Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

24 September 2019*

(State aid — Chemical industry — Decision declaring the aid incompatible with the internal market — Concept of State aid — State resources — Advantage — Recovery — Economic continuity — Principle of sound administration — Obligation to state reasons)

In Case T-121/15,

Fortischem a.s., established in Nováky (Slovakia), represented by C. Arhold, P. Hodál and M. Staroň, lawyers,

applicant,

v

European Commission, represented by L. Armati and G. Conte, acting as Agents,

defendant,

supported by

AlzChem AG, established in Trostberg (Germany), represented initially by P. Alexiadis, Solicitor, A. Borsos and I. Georgiopoulos, lawyers, and subsequently by P. Alexiadis, A. Borsos and V. Dolka, lawyers,

intervener,

ACTION under Article 263 TFEU seeking annulment of Articles 1 and 3 to 5 of Commission Decision (EU) 2015/1826 of 15 October 2014 on the State aid SA.33797 — (2013/C) (ex 2013/NN) (ex 2011/CP) implemented by Slovakia for NCHZ (OJ 2015 L 269, p. 71),

THE GENERAL COURT (Sixth Chamber),

composed of G. Berardis, President, S. Papasavvas and O. Spineanu-Matei (Rapporteur), Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 10 April 2019,

gives the following

* Language of the case: English.

Judgment

I. Background to the dispute

1 Novácké chemické závody, a.s. v konkurze ('NCHZ'), was a privately owned chemical producer with three divisions. It operated a chemical plant located in the Trenčín region (Slovakia). The company's main activities were the production of calcium carbide and technical gases, polyvinyl chloride (PVC) and its by-products, and an increasing share of low tonnage heavy chemicals and fine chemicals.

2 On 8 October 2009, NCHZ, which then belonged to Disor Holdings Ltd, having declared its inability to continue its operations and its insolvency, became the subject of insolvency proceedings.

3 On 5 November 2009, the Slovak Republic adopted the zákon č. 493/2009 Z.z. o niektorých opatreniach týkajúcich sa strategických spoločností a o zmene a doplnení niektorých zákonov (Law No 493/2009 on certain measures regarding strategic companies and on the amendment of certain laws; 'the Law on Strategic Companies'). That law, which entered into force on 1 December 2009, gave the State a right of pre-emption enabling it to purchase strategic companies which were the subject of insolvency proceedings and required the presence of an insolvency administrator to ensure the continued operation of the strategic company while those proceedings were ongoing. On 2 December 2009, NCHZ was classified by the Slovak authorities as a 'strategic company' within the meaning of that legislation and enjoyed that status until the expiry of the legislation on 31 December 2010 ('the first insolvency period'). NCHZ was the only company subject to the application of that law, which required the insolvency administrator to continue the company's operation and prevent unjustified collective dismissals.

4 On 28 December 2009, the 'relevant committee', within the meaning of Article 82 of the zákon č. 7/2005 Z.z. o konkurze a reštrukturalizácii a o zmene a doplneni niektorých zákonov (Law No 7/2005 on insolvency and restructuring and the amendments to certain laws, 'the Law on Insolvency') ('the relevant committee') was formed. That committee consisted, under that law, of the creditors' committee, representing unsecured creditors with unsecured claims against the insolvent company when the insolvency proceedings were opened, having registered their claims as 'pre-insolvency claims' (the creditor's committee'), the secured creditors, that is to say, creditors with claims secured by collateral, and the súd v Trenčíne (Trenčín Court, Slovakia).

5 On 29 December 2009, the first administrator was replaced for personal reasons by a new administrator ('the administrator').

6 On 17 June 2010, the súd v Trenčíne (Trenčín Court) ordered the administrator to sell NCHZ as a going concern in accordance with the procedural steps it had prepared. Following the announcement of the tender procedure on 12 August 2010 ('the 2010 tender procedure'), the relevant committee, on 24 November 2010, rejected the only tender received. On 3 December 2010, the súd v Trenčíne (Trenčín Court) ordered the administrator to prepare a detailed analysis of NCHZ's economic situation. Based on the outcome of that analysis, the administrator was either to accept or reject the sole tender submitted. The analysis was prepared on 8 December 2010 and the administrator announced that the tender would be rejected.

7 After 31 December 2010, NCHZ became subject to the application of the Law on Insolvency ('the second insolvency period). At the joint meeting of 26 January 2011 of the creditors belonging to the creditors' committee and the secured creditors, the administrator informed them that the operating costs generated by NCHZ's operations were higher than the operating income. He also provided them with a copy of his economic analysis of 23 December 2010, which was supplemented by a management

presentation. The abovementioned creditors decided that NCHZ's operations were to be continued ('the decision of 26 January 2011'). Following the approval of that decision by decision of the súd v Trenčíne (Trenčín Court) of 17 February 2011, the administrator continued NCHZ's operations.

8 On 7 June 2011, the súd v Trenčíne (Trenčín Court) issued an order requiring the administrator to sell NCHZ in accordance with the tender procedure organised by that court ('the 2011 tender procedure'). Following the announcement of the tender procedure on 12 July 2011 ('the 2011 tender procedure'), two tenders were received on 29 November 2011.

9 On 13 October 2011, the European Commission received a complaint from AlzChem AG alleging that the Slovak Republic had granted unlawful aid to NCHZ. AlzChem is a company whose registered office is in Germany and which operates in several fine chemicals markets in a number of EU Member States, including the Slovak Republic. That complaint was supplemented on 14 June 2012.

10 The Commission forwarded the complaint to the Slovak authorities on 17 October 2011 together with a request for information. On 22 March and 21 June 2012, the Commission sent the Slovak authorities further requests for information. The Slovak authorities responded to all of those requests.

11 On 7 December 2011, the administrator informed the súd v Trenčíne (Trenčín Court) of the outcome of the 2011 tender procedure and the creditors' vote in the relevant committee. On 14 December 2011, the súd v Trenčíne (Trenčín Court) asked the administrator to evaluate a further tender. On 15 December 2011, the administrator drew up an analysis stating that since the tender covered only some of NCHZ's assets, it was not in the best interests of the creditors. On 29 December 2011, the súd v Trenčíne (Trenčín Court) issued an order requiring the administrator to declare Via Chem Slovakia a.s. the successful tenderer. After conclusion of the purchase contract between that company and NCHZ on 16 January 2012, the sale was approved by the Protimonopolný úrad SR (Slovak competition authority) on 19 July 2012 and finalised on 31 July 2012.

12 On 1 August 2012, Via Chem Slovakia sold the chemical division of NCHZ, with the exception of the immovable assets (buildings and land), to the applicant, Fortischem a.s., which operates in the chemical production sector. The applicant is owned by Energochemica SE and, as it stated at the hearing in reply to a question raised by the Court, was founded in May 2012. The immovable assets necessary for chemical production were made available to the applicant under a lease contract.

13 On 24 January 2013, a meeting was held between the Commission and AlzChem, at the request of the latter, which submitted additional information by emails of 8 and 22 March 2013.

14 By letter dated 2 July 2013, the Commission notified the Slovak authorities of its decision to initiate the formal investigation procedure under Article 108(2) of the TFEU (OJ 2013 C 297, p. 85), as regards, first, the authorisation of the State, as a result of the Law on Strategic Companies, to continue NCHZ's operations from December 2009 to December 2010 and, secondly, the decision of 26 January 2011 to continue NCHZ's operations after the expiry of the Law on Strategic Companies. The Commission also expressed doubts as to whether the 2011 tender procedure pursuant to which NCHZ was sold was unconditional and stated that there were strong indications that there had been no break in economic continuity between NCHZ and the new entity.

15 Following the decision of 2 July 2013, the Commission received comments from the Slovak authorities as well as from AlzChem and another interested party. The comments from those interested third parties, together with further questions, were sent to the Slovak authorities, which submitted their comments on 14 January 2014.

16 On 7 October 2013 and 17 February 2014, meetings were held between the Commission and the Slovak authorities, at the request of the Slovak authorities. On 20 March 2014, the Commission sent an additional request for clarification to one of the interested third parties, which replied on 6 May 2014. On 2 May 2014, the Commission put further questions to the Slovak authorities, to which they replied on 14 and 30 May 2014.

II. The contested decision

17 On 15 October 2014, the Commission adopted Decision (EU) 2015/1826 on the State aid SA.33797 — (2013/C) (ex 2013/NN) (ex 2011/CP) implemented by Slovakia for NCHZ (OJ 2015 L 269, p. 71) ('the contested decision').

18 The Commission took the view that granting NCHZ strategic company status ('the first measure') constituted a selective advantage in favour of that company, was attributable to the State, had led to the use of State resources and distorted competition in a market open to trade between Member States. It concluded that that measure constituted State aid within the meaning of Article 107(1) TFEU, and that that aid was unlawful and incompatible with the internal market (recitals 110 and 114 to 124 of the contested decision). After finding that the State aid amounted to EUR 4 783 424.10, it took the view that the aid had to be recovered from NCHZ and that the applicant should also be covered by the recovery order since there was economic continuity with NCHZ (recitals 101 and 174 of the contested decision).

19 By contrast, the Commission found that the continued operation of NCHZ pursuant to the decision of 26 January 2011 did not constitute State aid within the meaning of Article 107(1) TFEU since at least two cumulative conditions for the existence of State aid, namely that the measure at issue is attributable to the State and that there is an economic advantage, were not satisfied (recital 113 of the contested decision).

20 The operative part of the contested decision is worded as follows:

'Article 1

The State aid of EUR 4 783 424,10 provided to NCHZ by declaring it a strategic company in line with the [Law on Strategic Companies], thereby sheltering it from the normal application of [insolvency] law, was unlawfully put into effect by [the Slovak Republic] in breach of Article 108(3) [TFEU] and is incompatible with the internal market.

…

Article 3

1. [The Slovak Republic] shall recover the incompatible aid referred to in Article 1 from NCHZ.

2. In view of the economic continuity between NCHZ and [the applicant], the obligation to repay the aid should also be extended to [the applicant].

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

4. Interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 […] and Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004.

Article 4

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.

2. [The Slovak Republic] shall ensure that this Decision is implemented within 4 months following the date of notification of this Decision.

Article 5

1. Within 2 months following notification of this Decision, [the Slovak Republic] shall submit the following information:

a) the total amount (principal and recovery interests) to be recovered from the beneficiaries;

b) a detailed description of the measures already taken or planned to be taken to comply with this Decision;

c) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. [The Slovak Republic] shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, at the request of the Commission, information on the measures already taken and planned to be taken to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 6

This Decision is addressed to the Slovak Republic.'

III. Procedure

21 By application lodged at the Court Registry on 6 March 2015, the applicant brought the present action.

22 By document lodged at the Court Registry on 14 July 2015, AlzChem applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission.

23 By letter lodged at the Court Registry on 6 August 2015, the applicant applied to have certain information contained in the application and its annexes as well as in the reply and an annex thereto treated as confidential vis-à-vis AlzChem, if it was granted leave to intervene. It included a non-confidential version of those pleadings in annex to its application for confidential treatment.

24 By order of the President of the Ninth Chamber of 22 September 2015, AlzChem was given leave to intervene in support of the form of order sought by the Commission. Non-confidential versions of the application, the reply and the annexes thereto, prepared by the applicant, were sent to the intervener. By letter lodged at the Court Registry on 8 October 2015, the intervener contested the application for confidential treatment.

25 On 8 October 2015, the present case was allocated to a new Judge-Rapporteur sitting in the Ninth Chamber. By decision of the President of the General Court of 3 October 2016, the present case was allocated to a new Judge-Rapporteur. Following a change in the composition of the Chambers of the Court, pursuant to Article 27(5) of the Rules of Procedure of the General Court, the Judge-Rapporteur was assigned to the Sixth Chamber, to which the present case was accordingly allocated.

26 On 6 February 2017, the Court (Sixth Chamber) put written questions to the applicant concerning its application for confidential treatment. It replied to those questions within the periods prescribed.

27 By order of 13 September 2017, *Fortischem* v *Commission* (T-121/15, not published, EU:T:2017:648), the President of the Sixth Chamber of the Court granted the application for confidential treatment in respect of some information contained in the application and some data contained in a number of annexes to the application and to the reply and dismissed the application for confidential treatment as to the remainder. The costs were reserved. On 26 October 2017, a non-confidential version, prepared by the applicant, of the items referred to in points 1 and 2 of the operative part of the order of 13 September 2017, *Fortischem* v *Commission* (T-121/15, not published, EU:T:2017:648), was sent to the intervener.

28 On 5 January 2018, the intervener lodged its statement in intervention at the Court Registry.

29 On 5 and 7 February 2018, the Commission and the applicant, respectively, submitted their observations on the statement in intervention at the Court Registry.

30 Acting on a proposal from the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral part of the procedure and, by way of measures of organisation of procedure pursuant to Article 89 of the Rules of Procedure, put written questions to the parties and asked them to produce a document. They replied to those questions within the periods prescribed and produced the document requested.

31 The parties presented oral argument and replied to the Court's oral questions at the hearing on 10 April 2019.

IV. Forms of order sought

32 The applicant claims that the Court should:

– annul Articles 1 and 3 to 5 of the contested decision;

– order the Commission to pay the costs.

33 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

34 The intervener contends, in essence, that the action should be dismissed.

V. Law

35 In support of the action, the applicant relies on six pleas in law. The first plea in law alleges infringement of Article 107(1) TFEU. The second plea in law alleges failure to observe the obligation to carry out a diligent and impartial examination and infringement of the Commission's obligation of cooperation. The third plea in law alleges infringement of the second paragraph of Article 296 TFEU with regard to the Commission's finding that State aid was granted to NCHZ. The fourth plea in law alleges infringement of Article 107(1) and Article 108(2) TFEU and Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1) due to the extension to the applicant of the obligation to recover the alleged State aid. The fifth plea in law, raised in the alternative, alleges infringement of Article 107(1)

and Article 108(2) TFEU, and of Article 14(1) of Regulation No 659/1999, due to the failure to limit the extension to the applicant of the obligation to recover the alleged State aid to 60% of the amount of that aid. The sixth plea in law alleges infringement of Article 296 TFEU with regard to the Commission's finding relating to economic continuity.

36 The Court considers that it is appropriate to examine, in turn, the third plea in law, the first and second parts of the first plea in law, the second plea in law, the third part of the first plea in law, the sixth plea in law, the fourth plea in law and finally the fifth plea in law.

A. The third plea in law, alleging infringement of the second paragraph of Article 296 TFEU with regard to the Commission's finding that State aid was granted to NCHZ

37 According to the applicant, the Commission must, in accordance with the case-law, demonstrate sufficiently why the matters of fact and law gathered by it prove the existence of State aid. The Commission must, therefore, also explain why the factual and legal arguments put forward by the Member State were insufficient to refute the existence of such aid. The applicant submits that the contested decision is vitiated by a failure to state reasons in several respects. In the first place, it claims that that decision is defective as regards the Commission's findings that the Law on Strategic Companies conferred an economic advantage on NCHZ which that company would not have obtained in the normal course of insolvency proceedings. According to the applicant, even though the Slovak authorities submitted detailed factual arguments showing that the creditors would have opted for NCHZ's continued operation, the Commission did not discuss the substance of that evidence and instead confined itself to raising general and unsubstantiated doubts. In the second place, it submits that the contested decision is vitiated by a failure to state reasons in so far as the Law on Strategic Companies failed to satisfy the market economy operator test.

38 The Commission, supported by the intervener, maintains that the applicant's line of argument is unfounded.

39 As is clear from settled case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the EU Courts to exercise their power of review (see judgment of 13 December 2018, *AlzChem* v *Commission*, T-284/15, EU:T:2018:950, paragraph 70 (not published) and the case-law cited).

