found that the Commission had not erred in basing its assessment of economic continuity on the scope of the transfer, the economic logic of the operation and the fact that the sale prices were unlikely to represent market prices. The General Court emphasised that even a market price would not necessarily have been sufficient to offset the competitive advantage linked to the receipt of unlawful aid. Thus, it was possible to establish economic continuity regardless of the finding of an intention to evade recovery.⁶³

Fortischem had also argued that the recovery obligation should not have been extended to more than 60% of the amount of aid found to be unlawful, since Fortischem had bought only 60% of NCHZ's assets. However, as Fortischem had leased certain chemical production properties which it had not acquired and which accounted for the remaining 40% of the remaining assets, Fortischem was able to use them to continue NCHZ's business. For that reason, the General Court also rejected this plea.⁶⁴

3.4 Findings on economic continuity based on case-law

The *Fortischem* case could be considered to have brought the clarity desired by *Nicolaides* into the assessment criteria,⁶⁵ albeit in the opposite way. Based on the judgments of the General Court and the ECJ, it seems that the economic logic of the operation and the scope of transfer are the most important criteria

⁶⁰ Case T-121/15 *Fortischem v Commission*, EU:T:2019:684, paras 263–264. Thus, the General Court confirmed the views of the Commission concerning the scope of the transfer and the economic logic of the operation, which the Commission already incorporated in the Recovery Notice (para. 92) published in 2019. The Commission referred to these also in the case of *Helsingin Bussiliikenne*. See Commission Decision (EU) 2020/1814 of 28 June 2019 ON THE STATE AID SA.33846 – (2015/C) (ex 2014/NN) (ex 2011/CP) implemented by Finland for *Helsingin Bussiliikenne Oy*, OJ, L 404/10, 2.12.2020, recitals 219 and 249.

⁶¹ Case T-121/15 *Fortischem v Commission*, EU:T:2019:684, paras 269–280.

⁶² *Ibid.*, paras 266–268.

⁶³ *Ibid.*, paras 281–284. For the ECJ's reasoning in this regard, see Case C-890/19 P *Fortischem v Commission*, EU:C:2021:345, paras 95–96.

⁶⁴ Case T-121/15 *Fortischem v Commission*, EU:T:2019:684, paras 285–291.

⁶⁵ See sub-chapter 3.1.

instead of the price of the transfer.⁶⁶ The identity of the owners or the time at which the transfer takes place does appear to be of only little importance, at least in terms of excluding the possibility of economic continuity. However, establishing economic continuity always requires a case-by-case assessment, which is anything but a simple task, especially if there are several transactions carried out.⁶⁷

The findings on the market price and its burden of proof in the *Fortischem* case can be considered interesting, as the case-law would have provided a basis for a different outcome.⁶⁸ In the legal literature, the Commission's approach in *Fortischem* has been described as stricter than in the past.⁶⁹ For example, in the *SMI* case, the ECJ concluded that when an undertaking receiving unlawful State aid is bought at the market price, i.e. at the highest price that a private investor acting under normal competitive conditions was ready to pay for that undertaking in the situation where it was in, in particular after having enjoyed State aid, the aid element was assessed at the market price and included in the purchase price. In such circumstances, the buyer cannot be considered to have received any advantage over other undertakings in the market.⁷⁰ In this case, the buyer cannot be required to repay the aid.⁷¹

In the light of the above case-law, the market price can be thought of as "cleaning up" the "contaminated" undertaking and/or its assets from the unlawful State aid.⁷² The legal literature has presented differing views in this regard. *Nicolaides* has taken the view that a transaction at market price is in itself sufficient to prevent any advantage from being transferred to the buyer. He has also provided a computational example to support his view.⁷³ Instead, according to *Monti*, the buyer may benefit from unlawful State aid even if the asset deal took place at market price.⁷⁴

It was stated in the old recovery notice, published in 2007, that a recovery order could be extended to a buyer if the Commission can prove that the assets

⁶⁶ See Case T-121/15 *Fortischem v Commission*, EU:T:2019:684, paras 281–284. Case C-890/19 P *Fortischem v Commission*, EU:C:2021:345, paras 86–92 and 100.

⁶⁷ See e.g. Opinion of AG Wathelet in Case C-357/14 P *Electrabel and Dunamenti Erőmű v Commission*, EU:C:2015:435, paras 140–170, and especially paras 148–149. This was also underlined by the ECJ in *Fortischem*. See Case C-890/19 P *Fortischem v Commission*, EU:C:2021:345, paras 95–104.

⁶⁸ See further e.g. *Nicolaides* 2019, p. 520–524.

⁶⁹ See e.g. *Säcker – Montag* 2016, p. 1042.

⁷⁰ Case C-277/00 *Germany v Commission*, EU:C:2004:238, para. 80. See also C-390/98 *Banks*, EU:C:2001:456, para. 77.

⁷¹ Case C-277/00 *Germany v Commission*, EU:C:2004:238, para. 81.

⁷² *Gyarfas* has drawn attention to the fact that the Recovery Notice does not refer to para. 77 of the *Banks* case. See *Gyarfas* 2012, p. 41.

