Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

29 July 2024*

(Appeal – State aid – SA.33846 (2015/C) (ex 2014/NN) (ex 2011/CP) – Relevant issue post-dating the publication of the decision initiating the formal investigation procedure – Identification of the beneficiary of the aid – Obligation to publish an amending opening decision – Right of the beneficiary of the aid to submit comments – Essential procedural requirement – Incompatibility with the internal market – Recovery of the aid ordered by the European Commission – Amount to be recovered – Competence of the Member State concerned)

In Case C-697/22 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 11 November 2022,

Koiviston Auto Helsinki Oy, formerly Helsingin Bussiliikenne Oy, established in Helsinki (Finland), represented by O. Hyvönen and N. Rosenlund, asianajajat,

appellant,

the other parties to the proceedings being:

European Commission, represented by M. Huttunen, J. Ringborg and F. Tomat, acting as Agents,

defendant at first instance,

Republic of Finland,

Nobina Oy, established in Espoo (Finland),

Nobina AB, established in Solna (Sweden),

interveners at first instance,

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, O. Spineanu-Matei, J.-C. Bonichot (Rapporteur), S. Rodin and L.S. Rossi, Judges,

Advocate General: L. Medina,

* Language of the case: Finnish.

Registrar: A. Juhász-Tóth, Administrator,

having regard to the written procedure and further to the hearing on 22 February 2024,

after hearing the Opinion of the Advocate General at the sitting on 16 May 2024,

gives the following

Judgment

1 By its appeal, Helsingin Bussiliikenne Oy, now Koiviston Auto Helsinki Oy, seeks to have set aside the judgment of the General Court of the European Union of 14 September 2022, *Helsingin Bussiliikenne* v *Commission* (T-603/19, EU:T:2022:555; 'the judgment under appeal'), by which the General Court dismissed its action for the annulment of Commission Decision (EU) 2020/1814 of 28 June 2019 on State aid SA.33846 – (2015/C) (ex 2014/NN) (ex 2011/CP) implemented by Finland for Helsingin Bussiliikenne Oy (OJ 2020 L 404, p. 10; 'the decision at issue').

Legal context

2 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9), provides, in Article 1 thereof, entitled 'Definitions':

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

…

(h) "interested party" means any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.'

3 Under Article 6 of that regulation, entitled 'Formal investigation procedure':

'1. The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the [European] Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the internal market. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed 1 month. In duly justified cases, the Commission may extend the prescribed period.

2. The comments received shall be submitted to the Member State concerned. If an interested party so requests, on grounds of potential damage, its identity shall be withheld from the Member State concerned. The Member State concerned may reply to the comments submitted within a prescribed period which shall normally not exceed 1 month. In duly justified cases, the Commission may extend the prescribed period.'

Background to the dispute

4 Helsingin Bussiliikenne ('the former HelB') operated bus routes in the Helsinki area (Finland) and offered charter transport and bus leasing services. It was wholly owned by Helsingin kaupunki (City of Helsinki, Finland).

5 The background to the dispute was set out in paragraphs 3 to 9 of the judgment under appeal as follows:

'3 Between 2002 and 2012, the City of Helsinki took various measures in favour of HKL-Bussiliikenne [Oy] and the former HelB ("the measures at issue"). Accordingly, first, in 2002, HKL-Bussiliikenne was granted a EUR 14.5 million equipment loan to fund the procurement of bus transport equipment. The former HelB assumed that loan on 1 January 2005. Second, the City of Helsinki granted the former HelB, upon its establishment, a capital loan in the total amount of EUR 15 893 700.37 to refinance certain liabilities of HKL-Bussiliikenne and Suomen Turistiauto [Oy]. Third, on 31 January 2011 and 23 May 2012, the City of Helsinki granted the former HelB two new capital loans in the amounts of EUR 5.8 million and EUR 8 million respectively.

4 On 31 October 2011, the public transport services Nobina Sverige AB and Nobina Finland Oy lodged a complaint with the European Commission, which their parent company, Nobina AB, joined on 15 November 2011. By that complaint, they alleged that the Republic of Finland had granted unlawful aid to the former HelB. On 22 November 2011, the Commission forwarded that complaint to the Republic of Finland.

5 By Decision C(2015) 80 final of 16 January 2015 on measure SA.33846 (2015/C) (ex 2014/NN) (ex 2011/CP) – Finland – Helsingin Bussiliikenne Oy (OJ 2015 C 116, p. 22; "the opening decision"), the Commission initiated the formal investigation procedure under Article 108(2) TFEU regarding, inter alia, the measures at issue. That decision was published in the *Official Journal of the European Union* on 10 April 2015 and interested parties were invited to submit their comments within one month of that publication. …

6 Moreover, on 24 June 2015, during the procedure, the City of Helsinki informed the Commission of the implementation of the sale process of the former HelB. On 5 November 2015, the Republic of Finland forwarded to the Commission the draft sales contract drawn up with the [appellant].