40 The obligation to provide a statement of reasons must be assessed on the basis of the circumstances of each case, in particular the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of concern, for the purpose of the fourth paragraph of Article 263 TFEU, may have in obtaining explanations (see judgment of 13 December 2018, *AlzChem* v *Commission*, T-284/15, EU:T:2018:950, paragraph 71 (not published)).

41 It is not necessary for the statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons for a measure meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned. It is sufficient if it sets out the facts and the legal considerations of fundamental importance in the context of the decision (see judgment of 13 December 2018, *AlzChem* v *Commission*, T-284/15, EU:T:2018:950, paragraph 72 (not published) and the case-law cited).

42 Finally, the plea in law alleging infringement of the second paragraph of Article 296 TFEU is a separate plea from that alleging infringement of Article 107(1) TFEU. While the former, which alleges failure to state reasons or inadequacy of the reasons stated, concerns an issue of infringement of essential procedural requirements within the meaning of Article 263 TFEU, involving a matter of public policy, must be raised by the EU Courts of their own motion, the latter, which concerns the substantive legality of a decision, is concerned with the infringement of a rule of law relating to the application of the Treaty, again within the meaning of Article 263 TFEU, and can be examined by the EU Courts only if it is raised by the applicant. The obligation to state reasons is therefore a separate question from that of the merits of the grounds for the contested decision (see, to that effect, judgment of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 67).

43 It is necessary to examine, in the light of the considerations referred to in paragraphs 39 to 42 above, whether the contested decision is vitiated by a failure to state reasons or to state adequate reasons within the meaning of Article 296 TFEU.

44 In the contested decision, the Commission found that NCHZ's liabilities in respect of various State entities had been incurred because of the loss-making nature of the activities pursued. It considered that contrary to the practice consistent with the normal insolvency rules, no analysis had been prepared by the incumbent insolvency administrator and no meeting of creditors had been able to decide on the future of NCHZ. It noted that the insolvency administrator had acknowledged that it was required by the Law on Strategic Companies to continue to operate NCHZ with no possible alternative of considering other solutions (recitals 79 and 80 of the contested decision).

45 In that regard, the Commission took the view that the decision to apply the Law on Strategic Companies to NCHZ was not based on considerations taken into account by its creditors but on other public policy considerations, with the text of the decision of the Slovak Government referring only to the loss of jobs and competitiveness in the Slovak chemical industry, and accordingly the Slovak economy as a whole. In its view, the decision of the State to apply that law to NCHZ was, accordingly, clearly unjustified on the basis of the market economy creditor test (recital 82 of the contested decision).

46 In response to the arguments put forward by the Slovak authorities to the effect that it is likely that the creditors would have decided to continue operating NCHZ even if the Law on Strategic Companies had not been applied to it, the Commission stated, inter alia, that (i) there was no reliable examination of any other possible solutions in the analysis of the first administrator of 26 October 2009 ('the analysis of 26 October 2009'), raised by the Slovak authorities, (ii) a more detailed examination had not been carried out and (iii) the decision to continue to operate NCHZ taken at the start of the second insolvency period had taken place when the economic situation of creditors was different (recitals 82 to 84 of the contested decision). In the view of the Commission, the administrator's analysis of March 2014 ('the March 2014 analysis'), based on the methodology used for the analysis of the situation in the second period, was very brief, hypothetical and produced *ex post* (recital 87 of the contested decision). It concluded that the Slovak authorities had not demonstrated that, if the Law on Strategic Companies had not been applied to NCHZ, the continued operation of that company would have been approved, at the beginning of the insolvency proceedings or in the course of 2010, on the basis of a proper in-depth analysis and discussion by all the stakeholders (recital 88 of the contested decision).

47 In addition, the Commission stressed that, on account of the application of the Law on Strategic Companies, the uncertainty inherent in decision-making under the normal insolvency rules had been removed, since the continuation of all of NCHZ's operations had been guaranteed at least until the expiry of that law at the end of 2010. According to the Commission, that constituted a 'strong signal', in a sector, namely the chemical sector, in which security of supply was particularly important for customers. It noted that NCHZ had lost some customers in 2009 and 2010, as indicated in the administrator's economic analysis produced after the Law on Strategic Companies expired. It

therefore took the view that, if that law had not been applied to NCHZ, there would have been a much greater risk that sales would fall on account of the uncertainty arising from the insolvency proceedings and an increased risk that the creditors might consider the continued operation of NCHZ to be economically irrational and resort to the possibility of discontinuing NCHZ's operations (recitals 85, 86, 88 and 89 of the contested decision).

48 The Commission concluded that the application of the Law on Strategic Companies had conferred an economic advantage on NCHZ by protecting that company from the normal course of insolvency proceedings under the Law on Insolvency, the incumbent insolvency administrator, the creditors and the insolvency court having been deprived of the possibility of putting an end to NCHZ's operations or significantly reducing its workforce, either at the beginning of the insolvency proceedings or in the course of 2010, in view of the changes in the economic situation of that company. According to the Commission, the first measure also gave NCHZ, and third parties, inter alia customers and suppliers, certainty that that company would continue to operate, whereas such continuation would never be guaranteed under normal insolvency conditions; that company thus received preferential treatment compared with its competitors in a similar situation (recitals 78, 85, 89 and 90 of the contested decision).

49 It follows from the Commission's findings in the contested decision that, contrary to the applicant's claims, it stated the reasons why it had considered that the application of the Law on Strategic Companies to NCHZ had conferred an economic advantage on that company that it would not have received under the normal insolvency rules. It thus described its analysis of the consequences of the application of that law, that is to say the automatic continuation of NCHZ's operation and a barrier to collective redundancies, irrespective of any change in the economic situation of that company and where it was not able to pay its debts, in particular to various State entities. The Commission also referred to its assessment to the effect that the automatic continuation of NCHZ's operation had conferred a guarantee on its customers and suppliers that would not have existed in the normal course of insolvency proceedings.

50 Moreover, contrary to the applicant's claims, the Commission stated the reasons why it considered that the application of the Law on Strategic Companies failed to satisfy the market economy operator test and did not '[limit] its reasoning to the observation that the application of [that] law was based on public policy observations that a private creditor would not have taken into account'. After making that assessment, the Commission, contrary to the applicant's assertions, also responded to the arguments of the Slovak authorities concerning the positions taken by the initial administrator and the administrator. In that regard, it set out the reasons why, first, it rejected both the 26 October 2009 analysis and the March 2014 analysis and, secondly, it considered that it did not have at its disposal evidence that the relevant committee would have decided in favour of the continued operation of NCHZ during the first insolvency period. The Commission thus stated that it considered that the March 2014 analysis, based on the methodology used for the analysis of that period, was very brief, hypothetical and produced *ex post* and referred in that regard to various paragraphs of three judgments of the EU Courts, in which it was held that, for the purposes of applying the private investor test, the only relevant evidence was the information available and the developments which were foreseeable at the time when the State decision in question was taken. In addition, it stated that it considered that the Slovak authorities had not adduced evidence that, at the start of the insolvency proceedings or during 2010, the continued operation of NCHZ would in fact have been approved on the basis of an in-depth analysis and discussion by all the parties concerned. Finally, it noted the difference in the economic situation of the creditors when the decision was taken at the start of the second period.

51 Moreover, the applicant's arguments concerning the lack of explanation given by the Commission as to why the relevant committee would have decided not to maintain NCHZ's operations does not relate to the adequacy of the reasoning of the contested decision but points to the applicant's disagreement with the merits of the Commission's reasoning in its analysis and its conclusions, meaning that the applicant disputes the fact that evidence of what the decision of the relevant committee would have been was

not adduced. The matter of compliance with the obligation to state reasons and that of the merits of the reasons for the contested decision must be distinguished, in accordance with the case-law cited in paragraph 42 above.

52 Accordingly, it cannot be concluded that the contested decision is vitiated by a failure to state reasons concerning the Commission's conclusion relating to the existence of State aid granted to NCHZ and the third plea in law must therefore be rejected.

B. The first and second parts of the first plea in law, alleging respectively that there was no transfer of State resources and no economic advantage conferred on NCHZ

53 The first plea in law, alleging infringement of Article 107(1) TFEU, is divided into three parts. By the first part, the applicant disputes the fact that declaring NCHZ to be a 'strategic company' gave rise to a transfer of State resources. By the second part, it claims that measure did not confer any economic advantage on NCHZ. By the third part, it submits that, even if the Commission was fully entitled to find that State aid had been granted to NCHZ, it committed a manifest error of assessment when calculating the amount of that aid.

54 The Court considers it appropriate first of all to examine the first two parts of the first plea in law, which concern the classification of the measure in question as State aid, while the third part, which relates to the calculation of the amount of that aid, will be examined after the analysis of the second plea in law.

55 By the first part of the first plea in law, the applicant claims that the Commission's assessment in recitals 75 to 77 of the contested decision does not prove that there was a transfer of State resources on account of the classification of NCHZ as a 'strategic company'. In the first place, it maintains that the classification of NCHZ as a strategic company did not give rise to such a transfer, since the Slovak State did not have to bear any additional burden compared with the burden that it would have borne had the normal insolvency rules been followed. According to the applicant, it follows from the case-law that a transfer of State resources requires more than an abstract risk of further public liabilities caused by the continued operation of a company during insolvency proceedings, as long as the increase in public liabilities is an inherent consequence of the application of the Law on Insolvency in question. The applicant refers in that regard to the judgment of 1 December 1998, *Ecotrade* (C-200/97, EU:C:1998:579, paragraphs 36, 41 and 43). In the second place, in its observations on the statement in intervention, the applicant submits that by no means can the natural consequences of continued operation during insolvency proceedings be described as a 'de facto waiver of public debt'. According to the applicant, if that argument was upheld, any continued operation during insolvency proceedings which results in an increase of public debt would amount to a transfer of State resources. In the third place, in the reply, it states that it accepts that the test developed in the judgment of 1 December 1998, *Ecotrade* (C-200/97, EU:C:1998:579), to determine whether State resources have been transferred, is quite similar to the test for whether an economic advantage has been granted.

56 By the second part of the first plea in law, the applicant claims that the Commission committed a manifest error of assessment concerning the existence of an economic advantage conferred on NCHZ on account of that company's classification as a 'strategic company'. In the first place, it claims that NCHZ did not receive any advantage it would not have received under the normal insolvency rules, in so far as, in any event, its creditors would have opted for its continued operation and the temporary prohibition of collective dismissals favoured only the Slovak State, not NCHZ. In the second place, the application of the Law on Strategic Companies satisfied the market economy operator test, as it was economically advantageous for the public creditors.

57 The Commission, supported by the intervener, disputes the merits of the applicant's arguments.

1. The relevant case-law

58 First of all, it must be borne in mind that classification as State aid requires all the conditions laid down in Article 107(1) TFEU to be satisfied. Thus, first, there must be an intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between Member States. Thirdly, it must confer a selective advantage on the recipient. Fourthly, it must distort or threaten to distort competition (see judgment of 13 December 2018, *AlzChem* v *Commission*, T-284/15, EU:T:2018:950, paragraph 59 (not published) and the case-law cited).

59 According to settled case-law, only advantages conferred directly or indirectly through State resources or constituting an additional burden on the State are to be regarded as aid within the meaning of Article 107(1) TFEU. The very wording of this provision and the procedural rules laid down in Article 108 TFEU show that advantages granted from resources other than those of the State do not fall within the scope of the provisions in question (see, to that effect, judgments of 17 March 1993, *Sloman Neptun*, C-72/91 and C-73/91, EU:C:1993:97, paragraph 19; of 1 December 1998, *Ecotrade*, C-200/97, EU:C:1998:579, paragraph 35; and of 13 March 2001, *PreussenElektra*, C-379/98, EU:C:2001:160, paragraph 58).

60 It should be noted that, according to settled case-law, it is not necessary to establish in every case that there has been a transfer of State resources for the advantage granted to one or more undertakings to be capable of being regarded as a State aid within the meaning of Article 107(1) TFEU (judgment of 28 March 2019, *Germany* v *Commission*, C-405/16 P, EU:C:2019:268, paragraph 55; see also, to that effect, judgments of 15 March 1994, *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraph 14, and of 19 May 1999, *Italy* v *Commission*, C-6/97, EU:C:1999:251, paragraph 16).

61 Thus, the concept of 'aid' does not merely include positive benefits such as subsidies but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect (see judgment of 21 March 2013, *Commission* v *Buczek Automotive*, C-405/11 P, not published, EU:C:2013:186, paragraph 30 and the case-law cited; see also, to that effect, judgment of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 101 and the case-law cited).

62 Furthermore, according to that case-law, 'State aid', as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the EU Courts must, in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU (see judgment of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 111).

63 In that regard, it must be observed that, in the context of a review by the EU Courts of complex economic assessments made by the Commission in the field of State aid, it is not for those Courts to substitute their own economic assessment for that of the Commission (judgments of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 75, and of 21 March 2013, *Commission* v *Buczek Automotive*, C-405/11 P, not published, EU:C:2013:186, paragraph 49).

64 However, the EU Courts must, inter alia, establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (judgments of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 76, and of 21 March 2013, *Commission* v *Buczek Automotive*, C-405/11 P, not published, EU:C:2013:186, paragraph 50).

2. Contested decision

65 The Commission's findings in the contested decision concerning the existence of an economic advantage conferred on NCHZ on account of that company's classification as a 'strategic company' are set out in paragraphs 44 to 48 above.

66 As regards the use of State resources as a result of the first measure, the Commission considered that 'by virtue of that declaration [that it was a strategic company], the operation of [NCHZ] was maintained even though there was a clear risk (which indeed materialised) that the revenue would not be sufficient to cover the costs of the operation of the business during insolvency, including the social security contributions and other liabilities vis-à-vis the State' (recital 74 of the contested decision). It added that 'the continuation of operations and the accumulation of additional liabilities as a consequence of the application of the [Law on Strategic Companies] made it more difficult for the existing public creditors of NCHZ to recover their existing claims' (recital 76 of the contested decision). It concluded that the award to NCHZ of strategic company status led to the granting of State resources in the form of foregone revenue from public claims not honoured by NCHZ during the first insolvency period (recital 77 of the contested decision).

3. Classification by the Commission of the first measure as State aid

67 First of all, it must be noted, as regards the conditions that must be satisfied so that an intervention may be classified as State aid, in accordance with the case-law cited in paragraph 58 above, that the applicant does not dispute either the selective nature of the first measure or that it is liable to affect trade between Member States.

68 In addition, it must be noted that, although, by its arguments in support of the present part of the first plea in law, the applicant does not call into question the fact that the first measure is imputable to the State, it states that it wishes to dispute the fact that that measure involved State resources in the sense of an additional burden for the State or State entities and it seeks to show that NCHZ would not have been in a different situation if its situation had been governed by the provisions of the Law on Insolvency. However, it must be held that, by that line of argument, the applicant essentially calls into question the existence of an economic advantage. In the application, as regards its analysis of the condition relating to the existence of an advantage, it refers moreover to the evidence set out 'above', namely that concerning the concept of the transfer of State resources, and indicates that it is clear from that evidence that NCHZ did not receive any advantage it would not have received under the normal insolvency rules. Accordingly, that line of argument raised by the applicant must be linked to the examination of the second part of the first plea in law and the first two parts of that plea in law must be examined together.

69 In order to assess whether an economic advantage was granted to NCHZ on account of the first measure and the lawfulness of the contested decision on that point, it must be noted that, while the applicant and the Commission, supported by the intervener, agree on the relevance, in the present case, of the judgment of 1 December 1998, *Ecotrade* (C-200/97, EU:C:1998:579), they draw different conclusions from it.

