LEXCELLENCE

# STATE AID IN INSOLVENCY PROCEEDINGS

## CJEU CASE-LAW CONCERNING RECOVERY IN INSOLVENCY PROCEEDINGS, INCLUDING THE QUESTION OF EXTENDING THE RECOVERY OBLIGATION TO ACQUIRERS OF ASSETS

Budapest, 25 September 2019

## Judgment of 21 March 1990, *Belgium v Commission*, C-142/87, EU:C:1990:125

**Relevance:** Registration of liability for the repayment of unlawful aid in the schedule of liabilities as fulfilment of the recovery obligation

### Facts

In an early case of State aid granted during the 1980's Belgium brought an action for annulment of a Commission decision of 1987 ordering the recovery of unlawful aid to *Tubemeuse*, a Belgian manufacturer of seamless steel tubes for the oil industry. The aid consisted essentially of financial assistance and capital injections in a period of difficulties when modernization efforts did not have the anticipated effects, so private shareholders withdrew from the company and the Belgian State became almost the only shareholder. One of the grounds for annulment as relied on by Belgium was that *Tubemeuse* was subject to judicial composition proceedings which made recovery impossible under applicable Belgian law.

### Held

The Court laid down in this case for the first time and implicitly that registration of liability for repayment of the aid in the schedule of liabilities (in the insolvency proceeding of the beneficiary) may be sufficient to fulfil the recovery obligation. The Court also held that the order for recovery (as laid down in the contested decision) did not prescribe recovery of the aid on a privileged basis. The *Tubemeuse* judgment is often referred to by the Court when recalling its case-law according to which registration of the liability in the schedule for liabilities may be sufficient when the beneficiary undertaking is subject to insolvency proceedings.

### *Findings of the Court*

"58 Belgium claims that it was impossible to implement the Commission's decision immediately, in so far as it ordered the recovery of the contested aid. Recovery of aid granted contrary to the Treaty may be effected only in accordance with the relevant rules of national law. In this case, the composition proceedings to which Tubemeuse was subject prevented any claim by the Belgian State. The undertaking's assets have been assigned to its creditors and the State no longer has any power to order the recovery of the aid in question.

59 Belgium adds that, like a judgment of the Court, the Commission's decision cannot create any privilege in its favour which would permit it to derogate, to the disadvantage of Tubemeuse's creditors, from the rules applicable to such cases. In the context of the composition procedure, the Belgian State can only declare its debt as an unsecured creditor of the undertaking. In so far as the contested decision orders the immediate recovery of the aid, it thus infringes the general principles common to the Member States in regard to company law and the law of insolvency.

60 It should be noted that the Belgian Government's argument is based on the premiss that the contested decision orders the recovery of the aid in question on a privileged basis. However, the contested decision confines itself to ordering recovery of the aid, without prescribing the way in which that is be done.

61 In principle the recovery of aid unlawfully paid must take place in accordance with the relevant procedural provisions of national law, subject however to the proviso that those provisions are to be applied in such a way that the recovery required by Community law is

not rendered practically impossible (see the judgment of 2 February 1989 in Case 94/87 *Commission v Federal Republic of Germany* [1989] ECR 175).

62 Moreover, that is the reason why the Commission stated at the hearing that the Belgian Government had fulfilled its obligations under the contested measure in regard to the recovery of the aid since, after the dismissal of its application for interim measures by the President of the Court, the Belgian Government sought to have its debt registered as one of Tubemeuse's unsecured liabilities and lodged an appeal against the judgment rejecting that application. By contrast, the arrangements of an aid may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately so that their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore of necessity be determined in the light of the procedure prescribed in Article 108 TFEU (see, to that effect, the judgment of 22 March 1977, *Iannelli & Volpi*, 74/76, EU:C:1977:51, paragraph 14).”

## Judgment of 8 May 2003, *Italy* (C-328/99) *and SIM 2 Multimedia v Commission* (C-399/00), EU:C:2003:252

**Relevance:** Recovery from undertakings other than the initial beneficiary

### Facts

The original beneficiary of the disputed aid measures, *Seleco*, was active in the consumer electronics market (in the sector of colour television sets, decoders, video projectors and monitors). In March 1996 *Seleco* hived off its most profitable activities (video projectors and monitors) to Multimedia, a company established in 1995 of which it became the sole owner. In July 1996 *Seleco* sold 33.33% of the shares it held in *Multimeida* to *Italtel* and 33.333% to *Friulia*. The remaining shares were sold to a public company at a public sale by court order in December 1997 in the context of liquidation of *Seleco*.

At the end of 1993 *Seleco* was held by *SOFIN SpA* (a private company), *Friulia* (a finance company entirely controlled by the Region Friulia-Venezia Giulia) and *REL* (a state-controlled company reorganising the consumer electronics sector). At that time *Seleco*'s losses had risen to the point where its shareholders were required by Italian law to wind up the company or to recapitalise it. The shareholders (encouraged by intervention of the Italian Government) opted to recapitalise it, with substantial private contribution. In 1994-1995 *Seleco* again recorded serious losses, so at the end of 1995 its shareholders had again to choose between winding up and recapitalising it. Following the second recapitalisation, *Seleco* was declared bankrupt in April 1997. (As the Italian Government argued before the Court, in 1994 the public capital injected was about ITL 30 billion and the private capital injected was about ITL 32 billion. In 1996 the contribution from *Friulia* was ITL 12 billion and that from *REL* ITL 45 billion, while the private sector contributed ITL 40.8 billion.)

Following the *ex post* notification of some of the aid measures the Commission opened the formal investigation procedure in September 1994 and concluded it in February 1998. In the contested decision the Commission declared that certain aid measures which were part of *Seleco*'s recapitalisation in 1994 and 1996 constituted incompatible aid and ordered the recovery of them from *Seleco*, and with regard to the part not recoverable from *Seleco*, from Multimedia and "*any other firm which benefited from asset transfers designed to frustrate the effects of [the recovery] decision*". Italy and the legal successor of Multimedia (SIM 2 Multimedia) brought proceedings before the Court of Justice seeking annulment of the contested decision on the ground that the Commission erroneously classified the measures as aid (by failing to apply the private investor principle) and on the ground that the Commission should not have ordered recovery of the aid from Multimedia. Our summary is focused on the latter.

### Held

As the Court laid down in its assessment as a preliminary point, *"[…]the possibility of a company in economic difficulties taking measures to rehabilitate the business cannot be ruled out a priori because of requirements relating to recovery of the aid which is incompatible with the common market. However, […] if it were permissible, without any condition, for an undertaking experiencing difficulties and on the point of being declared bankrupt to create, during the formal inquiry into the aid granted it, a subsidiary to which it then transfers its most profitable assets before the conclusion of the inquiry, that would amount to accepting that any*

*company may remove such assets from the parent undertaking when aid is recovered, which would risk depriving the recovery of that aid of its effect in whole or in part*."

So the Court took account of the fact that Seleco hived off in March 1996 its most profitable assets to Multimedia, injecting substantial capital (ITL 29 billion) into that company, which helped to deprive Seleco of its substance in two respects (activities and capital) at a time when the Commission had initiated the formal investigation procedure. The Court also took into account that that transaction was likely not limited to the transfer of assets and that the transfer of Seleco's main activities was accompanied by the transfer to Multimedia of the corresponding workforce and hence its social security debts. Finally, the Court reminded that after Seleco sold two thirds of its shares in Multimedia, the latter remained under the control of Seleco and/or Friulia (which was itself Seleco's third shareholder). It was in this context that the Commission did not consider the price of the transfer, as it assessed that as irrelevant since it was focusing on the share deal. So as the Court emphasized *"[…]while it is correct that the sale of shares in a company which is the beneficiary of unlawful aid by a shareholder to a third party does not affect the requirement for recovery, the situation at issue here is different from that case. It involves the sale of Multimedia shares by Seleco, which created that company, and whose assets benefit from the sales price of the shares. Therefore, it cannot be excluded that Seleco retained the benefit of the aid received from the sale of its shares at market price*." In addition, the Commission did not take into account that its recovery order had consequences on the private company which bought the final third of the shares in Multimedia at a court-ordered public sale as part of the liquidation of Seleco. So the Court concluded that the Commission failed to give sufficient reasons in these regards and annulled the respective part of the contested decision.

***Findings of the Court***

*Arguments of the parties*

59. SIM Multimedia claims that the Commission has not demonstrated that the branch of the undertaking which includes video projectors and monitors (hereinafter □the multimedia branch□), which was hived off from Seleco and incorporated in Multimedia, received the aid referred to in Article 1 of the contested decision. As regards the aid granted by REL and Friulia to Seleco in 1994 (see Article 1(a), (c) and (d) of the contested decision), SIM Multimedia maintains that it is clear from the analysis of Seleco's accounts for the financial years 1993, 1994 and 1995 that the multimedia branch derived no benefit from that aid. As regards the aid granted by REL and Friulia to Seleco in 1996 (see Article 1(b) and (e) of the contested decision) the multimedia branch could likewise not have benefited from it. That aid was allocated to Seleco after the multimedia branch was transferred to Multimedia.

60. SIM Multimedia points out that, after the multimedia branch was transferred to Multimedia, Seleco, which had obtained 100% of the shares in Multimedia in exchange for that transfer, sold two thirds of those shares to Friulia and Italtel for a price corresponding to the value of that branch of the undertaking, which had been valued by an independent expert. Consequently, even supposing that the multimedia branch had benefited from the aid at issue, the amount of that aid would have been included in the independent expert's appraisal of the value of the branch and subsequently transferred to Seleco through the price paid for Multimedia's shares. Seleco therefore remained the sole real beneficiary of that aid. It follows that the assets in that company's bankruptcy have neither been diminished nor suffered damage.

61. The Commission states that the multimedia branch was an integral part of Seleco, at least until 18 July 1996, when that

company, of which Multimedia was a full (100%) subsidiary, sold to Friulia and Italtel two thirds of the shares it held in Multimedia. Therefore, the multimedia branch owed to the aid referred to in Article 1 of the contested decision not merely its survival, but also its very existence. In that regard, the Commission points out that, given Seleco's state of deep crisis since 1983, the undertaking would long since have collapsed without the aid from REL and Friulia. Moreover, that aid was granted to Seleco to compensate for its operating losses as a whole, without the public authorities setting specific conditions as regards its use. Therefore, all Seleco's branches benefited indiscriminately from that aid, in various ways. Without that aid, Seleco's administrators would certainly have had to siphon off from own resources sums of money earmarked for multimedia activities in order to satisfy social needs, which have priority by definition.

62. As regards, more particularly, the aid granted to Seleco in 1996 in particular, the Commission contends that there is no doubt that it was used for the multimedia branch. It served as rescue aid, that is, aid intended to compensate for previous losses sustained by Seleco - in this case, the losses recorded during the financial year 1995, when Seleco had not yet sold that branch to Multimedia and the latter company was still only a shell company.