7 On 14 December 2015, the former HelB was sold to … Viikin Linja Oy. In accordance with the terms of the deed of sale, Viikin Linja Oy was renamed Helsingin Bussiliikenne Oy ("the new HelB"). The transaction documents included a provision fully indemnifying the buyer of the former HelB in case of a State aid recovery claim ("the indemnification provision") and part of the sale price was deposited into an escrow account until a final decision on State aid has been reached or, at the latest, until 31 December 2022. Those transaction documents also included an earn-out mechanism on the basis of which the buyer undertook to pay the seller, into the same escrow account, a bonus if the previously agreed profit levels were exceeded.

8 The transfer to Viikin Linja covered all the business operations of the former HelB. The former HelB had no assets left except for the sums included in or credited to the escrow account. The liabilities arising from the measures at issue were not transferred to the new HelB. Following the sale of the former HelB, it was exempted by the City of Helsinki from repaying the

outstanding amount due in respect of the 2002 equipment loan. Furthermore, on 11 December 2015, the City of Helsinki converted the capital loans of 2005, 2011 and 2012, which had not been repaid, into equity of the former HelB.

9 On 28 June 2019, the Commission adopted the decision [at issue, t]he operative part of [which] is worded as follows:

"Article 1

The State aid amounting to EUR 54 231 850 unlawfully granted by [the Republic of] Finland under [the] Measures [at issue] […], in breach of Article 108(3) [TFEU], in favour of Helsingin Bussiliikenne Oy is incompatible with the internal market.

Article 2

1. [The Republic of] Finland shall recover the aid referred to in Article 1 from the beneficiary.

2. In view of the economic continuity between [the former] HelB (now Helsingin kaupungin Linja-autotoiminta Oy) and [the] new HelB (full name – Helsingin Bussiliikenne Oy, previously – Viikin Linja Oy), the obligation to repay the aid shall be extended to the new HelB (full name – Helsingin Bussiliikenne Oy).

3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

…

Article 4

1. Within two months following notification of this Decision, [the Republic of] Finland shall submit the following information to the Commission:
(a) the total amount (principal and recovery interests) to be recovered from the beneficiary;

…"'

The procedure before the General Court and the judgment under appeal

6 By application lodged with the General Court Registry on 9 September 2019, the new HelB brought an action seeking the annulment of the decision at issue.

7 In support of its action, it raised five pleas in law, the first alleging that the decision at issue was adopted in violation of its procedural rights, the second, that the Commission committed a manifest error in its assessment of the existence of economic continuity between the former HelB and the new HelB, the third, that insufficient reasons were given for the decision at issue, the fourth, that the principles of the protection of legitimate expectations and of proportionality were not observed, and the fifth, that Article 107(1) TFEU was infringed.

8 By the judgment under appeal, the General Court dismissed that action.

Forms of order sought by the parties to the appeal

9 By its appeal, the appellant claims that the Court of Justice should:

– set aside the judgment under appeal;

– annul the decision at issue; and

– order the Commission to pay all the costs incurred by the appellant before the General Court and the Court of Justice, together with statutory interest.

10 The Commission contends that the Court should:

– dismiss the appeal; and

– order the appellant to pay all the costs incurred by the Commission.

The appeal

11 In support of its appeal, the appellant puts forward two grounds of appeal, the first alleging a substantial procedural error and the second alleging a failure to observe the principle of proportionality.

The first ground of appeal

Arguments of the parties

12 By the first ground of appeal, the appellant alleges a substantial procedural error.

13 By the first part of that ground of appeal, the appellant submits that the General Court erred in law in holding that the Commission was not required to extend the formal investigation procedure if it wanted to decide on the economic continuity between the former HelB and the new HelB. According to the appellant, the General Court erred in holding, in paragraph 40 of the judgment under appeal, that the extension, not provided for in the opening decision, of the obligation to repay the State aid granted to the former HelB had not extended the subject matter of that procedure, as that subject matter remained limited to the aid referred to in that decision. The appellant claims that the transfer of the former HelB, which took place on 14 December 2015, was a new issue that was not reflected in the opening decision, which required the Commission to rectify or extend the formal investigation procedure.

14 By the second part of that ground of appeal, the appellant submits that the General Court erred in holding, in paragraph 51 of the judgment under appeal, that the infringement of Article 108(2) TFEU, committed by the Commission by failing to involve the appellant in the formal investigation procedure, did not constitute an infringement of an essential procedural requirement, but only a procedural irregularity, which could entail the annulment of the decision at issue only if it were shown that in the absence of such irregularity that decision might have been substantively different.

15 The appellant submits that the General Court also erred in stating, in paragraphs 50 and 51 of the judgment under appeal, that the Commission's failure to involve interested parties in the administrative procedure could constitute an infringement of an essential procedural requirement only if that failure concerned the content of the opening decision.