⁷³ See *Nicolaides* 2019, p. 518.

⁷⁴ See *Monti* 2011, p. 422–423.

had been sold at a price lower than their market value.⁷⁵ Therefore, the stand taken by the General Court in *Fortischem*, and confirmed by the ECJ, on the burden of proof of the market price can be considered noteworthy. Although the *Fortischem* case seems to indicate that even a transaction at market price does not remove the possibility of economic continuity, it is difficult for the buyer to prove that the transaction was made at market price, especially if the assets have not been sold in an open and public tender procedure. The Commission seems to consider the absence of such tender procedure as a very strong indication that the assets have not been sold at market price.

However, *Nicolaidis* has considered that auctioning or open tender procedure cannot be regarded as the only way to ensure that the transaction took place at market price.⁷⁶ In this respect, he has referred to the *SMI* case, in which the ECJ, unlike the Commission, found that there was no economic continuity between the undertakings.⁷⁷ The Commission Notice on the notion of State aid⁷⁸ would seem to support this interpretation in a sense, as it would not seem to rule out the possibility that the market price could also be achieved through a targeted, non-open tender procedure. This could be the case, particularly, in smaller Member States, where there may be only a limited number of potential buyers (or “qualified bidders”, as described in the Notice).⁷⁹

In our view, the most interesting and significant part in the ECJ’s judgment in *Fortischem* is the ECJ’s position on its own judgment in the *SMI* case. According to the ECJ, it was not apparent from the *SMI* ruling that the ECJ had intended to establish a presumption of general application. Instead, the ECJ stated that the considerations set out in paragraph 93 of that judgment concerned only the specific context of the case. The ECJ further noted that unlike in the *Fortischem* case, it was common ground in the *SMI* case that the sale had taken place at market price.⁸⁰ Therefore, it could perhaps be argued that the significance of the *SMI* case in the legal literature described above has been overemphasised.

Despite the clarity brought by the General Court and the ECJ in *Fortischem*, it will be interesting to see whether the position of the General Court, and possibly the ECJ, will be the same in the *Helsingin Bussiliikenne* case. As stated

⁷⁵ Notice from the Commission – Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ, C 272/4, 15.11.2007, para. 33.

⁷⁶ See *Nicolaidis* 2019, p. 523.

⁷⁷ See Case C-277/00 *Germany v Commission*, EU:C:2004:238, para. 89. Cf. Case C-127/16 *P SNCF Mobilités v Commission*, EU:C:2018:165, para. 110. The ECJ held that the General Court had not erred in finding that the price was not a market price, as it was not the result of an open and transparent tendering procedure.

⁷⁸ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union C/2016/2946 OJ, C 262/1, 19.7.2016.

⁷⁹ *Ibid.*, paras 89–93.

⁸⁰ Case C-890/19 *P Fortischem v Commission*, EU:C:2021:345, paras 64–67.

earlier, in the *Helsingin Bussiliikenne* decision, the Commission referred to its decision concerning NCHZ and Fortischem from year 2014, which it had also codified as part of the current Recovery Notice. Further research could assess what is the affection of this new case-law to private law on restitution.

4. CONCLUDING REMARKS

The primary requirement of recovery of unlawful State aid is to recover it effectively and immediately. High importance of *effet utile* means that national legislation may not hinder the effective recovery. In addition to a limitation period of ten years, described in Article 17 of the Procedural Regulation, efficient recovery may be hindered only because of absolute impossibility, which naturally has a high criterion to be applicable.

The recovery of an unlawful aid is considered a logical consequence and the recovery re-establishes the previously existing situation. For this reason, the recovery of unlawful aid may require the recovery to be extended to an undertaking to which an undertaking that originally received the aid has transferred or sold part of its assets. In this article, we focused on examining the latter mean, in respect of which the Commission may, but is not obliged to, assess the existence of economic continuity in the light of the five criteria mentioned in the Recovery Notice.

It appears from the *Fortischem* case that the buyer should be able to demonstrate, instead of the Commission, that the business transaction certainly takes place at market price. However, as price of the transfer is just one of the factors that may be taken into consideration, even the market price does not automatically preclude economic continuity if the assets are purchased in their entirety (the scope of the transfer) and used in the same manner (the economic logic of the operation) as before.

From the buyer's point of view, it seems difficult to limit the risks with the seller's warranties and indemnities, as such clauses may be qualified as separate State aid measures aiming to circumvent the recovery. This is especially the case if the seller is also the party that granted the aid. Hence, the buyer must be particularly careful when carrying due diligence in such cases. Instead, it would seem possible to limit the risks by acquiring only part of the business of an undertaking that may have received unlawful State aid. Even if the assets benefiting from the aid were sold separately, it may still be worthwhile to make sure that all the sale prices are market-based.⁸¹ Another way to reduce risks of the buyer would seem to be that assets would be integrated to the commercial strategy of the buyer, and thus, used more likely differently than by seller.

⁸¹ See Case C-277/00 *Germany v Commission*, EU:C:2004:238, para. 69.