63. The Commission also maintains that the parent company's subsequent decision to sell all or a large part of its shares in the subsidiary to a third party is not relevant for the purposes of the subsidiary's obligation to reimburse the aid paid in error. While a change in share ownership alters the internal distribution of assets with regard to the parent company, it does not alter the production capacity of the subsidiary which, through the fact that its economic activities wrongly benefited from unlawful aid, continues to distort competition.

64. Finally, the Commission points out that the price for transferring the multimedia branch was influenced by the fact that the parties concerned, in particular Friulia and Italtel, as well as the independent expert, were certainly not unaware of the risks inherent in the procedure initiated under Article 93(2) of the Treaty, which had been the subject of a communication in the Official Journal of the European Communities of 29 December 1994 (OJ 1994 C 373, p. 5), in particular the risk of having to repay the aid in due course.

*Findings of the Court*

65. As a preliminary observation, it should be pointed out that, in accordance with Community law, when the Commission finds that aid is incompatible with the common market, it may order the Member State to recover that aid from the recipient (Case 70/72 *Commission v Germany* [1973] ECR 813, paragraph 20).

66. The recovery of unlawful aid is the logical consequence of a finding that it is unlawful (see *Tubemeuse*, paragraph 66) and seeks to re-establish the previously existing situation (Case C-382/99 *Netherlands v Commission* [2002] ECR I-5163, paragraph 89).

67. Article 2(1) of the contested decision provides that the Italian Republic is to take all the necessary measures to recover the incompatible aid identified by the Commission, and which has already been granted unlawfully, from Seleco SpA and, additionally, with regard to the part not recoverable from Seleco, from Multimedia and any other firm which benefited from asset transfers designed to frustrate the effects of the contested decision.

68. The Commission, in giving the reasons for that element of the operative part of the contested decision, was right to observe in point 113 that in order to ensure that the decision is implemented correctly the Member State is required to act like a private creditor.

69. The Commission was also right to state in points 113 to 115 of the grounds of the contested decision, that:

- To ensure that the Commission decision is implemented correctly, the Member State is required to recover the aid without delay, using all the legal means at its disposal, including seizure of the firm's assets and,

where necessary, its liquidation if it is unable to repay the amounts in question. The proceeds of the sale of the assets allow the creditors, including the Member State, to be repaid even if they are not sufficient to cover all the debts of the firm and even if, consequently, the aid is not recovered in full. In such circumstances, the liquidation of the firm is still important from a competition standpoint as it frees the market segment previously held by the firm and makes it available to creditors, while giving them the opportunity to acquire the assets and reallocate them more effectively.

- There are, however, circumstances which can hamper that process, jeopardise the effectiveness of the recovery decision and frustrate the rules on State aid. Such is the case when, following a Commission investigation or decision, the assets and liabilities of the firm as an ongoing concern are transferred to another firm controlled by the same persons at below-market prices or by way of procedures that lack transparency. The purpose of such a transaction can be to place the assets out of reach of the Commission decision and to continue the economic activity in question indefinitely.

- As in any other recovery procedure, the Member State must, like any other diligent creditor, exhaust all the legal instruments available under its own legal system, such as those used to combat fraud against creditors in the form of acts carried out by the firm in liquidation during the suspect period prior to the bankruptcy, which would allow such acts to be declared invalid.

70. Next, it is to be observed that, as is noted at point 47 of the grounds of the contested decision, according to the Italian Government, Seleco allegedly set up Multimedia above all in order to merge with the only other Italian producer of the same type of products (video projectors, monitors and decoders), Italtel, and to benefit from the pooling of technical know-how and the customers Seleco had on this market. The sale of the Multimedia shares also provided Seleco with some of the liquidity it needed in order to cover its 1995 losses.

71. Moreover, it is apparent from the file that:

- in March 1996, following the creation of Multimedia in 1995, Seleco hived off certain of its assets to Multimedia and became its sole owner;

- in June 1996, Multimedia was transformed into a company limited by shares;

- in July 1996, Seleco sold two thirds of its shares in Multimedia to Italtel and to Friulia, for ITL 20 billion, with Seleco retaining the final third;

- the final third of the shares in Multimedia was sold in December 1997 to a private company at the Seleco bankruptcy sale.

72. In the present case, it is also common ground that the value of the multimedia branch transferred by Seleco to Multimedia in exchange for all of the latter's shares had been estimated by a sworn expert appointed by the national court for that purpose. It is also common ground that the price Friulia and Italtel paid for the purchase of two thirds of the shares which Seleco held in Multimedia, which took place several months after that transfer, in effect corresponded to two thirds of the value of the multimedia branch, as estimated by the abovementioned sworn expert. The Commission has not put forward any concrete evidence that expert estimated the value of the multimedia branch transferred by Seleco to Multimedia taking into account the risk that the latter company might be required, should the case arise, to repay all or part of the aid granted to Seleco.

73. It is further not in dispute that the administrator appointed by the court in Seleco's bankruptcy did not act to revoke the transfer by Seleco of the two thirds of the shares which it held in Multimedia.

74. Finally, it is clear from the documents before the Court that the expert's report produced at the end of 1997 at the request of the bankruptcy court set the value of Multimedia's trading capital considerably

lower than what had been estimated in the previous expert's report.

75. In those circumstances, the question arises whether Multimedia should also be considered as having been a beneficiary of the aid.

76. In that regard, it is appropriate to point out that the possibility of a company in economic difficulties taking measures to rehabilitate the business cannot be ruled out a priori because of requirements relating to recovery of the aid which is incompatible with the common market.

77. However, as the Commission is essentially maintaining before the Court, if it were permissible, without any condition, for an undertaking experiencing difficulties and on the point of being declared bankrupt to create, during the formal inquiry into the aid granted it, a subsidiary to which it then transfers its most profitable assets before the conclusion of the inquiry, that would amount to accepting that any company may remove such assets from the parent undertaking when aid is recovered, which would risk depriving the recovery of that aid of its effect in whole or in part.

78. Thus the Commission pointed out at points 116 and 117 of the grounds of the contested decision that:

- in order to prevent the effectiveness of the decision to recover the aid from being frustrated and the market from continuing to be distorted, the Commission may be compelled to require that the recovery is not restricted to the original firm but is extended to the firm which continues the activity of the original firm, using the transferred means of production, in cases where certain elements of the transfer point to economic continuity between the two firms;

- the elements examined by the Commission include the purpose of the transfer (assets and liabilities, continuity of the workforce, bundled assets, etc.), the transfer price, the identity of the shareholders or owners of the acquiring firm and of the original firm, the moment at which the transfer was carried out (after the start of the investigation, the initiation of the procedure or the final decision) and, lastly, the economic logic of the transaction.

79. In this case, it is, admittedly, relevant to point out, as the Commission does in points 118 and 119 of the grounds of the contested decision, that:

- Seleco hived off in March 1996 its most profitable assets to Multimedia, injecting ITL 29 billion into the capital of that company;

- that transaction, which helped to deprive Seleco of its substance in two respects (activities and capital), occurred at a time when the Commission had initiated the procedure laid down in Article 93(2) of the Treaty;

- it is likely that the transaction was not limited to a transfer of assets and that the transfer of Seleco's main activities was accompanied by the transfer to Multimedia of the corresponding workforce (or part of it) and hence of its social security debts at the very least;

- after Seleco sold two thirds of its shares in Multimedia, the latter remained under the control of Seleco and/or Friulia (which was itself Seleco's third shareholder and which had granted Seleco a convertible loan of ITL 12 billion).

80. However, it must be observed that, in that statement of reasons, the Commission makes no mention of the price of the transfer, although it referred to that element in the contested decision as one of the two which had to be taken into account.

81. In that regard, it stated in its rejoinder, inter alia:

- that it assumed that the price of the transfer of the multimedia branch was influenced and dictated by the circumstances. In other words, when the sales price and the value of the assets at issue were fixed, the parties must certainly have known that they risked incurring a procedure under Article 88(2) EC and being required in due course to repay the aid categorised as unlawful, and

- that, whatever the price of the sale, it is not relevant in the present case, since it concerns an operation relating to the shares.

82. As regards the first of those statements, it is appropriate to point out that, as stated in paragraph 72 of the present judgment, the Commission had not put forward any concrete evidence to show that the sworn expert took account of such a risk in his estimate of the value of the multimedia branch.

83. As regards the second statement, while it is correct that the sale of shares in a company which is the beneficiary of unlawful aid by a shareholder to a third party does not affect the requirement for recovery, the situation at issue here is different from that case. It involves the sale of Multimedia shares by Seleco, which created that company, and whose assets benefit from the sales price of the shares. Therefore, it cannot be excluded that Seleco retained the benefit of the aid received from the sale of its shares at market price (see, to that effect, Case C-390/98 *Banks* [2001] ECR I-6117, paragraphs 77 and 78).

84. In addition, the Commission did not take into account in the contested decision the consequences of the obligation on the part of the Italian Republic to recover the unlawful aid from Multimedia with regard to the private company which, at a court-ordered public sale as part of the liquidation of Seleco, bought the final third of the shares in Multimedia.

85. In the light of the foregoing, it is apparent that the statement of the reasons on which the contested decision is based is inadequate for the purposes of Article 253 EC, in particular as regards the alleged irrelevance of the fact that the shares in Multimedia were bought at a price which seemed to be the market price, although that point was required also to be taken into account in the present case.

## Judgment of 29 April 2004, *Germany v Commission*, C-277/00, EU:C:2004:238

**Relevance:** Recovery from undertakings other than the initial beneficiary

### Facts

Before the reunification of Germany, the predecessor of *SMI (System Microelectronic Innovation GmbH*) was a market leader in the production of customised circuits in the Comecon, with 8500 employees. During the 1990's it was held in public ownership (owned by the Land of Brandenburg and the *Treuhandanstalt,* the German public-law body responsible for restructuring the undertakings of the former DDR) and from 1993 to 1997 it received considerable restructuring and operating aid from its owners. In April 1997 *SMI* had to file for bankruptcy, and it ceased trading on 30 June 1997. On the same date the administrator founded a hive-off vehicle, *SiMI*, which, in return for consideration, was to continue *SMI*'s business using *SMI*'s plant, with about 105 employees. All the shares in *SiMI* were owned by *SMI*. On 1 July the administrator founded a wholly-owned subsidiary of *SiMI*, namely *MD&D*, with the intended activities complementing those of *SiMI* (i.e. consulting, marketing, development and design of microelectronic products and services). In July 1997 the Land of Brandenburg granted further aid to *SiMI*. After that, the Land of Brandenburg and the bankruptcy administrator tried to sell *SiMI* to a private investor. After some unsuccessful efforts they finally concluded an agreement with *Megaxess* (a private investor from the USA) and sold by a contract of 28 June 1999 80% of the shares of MD&D (while the remaining 20% were bought by three of *MD&D*'s employees). The privatisation was completed as on 14 July *MD&D* acquired the shares of *SiMI* at their nominal value and the assets of *SMI* for DEM 1.7 million.