16 According to the appellant, first, that view of the General Court varies the right of the purchaser of an undertaking in receipt of State aid to submit its comments on the formal procedure for investigating that aid, making it dependent on the time at which the acquisition of that undertaking takes place.

17 Second, it is contrary to the principle of equal treatment to place the recipient of a transfer of a business which takes place during the formal investigation procedure in a less favourable position than that of the recipient of a transfer of a business which occurs prior to the publication of the decision initiating the procedure, which therefore has the opportunity to submit comments on that matter at the stage of that decision, or than that of the recipient of a transfer of a business which occurs only subsequent to the Commission's final decision, which may submit comments during the national implementation stage.

18 Third, the appellant states that the abovementioned approach of the General Court would lead to a situation in which an interested party in a situation comparable to that of the appellant is not given any opportunity to submit its comments, relevant information or evidence before the Commission adopts a decision on the recovery of aid that it has found to be unlawful.

19 According to the appellant, the General Court based the distinction that it drew between an infringement of an essential procedural requirement and another procedural irregularity on case-law precedents whose facts differ from those in the present case. In the cases which gave rise to the judgment cited in paragraph 51 of the judgment under appeal and to the case-law to which the judgment cited refers, the party concerned had the opportunity to be heard and the failure to comply with the obligation to hear that party related only to certain documents in the file. Furthermore, the appellant submits that the case-law referred to in the judgment cited in paragraph 51 of the judgment under appeal has its origin in facts that are not comparable to those in the present case.

20 The appellant submits that, by contrast, it is apparent from the judgment of 11 December 2008, *Commission* v *Freistaat Sachsen* (C-334/07 P, EU:C:2008:709, paragraph 55), that, 'where the Commission decides to initiate the formal investigation procedure in respect of proposed aid, it must give interested parties, including the undertaking(s) concerned, an opportunity to submit their comments, [t]hat rule [being] in the nature of an essential procedural requirement'.

21 The appellant claims also that the right to be heard in an administrative procedure is a fundamental right recognised by EU law and enshrined in Article 41 of the Charter of Fundamental Rights of the European Union, entitled 'Right to good administration'. According to the appellant, infringement of that right constitutes a substantive procedural defect justifying annulment of the decision at issue, without the injured party being required to prove the possible effects of being heard on the decision to be taken in the administrative procedure. By finding that the outright deprivation of the right to be heard is merely a procedural irregularity, the General Court suggests that that right is not a fundamental right, but a right that may be infringed with impunity.

22 The appellant states that the right to be heard is also a general principle of law, enshrined with regard to competition law by the judgment of 23 October 1974, *Transocean Marine Paint Association* v *Commission* (17/74, EU:C:1974:106, paragraph 15), which emphasises that that right is all the more important where the decision at issue imposes 'considerable obligations having far-reaching effects'.

23 According to the appellant, in the present case, the decision at issue has serious consequences for the new HelB, since it required it to pay a sum of approximately EUR 54 million, together with interest linked to the recovery of the unlawful State aid, putting it in danger of bankruptcy and compelling it to seek restructuring in June 2021. The restructuring procedure ended in February 2022, with the sale of the Koiviston Auto group that had acquired the new HelB, since the family that had founded that group in the 1920s was forced to make that sale in order to be able to pay the amount recovered. By contrast, that recovery benefited the City of Helsinki, even though it was responsible for the unlawful State aid, since it recovered that aid which it had granted to its own company, while retaining the full purchase price paid by the appellant.

24 By the third part of the first ground of appeal, the appellant submits that, even if it were accepted that the Commission did not infringe an essential procedural requirement in the present case and that it committed only a procedural irregularity, the fact remains that the General Court erred in law in holding, in paragraph 64 of the judgment under appeal, that the appellant's comments would not have allowed the decision at issue to be altered.

25 The appellant claims that that error is the consequence of another error committed by the General Court, in paragraph 56 of the judgment under appeal, inasmuch as that Court stated that the comments which, according to the appellant, could have been submitted in the absence of the procedural irregularity found, related to only one of the criteria used to determine the existence of economic continuity, namely the economic logic of the transaction. According to the appellant, as is apparent, on the contrary, from paragraphs 42 and 52 of the judgment under appeal, it claimed before the General Court that the formal investigation procedure would or could have led to a different result, primarily as regards the application of the principle of economic continuity and the genuine nature of the transfer of the State aid to the new HelB.

26 Moreover, the appellant submits that, where a Commission decision is challenged before the Courts of the European Union, that decision is examined on the basis of the information and documents available to the Commission at the time when the decision was adopted (judgment of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 91). Consequently, since applicants are reliant only on the material in the file in the formal investigation procedure, they are not in a position, including in the context of judicial proceedings, to submit evidence showing that their participation in that formal investigation procedure could have had an impact on that decision. Therefore, they are not in a position to adduce evidence that that participation could have had an impact on that decision.