70 The applicant maintains that, in order to assess whether the application of the Law on Strategic Companies conferred an economic advantage on NCHZ, it is necessary to conduct a two-stage examination. In the first place, it is necessary to establish whether that law enabled NCHZ to enjoy an economic advantage that that company would not have enjoyed under the Law on Insolvency and to examine the 'counterfactual scenario' which requires a hypothetical *ex post* analysis. If the first question is answered in the negative, the existence of an economic advantage can be ruled out, since, in fact, NCHZ was no more favoured than it would have been under the normal insolvency rules. In the second place, if the first question is answered in the affirmative, the existence of an economic

advantage can be ruled out if, under the Law on Strategic Companies, the Slovak State acted as a market economy operator, and accordingly the application of that law was consistent with the economic interests of that State.

71 By contrast, the Commission considered that the applicant's position renders the case-law relating to the market economy operator test meaningless.

72 It must be noted that, in accordance with the judgments of 1 December 1998, *Ecotrade* (C-200/97, EU:C:1998:579, paragraph 45) and of 17 June 1999, *Piaggio* (C-295/97, EU:C:1999:313, paragraph 43), the application to an undertaking of rules derogating from the normal insolvency rules must be regarded as giving rise to the grant of State aid in two situations. In the first situation, it is established, in essence, that that undertaking has been permitted to continue trading in circumstances in which it would not have been permitted to do so if the normal insolvency rules had been applied. In the second situation, it is established, in essence, that that undertaking has enjoyed one or more advantages, such as a State guarantee, a reduced rate of tax, exemption from the obligation to pay fines and other pecuniary penalties or waiver in practice of public debts wholly or in part, which could not have been claimed by another insolvent undertaking in connection with the application of the normal insolvency rules.

73 The assessment of the first measure by the Commission in the contested decision must be reviewed in the light of those considerations in order to examine whether the Commission did not err in concluding that that measure involved the grant of State aid to NCHZ.

74 In that regard, it is appropriate to examine, in the first place, the conditions under which the continued operation of NCHZ was authorised as a result of the application of the Law on Strategic Companies and the consequences deriving from that application. It is appropriate to examine, in the second place, the applicant's claim that the Slovak State's decision to apply the Law on Strategic Companies to NCHZ satisfied the market economy operator test. In the third place, it is appropriate to examine the applicant's claims that the situation would have been the same if NCHZ had been subject to the normal insolvency rules.

(a) The conditions for application of the Law on Strategic Companies to NCHZ on account of its classification as a 'strategic company' and the consequences deriving from that application

75 It has been established, in the present case, on account of the classification of NCHZ as a 'strategic company', that the first administrator had no choice but to continue NCHZ's operations, which was required under the Law on Strategic Companies (recital 80 of the contested decision). Accordingly, during the first insolvency period, during which NCHZ was subject to that law, that company was required to continue to operate, irrespective of its economic situation and any consideration relating to the interest of its creditors and, thus, even in the event that its liabilities increased and exceeded its revenue (recitals 78, 80 and 81 of the contested decision).

76 In those circumstances, while NCHZ was loss-making at the end of 2009, as indicated in the analysis of 26 October 2009, the pre-insolvency public creditors with post-insolvency claims were put in the position of having to suffer for an irreducible period a highly likely increase in unpaid liabilities owing to them.

77 In that regard, the fact that, in the context of the Law on Strategic Companies, the automatic continuation of NCHZ's operation was linked to a barrier to collective redundancies entails an even greater risk of an increase in NCHZ's liabilities, in particular to public creditors, including the Sociálna poisťovňa, a.s. (social insurance company, Slovakia) and the Všeobecná zdravotná poisťovňa, a.s. (health insurance company, Slovakia). On account of that barrier, NCHZ's operating costs could not be limited by means of a reduction in staff. NCHZ had to be able to pay its suppliers in the context of the

automatic continuation of its operation and, in the light of its financial position, it could not, at the same time, bear in full the social costs payable to the two abovementioned public creditors. It must be noted, however, that that barrier allowed it to retain its staff in order to continue operating.

78 Moreover, the first measure gave customers certainty that NCHZ would continue to operate throughout the first insolvency period, as indicated by the Commission in the contested decision (recitals 85 and 86 of the contested decision).

79 Accordingly, the Commission did not err in stating the consequences arising from the application of the Law on Strategic Companies.

(b) The applicant's claim that the Slovak State's decision to classify NCHZ as a 'strategic company' satisfied the market economy operator test

80 According to the applicant, the application of the Law on Strategic Companies satisfied the market economy operator test, since it was economically advantageous for the public creditors. In the first place, the market economy operator test does not apply only to measures which may theoretically be taken by private operators, but also those which, because of their sovereign nature, can only be adopted by that State, such as legislative acts. In addition, the applicant maintains that public policy considerations do not preclude the market economy operator test from being satisfied, since Article 107(1) TFEU does not distinguish between the various aims of measures or the various reasons for them, but merely defines them in terms of their effects.

81 In the second place, the private creditor test is applicable not only to claims of the State governed by private law, but also to its claims under public law, such as those relating to the payment of social security contributions. In the present case, that test is satisfied, since the continued operation of NCHZ should be regarded as by far the most economically favourable scenario for the public creditors. In order to make that comparison, all the relevant information known at the date of adoption of the first measure should be taken into consideration.

82 First, according to the applicant, all the pre-insolvency unsecured and secured public creditors had a manifest interest in the continued operation of NCHZ, since it represented the only way of achieving at least partial satisfaction of their pre-insolvency claims and they did not face any risk of further financial exposure. It is clear from the Slovak State's decision to classify NCHZ as a 'strategic company' that it was aware that the situation of those creditors would be worse in the event of the company's liquidation.

83 Secondly, during the formal investigation procedure, the Slovak authorities submitted detailed information proving that, on the date of the adoption of the first measure, the continued operation of NCHZ was also the best economic option when taking into account the possible increase of unpaid liabilities during continued operation. For example, it was demonstrated that the situation of the social insurance company, which was the largest post-insolvency public creditor, would have been manifestly worse in the event of the immediate liquidation of NCHZ. However, in the contested decision, the Commission did not even refer to those arguments. In the reply, the applicant adds that it seems to be disproportionally strict to distinguish between the costs to be borne by the social insurance company in the case, first, of continued operation of NCHZ and, secondly, the immediate liquidation of NCHZ.

84 Thirdly, the applicant claims that the Commission has not challenged the accuracy of the figures presented either in the contested decision or before the Court.

85 According to the case-law, the private creditor test requires that the conduct of a public creditor be compared to that of a private creditor in a situation as close as possible to that of the public creditor. Evidence may be required showing that the State's decision is based on economic assessments comparable to those which a private creditor would have made (see, to that effect, judgment of 18 May 2017, *Fondul Proprietatea*, C-150/16, EU:C:2017:388, paragraphs 25 and 26 and the case-law cited).

86 However, the private creditor test cannot be deemed applicable in the present case. No evidence was adduced by the Slovak State during the administrative procedure to show that it adopted the decision to classify NCHZ as a 'strategic company' in the context of an action of an economic nature and in its capacity as creditor, and not as a public authority (see, to that effect and by analogy, judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraphs 81 and 82).

87 In any event, according to the case-law, assuming that the Commission should have entertained doubts as to the applicability of that test, it is for the latter to carry out a global assessment taking into account, in addition to the evidence provided by that Member State, any other relevant evidence in the present case enabling it to determine whether the Member State took the measure in question in its capacity as an economic operator or as a public authority. In particular, the nature and subject matter of that measure are relevant in this regard, as is its context, the objective pursued and the rules to which the measure is subject. By contrast, for the purposes of showing that, before or at the same time as that adoption, the Member State took that decision as an economic operator, it is not enough to rely on economic evaluations made after the measure was adopted, on a retrospective finding that the measure adopted by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen (see, to that effect and by analogy, judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraphs 85 and 86).

88 It follows from the Law on Strategic Companies and the decision of the Slovak State to confer the status of strategic company on NCHZ that the Slovak State's sole objective was to avoid the negative effects of NCHZ's ceasing to operate on the operation and competitiveness of the chemical industry as a whole in Slovakia, as well as the negative impact on employment in the region concerned which would endanger the Slovak economy. By contrast, contrary to the applicant's claims, it is not apparent from the Slovak State's decision to classify NCHZ as a 'strategic company' that it was aware that the situation of the pre-insolvency public creditors would be worse in the event of the liquidation of that company.

89 As the Commission maintains, the barrier to collective redundancies formed part of the main objective of the Law on Strategic Companies, which was to continue operating such companies, which would undoubtedly have been be rendered at the very least difficult if not impossible if, as regards NCHZ, actions by the incumbent administrator or third parties could have led to a significant reduction in personnel.

90 Furthermore, in the first place, the applicant's argument presupposes that the State may be regarded as a single public creditor. However, such an approach was rejected in the judgment of 13 December 2018, *AlzChem* v *Commission* (T-284/15, EU:T:2018:950, paragraphs 184 to 196 (not published)).

91 In addition, as the Commission, in essence, stated in the contested decision (recitals 81, 83, 87 and 88 of the contested decision), there is no sufficient and contemporaneous evaluation of the application of the Law on Strategic Companies to NCHZ, which examines the continued operation of that company in the light of the interests of the public creditors, while, for the purpose of the applicability and application of the private creditor test, the only relevant evidence is the information which was available, and the developments which were foreseeable at the time when the decision at issue was taken (see, to that effect and by analogy, judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 105). The applicant submits, however, that it 'has no possibility of verifying whether any such detailed evaluations [of whether the situation of the pre-insolvency public creditors

would have been worse in the event of the liquidation of NCHZ] were made before the decision [to classify NCHZ as a 'strategic company'] was taken'. It also maintains that, on account of that classification, the incumbent administrator could not have prepared a comprehensive analysis at that time, in the sense, as it stated at the hearing in reply to a question put by the Court, that it was not necessary to carry out that analysis because of the application of the Law on Strategic Companies.

92 In the second place, even taking into account only the situation of the social insurance company, as relied on by the Slovak authorities in their second response to the Commission of 29 November 2013, the applicant's argument cannot succeed. While it claims that, in the event of immediate liquidation, that company, which was the largest post-insolvency public creditor, would have had a claim of over EUR 3 million, it does not indicate the amount of that company's claim in the event of NCHZ's continuing to operate, which should have been estimated at the time when that company was classified as a 'strategic company', as required by the case-law referred to in paragraph 91 above.

93 Moreover, the argument put forward by the applicant in its reply, to the effect that the Slovak State took into account the fact that it would have had to pay, via the social insurance company, unemployment benefits in the event of NCHZ's liquidation must be rejected. In that regard, the applicant claims that unemployment benefits would have had to have been paid to the former employees of NCHZ and to the employees of other companies directly affected by the liquidation and that the total amount of those payments would have been considerably greater than the amount of the alleged aid. If it had been necessary to pay those benefits, they would not have been paid to NCHZ but to the employees, including those working for companies other than NCHZ. Accordingly, the fact that the Slovak State might become a debtor in respect of former employees of NCHZ or of other companies cannot be taken into consideration in so far as concerns the examination of its conduct as a creditor of NCHZ. As the Commission maintains, the applicant acknowledges that the Slovak State could therefore have been placed at an advantage in its capacity as a public authority responsible for unemployment benefits payable to former employees, but not in its capacity as a creditor of NCHZ, which renders the figures it puts forward irrelevant, even assuming they are correct. In that regard, it must be noted that the applicant's reasoning is based on assumptions, as regards both the number of employees who could have been concerned and the assessment carried out.

94 Consequently, assuming that the market economy operator test is applicable in the present case, the applicant's argument that the application of the Law on Strategic Companies satisfied that test must be rejected.

(c) The applicant's claims that the situation would have been the same if NCHZ had been subject to the normal insolvency rules

95 The applicant claims, on the basis of a certain number of factors, that the application of the Law on Insolvency to NCHZ would have led to the same situation as that arising from the application of the Law on Strategic Companies to that company, which therefore did not benefit from any additional advantage in respect of the continuation of its operations imposed by the Law on Strategic Companies.

(1) The claim that the first administrator had decided in favour of continuing NCHZ's operations before the adoption of the Law on Strategic Companies

96 In the first place, according to the applicant, the first administrator decided, on 14 October 2009, that is to say before the adoption of the Law on Strategic Companies, in favour of NCHZ's continued operation. In support of that claim, the applicant refers to a statement issued by a press agency. However, it must be noted that it was more of a statement of intention than a decision that could bind the first administrator, who indicated that he 'want[ed] to do everything to maintain the

operation of the plant'. Moreover, it was mentioned that that administrator was still required to provide the Slovak minister concerned with an economic analysis of maintaining the operation of NCHZ, which was submitted on 26 October 2009.

97 In the second place, the applicant claims that the first administrator had considered that the legal requirements for continuing NCHZ's operations were met, as he explained in his speech to NCHZ's employees at a meeting held on 20 October 2009. However, the applicant refers only to part of that speech. In that speech, the first administrator did indeed refer to the fact that the initial assessment had led him to conclude that NCHZ's value as a going concern was considerably higher than if the assets were sold in another way. He nevertheless also stated that another, no less important, reason for his decision to continue operations was the economic and social significance of the insolvent entity for the whole region concerned, not only for a 'small number; of NCHZ' employees, but also for their families. Those two reasons, that is to say the economic value of NCHZ and the social impact, are furthermore repeated subsequently in his speech. The second reason referred to, moreover, corresponds to that invoked in the context of the adoption of the Law on Strategic Companies. Accordingly, the decision of the first administrator cannot be considered to have been linked solely to the analysis of NCHZ's economic situation.

98 In the third place, the applicant refers to the analysis of 26 October 2009. First of all, it must be noted that what the applicant describes as an analysis is a presentation containing graphics, lists of summary considerations relating to the financial results for the period from January to November 2009, the economic measures of the first administrator for the fourth quarter of 2009, the economic plan for 2010, and a three-point conclusion.

99 First, while the applicant maintains that most of the measures referred to in the analysis of 26 October 2009 were based on market developments or on negotiations with private parties, that is in no way apparent from the document communicated. Moreover, as the Commission argues, it must be noted that certain measures, such as tax relief, implied intervention on the part of public authorities.

100 Secondly, in the analysis of 26 October 2009, it is true that the first administrator concluded, as the applicant claims, that it was necessary to continue NCHZ's operations in order to sell it as a going concern and to provide the best possible satisfaction for NCHZ's creditors. However, it added that it would 'strictly proceed in a manner that would ensure that no outstanding liabilities closely related to the operation of the company [arose] during the operation of [NCHZ]. Accordingly, even though the first administrator considered in October 2009 that the decision to continue NCHZ's operation was at that time the best solution, that does not mean that that decision would have remained unchanged in the light of the changes in NCHZ's economic situation in 2010.

101 Thirdly, while the applicant maintains that the analysis of 26 October 2009 had been reinforced by the production figures and new orders placed between September and November 2009, which proved that NCHZ remained operational, in so far as those results were similar to those obtained during the eight preceding months of 2009, and that there was every reason to believe that the company's operation would make it possible to attract investors, it must be noted that, first, the significance to be accorded to the fact of maintaining the level of orders placed is limited on account of the announcement in October 2009 concerning the adoption of a law on strategic companies. Moreover, it is apparent from the Slovak authorities' second response to the Commission of 29 November 2013 that at that time there was a downward trend in revenue from sales and new orders. Second, the applicant's line of argument is based on pure assumptions regarding the existence of future investors.

102 It follows that, even if it were to be considered that, beyond a mere statement of intention, the first administrator had decided to continue NCHZ's operations before the adoption of the Law on Strategic Companies, which the Commission appears to accept, that fact cannot, in any event, imply that it would necessarily have maintained that position throughout the first insolvency period or that the administrator would have followed it.