In the meantime, as from 1996 the Commission started investigating the aid granted to *SMI*, and following a formal investigation procedure (between 1997 and 2000) the Commission concluded in its (contested) decision of 11 April 2000 that the aid granted to *SMI* by its owners between 1993 and 1997, similarly to the aid granted to *SiMI* in the second half of 1997, was unlawful and incompatible aid. As the Commission laid down in the contested decision, the aid had to be recovered from *SMI, SiMI, MD&D,* and also from "*any other firm to which SMI's, SiMI's or MD&D's assets have been or will be transferred in order to evade the consequences of [the contested] decision*". Germany challenged the legality of the Commission's decision both on the ground that the aid was granted on the basis of an approved aid scheme facilitating the restructuring and privatisation of undertakings established in the former DDR, and on the ground that the definition of the beneficiaries (and the extension of the recovery obligation to *SiMI, MD&D* and to their owners or future successors) was illegal. The first ground was rejected by the Court, however, the second was upheld and the Court laid down important interpretations concerning the possibility and conditions of extending the recovery obligation to successors, buyers of assets and parent companies.

### Held

The Court first recalled its earlier case-law according to which where an undertaking that has benefited from unlawful aid is bought at market price, the aid element was assessed at the market price and included in the purchase price, so the buyer cannot be regarded as having benefited from the advantage. So the Court first noted that the Commission did not take into consideration the price for the sale of *SiMI*'s shares to *MD&D,* but merely found that its shares were sold to *MD&D* and therefore ordered the recovery of the aid (granted to *SMI*) from *MD&D*. So the Commission made an error of law thereby. Second, the Court considered that in the event when hive-off companies are created in order to continue the activities of the aid

beneficiary, those hive-off companies may also be required to repay the aid, where it is established that they actually continue to benefit from the competitive advantage linked with the receipt of the aid. As the Court noticed, this could be the case if the hive-off company acquired the assets of the company in liquidation without paying the market price. However, in the case before it the Commission did not establish that *SMI*'s plant was leased by *SiMI* at a lease price not consistent with market conditions. This was also deemed to be an error of law on the part of the Commission. Thirdly, the Court took into account that the Commission ordered recovery of the aid from *MD&D* basically on the ground that the sale of *MD&D* to *Megaxess*, the sale of *SiMI*'s shares to *MD&D* and the transfer of the assets of *SMI* to *MD&D* were closely related and were designed and aimed to evade the consequences of the Commission's State aid decision. However, the Court assessed those transactions within the framework of the insolvency proceedings: it took account of the fact that they were performed on the initiative of the bankruptcy administrator (acting under judicial supervision), whose task and responsibility was to satisfy the creditors as far as possible. The Commission has shown nothing to suggest that those actions were performed in a way which defrauded the creditors or may have reduced the assets of the insolvent company, and neither has it maintained that there was any breach of the principle of equal ranking of creditors to the loss of the public creditors. So as the Court concluded, "*in such a situation, if the claims in respect of recovery of the disputed aid were properly listed among the liabilities of the liquidation, the sale of SMI's assets at the market price cannot have led to any form of evasion of the obligation to recover aid*." Finally, the Commission referred to the lack of a sufficiently open and transparent procedure applied to the sale of *SMI*'s assets. However, the Court assessed the fact that the sale was subject to court supervision and the preceding unsuccessful attempts to sell the assets to another American company as indications that the procedure was sufficiently open and transparent. So in the absence of any proof by the Commission of the alleged lack of transparency the Court held that the Commission did not establish that the transaction was designed to evade the consequences of the contested decision (and so the recovery obligation could not have been extended to *MD&D*).

***Findings of the Court***

"60 By its first and fourth pleas, which should be examined together and which fall into five parts, the German Government claims that the recovery order in Article 3 of the contested decision is unlawful for:

- infringement of Article 87(1) EC and Article 88(2) EC, since the status of aid beneficiary was unlawfully extended because of a supposed intention to evade the repayment obligation;

– breach of the principle of the rights of the defence and of Article 88(2) EC, in so far as the recovery order is also addressed to SiMI, MD & D and other unnamed undertakings, even though the Commission did not open a specific inquiry procedure against those undertakings;

– lack of competence of the Commission to define the manner in which the national authorities must act in order to recover the unlawful aid;

– breach of essential procedural requirements, in the form of inadequate ascertainment of the facts and a defective statement of reasons in the contested decision, and

– breach of the principles of legal certainty and proportionality.

The first part

*Arguments of the parties*

61 The German Government claims, first of all, that the recovery order in Article 3 of the contested decision infringes Article 87(1) EC and Article 88(2) EC, in so far as none of the undertakings mentioned therein, namely SMI, SiMI, MD & D and other unnamed undertakings, received benefits totalling DEM 140.1 million and none of those undertakings obtained a benefit from the various measures adopted by the administrator. Making reference to those measures, the German Government claims, first of all, that SiMI did not derive any benefit from using SMI's assets, since it paid SMI a price consistent with the market price and, secondly, that MD & D did not derive any benefit from acquiring 80% of SiMI's shares and SMI's assets, since it paid SMI the market price.

62 The German Government also asserts that MD & D cannot be required to repay the aid granted to SMI simply because it had acquired assets held by that company. It would be absurd to take the view that the repayment obligation should always follow SMI's assets since, if that were the case, no one would be willing to acquire the assets, which would quite simply be doomed to destruction. It also claims that SiMI was not liquidated after its shares were sold to MD & D, but continued to exist, maintaining its rights and obligations. Consequently, any debts pertaining to the repayment of the disputed aid should therefore also remain with SiMI and MD & D cannot be held liable for those debts.

63 The German Government further denies that the operations carried out by the administrator sought to evade the obligation to repay the disputed aid. In selling SMI's assets at the market price, the administrator was not 'protecting' the company's assets, since the sum obtained from that sale was paid into the bankrupt company's assets, which are subject to the repayment obligation. This obligation was not evaded either by selling SMI's assets 'en bloc', since that produced a higher sum than would have been obtained by selling the assets in question separately, which increased the resources available for recovering the disputed aid. Moreover, even if SiMI and MD & D had not been created, no investor would have been prepared to acquire SMI, which was insolvent on account of all its debts, with the result that the administrator could do nothing but sell the company's assets at the market price.

64 Lastly, the German Government disputes the Commission's argument that the distortion of competition caused by the grant of State aid would not be eliminated if the buyer of the assets of the beneficiary undertaking continued the economic activity with those assets. In the view of the German Government, those who acquire the assets of the beneficiary undertaking at the market price do not cause any distortion of competition, because they have not obtained any abnormal benefit compared with their competitors.

65 The Commission first of all clarifies in general terms its views regarding the determination of the persons who are required to repay aid in the event of a transfer of shares in the beneficiary company (share deal) or assets held by that company (asset deal).

66 It begins by observing that no particular difficulties arise in the case of the share deal, since the beneficiary company continues to exist and only the owner changes. As is also confirmed by the Court's case-law, in these circumstances the repayment obligation continues to rest with the company that received the aid, irrespective of changes affecting the ownership of that company and any consideration given to the recovery obligation when determining the conditions for the sale of the abovementioned shares. By continuing the subsidised activity, this company continues to derive a benefit from the aid, thereby perpetuating the distortion of competition.

67 Nor are there particular difficulties in the case where the assets of the beneficiary company are transferred to undertakings in the same group. In this case, in addition to the beneficiary company, the aid in question would have to be repaid by the undertakings in the group which, because of the transfer of assets, have been able to enjoy the favourable effects stemming from the grant of that aid, thus deriving an economic advantage.

68 On the other hand, as far as the sale of the beneficiary company's assets to third companies is concerned, the Commission draws a distinction depending on whether the assets have been sold separately or 'en bloc'.

69 In cases where those assets have been sold separately, at the market price, the buyers are not required to repay the aid. Because of this separate sale, the subsidised activity disappears, which leaves scope for the beneficiary company's competitors. In this way, the recovery of aid from the seller, whether it be from the beneficiary company itself or from the assets of the bankrupt or liquidated company, makes it possible to eliminate the distortion of competition.

70 Major problems arise, on the other hand, where the assets have been sold 'en bloc' so as to allow the buyer to continue the beneficiary company's activity. In these circumstances, continuing the subsidised activity could perpetuate the distortion of competition with the result that particular caution is needed in order to prevent the transfer of the beneficiary company's assets allowing the repayment obligation to be evaded by 'protecting' those assets. In the view of the Commission, in such a case, evasion can be ruled out only where, in addition to taking place at the market price, the transfer of the beneficiary company's assets 'en bloc' is made as part of an unconditional procedure that is open to all the company's competitors. Only in this case are the buyers not required to repay the aid.

71 Having clarified its position in general terms, the Commission, referring to the present case, stresses that:

– the decisions to file for bankruptcy and to create SiMi and MD & D were taken in June and July 1997, when the German authorities certainly knew of the Commission's intention to open an inquiry procedure;

– between mid-1997 and June and July 1999, SMI's activities were continued through the leasing of its assets to SiMI. Since it did not obtain information enabling it to assess whether the lease price was consistent with market conditions, the Commission could only take the view that, during this period, SiMi and MD & D, which is its wholly-owned subsidiary, had benefited from aid that was unlawfully granted to SMI;

– on 28 June 1999, as the Commission was preparing to adopt a negative decision together with a recovery order, MD & D was sold to three of its employees and to Megaxess;

– on 14 July 1999, SiMI's shares and all SMI's assets were sold to MD & D without an open and transparent procedure having been followed.

72 In the view of the Commission, it is apparent from all these circumstances that the different transactions were coordinated in such a way that the repayment obligation fell on SMI and SiMI, whilst MD & D, free of that obligation, was allowed to continue the subsidised economic activities. The Commission therefore considers that the economic link between MD & D, on the one hand, and SMI and SiMI, on the other, was not broken, since the sole objective of the different transactions was to allow those activities to be continued, evading the recovery order. The extension of the obligation to repay the disputed aid to MD & D is thus justified.

*Findings of the Court*

73 As a preliminary observation, it should be pointed out that, in accordance with Community law, when the Commission finds that aid is incompatible with the common market, it may require the Member State to recover that aid from the recipient (Case 70/72 *Commission v Germany* [1973] ECR 813, paragraph 20, and Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia v Commission* [2003] ECR I-4035, paragraph 65).

74 Removing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful and seeks to re-establish the previous situation (*Italy and SIM 2 Multimedia*, paragraph 66).