27 In its reply, the appellant states that it agrees with the Commission's assessment, set out in paragraph 73 of its response, that the examination of the existence of State aid and the examination of economic continuity are separate matters. That is why, according to the appellant, interested parties should be heard on those two matters.

28 The Commission disputes the appellant's arguments.

29 In the first place, as regards the claim that the Commission was required to correct or extend the opening decision, that institution submits that the General Court correctly held, in paragraph 39 of the judgment under appeal, that the Commission had not changed its view, subsequent to that decision, as to the beneficiary of the State aid and, in paragraph 40 of that judgment, that it had also not changed its view as to the subject matter of that aid, which was limited to the four measures identified in that decision. The finding of economic continuity between the new HelB and the former HelB did not therefore alter the Commission's assessment. Thus, according to the Commission, the General Court did not err in law, in paragraph 41 of the judgment under appeal, in finding that the Commission was not required to correct or extend the opening decision.

30 In the second place, the Commission disputes the alleged infringement of an essential procedural requirement inasmuch as it failed to invite the new HelB to submit its comments on economic continuity.

31 In that regard, first, as regards the error of law allegedly committed by the General Court concerning the principle of equality, in so far as that Court held that the right of the recipients of a transfer of a business to be heard during the formal investigation procedure differs according to the date of the transfer, the Commission claims that the distinction made by the General Court is justified by an objective difference in circumstances. If the transfer takes place after the initiation of the formal investigation procedure, the buyer would be aware of the ongoing formal investigation procedure and would be deemed to accept the existing situation, that is to say, the fact that the Commission may decide that the State aid at issue is incompatible with the internal market and must be recovered. In those circumstances, there is nothing to prevent the buyer, which is, consequently, the economic successor, from taking that risk into consideration in its negotiations with the seller.

32 The Commission submits that, in the present case, in particular, there can be no doubt that the new HelB was informed of the ongoing formal investigation procedure, since a clause in the sales contract guaranteed it full indemnification in case of a State aid recovery claim.

33 Second, as regards the fact, according to the appellant, that the distinction drawn by the General Court between an infringement of an essential procedural requirement and another procedural irregularity is unfounded, the Commission submits that that distinction follows from the case-law of the Court of Justice. By confusing the right to be heard with the right to be involved in the administrative procedure concerning State aid, the appellant fails to take account of that case-law. Thus, in the judgment of 11 March 2020, *Commission* v *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo* (C-56/18 P, EU:C:2020:192), which, according to the Commission, the appellant incorrectly considers to be irrelevant to the present case, the Court of Justice held that the interested parties had been involved in the administrative procedure, but not to a sufficient extent.

34 The Commission states that a procedural irregularity entails the annulment of the decision at issue only if it is shown that in the absence of such irregularity that decision might have been substantively different, as the General Court pointed out in paragraph 51 of the judgment under appeal.

35 Third, according to the Commission, as regards the error allegedly committed by the General Court in finding that the fact that the appellant was not invited to submit its comments on the opening decision does not constitute an infringement of an essential procedural requirement, the Commission claims that there is no such infringement where the issue which the Commission is

alleged to have omitted from a decision to initiate the formal investigation procedure does not constitute an issue of fact or law relevant to the investigation of the aid measure at issue (judgment of 10 March 2022, *Commission* v *Freistaat Bayern and Others*, C-167/19 P, EU:C:2022:176, paragraph 96). In the present case, the Commission did not omit any issue relevant to the investigation of the measures at issue in the opening decision.

36 Fourth, the Commission maintains that, in any event, it is not obliged to involve in the formal investigation procedure an economic successor which acquires a company after the adoption of the decision to initiate that procedure. It therefore states that the General Court erred in law in paragraphs 47, 48 and 51 of the judgment under appeal by holding that it had infringed Article 108(2) TFEU and asks the Court of Justice to replace the erroneous grounds set out in those paragraphs with the grounds set out below.

37 The Commission submits that the obligations arising from Article 108(2) TFEU are limited to the requirements relating to the decision initiating the formal investigation procedure and are linked to that decision. As regards, more specifically, the requirement to involve interested parties in an appropriate manner in the administrative procedure concerning State aid, that requirement cannot have the effect of enabling interested parties to obtain the same rights as the Member State concerned. The General Court's finding that the Commission should have specifically involved the appellant in the formal investigation procedure and given it the opportunity to submit its comments on the economic continuity aspects due to the particular circumstances of the case calls into question the principle that State aid investigations are primarily procedures against the Member State that granted the aid at issue.