(2) The claim that the initial decision of the first administrator would have been upheld by the relevant committee

103 According to the applicant, there is no reason to believe that the relevant committee would not have upheld the initial decision of the first administrator. It claims that it was already clear that, in the event of NCHZ's liquidation, the pre-insolvency creditors would not have obtained any repayment and therefore had nothing to lose by voting to continue that company's operations and that both the secured creditors and the creditors' committee and the insolvency court would have found in favour of NCHZ's continued operation. In support of its argument, it relies on the March 2014 analysis, which was carried out *ex pos*t at the express request of the Commission. According to the applicant, it was clear that the costs of decontaminating the site would amount to millions of euros and would take priority over pre-insolvency claims. Furthermore, it claims that the economic forecasts in 2009 were certainly better than those in 2010 and that, although the actual development of NCHZ was subject to the harmful effect of certain developments on the market which took place in 2010, they could not have been anticipated at the end of 2009. Moreover, it claims that, even if the continued operation of NCHZ had not been in the interest of the post-insolvency public creditors, they could not have challenged it.

104 In that regard, in the first place, it must be noted that the applicant's argument is based on assumptions and assertions, in so far as it relies on the analysis of 26 October 2009, which cannot be regarded as sufficient (see paragraphs 98 to 101 above), and does not refer to any analysis carried out during the first insolvency period, the absence of such an analysis not being surprising since, as the applicant itself stated (see paragraph 91 above), irrespective of the content and findings of an analysis at that time, NCHZ's operation had to continue (recital 80 of the contested decision). In addition, in their third response to the Commission, of 13 January 2014, the Slovak authorities had indicated that, even though they considered that the decisions taken subsequently could be seen as a clear indicator that the relevant committee would have decided in favour of continuing NCHZ's operations, they did not know what that committee might have ultimately decided in December 2009.

105 In the second place, the fact that the price level of the main raw materials and of certain products could change in an unfavourable manner, as was the case, which the applicant submits in the reply, is a factor which ought to have been taken into consideration by the incumbent administrator and the relevant committee. While the applicant claims that those changes were not foreseeable when the first administrator decided to continue NCHZ's operations and could not even have been known at the end of 2009, it must nevertheless be noted that, in the analysis of 26 October 2009, the increase in the price of energy and the fall in the price of products were mentioned as reasons for the negative results between June and July 2009 and that, at the very least, the question of the price of strategic raw materials was indicated as a risk factor concerning financial management for the fourth quarter of 2009.

106 In the third place, even considering that it was well known that the costs of decontamination in the event of NCHZ's ceasing to operate would have been considerable, the fact remains that the question was whether the incumbent administrator and the relevant committee, including the súd v Trenčíne (Trenčín Court), in fact would have considered that the solution to be adopted was to continue to operate NCHZ. The applicant's argument on that point is based merely on assumptions.

107 First, the decisions of the members of the relevant committee which would have had to be put forward for decision in accordance with the Law on Insolvency to the súd v Trenčíne (Trenčín Court) are not known, namely the decisions of the secured creditors and the creditors' committee.

108 It is not significant that, according to the applicant, the Fond národného majetku Slovenskej republiky (National Property Fund of the Slovak Republic), which was a pre-insolvency public creditor that was both unsecured and secured, noted, in a statement annexed to the first response of the Slovak

authorities to the Commission of 2 September 2013, that it would have voted in favour of NCHZ's continued operation. The statement of that entity dates from July 2013, that is to say after the first insolvency period.

109 In addition, while the applicant claims that the pre-insolvency creditors faced no risk, it neglects the fact that it is clear from the case file that secured creditors saw their claims increase during the first insolvency period. However, it indicates the figures showing an increase in claims for the town of Nováky (Slovakia) and the Environmentálny fond (Environmental Fund, Slovakia) already at the end of 2009, figures which also come from the case file. Accordingly, it would be incorrect to consider, without a more substantiated analysis, that the situation of those creditors was so clear that they could only have voted at that time to continue NCHZ's operations.

110 Moreover, the applicant submits that the creditors' committee was made up of five private creditors, all unsecured, which were at that time all privately owned companies and had voted to continue NCHZ's operations on 11 January 2010. It must be noted that such a decision, on 11 January 2010, cannot be significant, since NCHZ was by then already subject to the provisions of the Law on Strategic Companies. Accordingly, not only could that vote have had no more than symbolic value, it cannot have been influenced by the fact that that law applied. Moreover, there is no certainty, or even indication, that that vote would have been repeated in the same way when the economic situation of NCHZ deteriorated during the first insolvency period in 2010.

111 Secondly, in so far as the súd v Trenčíne (Trenčín Court) was to give its decision after the creditors' committee and the secured creditors, there is no certainty concerning its decision; the applicant merely claims, in reply to the Commission's argument, that it would have ordered the continuation of NCHZ's operations, as it did in 2011.

112 Thirdly, the applicant maintains that even if the continued operation of NCHZ had not been in the interest of the post-insolvency public creditors including the social insurance company and the health insurance company, which held approximately 83% of the unpaid liabilities of the public creditors, those creditors could not have challenged it. It adds that even if all those creditors had been entitled to give their views on continuing NCHZ's operations — which was not the case — their opposition could not have influenced the final decision, since the total level of liabilities following the insolvency amounted to EUR 8.5 million at the end of 2009 and the claims of the public creditors represented less than 9% of that total.

113 It is true that it does not follow from the provisions of the Law on Insolvency, and in particular from Article 83(4) thereof, that, in the circumstances of the present case, the social insurance company could have intervened in the decision to continue NCHZ's operations before the súd v Trenčíne (Trenčín Court) (see, to that effect, judgment of 13 December 2018, *AlzChem* v *Commission*, T-284/15, EU:T:2018:950, paragraph 151 (not published)).

114 However, even supposing all the figures put forward by the applicant are established, it must be noted that the incumbent administrator was responsible for payment of the post-insolvency claims. The fact of allowing NCHZ's liabilities to increase during the first insolvency period was contrary to that obligation. It must be stressed, as the Commission maintains, that, while it is true that an insolvent entity may in practice be operated even when it generates losses, the first administrator had expressly stated that he would ensure that that did not happen (see paragraph 100 above).

115 Moreover, the applicant's assertion is based on the presumption that the relevant committee would not have examined, or deemed irrelevant, the foreseeable prospects, at the end of 2009, of an increase in public claims in 2010 in the event of a decision to continue NCHZ's operations. At the hearing, in reply to a question put by the Court, the applicant acknowledged that, in the case of a very

substantial amount of post-insolvency liabilities during continued operation, the pre-insolvency creditors would have been the first to approach the administrator to ask for operations to cease, in order to preserve any possible chance of recovering their claims.

116 In the fourth place, it is not possible to uphold the applicant's argument disputing that, although the Commission did not question the accuracy of the March 2014 analysis, which it had asked the Slovak authorities to provide, it did not accept it as evidence, stating that it was very brief and hypothetical and produced only after the event (recital 87 of the contested decision).

117 First, contrary to the applicant's claims, the March 2014 analysis is, at the very least, incomplete. It was important to know the potential costs of continuing NCHZ's operations for the pre-insolvency creditors which could also have post-bankruptcy claims (see paragraph 109 above). However, the analysis gives no indication in that regard.

118 Secondly, the applicant's argument calls into question the Commission's assessment relating to the hypothetical nature of the March 2014 analysis and the irrelevance of an *ex post* analysis cannot be upheld.

119 In that regard, the applicant disputes the fact that in the contested decision the Commission rejects the evidence by claiming that it was prepared after the event, without providing a meaningful explanation, except for a reference to case-law in a single footnote, although that case-law does not support the Commission's argument that the *ex-post* analysis is irrelevant. According to the applicant, the March 2014 analysis was particularly reliable, since the main cost factors arising from NCHZ's liquidation were connected with the nature of that company's business and the commitments of the chemical industry and could not have been affected by any changes in the economic situation of NCHZ during insolvency. The Commission has not disputed the facts and figures in question. Moreover, in that type of situation, an analysis made after the event is permissible (see, to that effect, judgment of 29 March 2007, *Scott* v *Commission*, T-366/00, EU:T:2007:99, paragraphs 136 to 138). In addition, as a result of the application of the Law on Strategic Companies, the incumbent administrator could not have carried out a comprehensive analysis at that time, which distinguishes NCHZ's situation from those which gave rise to the case-law referred to by the Commission in the footnote on page 13 of the contested decision. According to the applicant, it is necessary to make a precise distinction between the test established in the judgment of 1 December 1998, *Ecotrade* (C-200/97, EU:C:1998:579) and the market economy operator test. Although, in the context of the market economy operator test, it is permissible to doubt the relevance of an *ex post* analysis in certain circumstances, the analysis required by that judgment, which consists of determining whether NCHZ would have continued to operate, including in the event that the normal insolvency rules were applied to it, requires, by definition, a hypothetical *ex post* analysis. By virtue of the test established in that judgment, it is necessary to assess what, in all likelihood, would have happened if the Law on Strategic Companies had not existed.

120 It must be noted that, contrary to the applicant's claims, paragraph 36 of the judgment of 1 December 1998, *Ecotrade* (C-200/97, EU:C:1998:579) does not set out a requirement for a 'hypothetical counterfactual analysis' but seeks to address the Commission's argument, put forward in the case giving rise to that judgment, that the reduction in profits on account of the measure at issue could have led to a loss of tax revenue for the State, which involved a transfer of State resources due to that measure. Furthermore, no other paragraph of that judgment sets out the requirement for a 'hypothetical counterfactual analysis'.

121 As regards the Commission's assessment concerning the *ex post* nature of the March 2014 analysis and its irrelevance, it is indisputable that, without the application of the Law on Strategic Companies to NCHZ, first, the barrier to collective redundancies would not have been imposed and, secondly, the continuation of that company's operations would have had to have been decided on by the relevant committee and would not have been automatic. In that regard, contrary to the applicant's claims, a

comparison of the situation that arose as a result of the application of the Law on Strategic Companies to NCHZ with the situation that would have taken place if NCHZ had been subject to the normal insolvency rules can only rely on an analysis based on knowledge of the situation and the information existing at the time when the decision concerning whether or not to continue NCHZ's operations was to be taken and when it was classified as a 'strategic company' (see, to that effect, Opinion of Advocate General Fennelly in *Ecotrade*, C-200/97, EU:C:1998:378, point 31).

122 However, the applicant does not claim that the March 2014 analysis was prepared on the basis of data contemporaneous with NCHZ's classification as a 'strategic company'. It follows from that analysis, produced by the applicant, that the administrator did not draft it on the basis of the information available in 2009 but used information from December 2010 in order to establish whether that information could have been valid in December 2009, without reviewing it other than to consider that some of that information was not time sensitive. He moreover stressed the difficulties involved in gathering contemporaneous information from December 2009.

123 Accordingly, it cannot be deemed certain that the March 2014 analysis corresponds to the situation that NCHZ would have been in if that company had not been classified as a 'strategic company'. Thus, the Commission's assessment in the contested decision that the March 2014 analysis was irrelevant, in so far as it was hypothetical and *ex post*, must be regarded as not incorrect.

124 In the fifth place, according to the applicant, there is no evidence to show that the immediate liquidation of NCHZ would have been relevant. In support of that argument, it submits that, in the contested decision, the Commission failed to examine the content of the evidence submitted in the course of the formal investigation procedure, and merely displayed, generally and arbitrarily, scepticism to it (recitals 83, 84 and 87 of the contested decision), without adducing the least evidence in support of its opinion that the relevant committee would not have agreed that NCHZ's operations should continue. The applicant maintains that the Commission did not call into question the figures and information submitted by the Slovak authorities, thereby clearly acknowledging that they were correct.

125 In that regard, contrary to the applicant's claims, it must be held that it was for the Member State concerned, in the present case the Slovak Republic, and not for the Commission, to demonstrate that the situation would have been the same if the normal insolvency rules, and not the Law on Strategic Companies, had been applied to NCHZ. However, in the contested decision, the Commission set out the reasons why it had not used the information submitted for that purpose (see paragraphs 98 to 101 and 116 to 123 above) and it must be held that, contrary to the applicant's claim, it did not agree that the figures and information submitted by the Slovak Government were correct. Consequently, the applicant's claim that there is no evidence to show that immediate liquidation would have been relevant must be rejected.

126 In addition, in the light of the case-law cited in paragraph 91 above, the lack of an adequate and contemporaneous study of the application of the Law on Strategic Companies to NCHZ, having examined the continuation of that company's operations in view of the interests of the public creditors justifies the fact that, contrary to the applicant's claims, there was no need for the Commission to address, in the contested decision, the arguments put forward by the Slovak State concerning the costs incurred in the liquidation of NCHZ by the social insurance company, which were based on the March 2014 analysis.

127 Accordingly, contrary to the applicant's claims, it cannot be concluded that there is no reason to believe that the relevant committee would not have upheld the initial decision of the first administrator.

128 Moreover, it is necessary to reject the applicant's argument, put forward in response to an argument of the Commission, that the decision to continue NCHZ's operations would have been taken in any event and does not contradict the decision of the Slovak State to apply the Law on Strategic Companies to NCHZ. According to the applicant, that decision must be understood as mindful of the fact that the economic and financial crisis was at that time at its height and considering that, owing to fear and perhaps in view of the upcoming elections in 2010, that government took proactive action, without recourse to specific information about NCHZ's actual situation and without the first administrator having requested any intervention on the part of the Slovak State.

129 That argument raised by the applicant is not convincing, since it relies on the premiss that the Slovak State adopted a law and decided to apply it to a single company, without having specific information about that company's situation. However, it must be recalled that the first administrator was required to provide information to the Slovak authorities, which he did with the analysis of 26 October 2009 (see paragraph 96 above). If the outcome of the decision to be taken by the relevant committee was at that time as certain as the applicant claims, there was no reason for the Slovak authorities to doubt that NCHZ would continue to operate. By contrast, the existence of a fear in respect of the elections, as claimed by the applicant, serves to show that another decision, namely the liquidation of NCHZ, could have been taken by the relevant committee, in the light of NCHZ's economic situation and the prospects for its development.

130 In the light of all the above considerations, the applicant's claim that, if NCHZ had been subject to the normal insolvency rules, the decision of the incumbent administrator would have been confirmed by the relevant committee, which would then have decided to continue NCHZ's operations, must be rejected.

(3) The claim that a decision by the relevant committee would have provided customers and suppliers with the same security as the Law on Strategic Companies

131 In the first place, according to the applicant, a decision by the relevant committee would have provided clients and suppliers with the same certainty as the Law on Strategic Companies, contrary to the Commission's assertions (recital 88 of the contested decision). It claims that, even if those assertions were true – which is not the case –, that certainty could only have had an effect on the likelihood and amount of the (partial) satisfaction of NCHZ's debts in the event that the company continued to operate and not in the event of its immediate liquidation. The applicant disputes, moreover, the Commission's assessment that the existence of a better guarantee, provided to customers and suppliers by the application of the Law on Strategic Companies, that NCHZ would continue to operate until the expiry of that law is demonstrated by the fact that, despite the application of that law, NCHZ lost customers in 2009 and 2010 (recitals 85 and 86 of the contested decision).