75 That purpose is achieved once the aid in question, together where appropriate with default interest, has been repaid by the recipient (Case C-350/*93 Commission v Italy* [1995] ECR I-699, paragraph 22) or, in other words, by the undertakings which actually benefited from it (Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 57). By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (Case C-350/93 *Commission v Italy*, paragraph 22).

76 Consequently, the main purpose of the repayment of unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage afforded by the unlawful aid.

77 It is therefore in the light of these general findings that the lawfulness of the recovery order set out in Article 3 of the contested decision should be examined.

78 As regards the aid granted to SiMI, first of all, it should be noted that, after that aid had been granted, SiMI was sold to MD & D whilst retaining its legal personality. In other words, this was a transfer through a sale of shares, a share deal.

79 It should also be noted that, as can be seen from paragraph 44 of the grounds of the contested decision, the Commission considered that the aid in question must be recovered from MD & D, as the buyer of SiMI.

80 The Court has consistently held that where an undertaking that has benefited from unlawful State aid is bought at the market price, that is to say at the highest price which a private investor acting under normal competitive conditions was ready to pay for that company in the situation 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 regarded as having benefited from an advantage in relation to other market operators (Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 77).

81 In the present case, the undertaking to which unlawful State aid was granted retains its legal personality and continues to carry out, for its own account, the activities subsidised by the State aid. Therefore, it is normally this undertaking that retains the competitive advantage connected with that aid and it is therefore this undertaking that must be required to repay an amount equal to that aid. The buyer cannot therefore be asked to repay such aid.

82 In addition, it is not disputed that the Commission did not take into consideration the price for the sale of SiMi's shares to MD & D and merely found, in paragraph 44 of the grounds of the contested decision, that 'in so far as the present decision concerns aid granted to SiMI, it should be noted that its shares were sold to MD & D on 14 July 1999. Therefore, this aid must be recovered from MD & D'.

83 It must therefore be concluded that, by ordering MD & D to repay the State aid granted to SiMI, the Commission failed to have regard to the principles governing the recovery of State aid.

84 Secondly, as regards the aid granted to SMI, it should be noted that, as can be seen from paragraphs 50 to 52 of the grounds of the contested decision, the Commission regarded SMI, SiMI, MD & D and any firm that acquired the assets of one of these three companies in order to evade the consequences of the decision as beneficiaries of that aid. In addition, at the hearing, the Commission made clear that it considers that all the companies mentioned in Article 3(3) of the contested decision are jointly and severally liable for the repayment obligation.

85 In the light of the fact that in the present case SMI has been in liquidation since bankruptcy proceedings were opened on 1 July 1997, it should be pointed out that, as follows from the case-law on bankrupt undertakings that have received aid, the re-establishment of the previous situation and the elimination of the distortion of competition resulting from the unlawfully paid aid may, in principle, be achieved by registration of the liability relating to the repayment of the aid in question in the

schedule of liabilities. In accordance with this case-law, such registration would be sufficient (Case 52/84 *Commission v Belgium* [1986] ECR 89, paragraph 14, and Case C-142/87 *Belgium v Commission ('Tubemeuse')* [1990] ECR I-959, paragraphs 60 to 62).

86 It is certainly possible that, in the event that hive-off companies are created in order to continue some of the activities of the undertaking that received the aid, where that undertaking has gone bankrupt, those companies may also, if necessary, be required to repay the aid in question, where it is established that they actually continue to benefit from the competitive advantage linked with the receipt of the aid. This could be the case, inter alia, where those hive-off companies acquire the assets of the company in liquidation without paying the market price in return or where it is established that the creation of such companies evades the obligation to repay that aid.

87 In the present case, as regards, first of all, the repayment obligation imposed on SiMI by the Commission, it is clear from paragraph 71 of the present judgment that the Commission based its assessment, first, on the fact that SiMI continued SMI's activities by leasing SMI's plant and, secondly, on the fact that it did not obtain information that allowed it to assess whether the lease price was consistent with market conditions.

88 It should be noted that the mere fact that SMI's plant was leased for a certain period by SiMI does not necessarily mean that SiMI enjoyed the competitive advantage linked with the aid granted to the lessor almost three years before the creation of the lessee. Furthermore, the German Government has asserted, and the Commission has not denied, that the lease price in question was consistent with market conditions.

89 Therefore, in so far as it orders the repayment by SiMI of the aid granted to SMI, the contested decision does not comply with the principles governing the recovery of unlawful State aid.

90 Secondly, as regards the obligation imposed on MD & D to repay the aid granted to SMI, it can be seen from the grounds of the contested decision that the Commission essentially based its assessment on the existence of an intention to evade the consequences of that decision, which, according to the Commission, objectively results from the fact that all the purchase transactions in question, the sale of MD & D to Megaxess, the sale of SiMI's shares to MD & D and the sale of SMI's assets to MD & D, were closely connected and amounted to a transfer of all the assets owned by SMI and used by SiMI to MD & D's new shareholders, in such a way as to shelter them from the recovery of the disputed aid.

91 This line of argument cannot be accepted.

92 First of all, the German Government has pointed out, and the Commission has not denied, that both the sale of SiMI's shares to MD & D and the sale of SMI's assets to MD & D were made at the market price. Consequently, these transactions did not remove resources from the bankrupt undertaking's assets.

93 Secondly, none of these transactions was carried out by SMI: they were performed on the initiative of the bankruptcy administrator who, acting under judicial supervision, was responsible for working to satisfy creditors as far as possible. As the Advocate General pointed out in point 99 of his Opinion, the Commission has shown nothing to suggest that, in this case, any actions were performed which defrauded the creditors and may have reduced the assets of the insolvent company, nor has it maintained that there was any breach of the principle of the equal ranking of creditors to the loss of the public creditors. In such a situation, if the claims in respect of recovery of the disputed aid were properly listed among the liabilities of the liquidation, the sale of SMI's assets at the market price cannot have led to any form of evasion of the obligation to recover that aid.

94 Thirdly, it is likewise not possible to accept the argument put forward by the Commission that the distortion of competition

cannot be eliminated in the present case by listing the relevant claim among SMI's liabilities, since the sale of SMI's assets to MD & D was made, firstly, 'en bloc', and, secondly, without employing an open and transparent procedure, thus allowing MD & D to continue the subsidised activities.

95 Not only is this argument not included in the grounds of the contested decision as the basis for the obligation on the part of MD & D to repay the aid granted to SMI, but it follows both from those grounds and from the documents before the Court that the sale in question was supervised by a court and did not take place immediately, but was preceded by unsuccessful attempts with another American company. This information gives reason to suggest that the procedure followed was sufficiently open and transparent. In addition, the Commission has not presented any information to show that SMI's competitors complained about the lack of transparency that, in the view of the Commission, characterised the operation.

96 In the light of this information, it must be concluded that the Commission did not establish the existence of a transaction designed to evade the consequences of the contested decision which could found an obligation on the part of MD & D to repay the unlawful aid granted to SMI.

97 Consequently, in so far as it orders MD & D to repay the aid granted to SMI, the contested decision does not comply with the principles governing the recovery of unlawful State aid.

98 Lastly, as regards the extension of that repayment obligation to 'any other firm to which SMI's, SiMI's or MD & D's assets have been or will be transferred in order to evade the consequences of this decision', it should be noted that, as is apparent from the documents before the Court, the extension of the obligation can apply only to Megaxess. In the light of the fact that in the present case neither MD & D nor SiMI can be required to repay the unlawful aid granted to SMI, this applies all the more to Megaxess, which in fact merely acquired 80% of the shares in MD & D.

99 In the light of all the above considerations, the first part of the first and fourth pleas relied on by the Federal Republic of Germany should be upheld and the contested decision annulled in so far as it orders the recovery of aid granted to SMI from undertakings other than SMI and the recovery of aid granted to SiMI from undertakings other than SiMI.

## Judgment of 13 September 2010, *Hellenic Republic* (T-415/05), *Olympiakes Aerogrammes AE* (T-416/05) *and Olympiaki Aeroporia Ypiresies AE* (T-423/05) *v Commission*, EU:T:2010:386

**Relevance:** Recovery from undertakings other than the initial beneficiary, financial continuity between undertakings

### Facts

In order to facilitate the privatisation of the Greek State-owned airline *Olympiaki Aeroporia AE (Olympic Airways,* as from December 2003 *Olympiaki Aeroporia Ypireseis, Olympic Airways Services, 'OA'*), its flight operations and its subsidiary Olympic Aviation were hived off and regrouped within another of OA's subsidiaries, *Makedonikes Aerogrammes AE (Macedonian Airways*), which received the name *Olympiakes Aerogrames AE (Olympic Airlines, 'NOA'*).

Public support to OA has been subject to several Commission decisions, including the one of December 2002, which declared incompatible the restructuring aid granted to OA in 1994, 1998 and 2000 for failure to comply with the conditions of approval of those aid measures. As Greece had not complied with the recovery obligation on time, the Commission opened infringement proceedings, brought the case before the Court and the CJEU ascertained the infringement in its judgment of 12 May 2005 (Commission v Greece, C-415/03). In that judgment the Court took into consideration the fact that the Hellenic Republic had transferred OA's most profitable assets, free of all debts, to NOA, which also belonged to that Member State and was entitled to special protection from its creditors, in derogation from the provisions of the general law and commercial law obligations. The Court particularly held that that legal structure made it impossible, under national law, to recover the aid granted and was an obstacle to the effective implementation of the Commission's decision ordering recovery of the aid. That judgment was followed by a second infringement procedure (for failure to comply with the judgment) in which the Court imposed a daily penalty payment and a lump sum in 2009.

It was within that context that the privatisation process of OA became subject of State aid investigations (from 2003, with the opening of the formal investigation procedure in 2004). In the opening decision the Commission considered that the new airline, NOA, had benefited from the transfer of important assets from OA, leaving OA with its significant liabilities, and that none of OA's creditors could have recourse to NOA. So the Commission regarded OA and NOA as one single undertaking. On September 14 the Commission adopted the contested decision, finding that certain measures granted incompatible State aid to NOA, other measures to OA, and ordered recovery from 'the beneficiaries'. Greece, OA and NOA brought proceedings before the Court alleging (among others) that the Commission committed a manifest error of assessment when assuming economic continuity between OA and NOA and by ordering the recovery of aid granted to OA from NOA.

### Held

The Court reconfirmed its interpretations laid down in the *SIM 2 Multimedia* judgment and rejected the pleas concerning manifest error of assessment concerning economic continuity between OA and NOA. The Court also made it clear that the presence of an intentional element is not necessary to find that the obligation to repay aid has been evaded by the transfer of assets. The Court also emphasized that the time of the transfer of assets is an objective criterion meaning that the time of the transfer (i.e. if a formal State aid investigation had already been

initiated, or if national authorities had to be aware of the Commission's intention to investigate the case) is capable of constituting evidence of evasion.