38 Fifth, as regards the claim that the alleged infringement of Article 108(2) TFEU adversely affects the right to be heard enshrined in Article 41 of the Charter of Fundamental Rights and is therefore in the nature of an infringement of an essential procedural requirement, the Commission submits that interested parties do not have the right to be heard, but only the right to be involved in the administrative procedure followed by the Commission to the extent appropriate in the light of the circumstances of the case (judgments of 11 March 2020, *Commission* v *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo*, C-56/18 P, EU:C:2020:192, paragraph 71 and the case-law cited, and of 29 September 2021, *Ryanair and Others* v *Commission*, T-448/18, EU:T:2021:626, paragraph 102).

39 The Commission states that the EU Courts cannot, on the basis of general principles of law, such as the right to be heard, extend the procedural rights granted to interested parties by the FEU Treaty and secondary legislation. Proceedings under Article 108(2) TFEU are *inter partes* proceedings only for the Member State concerned, but not for the other parties (judgment of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraph 168). In a procedure for reviewing State aid, beneficiaries of State aid cannot therefore rely on the rights of the defence.

40 According to the Commission, the obligation for it to communicate in advance to the beneficiaries of the State aid the evidence on which it intends to base its final decision amounts to establishing an adversarial debate in the same way as is offered to the Member State responsible for granting the aid. Such an obligation would be contrary to the judgment of 11 March 2020, *Commission* v *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo* (C-56/18 P, EU:C:2020:192, paragraphs 74 and 75).

41 In the third place, as regards the error of law allegedly committed by the General Court in holding that the appellant's comments would not have made it possible to alter the decision at issue, the Commission submits that that complaint is manifestly inadmissible, since it concerns, in reality, the General Court's assessment of the evidence.

42 Furthermore, the Commission claims that the appellant's assertion that the General Court placed an impossible burden on it to adduce evidence, since it was allowed to submit only evidence of which the Commission had been aware at the date of the decision at issue, is unfounded. The Commission states that the appellant was able to submit before the General Court all relevant evidence and that the General Court was entitled to hold that the appellant had not adduced evidence that was incumbent upon it to provide.

Findings of the Court

43 By its first ground of appeal, the appellant submits that the General Court erred in law in finding, in paragraph 51 of the judgment under appeal, that the Commission had not infringed an essential procedural requirement by failing to give it the opportunity to submit its comments during the formal investigation procedure in respect of the measures at issue.

44 By the first part of that ground of appeal, the appellant criticises the General Court for having, in paragraphs 36 to 41 of the judgment under appeal, rejected its argument that the Commission was required to supplement or correct the opening decision following the transfer of the former HelB.

45 As a preliminary point, it must be borne in mind that, in the context of the procedure for reviewing State aid provided for in Article 108 TFEU, the preliminary stage of the procedure for reviewing aid under Article 108(3) TFEU, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question, must be distinguished from the examination under Article 108(2) TFEU. It is only in connection with the latter examination, which is designed to enable the Commission to be fully informed of all the facts of the case, that the FEU Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (judgment of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 27 and the case-law cited). That obligation is in the nature of an essential procedural requirement, since it is intrinsically linked to the correct formation or expression of the intention of the author of the act (see, to that effect, judgments of 11 December 2008, *Commission* v *Freistaat Sachsen*, C-334/07 P, EU:C:2008:709, paragraph 55, and of 10 March 2022, *Commission* v *Freistaat Bayern and Others*, C-167/19 P and C-171/19 P, EU:C:2022:176, paragraph 89).

46 The scope of that obligation is specified by Article 1(h) of Regulation No 2015/1589, which provides that the category of 'interested parties' consists of 'any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations'.

47 In that regard, the Court has held that, since the procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State responsible for granting the aid, interested parties other than that Member State cannot themselves seek to engage in an adversarial debate with the Commission in the same way as is offered to that Member State (see, to that effect, judgment of 24 September 2002, *Falck and Acciaierie di Bolzano* v *Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524, paragraphs 81 and 82), and that the recipient of the aid

does not have more extensive rights than other interested parties (see, to that effect, judgment of 11 March 2020, *Commission* v *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo*, C-56/18 P, EU:C:2020:192, paragraph 75).

48 In those circumstances, the Court held that publication of a notice in the *Official Journal of the European Union* is an appropriate means of informing all the parties concerned that a formal investigation procedure has been initiated. That communication is intended to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action. Such a procedure also guarantees to the other Member States and the sectors concerned an opportunity to make their views known (judgment of 24 September 2002, *Falck and Acciaierie di Bolzano* v *Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524, paragraph 80).

49 However, interested parties are able to submit their comments effectively only if the published decision expressly and clearly mentions the relevant issues of fact and law, as provided for in the first sentence of Article 6(1) of Regulation 2015/1589 (judgment of 10 March 2022, *Commission* v *Freistaat Bayern and Others*, C-167/19 P and C-171/19 P, EU:C:2022:176, paragraph 91).