132 In the contested decision, the Commission considered that the first measure had granted NCHZ and third parties, in particular its customers and suppliers, certainty that that company would continue its operations, whereas the continuation of the operations of a company in insolvency would never be guaranteed under normal insolvency conditions; NCHZ thus received preferential treatment compared with its competitors in a similar situation (recitals 78, 85, 89 and 90 of the contested decision). It noted that, despite the shield provided by the application of the Law on Strategic Companies, NCHZ had lost some customers in 2009 and 2010, as shown by the economic analysis of the administrator which was prepared after that law had expired (recital 86 of the contested decision). It considered that 'if [that law] had not been applied to NCHZ, the company would have faced additional negative consequences (such as customers switching to safer suppliers), which would have significantly increased the risk of the creditors opting to discontinue operation [of the company] at that stage' (recital 88 of the contested decision).

133 It is therefore clear from the contested decision that the Commission not only took into consideration the situation at the time when NCHZ was subject to the application of the Law on Strategic Companies, but intended to indicate that a decision to terminate NCHZ's operations could have been taken in 2010, whereas that law produced its effects throughout the first insolvency period, that it to say for a little more than a year, thereby freezing the situation throughout that period. The applicant itself submits that, when the failure of the insolvency administrator is established, the relevant committee must be convened, in accordance with Article 88(2) of the Law on Insolvency.

134 The applicant's line of argument does not take into account the fact that the pre-insolvency creditors, in particular the public creditors, could have seen their post- insolvency claims increase with NCHZ's continued operation during the first insolvency period and that, if NCHZ continued to operate, they had an interest in NCHZ's being profitable so that their post-insolvency claims would paid, otherwise there would be an additional loss in addition to the pre-insolvency claim. As the Commission stated (recital 86 of the contested decision), in a situation where customers or suppliers were leaving, those creditors might have reviewed their position in 2010 if NCHZ had been subject to the normal insolvency rules. In addition, even the creditors with pre-insolvency claims only might have recommended the termination of NCHZ's operations (see paragraph 115 above).

135 However, while, as the applicant argues, the application of the Law on Strategic Companies did not guarantee that deliveries would actually be made, it guaranteed that the staff would be retained, due to the barrier to collective redundancies, and inter alia ensured customers and suppliers that NCHZ would continue to operate until at least the expiry of that law, irrespective of the amount of unpaid claims, including public claims.

136 The applicant has not adduced any evidence to show how a decision of the relevant committee would have given the same certainty to third parties, while requiring NCHZ to continue to operate for a period equivalent to the period of application of the Law on Strategic Companies. In particular, it is not claimed that, in accordance with the provisions of the Law on Insolvency, the relevant committee could have determined or even envisaged determining such a definite period in which the operations of NCHZ would continue. The applicant merely claims that, in the light of the duration of the continuation of NCHZ's operations during the second insolvency period, it may be assumed that the duration of a decision by the relevant committee to continue NCHZ's operations during the last quarter of 2009 could have been equivalent.

137 In addition, as regards the loss of customers in 2009 and 2010, referred to by the Commission in recital 86 of the contested decision, the applicant merely claims that the company was stable at the end of 2009. It is clear from the case file that at that time there was a downward trend in respect of revenue both from sales and new orders (see paragraph 101 above). Accordingly, it was not certain that the alleged stability relied on by the applicant could have continued throughout the first insolvency period if the normal insolvency rules had been applied.

138 In the second place, in response to the Commission's argument that NCHZ's situation during the period between the declaration of insolvency and the adoption of the Law on Strategic Companies, followed by its application to NCHZ, was to some extent distorted by information from the public domain indicating clearly that a legislative solution was being drawn up, the applicant maintains that, although the Commission refers to several statements, they were all made on the same day, 26 October 2009, the date of a visit by the Slovak Minister for the Economy to the NCHZ site. According to the applicant, since the public statements were made a mere 10 days before the Law on Strategic Companies was adopted, their effect was limited to the period preceding that adoption, whereas the first 2 months after NCHZ had filed for insolvency had been decisive in ensuring the success of continuing its operations during the insolvency period, since NCHZ's management and the first administrator had been obliged to engage in numerous negotiations with the main customers and suppliers. The applicant submits that the abovementioned statements are instead solid evidence of NCHZ's financial strength during the insolvency proceedings.

139 In that regard, first of all, it must be held that, as the Commission maintains, even assuming that NCHZ had implemented a good communication strategy, that could not, however, have ensured that the company's commercial relationships would be maintained. Next, it has already been found that the first administrator had indicated his intention to do his utmost to keep NCHZ operating. Finally, as the Commission points out, it is apparent from the first article cited by the Commission, published on 26 October 2009, that the spokesperson of the Slovak Minister for Economic Affairs had reported to the press that a Law on Strategic Companies was being drawn up and that NCHZ's creditors were reassured by that fact alone. The same article indicates that the Slovak Minister for Economic Affairs had stressed, in his public statements, that that law should constitute a certain guarantee for suppliers that they would not lose their claims. Moreover, it is apparent from the second article cited by the Commission, published on 26 October 2009, that, on the same day, the Slovak Minister for Economic Affairs, during his visit to NCHZ, had presented a law on strategic companies, which was in the process of being drawn up and which was to help that company and create guarantees for its creditors.

140 Accordingly, the applicant's claim that a decision by the relevant committee would have provided customers and suppliers with the same certainty as the Law on Strategic Companies must be rejected.

(4) The claim that NCHZ did not enjoy any additional advantage in the context of maintaining its business imposed by the Law on Strategic Companies

141 In the reply, in response to the Commission's argument that the continuation of NCHZ's operations at a loss was likely to have affected the priority of the creditors' debts, possibly leading to an effective renunciation of its debts by the State, the applicant claims that, during the first insolvency period, the incumbent administrator was also required to apply the usual insolvency rules, and, when an insolvent company is operated with a view to its sale as a going concern, creditors with pre-insolvency claims are given precedence, irrespective of their public or private status. NCHZ did not therefore enjoy any additional advantage in the context of the maintenance of its business provided for by the Law on Strategic Companies.

142 That argument cannot succeed.

143 In the first place, the applicant cannot validly claim that the unpaid debts were not the result of the implementation of the Law on Strategic Companies, but rather, in essence, that of normal operation during insolvency. Such an argument implies that an insolvent undertaking must be operated at a loss. According to Article 88(2) of the Law on Insolvency, in such a case, either at the start of the first insolvency period or during that period, the incumbent administrator would have been required to approach the relevant committee in order to receive instructions concerning the continued operation of NCHZ, since the Law on Insolvency takes into account the interest of the creditors first of all. The pre-insolvency creditors could also have alerted that administrator in that regard (see paragraph 115 above). Accordingly, in the context of the application of the normal insolvency rules, there were options to restrict operation at a loss, which was precluded by the Law on Strategic Companies.

144 In the second place, as a result of the continued operation of NCHZ required by the Law on Strategic Companies, that company was required to honour its debts associated with production which, in the light of its financial position, could only have a negative effect, in particular, on the settlement of its debts in respect of the two public entities, the social insurance and health insurance companies.

145 Furthermore, in that context, the barrier to collective redundancies, also required by the Law on Strategic Companies aggravated the situation. As the applicant submits, if NCHZ had been subject to the normal insolvency rules, collective redundancies would have been decided upon at the start of the insolvency and not, as was the case, in 2011. It is true that the applicant maintains that NCHZ's costs would have been significantly reduced by that and that the reality was otherwise, since, NCHZ being

unable to take advantage of that option, it had to bear additional costs that were practically unnecessary, a significant part of which constituted payments to the social insurance and health insurance companies. However, the applicant fails to point out that NCHZ could not pay all those debts and that the debts owing to those two public entities increased, while, in parallel, NCHZ retained the benefit of its employees for the purposes of continuing its operations. Accordingly, the applicant's argument that the prohibition of economic redundancies did not constitute an economic advantage for NCHZ cannot succeed and, contrary to the applicant's claims, that barrier led to an additional burden for the public creditors, compared to what would have resulted from the application of the normal insolvency rules.

146 Moreover, the applicant's argument that the Law on Strategic Companies only conferred an economic advantage on the Slovak State, since, if NCHZ had made those employees redundant earlier, that State would have had to bear most of those costs in the form of unemployment support and other social transfers (see paragraph 93 above).

147 Consequently, the claim that NCHZ did not enjoy any additional advantage in the context of the continuation of NCHZ's business provided for by the Law on Strategic Companies cannot succeed.

148 In the light of all the foregoing considerations, the applicant's argument that the application of the normal insolvency rules to NCHZ would have led to the same situation as that resulting from the application of the Law on Strategic Companies to that company must be rejected.

(d) Conclusion

149 It must be held that, on account of the classification of NCHZ as a 'strategic company' by the Slovak authorities, it was required, first, to continue to operate, irrespective of any consideration of its economic situation and its capacity to honour its debts, in particular public debts, and secondly, to retain its staff, owing to the barrier to collective redundancies, thereby allowing it to continue to operate with an assurance provided to its customers and suppliers that it would do so until the end of 2010. At the same time, the application of the Law on Strategic Companies to NCHZ imposed the risk on some of its creditors, in particular the public creditors, that their claims would increase during the first insolvency period, that risk being unavoidable in the light of its financial position at the time of its classification as a 'strategic company'. That risk moreover materialised during the first insolvency period, both for public creditors with pre-insolvency and post-insolvency claims and for those solely with post-insolvency claims.

150 However, it cannot be considered that, in circumstances corresponding to normal market conditions, NCHZ could have obtained the same advantage as was made available to it, through State resources, within the meaning of the case-law cited in paragraphs 59 and 61 above. First, the market economy operator test was not applicable in the present case and in any event, it was not established that the first measure satisfied that test. Second, it cannot be concluded that the situation would have been the same if NCHZ had been subject to the normal insolvency rules and no additional burden had been placed on the public creditors (see paragraphs 94 and 148 above). As regards the latter point, the applicant's argument relating to the judgment of 1 December 1998, *Ecotrade* (C-200/97, EU:C:1998:579, paragraph 36), cannot call that assessment into question. In paragraph 36 of that judgment, the Court of Justice held that the fact that the measure at issue in that case could have led to a reduction in the profits of private creditors and, accordingly, potential loss of tax revenue, did not permit the conclusion that that measure amounts to State aid. The connection between that measure and any loss of tax revenue was too indirect (see, to that effect, Opinion of Advocate General Fennelly in *Ecotrade*, C-200/97, EU:C:1998:378, point 24). Having regard to the first measure, the Commission's considerations in the contested decision are in no way based on similar considerations or such an indirect link.

151 Thus, the first measure, combining the obligation to continue NCHZ's operations and the barrier to collective redundancies, is covered by both the first and second situations considered in the judgments of 1 December 1998, *Ecotrade* (C-200/97, EU:C:1998:579, paragraph 45) and of 17 June 1999, *Piaggio* (C-295/97, EU:C:1999:313, paragraph 43) (see paragraph 72 above).

152 Consequently, the Commission did not err in concluding, on account of the classification of that company as a 'strategic company', that an economic advantage had been conferred on NCHZ involving State resources.

153 In the light of all the foregoing, the first and second parts of the first plea in law must be rejected.

C. The second plea in law, alleging failure to observe the obligation to conduct a diligent and impartial examination and infringement of the Commission's duty of cooperation

154 According to the applicant, the Commission failed to fulfil its obligation to conduct a diligent and impartial examination of the alleged State aid measure because, in essence, it ought to have requested further information before adopting the contested decision.

155 The Commission, supported by the intervener, disputes the merits of the applicant's arguments.

156 In the first place, the applicant claims that, if the Commission considered that a more detailed *ex post* analysis was necessary, it was obliged to request it, which it did not do. In addition, the March 2014 analysis was wrongly not taken into account for the sole reason that it was prepared *ex post*, although the Commission did not challenge the accuracy and reliability of the information it contained, which was not time sensitive.

157 According to the case-law relating to the principles governing the administration of proof in the State aid sector, the Commission is required to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision establishing the existence and, as the case may be, the incompatibility or unlawfulness of the aid, the most complete and reliable information possible for that purpose (judgments of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 90, and of 3 April 2014, *France* v *Commission*, C-559/12 P, EU:C:2014:217, paragraph 63).

158 The Commission is empowered to adopt a decision on the basis of the information available when it is faced with a Member State which fails to comply with its obligation of cooperation towards that institution under Article 4(3) TEU to provide information requested from it either for the purpose of assessing the compatibility of new or modified aid with the internal market or of verifying whether aid previously approved has been properly applied. Before taking such a decision, however, the Commission must order the Member State to provide it, within the time limit it lays down, with all the documentation, information and data necessary to carry out its review. It is only if the Member State, notwithstanding the Commission's order, fails to provide the information requested that the Commission is empowered to terminate the procedure and make a decision on the basis of the information available to it (judgment of 13 September 2010, *Greece and Others* v *Commission*, T-415/05, T-416/05 and T-423/05, EU:T:2010:386, paragraph 226).

159 It should be noted that the analysis of 21 March 2014 was sent by the Slovak authorities as an annex to their fourth response to the Commission of 14 May 2014.

160 It must be pointed out, first, that the question of what would have happened in December 2009 if NCHZ had not been classified as a 'strategic company' has been addressed, on several occasions, by the Slovak authorities themselves. It had already been covered by those authorities in their second response to the Commission of 29 November 2013 and in their third response to the Commission of

13 January 2014. Accordingly, the Commission cannot be criticised for not having requested a further analysis from the Slovak authorities in order to obtain, after their fourth response, fresh information. In that regard, it must be pointed out that, in the case that gave rise to the judgment of 13 September 2010, *Greece and Others* v *Commission* (T-415/05, T-416/05 and T-423/05, EU:T:2010:386), to which the applicant refers, the situation was different. In that case, the decision to initiate the formal investigation procedure did not include a preliminary assessment of the measures at issue in order to determine whether they included an aid element and, during the administrative procedure, those measures were not explicitly challenged, nor was any request for information relating to the conformity of those measures with market conditions made. In those circumstances, the EU Courts considered that a Member State could not be accused of not having provided sufficient information to the Commission to enable it to assess the measures at issue with knowledge of the facts and that it was for the Commission, in accordance with its duty of careful impartial examination in the interest of sound administration of the fundamental rules of the Treaty on State aid, to pursue its investigations and to deepen its inquiry (see, to that effect, judgment of 13 September 2010, *Greece and Others* v *Commission*, T-415/05, T-416/05 and T-423/05, EU:T:2010:386, paragraphs 240, 246 and 249).

161 It must be noted, secondly, that, contrary to the applicant's claims, it could not have been 'clear' that the information to be gathered from the administrator was to be obtained through an *ex post* analysis. In their first response to the Commission of 2 September 2013, the Slovak authorities maintained that the private creditor test should be applied to the social insurance company and to the health insurance company. Next, in their second response to the Commission of 29 November 2013, those authorities stated that 'the [Slovak] State did what the Commission requested it to do under the private creditor test'. They also stated that all the private creditors would have opted to continue NCHZ's operations, adding that the private creditor test should be applied only to the social insurance company, in the light of the case-law, the economic aspects of NCHZ and the principle of sound administration. Moreover, the applicant submits that the *ex post* analysis 'assessed the relevant questions for the 'transfer of State resources' as well as the 'private creditor test'.

162 Even if the private creditor test had been applicable, in accordance with the case-law, an *ex post* analysis could not have been relevant (see, to that effect, judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraph 71; see also, to that effect and by analogy, judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 105). In addition, contrary to the applicant's claims, such an analysis is not 'obviously the appropriate tool' for the requirements of the test established in the judgment of 1 December 1998, *Ecotrade* (C-200/97, EU:C:1998:579). The analysis of the likely development under the Law on Insolvency, that is to say, in the applicant's words, the examination of 'what the private creditors in the relevant committee would have decided', must be analysed on the basis of information from the time when NCHZ was classified as a 'strategic company' and when the Law on Strategic Companies was applied to it (see paragraph 121 above).