***Findings of the Court***

"131 As regards the Commission's argument that the judgment of 12 May 2005 concerns the very existence of NOA, by declaring it illegal, it forms part of the argument between the parties on the legal effect of that judgment as regards the identification of the effective recipient of the aid at issue.

132 On the substance, and at the outset, since, as part of its examination of the connection between OA and NOA, the Commission relied particularly on the matters taken into account by the Court of Justice in the judgment of 12 May 2005 to find that 'NOA is a successor company to OA at least for the purposes of recovery of State aid arising prior to the [splitting]' (point 183 of the contested decision), it is appropriate to make clear the legal effect of that judgment in this case.

133 Contrary to the Commission's allegations before the General Court, that judgment can only be accepted as having the force of res judicata as regards recovery of the aid covered by the Decision of 11 December 2002, since the established failure to fulfil obligations related precisely to the failure to implement that decision.

134 In particular, as regards the finding that there was financial continuity between OA and NOA for the purposes of recovery of the aid at issue prior to the splitting, even if the relevant facts which could be taken into consideration are essentially the same, whether for the recovery of the aid required by the Decision of 11 December 2002 or for the recovery of the aid granted to OA prior to the splitting, as required by the contested decision, all the elements are not, however, strictly identical. The difference rests in the fact that the transfer of assets from OA to NOA, in the flight operations sector, by detailed arrangements which made recovery of the aid granted to OA impossible from NOA, took place after the adoption of the Decision of 11 December 2002, but prior to the initiation of the formal investigation procedure which led to the adoption, on 14 September 2005, of the contested decision.

135 However, the time of the transfer of the assets to the new company is among the criteria which may, to varying degrees according to the case, be taken into account. Indeed, it is clear from the case-law that, in order to determine whether the obligation to recover aid paid to a company in difficulty can be extended to a new company to which the former company has transferred certain assets, where that transfer gives rise to the conclusion that there was financial continuity between the two companies, the following elements may be taken into consideration: the purpose of the transfer (assets and liabilities, continuity of the workforce, bundled assets), the transfer price, the identity of the shareholders or owners of the acquiring firm and of the original firm, the moment at which the transfer was carried out (after the start of the investigation, the initiation of the procedure or the final decision) and, lastly, the economic logic of the transaction *(Italy and SIM 2 Multimedia v Commission*, paragraphs 78, 80 and 85).

136 In this case, it is therefore necessary to determine whether, taking account of the factual context specific to the present proceedings, the Commission could, without exceeding the limits of its discretion, transpose, in the contested decision, the reasoning followed by the Court of Justice in the judgment of 12 May 2005 to conclude that there was financial continuity between OA and NOA for the purposes of recovery of the aid at issue.

137 As regards, in particular, the criterion, the content and scope of which will be made clear later (see paragraph 146 below), relating to the time of the transfer of the assets, it is sufficient at this stage to recall that, in the case that gave rise to the judgment of 12 May 2005, the transfer of assets of the company

OA, which was in difficulties, to the new company NOA, in such a way as to make recovery of the aid covered by the Decision of 11 December 2002 impossible from the former company, had taken place after the adoption of that decision (see paragraph 134 above). In *Italy and SIM 2 Multimedia v Commission*, paragraph 77, and Case C-277/00 *Germany v Commission*, paragraph 71, on which the analysis expounded in the judgment of 12 May 2005 is impliedly based (see paragraphs 143 and 144 below), the transactions of 'evasion' alleged by the Commission had been carried out either during the formal investigation, or at a time when the competent national authorities were aware of the Commission's intention to initiate an investigation.

138 In this case, it is appropriate to observe that the order to provide information, as regards all the measures connected with OA's restructuring and privatisation, capable of involving evidence of aid, had been addressed to the Hellenic Republic on 8 September 2003. The Hellenic Republic and OA could therefore hardly be unaware, at the time of NOA's formation, that the measures in favour of OA prior to the splitting could be the subject of a Commission investigation and that they were a continuation of certain earlier aid, referred to in the Decision of 11 December 2002, accorded to OA in the form of the Hellenic Republic's forbearance in respect of the non-payment of tax and social security contributions.

139 In those circumstances, in view of the similarity of the factual context, the analysis accepted by the Court of Justice in the judgment of 12 May 2005 according to which, in order to restore a situation of undistorted competition in the economic sector concerned, the obligation to recover the aid paid to OA could be extended to NOA, to which OA's most profitable activities had been transferred, applies also, for the same reasons, as regards the aid prior to the splitting at issue in this case.

140 In that regard, this Court cannot accept the interpretation of the judgment of 12 May 2005 advocated by the applicants, which submit that the Court of Justice did not find that NOA was OA's successor for the purposes of recovery of the aid.

141 In fact, in the judgment of 12 May 2005, paragraphs 33 and 34, the Court of Justice accepted the Commission's argument that the operation which consisted of the transfer to NOA of the assets of OA's flight operations sector, free of all debts, by structuring that operation in such a way as to make it impossible, under national law, to recover debts of the former company OA from the new company NOA, had 'created an obstacle to the effective implementation of [the] Decision [of 11 December 2002] and to the recovery of the aid by means of which the [Hellenic Republic] had supported the commercial activities of that company' and '[t]he purpose of that decision, which aim[ed] to restore undistorted competition in the civil aviation sector, [had] thus [been] seriously compromised'.

142 By drawing attention to the necessity to restore the competitive situation in the civil aviation sector, the Court thus designated NOA, implicitly, as the effective recipient of the aid granted to OA and covered by the Decision of 11 December 2002, since that aid to the former airline OA had benefited the flight operations sector transferred to NOA.

143 Indeed, in the light of the Opinion of Advocate General Geelhoed ([2005] ECR I-3878, points 28 to 36), the judgment of 12 May 2005 must be understood as finding that there was, for the purposes of recovery of the aid required by the Decision of 11 December 2002, financial continuity between OA and NOA as regards the flight operations sector. Consequently, the new airline NOA could, in principle, in its capacity as the undertaking enjoying the effective benefit of that aid, be the subject of a national procedure to recover the aid referred to in the abovementioned decision, in order to restore undistorted competition in the economic sector concerned.

144 In support of his analysis, Advocate General Geelhoed relied, in particular, on the

judgment in *Italy and SIM 2 Multimedia v Commission*, in which the Court of Justice held that the fact of permitting an undertaking in difficulty to create, during the formal inquiry into the aid which it received, a subsidiary to which it then transferred its most profitable business activities would amount to accepting that any company may remove such assets from the parent undertaking when aid is recovered, which would risk depriving the recovery of the aid of its effect in whole or in part. To prevent the effectiveness of the decision from being frustrated and the market from continuing to be distorted, the Commission may be compelled to require that the recovery is not restricted to the original firm but is extended to the firm which continues the activity of the original firm, using the transferred means of production, in cases where certain elements of the transfer point to economic continuity between the two firms (point 33 of the Opinion).

145 In this case, the Hellenic Republic's and NOA's argument seeking, in essence, to challenge the fact that OA's main assets – which related to the flight operations sector – were transferred to NOA, free of most of the liabilities, and by arrangements which made recovery of the aid from that company impossible, tend, in fact, to put in issue the analysis on which the Court of Justice relied in its judgment of 12 May 2005. Indeed, contrary to the applicants' allegations, the principal relevant elements of fact and law already taken into consideration in that judgment have not changed in this case. In particular, whilst it is correct that, in that judgment, the Court noted that the assets of the flight operations sector had been transferred to NOA 'free of all debts', that finding – based on the information which had been provided to it by the parties – is explained by the fact that the Court was not called upon, as part of the action before it for failure to fulfil obligations, to examine in detail all the arrangements in the restructuring of the Olympic Airways Group, particularly as regards the transfer of a very small part of the liabilities to NOA, since all the long-term debts and 90% of the short-term debts remained with OA. In that context, the fact, relied upon in this case by the applicants, that OA retained the ground-handling, maintenance and training operations but 10% of its short-term debts, that is to say, debts payable in less than one month, were transferred to NOA, as stated in the Moore Stephens report, cannot change the analysis arising from the judgment of 12 May 2005.

146 Moreover, it is appropriate to point out that, contrary to the applicants' allegations, the criteria laid down in the case-law for identifying the effective recipient of aid are objective. Indeed, it follows from the case-law that financial continuity can be established, for the purposes of the recovery of aid, on the basis of various objective elements such as the absence of any payment in consideration for the transferred assets, or of a price consistent with market conditions, or the objective fact that the effect of the transfer is to evade the obligation to repay the aid at issue (see, to that effect, Case C-277/00 *Germany v Commission*, paragraph 86; the judgment of 12 May 2005, paragraphs 32 to 34; and *Italy and SIM 2 Multimedia v Commission*, paragraph 78). In that regard, contrary to the applicants' allegations, it does not follow from the judgment in *CDA Datenträger Albrechts v Commission* that the presence of an intentional element is necessary to find that the obligation to repay aid has been evaded by the transfer of assets. Likewise, it is appropriate to observe that the criterion relating to the time of the transfer of the assets (see paragraphs 135 to 138 above) is also objective and does not imply the existence of an intention to evade. It must be understood as meaning that the time of the transfer is capable of constituting, according to the circumstances of the case, evidence of evasion.

147 In that context, the Court cannot accept the applicants' argument that the restructuring of the Olympic Airways Group and the transfer of the flight operations to NOA were required by the economic logic of a more effective recovery of the aid granted to OA through the privatisation of NOA.

148 In that regard, the purpose of the obligation to recover aid is to restore the competitive situation in the economic sector

concerned, and not to enable the public administration to recover its debts (see, to that effect, Case C-277/00 *Germany v Commission*, paragraph 76). The economic logic of the asset transfer transaction must therefore be examined from the point of view of restoring the competitive situation in the sector concerned.

149 It follows therefrom that the subjective element relied upon by the applicants, consisting in the fact that the restructuring of the Olympic Airways Group and the formation of NOA, with a view to enabling the privatisation of NOA, among others, in the most favourable circumstances and with maximum profit, with the aim of ensuring the recovery of the aid through, in particular, the proceeds of the privatisation, is in any event irrelevant.

150 Finally, the present proceedings occur in particular circumstances, characterised by the fact that the restructuring of OA and the formation of NOA were not short-term transactions, intended to facilitate the privatisation. The transfer to NOA of the flight operations sector of the Olympic Airways Group was effected by legislation, derogating from the general law, and the entire capital of that new company was immediately vested in the Hellenic Republic. In those circumstances, in the absence of payment of any consideration, by a new acquirer, as long as the privatisation of the airline had not been concluded, there was no need to determine whether the amount of the aid granted to OA prior to the hiving-off could be regarded as included in a purchase price consistent with market conditions (see, to that effect, Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 77, and Case C-214/07 *Commission v France* [2008] ECR I-8357, paragraphs 57 and 58).