50 It follows that simply publishing a decision to initiate the formal investigation procedure, without the content of such a decision being in accordance with the requirements of that provision, does not mean that the obligation imposed on the Commission at the time of the formal investigation procedure, one that is classified as an essential procedural requirement within the meaning of the second paragraph of Article 263 TFEU, has been satisfied (judgment of 10 March 2022, *Commission* v *Freistaat Bayern and Others*, C-167/19 P and C-171/19 P, EU:C:2022:176, paragraph 92).

51 The relevant issues of fact and law which must be included in the decision to initiate the formal investigation procedure are those which that procedure is intended to examine with a view to the adoption of the final decision by which the Commission takes a decision on the existence and compatibility of the State aid at issue and, where appropriate, on the obligation to recover that aid.

52 Furthermore, the Court has held that there may be circumstances in which the establishment of facts that are new or different from those referred to in the decision initiating the formal investigation procedure or the adoption of substantial amendments to the relevant legal framework may require greater involvement of the interested parties, or even require that a supplementary or corrected opening decision be published (judgment of 11 November 2021, *Autostrada Wielkopolska* v *Commission and Poland*, C-933/19 P, EU:C:2021:905, paragraph 71).

53 Where new issues arising after the decision to initiate the formal investigation procedure are 'relevant issues of fact and law', within the meaning of Article 6(1) of Regulation 2015/1589, the Commission's obligation to inform all interested parties thereof so that they are able to submit their comments can only be complied with by means of the publication of a supplementary opening decision. As has been recalled in paragraph 46 above, interested parties are an indeterminate group of addressees; it is only by way of publication that it can be ensured that they are informed.

54 In the present case, the former HelB, designated as the beneficiary of the State aid at issue in the opening decision, was acquired by the new HelB subsequent to that decision.

55 As the Advocate General observed in point 49 of her Opinion, it is apparent from paragraphs 42 to 46 of the judgment under appeal that the Commission had been informed of the process of the transfer of the former HelB's business since June 2015 and that a period of three and a half years elapsed between the date of that transfer to the new HelB and the date of the adoption of the decision at issue. In that regard, it is important to note that the Commission referred solely to the former HelB as a potential beneficiary of the aid at issue in the opening decision. Consequently, that transfer, once brought to the Commission's attention, was a relevant issue for its investigation, within the meaning of Article 6(1) of Regulation 2015/1589.

56 Nevertheless, that relevant issue could not be included in the opening decision, as it arose after that decision was published. In those circumstances, as set out in paragraph 53 above, the Commission was required, in order to allow the interested parties effectively to submit their comments, as required by Article 108(2) TFEU and Article 6(1) of Regulation 2015/1589, to publish a supplementary opening decision taking account of that new relevant issue.

57 As the Advocate General observed in points 53 and 54 of her Opinion, in the absence of such publication, neither the appellant nor any other interested party, in particular the undertakings competing with the appellant, were, at any stage of the formal investigation procedure, given an opportunity to submit their comments on the economic continuity between the former HelB and the new HelB and, consequently, on the possibility of recovering the State aid at issue from the new HelB.

58 It follows from the foregoing that the first part of the first ground of appeal, according to which the General Court erred in law in holding, in paragraph 41 of the judgment under appeal, that the Commission was not required to extend the formal investigation procedure by means of a supplementary opening decision, must be upheld.

59 By the second part of the first ground of appeal, the appellant submits that the General Court erred in finding, in paragraph 51 of the judgment under appeal, that the infringement of Article 108(2) TFEU on the part of the Commission, by failing to involve the appellant in the formal investigation procedure, did not constitute an infringement of an essential procedural requirement, but only a procedural irregularity, which could entail the annulment of the decision at issue only if it were shown that in the absence of such irregularity that decision might have been substantively different.

60 First, as has been recalled in paragraphs 45 and 50 above, the obligation to give interested parties the opportunity to submit their comments on the relevant issues of fact and law by means of the publication of the decision initiating the formal investigation procedure is in the nature of an essential procedural requirement, within the meaning of the second paragraph of Article 263 TFEU.

61 Second, as is apparent from paragraphs 55 and 56 above, the transfer of the former HelB to the new HelB constituted a relevant issue, within the meaning of Article 6(1) of Regulation 2015/1589, which, since it could not be included in the opening decision, which predated that event, had to give rise to the publication of a supplementary opening decision, in order to allow the interested parties effectively to submit their comments.

62 Consequently, the appellant is justified in claiming that the General Court erred in law in holding, in paragraph 51 of the judgment under appeal, that the Commission had not infringed an essential procedural requirement, but had only committed a procedural irregularity, by failing to involve it in the formal investigation procedure.

63 The second part of the first ground of appeal must therefore also be upheld.

64 It follows that the first ground of appeal must be upheld, without it being necessary to rule on its third part.

The second ground of appeal

Arguments of the parties

65 By the second ground of appeal, the appellant alleges a failure to observe the principle of proportionality.

66 It states that, in paragraph 159 of the judgment under appeal, the General Court found that the Commission was not required to determine to what extent the State aid resulting from the measures at issue had to be recovered from the new HelB. Nevertheless, the amount of aid to be recovered should not exceed the amount actually transferred to the appellant. The recovery of State aid is not in the nature of a penalty, but is intended to re-establish the conditions which existed before the aid was granted and to eliminate the distortion of competition caused by the aid.