163 In that context, in so far as only an analysis using *ex post* information had been sent by the Slovak authorities, with an explanation of the methodology followed, in annex to their fourth response to the Commission of 14 May 2014, which is not disputed, it must be considered, as the Commission did, that it was not necessary for it to request further information on that matter.

164 In the second place, the applicant maintains that the decision to recover the alleged State aid was adopted on the basis of provisional figures, without a prior request for confirmation of the final figures, which constitutes a clear breach on the part of the Commission both of its obligation to cooperate and of its duty to adopt decisions on the basis of sound information. It claims that the fact of requesting adequate information after the closure of the formal investigation cannot remedy the infringement of its obligation to request the disclosure of relevant information.

165 In the contested decision, the Commission considered that the amount of the aid corresponded to unpaid debts to the State and the public entities, which had accrued during the period in which the Law on Strategic Companies had been applied to NCHZ. It maintained that, on the basis of the

information provided by the Slovak authorities, the amount of claims which had not been paid to the public creditors amounted to EUR 735 817.44 on 31 December 2009 and EUR 5 519 241.54 on 31 December 2010. It noted that those amounts represented the most precise, available, and also rather conservative estimates of the amounts of outstanding liabilities on those dates. According to the Commission, the Slovak authorities had declared that there was no precise information concerning the outstanding debts to the public creditors on the date on which NCHZ had been classified as a 'strategic company' or when the Law on Strategic Companies had ceased to apply to it. The Commission concluded that the aid amounted to EUR 4 783 424.10 (recital 101 of the contested decision).

166 It must be recalled that, in accordance with Article 14(3) of Regulation No 659/1999, the recovery of unlawful aid from the beneficiary by a competent national authority must be carried out in accordance with the rules and procedures laid down by national law (see judgment of 13 February 2014, *Mediaset*, C-69/13, EU:C:2014:71, paragraph 34 and the case-law cited). EU law does not require the recovery of such aid to be made on the basis of the Commission's recovery decision alone (judgment of 11 September 2014, *Commission* v *Germany*, C-527/12, EU:C:2014:2193, paragraph 39).

167 It follows that, in the field of State aid, no provision of EU law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the recipient itself to work out that amount without overmuch difficulty (judgments of 12 October 2000, *Spain* v *Commission*, C-480/98, ECR, EU:C:2000:559, paragraph 25, and 12 May 2005, *Commission* v *Greece*, C-415/03, ECR, EU:C:2005:287, paragraph 39).

168 It thus follows from the case-law that the Commission can legitimately confine itself to a finding that the recipient has an obligation to repay the aid in question and leave it to the national authorities to calculate the exact amount (see, to that effect, judgment of 12 May 2005, *Commission* v *Greece*, C-415/03, EU:C:2005:287, paragraph 40). Further, the obligation on a Member State to calculate the exact amount of aid to be recovered forms part of the more general reciprocal obligation, enshrined in Article 4(3) TEU, incumbent upon the Commission and the Member States of sincere cooperation in the implementation of Treaty rules concerning State aid (see, to that effect, judgment of 13 June 2002, *Netherlands* v *Commission*, C-382/99, EU:C:2002:363, paragraph 91). The amount of the aid may be precisely quantified subsequently, at the stage of recovery of the aid, that is to say after the adoption of the contested decision (see, to that effect, judgment of 13 December 2017, *Greece* v *Commission*, T-314/15, not published, EU:T:2017:903, paragraph 203).

169 In the present case, it must be noted that the issue of the amount of the claims was discussed during the administrative procedure. It was also referred to in particular in the fourth response of the Slovak authorities of 14 May 2014. As the Commission maintains, it expressly requested, as is clear from the Slovak authorities' response, 'details of liabilities (NCHZ's private and public, secured and non-secured creditors [and] amounts due) at five distinct points in time: (i) the beginning of the [insolvency] period, (ii) December 2009 (the declaration of NCHZ as a strategic company), (iii) January 2011, (iv) the date of sale of NCHZ's business to Via Chem Slovakia and (v) the end of the [insolvency] period'. The amounts used by the Commission, as corresponding to the amount of the public claims at the start and at the end of the period concerned (recital 101 of the contested decision) are the total of the amounts indicated by the Slovak authorities as being due on 31 December 2009 and 31 December 2010 respectively. In that regard, the Slovak authorities stated that their response was based on the information available to the administrator and specified that that information could not represent the 'real amount' of the claims, in particular, since a claim existing in December 2010 could have been paid in January 2011. It must therefore be held that that response implied that the information sent was the information available. In addition, it must be noted that the applicant does not dispute the fact that the Commission set out its method of calculating the amount of the aid to be recovered.

170 In the light of the foregoing, the Commission cannot be criticised for not waiting for the Slovak authorities to send further figures before adopting the contested decision.

171 Moreover, it cannot be considered, as the applicant implies, that the Commission intended to mark its disapproval concerning the unlawfulness of the measure in question by ordering the recovery of a sum greater than the value received by the beneficiary. The applicant, moreover, does not refer to any evidence in the case file in support of that claim.

172 For the sake of completeness, it should be recalled that, by virtue of the obligation, enshrined in Article 4(3) TEU, incumbent upon the Commission and the Member States of sincere cooperation in the implementation of Treaty rules concerning State aid (see, to that effect, judgment of 13 June 2002, *Netherlands* v *Commission*, C-382/99, EU:C:2002:363, paragraph 91), the Commission and the Member State must collaborate in good faith. In the context of its replies to the questions put by the Court by way of measures of organisation of procedure (see paragraph 30 above), the Commission maintained that, during the phase of recovery of the aid in question, NCHZ's various public creditors had provided more accurate figures, which it did not have before it adopted the contested decision, concerning, inter alia, the claims of the Slovenský vodohospodársky podnik (Slovak water management company, Slovakia) and that it was apparent from the figures thus provided that the actual amount of the aid could have exceeded the amount of the aid indicated in the contested decision, which the applicant did not dispute.

173 Accordingly, the Commission cannot be criticised for having used estimates in the contested decision based on the information provided by the Slovak authorities or for acting in breach of its obligation of cooperation.

174 It follows that the second plea in law must be rejected.

D. The third part of the first plea in law, alleging a manifest error of assessment in calculating the amount of the alleged State aid

175 The applicant claims that even if the Commission was fully entitled to find that State aid had been granted to NCHZ by the first measure, it committed a manifest error of assessment in calculating the amount of that aid.

176 The Commission, supported by the intervener, disputes the merits of the applicant's arguments.

177 In the contested decision, the Commission considered that the amount of the aid corresponded to unpaid debts to the Slovak State and the public entities, which had accrued during the period in which the Law on Strategic Companies had been applied to NCHZ (recital 101 of the contested decision) (see paragraph 165 above).

178 In the first place, according to the applicant, a large proportion of the unpaid liabilities would have been accrued even if the decision to liquidate that company had been taken during the first insolvency period. The Commission therefore committed a manifest error of assessment in failing to take those debts into account in the 'counterfactual scenario'. The liquidation of NCHZ could not have taken place before May 2010 and the proportion of unpaid public liabilities accumulated until then cannot be considered to have been caused by the Law on Strategic Companies and, therefore, cannot be considered to be State aid. In addition, such a liquidation would also have produced unpaid liabilities for NCHZ in respect of the social insurance company.

179 It must be noted that the Commission was correct in considering that NCHZ had enjoyed an advantage resulting in an additional burden on the Slovak State owing to the application of the Law on Strategic Companies to NCHZ during the first insolvency period (see paragraph 152 above).

180 According to settled case-law, the objective of the obligation on a State to abolish aid found by the Commission to be incompatible with the internal market is to restore the previous situation (see judgment of 4 April 1995, *Commission* v *Italy*, C-350/93, EU:C:1995:96, paragraph 21 and the case-law cited; see also, to that effect, judgment of 17 June 1999, *Belgium* v *Commission*, C-75/97, EU:C:1999:311, paragraphs 64 and 65). By repaying, 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 (see, to that effect, judgments of 15 December 2005, *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraph 113, and of 4 March 2009, *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission*, T-445/05, EU:T:2009:50, paragraph 193).

181 It follows that the Commission did not err in finding that, in order to restore the previously existing situation, the amount of aid to be recovered had to correspond to the amount of the unpaid public liabilities during the period of application of the Law on Strategic Companies to NCHZ.

182 By contrast, the applicant's argument is based on a hypothetical 'counterfactual scenario' and a decision of the relevant committee to cease NCHZ's operations at the start of the first insolvency period. However, the amounts to be repaid cannot be determined in the light of the various operations which could have been implemented in the absence of the measure which led to the granting of the aid and restoration of the previous situation does not entail reconstructing past events differently on the basis of hypothetical elements such as the choices, often numerous, which could have been made by the operators concerned (see, to that effect and by analogy, judgments of 15 December 2005, *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraphs 114 and 118, and of 4 March 2009, *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission*, T-445/05, EU:T:2009:50, paragraph 203). It must be noted in that regard that, while the applicant puts forward very precise figures claiming, in particular, that the claims of the social insurance company and those of the health insurance company should be reduced respectively by EUR 1 590 091.20 and EUR 276 626.24, those figures are merely based on assumptions. First, in accordance with the scenario set out by the applicant, the date on which the decision to cease NCHZ's operations would have been taken is unknown. Secondly, contrary to its claims, according to the study of June 2010 to which it refers, ceasing production would require a period of 10 to 18 weeks, and not necessarily 18 weeks. Thirdly, still following the scenario set out by the applicant, there is no certainty as regards the number of employees who would have had to have been dismissed, since some employees could have decided to leave NCHZ before the company ceased its operations, which would have affected the amounts payable to the two abovementioned public entities.

183 Accordingly, the applicant's argument must be rejected in so far as it is based on the incorrect premiss that the Commission was obliged to take into consideration the costs of liquidation of NCHZ at the start of the first insolvency period.

184 In the second place, the applicant submits that the Commission's estimate of the liabilities accrued during the first insolvency period is based on incorrect figures and estimates. However, it has already been noted, in the context of the second plea in law, that the figures used to calculate the amount of the aid are those provided by the Slovak authorities and that, in any event, the exact total of the claims of that entity may be determined during the recovery phase (see paragraphs 164 to 173 above).

185 In the light of all the foregoing considerations, the third part of the first plea in law must be rejected.

186 Consequently, the first plea in law must be rejected in its entirety.

E. The sixth plea in law, alleging infringement of Article 296 TFEU with regard to the Commission's finding of economic continuity

187 The applicant claims not to understand the reasons that led the Commission to find that there was economic continuity and submits that the reasoning set out in the contested decision is not sufficient to enable the Court to review that decision. In the reply, it claims that the mere fact that the Commission was obliged to explain, in the defence, the reasons for the concrete '(non) application', in the contested decision, of the indicators which it had identified as relevant for that assessment (recital 132 of the contested decision) proves that the reasoning set out in the contested decision on that point was insufficient.

188 The Commission, supported by the intervener, disputes the merits of the applicant's arguments.

189 It must be noted, first, that, in the contested decision, the Commission stated that it would analyse only the possible economic continuity between NCHZ and the applicant, relying on the fact that, since Via Chem Slovakia sold NCHZ to the applicant on 1 August 2012, that is to say only 1 day after completing its acquisition of NCHZ, it had not actually managed or operated NCHZ (recitals 133 and 134 of the contested decision). The Commission stated that it acknowledged that the scope of those two transactions was not exactly the same, since Via Chem Slovakia retained ownership of certain immovable assets. It observed that, nevertheless, the immovable assets necessary for the continuation of NCHZ's economic activities had been made available to Fortischem on the basis of a lease contract. It stated that, therefore, the specific features of the two transactions would be taken into account to the extent that they were relevant to that assessment (recital 135 of the contested decision).

190 It must be noted, next, that the Commission stated that the obligation to recover incompatible State aid could be extended to a new company to which the company which benefited from that aid transferred or sold part of its assets, where that transfer or sale structure has led to the conclusion that there was economic continuity between the two companies (recital 130 of the contested decision). It added that, according to the case-law, the assessment of economic continuity between the aid beneficiary and the undertaking to which its assets were transferred was established based on a set of indicators, which it set out (recital 132 of the contested decision).

191 The Commission analysed the two sales transactions in the light of the indicators listed. First, it questioned whether the sale price paid by Via Chem Slovakia, then that paid by the applicant for the company's 'assets' represented a market price and concluded that that was probably not the case (recitals 136 to 148 of the contested decision). Secondly, as regards the scope of each of the sale transactions, it considered that the subject of the sale of NCHZ to Via Chem Slovakia was the whole of NCHZ as a going concern and all the rights and obligations relating to NCHZ and that the applicant ran the business of NCHZ without any major change in its sales, staff or production policy (recitals 149 to 158 of the contested decision). Thirdly, it stated that it assumed that there was no link between the former and new owners of NCHZ, which was transferred to the applicant, in so far as it did not have any evidence to the contrary (recitals 159 to 162 of the contested decision). Fourthly, as regards the timing of the 'sale', it concluded that it took place after the Commission had opened a preliminary investigation into the complaint and had sent its results to the Slovak authorities for comment (recital 163 of the contested decision). Fifthly, as regards the economic rationale of the transaction, it considered that there had not been any change in commercial strategy and that the applicant merely used the assets in the same way as the vendor (recitals 164 to 167 of the contested decision).

192 It must be observed, finally, that the Commission considered that the only changes appeared to relate to the name of the company and the legal entity to which NCHZ belonged. It referred to the conditions of the 2011 tender procedure and the sales contract between NCHZ and Via Chem Slovakia of 16 January 2012, according to which, in essence, NCHZ was sold as a set of tangible and

intangible assets together with its staff. It stated that the 'acquirer' had continued with the production portfolio and commercial policy of NCHZ and that the price paid probably did not constitute a market price (recital 168 of the contested decision). It concluded that there was economic continuity between NCHZ and the applicant (recital 169 of the contested decision).

193 Thus, it must be held that the Commission stated the reasons which led it to find that there was economic continuity between NCHZ and the applicant. It is true that, in recital 168 of the contested decision, under the heading 'Conclusion on economic continuity between NCHZ and the economic activities acquired and operated by [the applicant], it referred to evidence relating to the acquisition of NCHZ by Via Chem Slovakia. However, as regards the production portfolio and the price paid, the reference must be regarded, in the light of the assessments set out in recitals 146 and 157 of the contested decision, as, in any event, concerning the applicant.

194 Moreover, since the Commission stated that the assessment of economic continuity should be carried out using a set of indicators, it may be understood that, having analysed a number of factors, the indicators referred to in recital 168 of the contested decision were those on which it had based its conclusion.

195 In addition, contrary to what the applicant maintains, the Commission set out its reasoning concerning the sale price between NCHZ and Via Chem Slovakia, which cannot be described as imprecise and vague, and its reasoning concerning the sale price between Via Chem Slovakia and the applicant, which cannot be described as opaque. First, it set out the reasons why it considered that the requirements of the 2011 tender procedure did not make it possible to attract the maximum number of participants bidding against each other with their best offers, which is a prerequisite for sale at the highest possible market price (recitals 136 to 144 of the contested decision). Secondly, it stated that the sale was organised as a sale of the whole business as a going concern, which excluded the possibility of maximising the final price through tendering for partial areas of NCHZ's activities (recital 145 of the contested decision). Thirdly, it noted that, the sale of NCHZ by Via Chem Slovakia to the applicant was a transaction between two private companies where no tender procedure was organised, that those two parties simply negotiated a price, without any possibility for any other party to offer a higher price and that, consequently, the doubts as to whether the price paid by Via Chem Slovakia corresponded to the market price also related to the price paid by the applicant (recital 146 of the contested decision).