151 For all those reasons, the Commission's finding that there was financial continuity between OA and NOA for the purposes of recovery of the aid at issue granted to OA before the hiving-off cannot be held to be vitiated by manifest error of assessment.

152 Moreover, the contested decision contains a sufficient statement of reasons. The Commission clearly set out, in its examination of the connection between OA and NOA, in points 178 to 183 of that decision, the reasons for which it considered that there was, particularly in the light of the judgment of 12 May 2005, financial continuity between OA and NOA for the purposes of recovery of the aid at issue granted prior to the hiving-off. In that regard, it is appropriate to observe that, contrary to the applicants' allegations, the appraisal of the economic logic of NOA's formation, carried out in this case by the Commission in order to determine the effective recipients of the aid granted prior to the hiving-off, must be distinguished from the examination of the compatibility with the common market of the restructuring itself (see paragraph 99 above). The lack of such an examination by the Commission does not reveal therefore any insufficiency in the statement of reasons for the contested decision.

153 It follows therefore that the pleas in law alleging manifest error of assessment and breach of the duty to state reasons for the decision must be rejected as unfounded.

## Judgment of 11 December 2012, *Commission v Spain*, C-610/10, EU:C:2012:781

**Relevance:** Recovery from successor company, whether there is an enduring competitive advantage linked to receipt of the aid

### Facts

In 2002 the Court of Justice declared Spain's infringement for failure to recover illegal and incompatible aid from the *Magefesa* group (producer of domestic articles of stainless steel and small electric appliances) as prescribed by the Commission. The *Magefesa* group consisted of four undertakings, amongst which *Indosa*, which was subsequently declared insolvent in 1994 but continued its activities. Following the exchange of "voluminous" correspondence with the Spanish authorities, the Commission found in 2006 that the other three companies had ceased their activities and their assets had been sold at market price, so recovery was fully effected in their case, however, *Indosa* was continuing its activities, as *Indosa*'s liquidation agreement had been approved but that approval had been challenged, and after all the procedure for the liquidation of its assets had still not been initiated. The Spanish authorities informed the Commission that *Indosa*'s activities were being continued through its wholly-owned subsidiary CMD – which had been created by *Indosa*'s insolvency administrator in order to market the company's products and to which all of *Indosa*'s assets and staff had been transferred. Finding that *Indosa*'s assets had not been transferred in accordance with an open and transparent procedure, the Commission concluded that CMD was continuing the subsidised activity, and consequently, that in order to implement its original decision the incompatible aid had to be recovered from CMD. So the Commission requested (in 2009) that the Spanish authorities provided it with information concerning the timetable for the cessation of CMD's activities and the procedure for the disposal of its assets to be carried out under market conditions. Spain replied the same year that CMD had ceased its activities, and that former employees of CMD created a limited liability company with worker ownership, called *Euskomenaje*, the business activity of which was practically the same (manufacture and marketing of domestic articles and small electric appliances). Following the creation of *Euskomenaje*, the Administrator of the CMD insolvency authorised the provisional transfer of its assets to *Euskomenaje* pending conclusion of the liquidation procedure in respect of CMD. The Commission (not having been satisfied with the implementation of its original decision and the EU Court's judgment declaring the infringement for failure of recovery of 2002) started a new infringement procedure by sending a letter of formal notice at the end of 2009. Spain replied in 2010 January that *Indosa* and CMD were in the process of being wound up and that they had ceased their activities. The Commission brought the case before the Court, as *Euskomenaje* still continued its activities and recovery of the aid had not been effected from it.

### Held

First, in order the establish the infringement the Court recalled that in case illegal and incompatible aid cannot be recovered from the recipient undertaking, the initiation of insolvency proceedings and the registration of the claim for recovery in the schedule of liabilities may in principle satisfy the recovery obligation ("*restoration of the previous situation and the elimination of the distortion of competition resulting from the unlawfully paid aid may in principle be achieved through registration of the liability relating to the repayment of the aid in question in the schedule of liabilities*"). As the competent Spanish authorities had failed to register correctly liability relating to the repayment of the aid in the schedule of liabilities in the CMD insolvency proceedings, the Court ascertained that Spain had failed to fulfil its obligations

arising from the 2002 infringement judgment. However, in order to decide about the applicability of a penalty payment the Court had to establish whether the infringement still continued at the date of its dealing with the case (examination of facts by the Court), so the Court had to examine whether failure to recover the unlawful aid from *Euskomenaje* constituted a failure to recover aid as prescribed by the original Commission Decision of 1999.
In that regard the Court recalled first its well established case-law according to which registration of the liability in the schedule of liabilities is only sufficient if the insolvency proceedings result in the winding up of the undertaking (cessation of its activities) or the full recovery of the aid amount. ("*Registration of the liability relating to the repayment of the aid in question in the schedule of liabilities can meet the recovery obligation only if, where the State authorities are unable to recover the full amount of aid, the insolvency proceedings result in the winding up of the undertaking which received the unlawful aid, that is to say, in the definitive cessation of its activities.*") It is worth citing the exact wording of the Court's interpretation for all other cases: "*However, where the undertaking which received the unlawful aid is insolvent and a company has been created to continue some of the activities of the insolvent undertaking, the pursuit of those activities may, where the aid concerned is not recovered in its entirety, prolong the distortion of competition brought about by the competitive advantage which that company enjoyed in the market as compared with its competitors. Accordingly, such a newly created company may, if it retains that advantage, be required to repay the aid in question. That is inter alia the case where it is established that that company continues genuinely to derive a competitive advantage because of the receipt of that aid, especially where it acquires the assets of the company in liquidation without paying the market price in return or where it is established that the effect of that company's creation is circumvention of the obligation to repay the aid. […] That applies, in particular, if the payment of a market price is not sufficient to cancel out the competitive advantage linked to receipt of the unlawful aid.*" In order to assess the above, the Court took into account that CDM's assets were sold to its creditors (without an open procedure) and the assets were provisionally (for no consideration) transferred to *Euskomenaje; Euskomenaje* pursued the same activity, in CDM's buildings, using CDM's facilities, and was definitely created by CDM's former employees with the aim to pursue the original activities without assuming liability for CDM's debts; *Euskomenaje* used the *Magefesa* trade mark without acquiring it at an open tender. So the Court concluded that the competitive advantage linked to the receipt of the unlawful aid in question still existed, with the result that the registration, meanwhile, of the liabilities relating to the recovery of that aid in the schedule of liabilities was not sufficient to fulfil the recovery obligation as imposed by the original Commission decision.

***Findings of the Court***

"65 In order to determine whether the Kingdom of Spain adopted all the measures necessary to comply with the judgment in Commission v Spain, it must be ascertained whether the amounts of unlawful aid in question were repaid by the recipient undertakings. It must be stated in that regard that the dispute before the Court relates solely to the aid granted to Indosa.

[…]

69 It is common ground that, as at that date, the unlawful aid in question paid to Indosa had not been recovered from that company.

70 Furthermore, it is not disputed that that aid must be recovered from CMD, the company which was declared insolvent on 30 June 2008 after succeeding Indosa, itself declared insolvent on 19 April 1994.

71 If the aid unlawfully paid has to be recovered from an undertaking which is insolvent or subject to insolvency proceedings the purpose of which is to realise the assets and clear the liabilities, it is settled case-law that the fact that that undertaking is in difficulty or insolvent does not affect the obligation of recovery (see, inter alia, Case C-280/05 *Commission v Italy*, paragraph 28 and the case-law cited).

72 It is also settled case-law that the restoration of the previous situation and the elimination of the distortion of competition resulting from the unlawfully paid aid may in principle be achieved through registration of the liability relating to the repayment of the aid in question in the schedule of liabilities (see, to that effect, Case 52/84 *Commission v Belgium* [1986] ECR 89, paragraph 14; Case C-142/87 *Belgium v Commission*, [1990] ECR I-959, *'Tubemeuse'*, paragraphs 60 to 62; Case C-277/00 *Germany v Commission* [2004] ECR I-3925, paragraph 85; and Case C-331/09 *Commission v Poland* [2011] ECR I-2933, paragraph 60).

73 In the present case, it is common ground that the Autonomous Community of the Basque Country did not submit an application for registration of the liability relating to the repayment of the unlawful aid in question in the schedule of liabilities in the CMD insolvency proceedings until 10 June 2010, it being stated that that application related only to a minimal part of the aid in respect of which repayment had been required by Decision 91/1. That application subsequently underwent a number of corrections, the last of which was submitted on 7 December 2011. All those steps took place after the expiry of the period prescribed in the supplementary letter of formal notice.

74 It must thus be held that, as of 22 May 2010 – the date on which the period prescribed in the supplementary letter of formal notice expired – the liability relating to the repayment of the unlawful aid in question had not been registered in the schedule of liabilities in the CMD insolvency proceedings.

75 In those circumstances, the Kingdom of Spain cannot claim that, within the prescribed period, it took all the measures necessary to comply with the judgment in Commission v Spain.

76 Consequently, it must be held that, by failing, by the date of expiry of the period prescribed in the supplementary letter of formal notice issued by the Commission under Article 260(2) TFEU, to take all the measures necessary to comply with the judgment in Commission v Spain, relating, inter alia, to the recovery from Indosa of aid which, under Decision 91/1, was found to be unlawful and incompatible with the common market, the Kingdom of Spain has failed to fulfil its obligations under Article 260(1) TFEU."

[…]

"96 Having held that the Kingdom of Spain failed, within the period prescribed in the supplementary letter of formal notice, to comply with the judgment in Commission v Spain, the Court may impose on that Member State the payment of a penalty payment if the failure to fulfil obligations continues up to the time of the Court's examination of the facts (Case C-369/07 *Commission v Greece,* paragraph 59 and the case-law cited).

97 It is important therefore to ascertain whether that is the case.

[…]

98 In order to determine whether the failure to fulfil obligations of which the Kingdom of Spain stands criticised continued up until the Court's examination of the facts, it is necessary to consider the measures which were adopted, according to that Member State, after the period prescribed in the supplementary letter of formal notice.

99 In that regard, it should be pointed out that, as was observed in paragraph 72 above, if the undertaking which received the aid declared unlawful and incompatible with the common market has been declared insolvent, the restoration of the previous situation and the elimination of the distortion of competition resulting from the unlawfully paid aid may in principle be achieved through registration of

the liability relating to the repayment of such aid in the schedule of liabilities.