67 According to the appellant, recovery of an amount greater than that of the State aid received is at odds with the principle of proportionality. Contrary to what the General Court held in paragraph 157 of the judgment under appeal, the amount to be recovered could not be determined, in the present case, without assessing the market price of the former HelB, as the appellant claims it stated in its application at first instance. The appellant submits that, had it known that it would have had to answer for unlawful State aid granted to the seller and that it could not rely on the indemnification provision, the value of the business would have been negative.

68 The appellant states that the Court of Justice has held that the obligation on the transferee to repay State aid can apply only where the value of the undertaking has not been assessed at the market price and it is established that the transferee continues to benefit from the competitive advantage linked with the receipt of that aid (judgments of 29 April 2004, *Germany* v *Commission*, C-277/00, EU:C:2004:238, paragraphs 86, 92 and 93, and of 13 November 2008, *Commission* v *France*, C-214/07, EU:C:2008:619, paragraph 58).

69 The appellant therefore claims that, even if there were doubts as to whether the purchase price was in line with the market price, that did not relieve the Commission of its duty to examine the extent to which the State aid had been transferred to it.

70 Furthermore, according to the appellant, the Commission's approach, endorsed by the General Court, discriminates against undertakings subject to a recovery obligation which, like the appellant, have purchased a business from a public entity, and favour those which, in the same situation, have acquired a business from a private undertaking that has received unlawful State

aid. The latter could claim and obtain from the seller a reduction in the purchase price or damages on the basis of the contractual terms, which the former could not do because, in their case, the reduction in the purchase price would be regarded as new State aid.

71 Lastly, the appellant asserts that the City of Helsinki received an unjustified economic advantage as a result of the payment of the unlawful State aid. As the owner of the former HelB, it first received from the new HelB the purchase price of approximately EUR 36 million, and subsequently EUR 44 million by way of recovery.

72 The Commission disputes the appellant's arguments.

73 In the first place, the Commission states that the appellant's argument that the Commission should have determined the 'correct' sale price of the former HelB is unfounded. In that respect, the Commission claims that there is a difference between establishing economic continuity and determining the proportion in which recovery should be effected from the beneficiaries of the State aid. In order to establish economic continuity, it is not necessary for the Commission to determine the exact proportion in which the beneficiaries of the unlawful State aid must repay the aid. As the General Court correctly pointed out in paragraphs 86 and 87 of the judgment under appeal, it is not therefore necessary, in order to establish that there is such continuity, to determine the market price of the former HelB's economic activity, but it is sufficient for the Commission to show that the sale price of that activity did not correspond to the market price (judgments of 29 April 2021, *Fortischem* v *Commission*, C-890/19 P, EU:C:2021:345, paragraphs 77 to 81, and of 24 September 2019, *Fortischem* v *Commission*, T-121/15, EU:T:2019:684, paragraph 221).

74 In the second place, the Commission states that, as the General Court pointed out in paragraph 159 of the judgment under appeal, it was not required to determine to what extent the State aid the recovery of which had been ordered by the decision at issue had to be recovered from the appellant. It is for the Republic of Finland to take the appropriate measures to achieve effective recovery of the sums due.

75 In the third place, the Commission asserts that the appellant's claim that the reasoning followed by the judgment under appeal establishes an unjustified difference in treatment between the purchaser of a public undertaking in receipt of State aid and the purchaser of a private undertaking in receipt of such aid is based on confusion as to the distinct roles of a public operator and an economic operator owned by a public-law person.

76 In the fourth place, the Commission submits that the General Court's rejection of the second plea in law of the application at first instance, which was directed against the finding of economic continuity between the former HelB and the new HelB, is not challenged in the appeal. Since that economic continuity has to be accepted, it should be concluded from that that the unlawful State aid was transferred from one undertaking to the other.

Findings of the Court

77 The principle of proportionality requires that acts adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to

the aims pursued (judgments of 17 May 1984, *Denkavit Nederland*, 15/83, EU:C:1984:183, paragraph 25, and of 30 April 2019, *Italy* v *Council (Fishing quota for Mediterranean swordfish)*, C-611/17, EU:C:2019:332, paragraph 55).

78 Thus, observance of the principle of proportionality, which is binding on the Commission when it decides to recover unlawful State aid, must be assessed in the light of the objective pursued by such a decision.

79 In accordance with settled case-law, the recovery of unlawful State aid seeks to re-establish the previous situation, and that purpose is achieved once the aid in question, together where appropriate with default interest, has been repaid by the recipient or, in other words, by the undertakings which actually benefited from it. 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 (judgment of 1 October 2015, *Electrabel and Dunamenti Erőmű* v *Commission*, C-357/14 P, EU:C:2015:642, paragraph 110 and the case-law cited).