196 It follows, that, in accordance with the case-law cited in paragraphs 39 to 41 above, the contested decision must be regarded as containing a sufficient statement of reasons concerning the Commission's assessment that there was economic continuity between NCHZ and the applicant and, accordingly, the sixth plea in law must be rejected.

F. The fourth plea in law, alleging infringement of Article 107(1) and Article 108(2) TFEU and Article 14(1) of Regulation (EC) No 659/1999 on account of the extension to the applicant of the obligation to recover the alleged State aid

197 The applicant claims that the Commission infringed Article 107(1) and Article 108(2) TFEU and Article 14(1) of Council Regulation (EC) No 659/1999 by finding that there was economic continuity between NCHZ and itself and by extending the recovery obligation to it.

198 In the first place, the applicant claims that according to the case-law, State aid can be transferred to the purchaser of the aid beneficiary's assets only if the assets have been acquired below market price. However, in so far as Via Chem and subsequently the applicant had purchased NCHZ's assets at the market price, the applicant cannot be regarded as having benefited from State aid and that alone is sufficient to rule out any recovery from the applicant (see, to that effect, judgments of 29 April 2004, *Germany* v *Commission*, C-277/00, EU:C:2004:238, paragraph 70, and of 1 July 2009, *Operator ARP* v

Commission, T-291/06, EU:T:2009:235, paragraph 67). The Commission's approach in the present case infringes Article 14 of Regulation No 659/1999 because State aid can be recovered only from the aid beneficiary.

199 According to the applicant, the judgment of 28 March 2012, *Ryanair* v *Commission* (T-123/09, EU:T:2012:164, paragraphs 161 and 162), does not support the Commission's assertion that the market price is not the decisive criterion, since, in that judgment, the fact that a price corresponding to market value was paid rendered the examination of other criteria superfluous for the purpose of assessing economic continuity. The Commission confirmed that understanding of the case-law in its notice entitled 'Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid' (OJ 2007 C 272, p. 4; 'the 2007 Communication') since it states, in point 33, that it is entitled to extend the recovery only where it can prove that the assets were sold at a price lower than the market price. In the present case, it claims that it is free to use the indicators referred to in the abovementioned judgment as it sees fit and, except for the claim that the scope of the transaction must be the most important indicator, it has not even explained the ranking of the different indicators.

200 In the second place, the applicant submits that even in the particular case where assets of the beneficiary of the aid have been transferred below market price, that in itself does not entitle the Commission to extend the recovery decision to the purchaser of those assets. It must on the contrary establish that the transfer of assets took place in order to circumvent the recovery order and prove the existence of economic continuity between the aid beneficiary and the purchaser in the light of certain criteria (see, to that effect, judgment of 29 April 2004, *Germany* v *Commission*, C-277/00, EU:C:2004:238, paragraph 86). In the present case, those criteria manifestly militate against circumvention and economic continuity. Even if they are accurate, the Commission's findings cannot be used to justify its conclusion that there was economic continuity, since, in the light of its decision-making practice and the case-law, the scope of the transfer is not sufficient in itself to draw that conclusion, including as regards a sale as a going concern, where the applicant has moreover demonstrated that the highest market price was obtained. Therefore, there can be no economic continuity between NCHZ and Via Chem Slovakia or, more in particular, between NCHZ and the applicant.

201 In the third place, the applicant maintains that especially in insolvency cases, the Commission's approach is economically destructive and unnecessary from a competition law perspective. It claims that the Commission is trying to create much stricter case-law, according to which the scope of the transaction should be the decisive criterion.

202 The Commission, supported by the intervener, disputes the merits of the applicant's arguments. It considers that it took into consideration the various factors set out in the case-law and the specific features of the present case and did not err in finding that there was economic continuity in the present case and, therefore, in extending the recovery obligation to the applicant.

203 The Commission's findings in the contested decision concerning the existence of economic continuity between NCHZ and the applicant are set out in paragraphs 189 to 192 above.

1. Preliminary observations

204 It must be noted that Article 14(1) of Regulation No 659/1999, entitled 'Recovery of the aid', provides as follows:

'Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary […].'

205 According to settled case-law, the main objective pursued in recovering unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage which such aid affords. Restoring the situation prior to the payment of aid which was unlawful or incompatible with the internal market is a necessary requirement for preserving the effectiveness of the provisions of the Treaties concerning State aid (see judgment of 7 March 2018, *SNCF Mobilités* v *Commission*, C-127/16 P, EU:C:2018:165, paragraph 104 and the case-law cited).

206 While Regulation No 659/1999 does not expressly envisage a Commission decision finding economic continuity between the initial beneficiary of the aid in question and another entity, that principle has been developed by the EU Courts in order to allow the Commission to extend the obligation to recover aid to the purchaser of the assets of the initial beneficiary of the aid in question and to ensure that recovery decisions are effective.

207 Thus, the illegal 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 retains the actual benefit thereof (see, judgment of 7 March 2018, *SNCF Mobilités* v *Commission*, C-127/16 P, EU:C:2018:165, paragraph 106 and the case-law cited).

208 According to the case-law, in order to assess whether such economic continuity exists, the following factors 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 undertaking and of the original undertaking, 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 (see, to that effect, judgments of 8 May 2003, *Italy and SIM 2 Multimedia* v *Commission*, C-328/99 and C-399/00, EU:C:2003:252, paragraph 78; last indent; of 7 March 2018, *SNCF Mobilités* v *Commission*, C-127/16 P, EU:C:2018:165, paragraph 108; of 13 September 2010, *Greece* v *Commission*, T-415/05, T-416/05 and T-423/05, EU:T:2010:386, paragraph 135, and of 28 March 2012, *Ryanair* v *Commission*, T-123/09, EU:T:2012:164, paragraph 155). The EU Courts have stated that the Commission was not required to take into account all of the above factors, as is demonstrated by the use of the expression 'may be taken into consideration' (see, to that effect, judgments of 28 March 2012, *Ryanair* v *Commission*, T-123/09, EU:T:2012:164, paragraph 156, and 17 December 2015, *SNCF* v *Commission*, T-242/12, EU:T:2015:1003, paragraph 235).

209 As regards the sale price, although the market price criterion is one of the most significant, it is not a sufficient criterion for a finding that there is no economic continuity (see, to that effect, Opinion of Advocate General Mengozzi in *SNCF Mobilités* v *Commission*, C-127/16 P, EU:C:2017:577, paragraph 116). In that regard, it must be noted that, contrary to what the applicant claims, in the case giving rise to the judgment of 28 March 2012, *Ryanair* v *Commission* (T-123/09, EU:T:2012:164, paragraphs 157 to 161), the Commission concluded that there was no economic continuity, basing its decision both on the subject matter and the asset transfer price, consistent with the market price, and on the mismatch between the shareholders and the economic logic of the transaction, and not merely on the transfer price.

210 In addition, according to the case-law, 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 the case, in particular, 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, which 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 (judgments of

11 December 2012, *Commission* v *Spain*, C-610/10, EU:C:2012:781, paragraphs 104 to 107; of 24 January 2013, *Commission* v *Spain*, C-529/09, EU:C:2013:31, paragraphs 107 and 109, and of 17 December 2015, *SNCF* v *Commission*, T-242/12, EU:T:2015:1003, paragraph 234).

211 Finally, it must be recalled that the criteria laid down in the case-law for identifying the effective recipient of aid are objective and 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 (see, to that effect, judgment of 13 September 2010, *Greece and Others* v *Commission*, T-415/05, T-416/05 and T-423/05, EU:T:2010:386, paragraph 146).

212 Accordingly, it follows from the case-law that, although the fact that the transfer price is not the market price may lead to extension of the recovery obligation, the fact that the transfer price is consistent with market conditions may, contrary to the applicant's claims, be insufficient to rule out, in itself, the existence of economic continuity and does not prevent, in some circumstances, extension of the recovery obligation, which will be the result of circumvention, with no need for the intention to circumvent to be present.

213 Moreover, it must be stated that the 2007 notice to which the applicant refers was adopted before, inter alia, the delivery of the judgments of 13 September 2010, *Greece and Others* v *Commission* (T-415/05, T-416/05 et T-423/05, EU:T:2010:386) and of 28 March 2012, *Ryanair* v *Commission* (T-123/09, EU:T:2012:164). Accordingly, in that notice, the Commission was, by definition, unable to take into account developments in the case-law which took place after 2007 and cannot be criticised for now taking them into account.

214 Finally, as regards the subject matter of the transfer in the present case, it must be specified that, although, in the contested decision, the sale of NCHZ's assets is sometimes mentioned, it is not disputed that, with the exception of immovable property, the sale between Via Chem Slovakia and the applicant covered all assets and rights relating to chemical production (including production machines and equipment, contracts, etc.), and all commitments connected with chemical production (including all employment contracts) (recital 135 of the contested decision).

215 The Commission's analysis relating to economic continuity justifying the extension to the applicant of the obligation to recover State aid must be examined in the light of those considerations.

2. The sale price of NCHZ

216 The applicant claims that the Commission could not extend the recovery obligation beyond NCHZ, since the assets of the insolvent entity were sold at market price.

217 The Commission contests the merits of the applicant's argument.

218 In the decision opening the formal investigation procedure, the Commission expressed doubts as to whether the prices paid in turn by Via Chem Slovakia and by the applicant for NCHZ's assets corresponded to the market price and, in the contested decision, stated that it continued to entertain those doubts (recitals 136, 146 and 147 of the contested decision). In that regard, in the first place, the Commission stated that, first, the tender procedure for the sale to Via Chem Slovakia contained an option to select commitments, involving (i) maintaining a minimum level of production for 5 years, (ii) maintaining a minimum level of investments and (iii) restricting the possibility of selling or transferring NCHZ's assets for 5 years, which could deter potential participants or have a negative impact on the tenders submitted (recitals 17 and 138 to 144 of the contested decision), and, secondly, tenderers could only buy all the assets with a view to continuing operations, which meant that it could not be ruled out that the sale of partial areas on NCHZ's business could have led to a higher total sale price (recital 145 of the contested decision). In the second place, it found that the transfer to the

applicant of NCHZ by Via Chem Slovakia had constituted a transaction between two private companies where no tender procedure was organised (recital 146 of the contested decision). It concluded that it 'appear[ed] likely that NCHZ's assets were not sold in a manner that ensured the maximisation of revenue for the transferred business' (recital 147 of the contested decision).

(a) The burden of proof

219 The applicant maintains that the burden of proof concerning the economic advantage obtained by the purchaser of the assets of the aid beneficiary lies with the Commission and that it is not sufficient for it to express doubts. However, it has not adduced any evidence to show that the sale price was in fact lower than the market price.

220 The Commission disputes the applicant's claims.

221 It must be noted that, in so far as, in accordance with the case-law, just one of the factors to be taken into consideration in order to assess whether there was economic continuity is not sufficient in itself to rule out extending the recovery obligation to an undertaking other than the initial beneficiary of the aid in question, such as, for example, a sale price at market price, the Commission does not have to prove that there was no such sale price in order to conclude that there was economic continuity and the lack of guarantee of such a sale price may be taken into account in the Commission's overall assessment of the various factors under examination.

(b) The sale to Via Chem Slovakia

(1) The alleged presumption that a sale was made at market price when it takes place in the context of court-supervised insolvency proceedings

222 According to the applicant, since the sale was made in the context of insolvency proceedings under the supervision of an insolvency court with the obligation to act in the interest of the creditors of the insolvent company, the assets are presumed to have been sold at the highest price possible (see, to that effect, judgment of 29 April 2004, *Germany* v *Commission*, C-277/00, EU:C:2004:238, paragraphs 93 and 94).

223 According to the Commission, there is no presumption that any sale made in the context of insolvency proceedings took place at market price.

224 In that regard, it must be observed that, in the case giving rise to the judgment of 29 April 2004, *Germany* v *Commission* (C-277/00, EU:2004:238, paragraphs 92 and 93), the Commission had not called into question the assertion that the sale had been made at market price and had not found that the conditions connected with the sale had had the effect of reducing the sale price. Accordingly, the applicant interprets that judgment broadly.

225 Moreover, the fact that the sale takes place under the supervision of a court does indeed provide a guarantee that the rules laid down will be complied with and that the insolvency court will ensure that creditors are satisfied as far as possible. However, in the present case, it was for the Commission to confirm whether the conditions of the sale to Via Chem Slovakia were such as to guarantee payment of a market price and to examine the manner in which that sale took place.

(2) The alleged guarantee of the highest possible sale price on account of the sale in the context of an open, transparent and unconditional tender procedure

226 According to the applicant, as regards the sale of NCHZ to Via Chem Slovakia, the seller was legally required to obtain the highest possible sale price. The applicant claims that the tender procedure implemented by the administrator, in accordance with the requirements set out by the súd v Trenčíne (Trenčín Court), having been open, transparent and unconditional, guaranteed that NCHZ's assets were sold at the highest price possible on the market. It submits that the Commission does not question the transparency of the second tender procedure, but that its doubts related to the option concerning commitments (recitals 137 to 144 of the contested decision) and the impossibility of purchasing individual assets rather than purchasing them en bloc. It disputes the Commission's findings in that regard.

227 In the first place, in recitals 17 and 137 of the contested decision, the Commission noted that, under the 2011 tender procedure, potential participants could submit a tender with or without 'commitments of the transferee' ('a tender with commitments' and a 'tender without commitments' respectively). It observed that it was provided that, if the highest tender came from a tenderer which had chosen not to undertake the commitments, the applicant who had submitted the highest tender with commitments had the option to match its offer to the highest offer of the participants who had submitted a tender with commitments.

228 The Commission considered that the option for one tenderer to raise its offer after all the tenders had been submitted was likely to discourage potential participants and/or have a negative impact on the tenders submitted. It explained that a participant submitting a tender with commitments might potentially submit a lower tender than if the 2011 tender procedure did not provide for the possibility of matching. It considered that that condition could discourage participants who did not wish to submit a tender with commitments, given that, even if their offer was highest, it could be rejected. It concluded that the possibility of submitting a tender with commitments could have an influence on the price offered (recitals 138 to 140 and 143 of the contested decision).

229 First of all, it is necessary to reject the applicant's argument that the option concerning commitments, in fact, had no effect on the sale price, since no tenderer made use of it. On the one hand, it is based on a retrospective factual finding. Second, such an argument is irrelevant for the purposes of examining whether the conditions set out in the tender procedure made it possible to ensure the highest price possible.

230 It must be noted that the Commission stated in recital 141 of the contested decision that the conditions of the 2011 tender procedure gave precedence to participants willing to accept the commitments, which could indicate that the price proposed in a tender without commitments could be higher than the price proposed by the successful participant. It must, however, be pointed out that, in any event, for a tender with commitments to be awarded, the price proposed in that tender would have to be reviewed and matched to the price proposed in a tender without commitments.

231 It is nevertheless true that, as the Commission stated in recital 139 of the contested decision, one of the factors that ensures that the highest price is achieved in a tender procedure is the uncertainty concerning the price proposed by the other tenderers. A tender procedure which allows certain tenderers to change the price that they propose entails a risk, first, that those who are able to amend their tender may seek not to propose the highest price at which they have assessed the undertaking offered for sale, while waiting to see if it is necessary to increase their offer, and, on the other hand, that those who cannot amend their tender seek to propose a price which is also lower than the highest price at which they have assessed the undertaking offered for sale, or decide not to tender, considering that they might in any event be eliminated by a tenderer willing to accept the commitments.

232 Accordingly, it cannot be ruled out that the conditions laid down by the 2011 tender procedure providing for the possibility of altering the sale price proposed could have had an impact on the sale price, in the sense that it would not have been the highest possible price.