100 In the present case, the Autonomous Community of the Basque Country requested, on 10 June 2010, the registration of a liability in the amount of EUR 16 828.34 relating to the recovery of the unlawful aid in question. As that amount was manifestly lower than the total amount of the aid concerned, that Community corrected it a number of times, and that amount was increased, according to the Community's last declaration on 7 December 2011, to EUR 22 683 745, a sum which tallies with the Commission's estimates of the liability in question. By order of the Juzgado de lo Mercantil No 2 of Bilbao of 4 April 2012, that claim was registered against CMD in the amount of EUR 22 683 745.

[…]

102 It must therefore be held that the liability relating to the repayment of the unlawful aid in question has been registered in the schedule of liabilities in the CMD insolvency proceedings.

103 However, and contrary to the assertions made by the Kingdom of Spain, that fact is not in itself sufficient to mean that the obligation to comply with the judgment in Commission v Spain has been met.

104 As the Court has ruled on numerous occasions, registration of the liability relating to the repayment of the aid in question in the schedule of liabilities can meet the recovery obligation only if, where the State authorities are unable to recover the full amount of aid, the insolvency proceedings result in the winding up of the undertaking which received the unlawful aid, that is to say, in the definitive cessation of its activities (see, to that effect, Commission v Belgium, paragraphs 14 and 15; Commission v Poland, paragraphs 63 to 65; and Case C-454/09 Commission v Italy [2011] ECR, paragraph 36).

105 It is important to bear in mind, in that regard, that the purpose underlying the recovery of aid declared incompatible with the common market is to remove the distortion of competition caused by the competitive advantage which the recipient of the aid has enjoyed in the market as compared with its competitors, thereby restoring the situation which existed before the aid was paid (see, to that effect, Case C-348/93 *Commission v Italy* [1995] ECR I-673, paragraph 27, and *Commission v Poland*, paragraph 56).

106 However, where the undertaking which received the unlawful aid is insolvent and a company has been created to continue some of the activities of the insolvent undertaking, the pursuit of those activities may, where the aid concerned is not recovered in its entirety, prolong the distortion of competition brought about by the competitive advantage which that company enjoyed in the market as compared with its competitors. Accordingly, such a newly created company may, if it retains that advantage, be required to repay the aid in question. That is inter alia the case where it is established that that company continues genuinely to derive a competitive advantage because of the receipt of that aid, especially where it acquires the assets of the company in liquidation without paying the market price in return or where it is established that the effect of that company's creation is circumvention of the obligation to repay the aid (see, to that effect, *Germany v Commission*, paragraph 86). That applies, in particular, if the payment of a market price is not sufficient to cancel out the competitive advantage linked to receipt of the unlawful aid.

107 In such a case, the registration in the schedule of liabilities of the liability relating to the aid declared unlawful and incompatible with the common market is not sufficient, on its own, to make the distortion of competition thus created disappear.

108 The foregoing considerations are not invalidated by the judgment in Case C-496/09 Commission v Italy. It does not emerge from that judgment that, despite the fact that the aid in question had not been recovered in its entirety, the recipient could continue its

activities because the liability relating to the aid had been registered in the schedule of liabilities in the insolvency proceedings relating to the recipient.

109 It is stated in paragraph 69 above that, in the present case, the unlawful aid in question has not in fact been recovered. It must therefore be ascertained whether, at the time of the Court's examination of the facts, there is an enduring competitive advantage linked to receipt of that aid.

110 In that regard, a number of items in the file placed before the Court show that Euskomenaje continues to derive genuine benefit from that advantage. The successive developments in the CMD insolvency proceedings suggest that the objective of those developments was to ensure that the subsidised activities continued, even though the unlawful aid in question had not been fully recovered.

111 In particular, it emerges from the case-file that:

– the CMD liquidation plan, which was approved by an order of the Juzgado de lo Mercantil No 2 of Bilbao of 22 June 2010, provided, in essence, that all of that company's assets would be sold as a whole to its creditors – primarily its former employees – as partial compensation for their claims, although the liability relating to the unlawful aid in question was not at the time one of the liabilities acknowledged;
– shortly before that plan was approved, Euskomenaje, the activities of which are in essence identical to those carried on until then by CMD, had just been specifically created by CMD's former employees;
– the CMD liquidation plan 'clearly' pursued 'the objective of continuing the subsidised activities through a newly created company which would not assume liability for CMD's debts', according to a letter sent on 17 February 2011 by the Basque Government to the Chairman of Euskomenaje's Board of Directors;
– Euskomenaje uses Magefesa's industrial property, including the trade mark Magefesa, which was assigned to it directly, that is to say, without a competitive tendering procedure and for no consideration, as emerges, inter alia, from the letters of 3 December 2010 and 10 March 2011 sent by the Autonomous Community of the Basque Country to the Juzgado de Primera Instancia (Court of First Instance) No 10 of Bilbao;
– the opposition of the Autonomous Community of the Basque Country to the abovementioned assignment was unsuccessful;
– although, on appeal lodged by the Autonomous Community of the Basque Country after the case had been brought before the Court, the CMD liquidation plain was annulled by order of 16 January 2012 of the Audiencia Provincial of Bizkaia, CMD's insolvency administrators had in the meantime authorised the provisional transfer of the company's assets to Euskomenaje until the conclusion of the CMD liquidation procedure, that transfer being effected for no consideration, without advertising, without a transfer of title deeds and in a manner 'at variance with the elementary principles of managing liquidation proceedings', as is apparent, inter alia, from the letter referred to in the third indent of this paragraph;
– notwithstanding the order of 12 January 2011 deciding that CMD's activities were to cease and its places of business to be closed, Euskomenaje is still manufacturing domestic articles in CMD's facilities, making use of its buildings, machines and industrial property, as is apparent from the application submitted by the Autonomous Community of the Basque Country on 3 March 2011 to the Juzgado de lo Mercantil No 2 of Bilbao, specifically requesting that the activities of Euskomenaje which were still taking place in CMD's facilities be stopped.

112 In view of that evidence in the file placed before the Court, it must be held that the

competitive advantage linked to the receipt of the unlawful aid in question still exists, with the result that the registration, meanwhile, of the liabilities relating to the recovery of that aid in the schedule of liabilities is not sufficient to bring the situation into conformity with Decision 91/1 and the judgment in Commission v Spain.

113 In the light of the foregoing, it must be held that the failure to fulfil obligations of which the Kingdom of Spain stands criticised continued up until the Court's examination of the facts.

114 In those circumstances, the Court considers that an order imposing a penalty payment on the Kingdom of Spain is an appropriate financial means by which to encourage the Kingdom of Spain to take the measures necessary to put an end to the infringement established and to ensure full compliance with Decision 91/1 and the judgment in Commission v Spain."

## Judgment of 17 January 2018, *Commission v Greece*, C-363/16, EU:C:2018:12

**Relevance:** Definitive cessation of the activities of the beneficiary undertaking is only necessary where the recovery of the entire amount of the aid remains impossible throughout the insolvency proceedings

### Facts

In one of the most recent judgments concerning recovery of aid through insolvency proceedings the Court laid down an interpretation concerning the necessity of cessation of activities of the beneficiary undertaking in a situation when the aid was effectively fully recovered during the insolvency proceedings. According to the facts of the case giving rise to the judgment, United Textiles SA, a Greek textile undertaking received a State guarantee for the rescheduling of a bank loan and benefitted also from the State rescheduling of its social insurance debts. The Commission qualified the measures as incompatible aid and ordered their recovery. The Greek authorities certified the debts in amounts corresponding to the State aid measures declared incompatible and notified the Commission that United Textiles has been officially declared insolvent. In the context of the insolvency proceedings the Greek authorities notified the debts and also a public auction of United Textiles' assets has been initiated within the framework of those proceedings. However, shortly after that the Greek authorities informed the Commission that they had suspended the public auction of the assets for a period of six month in order to closely examine the possibility of relaunching the activity of United Textiles within the wider context of the policy of relaunching Greek industry and securing employment. As a reaction to that the Commission services called on the Greek authorities to proceed immediately to the full recovery of the aid or to continue the insolvency proceedings relating to the company. The Greek authorities than informed the Commission that the plan to relaunch United Textiles included the full and immediate recovery of the State aid granted, together with interest, before the possible relaunch of its activity. However, as the Commission was not satisfied with that solution, it brought an action for failure to fulfil the obligation of recovery before the CJEU:

### Held

The Court recalled its case-law concerning registration of the debt relating to the repayment of the aid as an appropriate measure for recovery in case the full amount cannot be recovered from the recipient undertaking. The Court also reminded that such a registration of liability is only sufficient if, in case the full amount of aid cannot be recovered throughout the insolvency proceedings, those proceedings result in the winding-up of the undertaking, that is to say, in the definitive cessation of its activities. However, it also follows from the same well-established case-law that the definitive cessation of the activities is only necessary if the full amount of aid cannot be recovered during (or as a result of) the insolvency proceedings. So the Commission wrongly tried to force the definitive cessation of United Textiles' activities in a case where the aid amount was entirely recoverable together with interest.

However, in order to assess the alleged infringement (for failure to fulfil recovery on time, as prescribed by the Commission decision), the Court had to examine whether such recovery was effected immediately, i.e. within the prescribed period. As the Court noted, "*it seems unlikely that the various steps in insolvency proceedings, from the initial petition for insolvency to the declaration of insolvency and registration in the schedule of liabilities, to the winding-up of the beneficiary and the full recovery of the aid in question or, as the case may be, the definitive cessation of the activities of the beneficiary, would normally be taken within the four-month period usually set by the Commission for the recovery of unlawful aid*." So the Court laid down

that in such a case recovery shall be deemed to be effected (distortion of competition shall be deemed to be eliminated) on time if registration of the debt relating to the repayment of the aid in question in the schedule of liabilities has been effected within the prescribed period. Since the Greek authorities did not fulfil that obligation within the 4 month period as laid down in the Commission decision, the Court granted the Commission's application and confirmed the infringement.

***Findings of the Court***

"It is clear from the case-law of the Court that the Member State to which a decision requiring recovery of unlawful aid declared incompatible with the internal market is addressed is obliged under Article 288 TFEU to take all measures necessary to ensure implementation of that decision. It must succeed in actually recovering the sums owed in order to eliminate the distortion of competition caused by the anticompetitive advantage procured by that aid (judgment of 24 January 2013, *Commission v Spain*, C-529/09, EU:C:2013:31, paragraph 91).

35 It follows from the first sentence of Article 14(3) of Regulation No 659/1999, read in the light of recital 13 of that regulation, that the recovery of unlawful aid found to be incompatible with the internal market is to be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow for the immediate and effective execution of the Commission's decision. To that end, the Member States concerned must take all necessary steps available in their respective legal systems, including provisional measures, without prejudice to EU law (judgment of 11 September 2014, *Commission v Germany*, C-527/12, EU:C:2014:2193, paragraph 38).