80 That is why the recovery of that aid, for the purpose of restoring the previously existing situation, cannot in principle be regarded as disproportionate to the objectives of the provisions of the FEU Treaty relating to State aid (judgment of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity*, C-164/15 P and C-165/15 P, EU:C:2016:990, paragraph 116 and the case-law cited). The recovery of unlawful State aid fails to observe the principle of proportionality only if the amount that the beneficiary has to repay exceeds the updated amount of aid received by the beneficiary.

81 Where the company receiving the unlawful State aid has been acquired by another company, that aid must be recovered from the company which carries on the economic activity of the undertaking which initially benefited from the advantage associated with the grant of State aid and which, therefore, retains the actual benefit thereof (judgment of 7 March 2018, *SNCF Mobilités* v *Commission*, C-127/16 P, EU:C:2018:165, paragraph 106 and the case-law cited). In that situation, the principle of proportionality limits the obligation to repay on the part of the purchaser of the undertaking that initially benefited from the aid to the amount of the competitive advantage which it has actually retained.

82 The appellant complains that the General Court failed to observe the principle of proportionality by holding, in paragraph 159 of the judgment under appeal, that the Commission was not required to determine the extent to which State aid had to be recovered from the appellant. The appellant submits that the General Court accepted in that paragraph that the Commission could impose on the appellant the obligation to repay the entirety of the aid paid to the former HelB, without assessing the extent to which that aid had actually been passed on to it.

83 However, the appellant's arguments are based on a misinterpretation of paragraph 159 of the judgment under appeal. The General Court merely found in that paragraph, without committing an error of law, that the Commission was not required to determine the amount of State aid that the Finnish authorities had to recover from the new HelB.

84 In fact, by the decision at issue, the Commission found that there was economic continuity between the former HelB and the new HelB and concluded from that that the obligation to repay the State aid had to be extended to the new HelB. In so doing, the Commission did not take a decision on the quantum of the aid granted to the former HelB of which the new HelB had retained the benefit. As the Commission submitted in its written pleadings, there is a difference

between establishing economic continuity and determining the proportion in which recovery of the unlawful aid must be effected from the beneficiaries of that aid. It follows that the appellant cannot validly claim that paragraph 157 of the judgment under appeal contains an error of law, since the General Court referred, in essence, to that difference.

85 In those circumstances, as the General Court held in paragraph 159 of the judgment under appeal, it is for the Republic of Finland to determine the amount of State aid that must be recovered from the new HelB.

86 The second ground of appeal, alleging that the General Court failed to observe the principle of proportionality, must therefore be rejected.

87 It follows from the foregoing that, since the first ground of appeal must be upheld, the judgment under appeal must therefore be set aside.

The action before the General Court

88 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice may, after quashing a decision of the General Court, refer the case back to the General Court for judgment or, where the state of the proceedings so permits, itself give final judgment in the matter.

89 In the present case, it is appropriate for the Court of Justice to give final judgment in the matter, as the state of the present proceedings so permits.

90 By the first plea in law in its action before the General Court, the new HelB submits that the Commission should have adopted, following the appellant's acquisition of the former HelB, a supplementary decision initiating the formal investigation procedure in order to enable it to submit its comments in the context of that procedure. Furthermore, the appellant states that, by failing to adopt such a decision in order to allow the interested parties to submit their comments, the Commission infringed an essential procedural requirement.

91 It is apparent from paragraphs 43 to 64 above that that plea in law is well founded and must therefore be upheld.

92 It follows that, since infringement of an essential procedural requirement entails the annulment of the act by force of law (judgment of 10 March 2022, *Commission* v *Freistaat Bayern and Others*, C-167/19 P and C-171/19 P, EU:C:2022:176, paragraph 94 and the case-law cited), the decision at issue cannot but be annulled.

Costs

93 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to the costs.

94 Article 138(1) of the Rules of Procedure, which is applicable to appeal proceedings by virtue of Article 184(1) thereof, provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the new HelB, now Koiviston

Auto Helsinki, has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to bear its own costs and to pay those incurred by the new HelB, relating to the proceedings both at first instance and on appeal.

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

1. **Sets aside the judgment of the General Court of the European Union of 14 September 2022, *Helsingin Bussiliikenne* v *Commission* (T-603/19, EU:T:2022:555);**

2. **Annuls Commission Decision (EU) 2020/1814 of 28 June 2019 on State aid SA.33846 – (2015/C) (ex 2014/NN) (ex 2011/CP) implemented by Finland for Helsingin Bussiliikenne Oy;**

3. **Orders the European Commission to pay, in addition to its own costs, those incurred by Koiviston Auto Helsinki Oy, relating to the proceedings both at first instance and on appeal.**

[Signatures]