36 In cases in which the unlawful State aid paid must be recovered from recipient undertakings which are in financial difficulty or are insolvent, it should be recalled that such difficulties do not affect the obligation to recover (see, to that effect, judgment of 11 December 2012, *Commission v Spain*, C-610/10, EU:C:2012:781, paragraph 71). The Member State is therefore required, as the case may be, to bring about the winding-up of that company, to have its claim registered as one of that company's liabilities or to take any other measure enabling the aid to be recovered (see, to that effect, judgment of 6 December 2007, *Commission v Italy,* C-280/05, not published, EU:C:2007:753, paragraph 28).

37 According to settled case-law, restoration of the previous situation and elimination of the distortion of competition resulting from that aid may, in principle, be achieved through registration of the debt relating to the repayment of the aid in question in the schedule of liabilities (judgment of 11 December 2012, *Commission v Spain*, C-610/10, EU:C:2012:781, paragraph 72 and the case-law cited).

38 However, it must be noted that such registration can satisfy the recovery obligation only if, where the State authorities are unable to recover the full amount of aid, the insolvency proceedings result in the winding-up of the undertaking, that is to say, in the definitive cessation of its activities, which the State authorities are able to bring about in their capacity as shareholders or creditors (judgment of 13 October 2011, Commission v Italy, C-454/09, not published, EU:C:2011:650, paragraph 36).

39 It follows that the definitive cessation of the activities of the undertaking receiving aid is necessary only where the recovery of the entire amount of the aid remains impossible throughout the insolvency proceedings.

40 As to the temporal aspects of the recovery of the aid found to be unlawful and incompatible with the internal market, first, it should be recalled that delayed recovery,

namely, after the period prescribed, cannot satisfy the requirements of the FEU Treaty (judgment of 12 December 2013, Commission v Italy, C-411/12, not published, EU:C:2013:832, paragraph 29 and the case-law cited).

41 Second, it should be recalled, as the Advocate General noted in point 59 of her Opinion, that it seems unlikely that the various steps in insolvency proceedings, from the initial petition for insolvency to the declaration of insolvency and registration in the schedule of liabilities, to the winding-up of the beneficiary and the full recovery of the aid in question or, as the case may be, the definitive cessation of the activities of the beneficiary, would normally be taken within the four-month period usually set by the Commission for the recovery of unlawful aid.

42 In those circumstances, registration of the debt relating to the repayment of the aid in question in the schedule of liabilities must be regarded as being, in principle, an appropriate measure capable of ensuring the elimination of the distortion of competition, as was recalled in paragraph 37 above, provided that such a measure is followed either by the recovery of the full amount of that aid or by the winding-up of the undertaking and the definitive cessation of its activities, if such recovery remains impossible throughout the insolvency proceedings.

43 For such a measure to be effective, in particular having regard to the requirement of immediate implementation of the decision ordering the recovery of unlawful aid found to be incompatible with the internal market, it must, as the Advocate General noted in point 60 of her Opinion, be carried out within the period prescribed by the Commission (see, to that effect, judgments of 14 April 2011, *Commission v Poland*, C-331/09, EU:C:2011:250, paragraphs 60 to 65; of 13 October 2011, *Commission v Italy*, C-454/09, not published, EU:C:2011:650, paragraphs 38 to 42; and of 11 December 2012, *Commission v Spain*, C-610/10, EU:C:2012:781, paragraphs 73 to 75).)."

## Judgment of 19 June 2019, *Ja zum Nürburgring v Commission*, T-373/15, EU:T:2019:432

**Relevance:** Recovery from undertakings other than the initial beneficiary, financial continuity between undertakings

### Facts

The public undertaking owners of the Nürburgring complex received public support between 2002 and 2012 relating to the construction of a leisure park, hotels, restaurants and the organisation of Formula I races. Following a complaint from the applicant, *Ja zum Nürburgring*, a German motorsport association for the reinstatement and promotion of a race track at the Nürburgring, the Commission initiated the formal investigation procedure in March 2012 concerning the said support measures. In July 2012 the local court of Bad Neuenahr-Ahrweiler made a fining that the owners of Nürburgring ('the sellers') were insolvent and on November 1 2012 it opened the insolvency proceedings with no declining of jurisdiction. It was decided to proceed to the sale of the sellers's assets (the sale of the Nürburgring assets), for which a tender process was launched by the administrators on 15 May 2013. One week later the Commission informed Germany and the administrators of the criteria which the tender process was required to meet in order to rule out any element of State aid and informed them of the obligation on the part of the successful buyer to reimburse such advantages as it might receive. At the tender process 70 potential buyers expressed their interest; 24 potential buyers submitted indicative offers of which 18 were deemed eligible for due diligence; 13 potential buyers submitted confirmatory offers, four of which submitted an offer for all assets, and on 11 may 2014 the committee of the sellers' creditors, in the context of the sellers' insolvency proceedings, approved the sale of the Nürburgring assets to *Capricorn* (for EUR 77 million, while other offers were EUR 47 million and EUR 52 million). On 1 October 2014 the Commission concluded the formal investigation procedure concerning the aid measures, declared the aid unlawful and incompatible, ordered its recovery from the sellers and declared that any potential recovery of the aid to the sellers would not concern Capricorn or its subsidiaries. The Commission also concluded that the sale of the Nürburgring assets to *Capricorn* did not constitute aid, and laid down its assessment according to which the tender process had been conducted in an open, transparent and non-discriminatory manner, resulted in a sale price consistent with the market, and as a consequence that there was no economic continuity between the sellers and the buyer. The applicant brought an action for annulment against the Commission's decision.

### Held

Concerning the first part of the Commission's decision, according to which there was no economic continuity between the sellers and the buyer, and therefore any potential recovery of the aid to the sellers would not concern the buyer, the Court took note of the fact that that finding was made by the Commission on the basis of the formal investigation procedure. Since the admissibility of the applicant's action is subject to proof of individual concern by the decision itself (i.e. subject to proof that the market position of the applicant as the competitor of the beneficiary has been substantially affected, and not only its procedural rights had been infringed) which was not fulfilled in this case, that part of the application was found to be inadmissible.

However, as regards the second part of the Commission's decision declaring that the sale of the Nürburgring assets to Capricorn did not constitute State aid, the General Court found that that decision had been made without initiating the formal investigation procedure. Therefore, the application was held to be admissible (on the ground that a decision by the Commission taken without initiating the formal investigation procedure infringed the applicant's procedural rights, as the applicant, in its quality of an interested third party, might have sent its observations and relevant information to the Commission which could have influenced the Commission's assessment of the case). In such situations, in order to assess the lawfulness of the Commission's decision not to initiate the formal investigation procedure, the relevant question is, whether the Commission ought to have doubts or serious difficulties in determining that the measure did not constitute aid. In order to decide that, the Court recalled its well established case law laying down that in case if the assets of State aid beneficiaries are sold at a price lower than the market price, undue advantage could be conferred on the buyer. Furthermore, for the purposes of checking the market price, the form of the transfer of the company (in particular market tendering deemed to ensure that the sale takes place under market conditions) may be taken into consideration. So where an undertaking is sold by way of an open, transparent and unconditional tender procedure, it can be presumed that the market price corresponds to the highest offer (on condition that it is established, first, that that offer is binding and credible and, secondly, that the consideration of economic factors other than the price is not justified). Finally, the question whether a tender procedure has been open and transparent is to be determined on the basis of a body of evidence specific to the circumstances of the case at issue. As the applicant was unable to submit sufficient evidence according to which, on the basis of the case-law recalled, the Commission should have had doubts or serious difficulties concerning the openness and transparency of the tender procedure at issue, the General Court dismissed the application.

### *Findings of the Court*

"39 The parties agree that the first contested decision was taken after a formal investigation procedure.

40 In that regard, and in the first place, it must be recalled that, in its judgment of 17 September 2015, *Mory and Others v Commission* (C-33/14 P, EU:C:2015:609, paragraph 104), the Court of Justice held that a decision on economic continuity must be regarded as a decision which is 'related and complementary' to the final decision preceding it on the aid concerned, in so far as it defines the scope thereof as regards the status of beneficiary of that aid and, therefore, as regards that of the party obliged to repay that aid, following the occurrence of an event after the adoption of that decision, such as the acquisition by a third party of the assets of the initial beneficiary of that aid.

41 In the present case, by the first contested decision, the Commission, after finding that there was no economic continuity between the sellers and the buyer, decided that any potential recovery of the aid to the sellers would not concern the buyer.

42 It is therefore appropriate to find that the first contested decision is a decision which is 'related and complementary' to the decision on the aid to the sellers taken after the formal investigation procedure.

[…]

130 By the first three parts of the first plea and by the second and fourth pleas, the applicant submits, in essence, that the Commission erred in law in finding that the tender process had been open, transparent, non-discriminatory and unconditional.

131 Moreover, the applicant submits that the requirement for transaction security was not applied, since the letter from Deutsche Bank of 10 March 2014 did not constitute proof of financing of Capricorn's offer.

132 It is necessary to ascertain, in view of those two main claims, whether the examination carried out by the Commission with regard to the proper conduct of the tender process was of such a kind as to rule out such serious difficulties in assessing the measure concerned as to justify the initiation of a formal investigation procedure.

133 According to consistent case-law, where an undertaking that has benefited from aid that is incompatible with the internal market is bought at the market price, that is to say, at the highest price which a private investor acting under normal competitive conditions was ready to pay for that company in the situation it was in, in particular after having enjoyed State aid, the aid element is assessed at the market price and included in the purchase price. In such circumstances, the buyer cannot be regarded as having benefited from an advantage in relation to other market operators (see, to that effect, judgment of 29 April 2004, *Germany v Commission*, C-277/00, EU:C:2004:238, paragraph 80 and the case-law cited).

134 If, on the contrary, the assets of State aid beneficiaries are sold at a price lower than the market price, undue advantage could be conferred on the buyer (see, to that effect, judgment of 28 March 2012, Ryanair v Commission, T-123/09, EU:T:2012:164, paragraph 161).

135 For the purposes of checking the market price, the form of the transfer of a company, in particular, for example, public tendering, deemed to ensure that a sale takes place under market conditions, may be taken into consideration. It follows that, where an undertaking is sold by way of an open, transparent and unconditional tender procedure, it can be presumed that the market price corresponds to the highest offer, provided that it is established, first, that that offer is binding and credible and, secondly, that the consideration of economic factors other than the price is not justified (see, to that effect, judgments of 24 October 2013, *Land Burgenland and Others v Commission*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraphs 93 and 94, and of 16 July 2015, *BVVG*, C-39/14, EU:C:2015:470, paragraph 32).

136 According to the case-law, the question whether a tender procedure has been open and transparent is determined on the basis of a body of evidence specific to the circumstances of each case (see judgment of 7 March 2018, *SNCF Mobilités v Commission,* C-127/16 P, EU:C:2018:165, paragraph 68 and the case-law cited).”