233 In the second place, in the contested decision, the Commission considered that the fact that the sale was organised as the sale of a going concern, that is to say with all the assets bundled together, ruled out the possibility of maximising the final price through bidding for partial areas of NCHZ's activities, while at the same time avoiding or limiting potential difficulties stemming from the possible discontinuation of that company's activities. It found that the documents submitted by the Slovak authorities referred to potential participants who were interested in acquiring only some parts of NCHZ's business. According to the Commission, it was therefore impossible to rule out that a sale of partial areas of NCHZ's business would not have led to a higher total sale price (recital 145 of the contested decision).

234 The applicant claims that it is not important to determine whether the sale of separate assets would have made it possible to obtain a higher sale price, but rather to know whether the purchaser paid a price for the assets consistent with the market price and the only question requiring an answer is whether the purchaser obtained an economic advantage. Moreover, according to the applicant, the Commission should have adduced evidence to show that it would have been possible to obtain a better result by selling the assets separately.

235 The Commission disputes that line of argument and maintains that, if a higher price could have been achieved by selling the assets separately, but nonetheless it was decided to sell the company bundled as a going concern to ensure the continuation of NCHZ's business and not to maximise the proceeds of sale, it is clear that the sale was not made at market price, that is to say the highest price likely to be obtained on the market.

236 It must be noted that, at the very least, one participant expressed an interest in a partial sale (recital 145 of the contested decision, and that the súd v Trenčíne (Trenčín Court) asked the administrator to assess that additional tender. However, it must be noted that, in reply to a question put by the Court, the Commission stated, without being contradicted by the applicant, that the 2011 tender procedure prohibited the sale of the assets separately.

237 It must be considered that the price to be taken into consideration is that of the undertaking offered for sale. It cannot be presumed that, by proposing only the purchase of the undertaking as a whole, that is to say by a single purchaser, the price obtained for the sale of the undertaking was the highest that could be obtained on the market. Even if the objective pursued was the continued operation of NCHZ, that did not involve prohibiting the sale of assets separately.

238 First, the activity of the undertaking sold could clearly have been continued when the ownership of the different assets was divided among several entities. The subsequent sale to the applicant showed that an undertaking could have been concerned by the purchase of part of the assets, while leasing the other part, and thus have the use of all of those assets.

239 Secondly, as the Commission and the intervener submitted at the hearing, the option of selling the assets separately that could have been provided did not mean that such a sale would be made, in particular where it would have been financially less advantageous.

240 Such a sales option, which did not restrict the subject of the transfer to an overall economic unit, would nevertheless have made it possible not to limit the choice of prospective buyers (see, to that effect, judgment of 28 March 2012, *Ryanair* v *Commission*, T-123/09, EU:T:2012:164, paragraph 158) and to presume, subject to the other conditions of the 2011 tender procedure being different (see paragraph 232 above), that the sale of the undertaking was made at the highest price.

241 For the sake of completeness, it should be noted that the applicant submits that when, as in the present case, assets are sold to a third party in the context of a tender procedure which forms part of insolvency proceedings, the economic motivation of the parties is clear and that that of the buyer is to carry out a transaction which, in its view, might lead to profit. It must be noted that, in so far as Via Chem Slovakia did not operate NCHZ, but sold it following its acquisition, the applicant's reasoning applied to the first sale implies that Via Chem Slovakia offered and paid a price below market price.

242 In the third place, while the applicant submits that the two tender procedures confirm that the price of the sale to Via Chem Slovakia was consistent with market conditions, it must, however, be noted that, as the Commission stated in recital 16 of the contested decision, the 2010 tender procedure resulted in the submission of a tender by only one tenderer, which the administrator rejected, thinking that a better offer could be obtained.

243 Moreover, since the two participants in the last stage of the 2011 tender procedure submitted tenders close to the first tender (recital 16 of the contested decision), the applicant drew the conclusion that that fact constituted evidence that that was the market price. That argument must be rejected, however, first, since one of the two tenderers was the company whose tender had been rejected during the 2010 tender procedure and, secondly, for the reasons set out in paragraphs 232 and 240 above.

244 In the fourth place, in reply to the applicant's argument, the Commission claims that the '*ex post* analysis' carried out by the administrator of the price offered by Via Chem Slovakia did not prove that the price thus obtained actually corresponded to a market price. That analysis concerns the question whether, at that stage, the best solution was to sell the undertaking to Via Chem Slovakia.

245 In that regard, it must be noted that, in reply to a question put by the Court at the hearing, the Commission stated that it classified the analysis as '*ex post*' since it had been carried out after the tenders were received in the 2011 tender procedure. It follows from that analysis, communicated by the Commission in the context of the measures of organisation of procedure, that it concerned the question whether, at that stage, the best solution was to sell the undertaking to Via Chem Slovakia. It also follows that the administrator did not take the view that the price offered by Via Chem Slovakia represented the market price without a doubt, but that he stated that it was necessary to sell NCHZ, because to defer the sale would entail further negative repercussions on that company, in particular if its operations were continued in the context of insolvency.

246 In the light of all of the foregoing considerations, it must be held that, contrary to the applicant's claims, the conditions of the 2011 call for tenders did not allow for the presumption that the purpose of the sale was to obtain the maximum possible proceeds and the Commission was right to consider that there was no guarantee that the sale price paid by Via Chem Slovakia for NCHZ was the market price.

(c) The sale by Via Chem Slovakia to the applicant

247 The applicant claims that, notwithstanding the fact that the conditions of sale between Via Chem Slovakia and itself are irrelevant, on account of the fact that the first sale was made at market price, it must be held that a sale price negotiated by private operators in a market economy is presumed to be in line with market conditions, including in the absence of a procurement procedure.

248 In the contested decision, the Commission considered that the sale of Via Chem Slovakia to the applicant was a transaction between two private companies where no tender procedure was organised. It stated that the price was simply negotiated between the two private companies without any

possibility for other parties to offer a higher price. It concluded that the doubts as to whether the price paid by Via Chem Slovakia corresponded to a market price also related therefore to the price paid by the applicant (recitals 146 of the contested decision).

249 It is necessary to reject the applicant's reference to a decision-making practice, in so far as the Commission's decision-making practice in other cases cannot affect the validity of a contested decision, which can be assessed only in the light of the objective rules of the Treaty (see, to that effect, judgment of 20 May 2010, *Todaro Nunziatina & C.*, C-138/09, EU:C:2010:291, paragraph 21, and of 17 December 2015, *SNCF* v *Commission*, T-242/12, EU:T:2015:1003, paragraph 121).

250 Moreover, it is true that, as the Commission found in the contested decision, the fact that there was no competitive procedure does not provide certainty that that price was consistent with the market price or below it.

(d) Conclusion

251 In the light of all the foregoing considerations, as the Commission considered, in essence, in recitals 144 to 146 and 168 of the contested decision, it must be concluded that it cannot be certain that the two successive sales were made at market price.

3. The scope of the transaction

252 According to the applicant, the only criterion which does not militate against the existence of circumvention lies in the scope of the transaction. It claims that, even if the separate sale of NCHZ's assets had alone sufficed to rule out the existence of economic continuity, the mere fact that NCHZ's assets were sold as a going concern between NCHZ and Via Chem Slovakia is not sufficient to establish that there was economic continuity. In addition, as regards the sale of certain of Via Chem Slovakia's assets to the applicant, since only 60% of NCHZ's business was transferred, it would even be possible to claim that the scope of the transfer was insufficient to satisfy that criterion, with the result that economic continuity could be ruled out on that basis alone.

253 The Commission, supported by the intervener, disputes the applicant's arguments. It considers that the scope of the transaction is a particularly important criterion and notes that the applicant does not call into question the arguments put forward on that point in the contested decision but seeks to minimise the importance of that aspect, without support for its point of view in the case-law.

254 In the contested decision, in the first place, the Commission stated that the larger the part of the original business that was transferred to a new entity, the higher the likelihood that the economic activity related to these assets continued to benefit from the incompatible aid (recital 149 of the contested decision).

255 In the second place, the Commission pointed out, first, that the sale to Via Chem Slovakia concerned the whole of NCHZ's business, as a going concern (recitals 150 and 151 of the contested decision). It pointed out, secondly, that, as regards the sale to the applicant, the scope of activity of the business acquired by the applicant remained the same as the previous scope of NCHZ's activities and that more than 95% of NCHZ's employees were transferred (recital 152 of the contested decision). It also noted that, apart from immovable property, all the assets, rights and obligations relating to the transferred business had been taken over by the applicant (recitals 153 and 156 of the contested decision). According to the Commission, the fact that part of the assets are used on the basis of a lease contract rather than direct ownership does not change the fact that the applicant 'simply' continues with the economic activities of NCHZ in the same scope as before the transaction (recital 156 of the contested decision). Moreover, the Commission maintained that the applicant had kept the NCHZ management (recital 154 of the contested decision), having announced in the press,

when it acquired that company's business, that it did not plan any major changes concerning staff or production and that it was keeping the existing management (recital 155 of the contested decision). Thus, according to the Commission, the applicant continued NCHZ's operations without any major changes in its commercial, staff or production policy (recital 158 of the contested decision).

256 It must be noted that, in order to demonstrate that the scope of the transaction is actually a negative criterion which, in itself, makes it possible to rule out, when it is not satisfied, the possibility that the transaction in question seeks to circumvent the recovery decision, the applicant claims that that conclusion derives from case-law and, in that regard, cites point 67 of the Opinion of Advocate General Tizzano in *Germany* v *Commission* (C-277/00, EU:C:2003:354). That point reproduces an argument of the Commission and does not refer, contrary to its assertions, to any additional reference. Moreover, although it is clear from the case-law that various items of evidence may be taken into consideration, including 'the purpose of the transfer (assets and liabilities, continuity of the workforce, bundled assets)' (see paragraph 208 above), it does not follow that economic continuity must be ruled out in the event that the transaction is small in scope.

257 Moreover, it must be held that, as the Commission claims, the applicant has adduced no argument in order to challenge the assessments set out in the contested decision concerning the scope of the two successive sale transactions, with the exception, however, of the argument that only 60% of the business was transferred to the applicant. Nevertheless, the Commission addressed that argument in recital 153 of the contested decision and the applicant has not adduced any argument contradicting the findings that it leased from Via Chem Slovakia the immovable property (land and buildings) that it had not purchased and which were necessary for chemical production. In addition, it has adduced no argument challenging the other findings of the Commission, to the effect that the applicant continued NCHZ's operations with no major changes in its in commercial, staff or production policy (see paragraph 255 above).

258 The Commission's findings in the contested decision do not appear to be vitiated by any error and permit the view that, in the present case, the scope of the transaction, in the sense of the subject matter of the transfer, suggests that there was economic continuity between NCHZ and the applicant. The fact that the latter did not purchase the immovable property necessary for chemical production, comprising land and buildings, but leased them, cannot invalidate that finding, since it has the use of all the elements which enable the continuation of NCHZ's operations.

4. The economic logic of the transaction

259 The applicant claims, with reference to paragraph 33 of the 2007 notice, that the criterion relating to the economic logic of the transaction does not seek to ensure that the buyer uses the assets differently from the seller, but to determine whether an economic reason other than circumvention of the recovery decision justifies the transaction. That criterion is not intended to be used beyond that indication of circumvention and is particularly useful in intra-group transactions. When, as in the present case, assets are sold to a third party in the context of a tender procedure which forms part of insolvency proceedings, the economic motivation of the parties is obvious. First, the applicant claims that the seller, in the present case the insolvency administrator, seeks to obtain funds in order to service the debts of the insolvent company and, to do so, will sell, as in the present case, assets in accordance with the principle of continuing the business in order to settle the claims of the creditors, if that sale would make it possible to generate greater revenue than the sale of the separate assets. Secondly, the buyer wants to make a deal that, in its view, will lead to profit. In any event, the Commission's claim that the acquisition of NCHZ's assets did not coincide with the applicant's other activities (recital 166 of the contested decision) is 'pure economic nonsense'.

260 The Commission considers that the contested decision is not vitiated by any error in that regard. It claims that the applicant does not cite any case-law in support of its interpretation of the economic logic criterion and appears to overlook the fact that it is referred to in the case-law as one of the factors which may be taken into consideration in order to establish economic continuity between a State aid beneficiary and the purchaser of the assets of that beneficiary and not to demonstrate a potential circumvention of the recovery order.

261 In the contested decision, the Commission maintained that the purpose of the economic logic criterion was to verify whether the purchaser of the assets used them in the same way as the seller or whether, on the contrary, it integrated those assets into its own commercial strategy and thus generated synergies justifying its interest in acquiring these assets (recital 164 of the contested decision). It noted that the applicant had purchased the whole of NCHZ's chemical division, namely the main part of that company's business, with over 95% of its employees and rights and obligations, and that the production portfolio and the scope of the applicant's business was identical to that of NCHZ (recital 165 of the contested decision). In addition, it stated that the applicant had announced in the press that it did not intend to make any major changes to the way NCHZ operated and the scope of its business. According to the Commission, even though the applicant belonged to a large group of companies, there did not seem to be any major synergy effects with other members of the group (recital 166 of the contested decision). It concluded that there had been no change in the commercial strategy and the applicant simply used the assets in the same way as the seller (recital 167 of the contested decision).

262 First, it must be recalled there need not be an intentional element in order to find that the obligation to recover aid has been evaded by the transfer of assets (see paragraph 211 above). Accordingly, contrary to the applicant's claims, the criterion of the economic logic of the transaction, which is one of the factors cited in the case-law (see paragraph 208 above) does not necessarily and only seek to establish whether an economic reason other than such circumvention justifies the transaction in question.

263 Next, it must be noted that it cannot be claimed, as the applicant maintains, that the economic logic underlying the transfer of NCHZ as a going concern was clearly to obtain the maximum possible proceeds in order to service the creditors' claims. As has been found, the tender procedure leading to the sale to Via Chem Slovakia was not organised in such a way that the highest possible sale price was guaranteed (see paragraph 246 above).

264 Finally, as regards the sale to the applicant, the Commission recognised that certain members of the group of companies to which the applicant belonged were also active in the chemical industry but noted that their fields of activity were different. The applicant only calls into question that assessment of a lack of synergy by making unsubstantiated assertions. In any event, the fact, which is not disputed, that, as the Commission found, the applicant merely used the assets in the same way as NCHZ without changing its commercial strategy, leads to the conclusion that the economic logic of the sale to the applicant was, for the applicant, a continuation of the business previously conducted by NCHZ.

265 Accordingly, the Commission was entitled, without committing any error, to conclude that the economic logic of the transaction was an indication of economic continuity between NCHZ and the applicant.

5. The other factors examined by the Commission

(a) The intention to evade the recovery decision

266 The applicant submits that, in recital 131 of the contested decision, despite the fact that the Commission found that, even though it had no direct evidence that the transaction was intended to evade the effects of any recovery decision, it nevertheless also stated that the Slovak authorities clearly knew that the Commission was conducting a preliminary investigation following the complaint lodged on 17 October 2011 and knew of the existence of the cartel fine of EUR 19.6 million imposed on NCHZ by the decision of 22 July 2009. According to the applicant, the Commission 'insinuat[ed]' incorrectly that those two points were indirect evidence of the intention to evade recovery. In the reply, the applicant takes note that the Commission recognises that the present case does not concern circumvention.

267 The Commission, supported by the intervener, claims that it concluded that there was economic continuity between NCHZ and the applicant, which could have existed independently of a precise intention to circumvent a recovery decision and that it never stated that the present case concerned circumvention (recital 131 of the contested decision).

268 It must be held that, in the contested decision, the Commission did not find that there was economic continuity between NCHZ and the applicant on account, in particular, of an intention to circumvent the recovery obligation imposed by that decision. Consequently, the applicant's argument is ineffective.

(b) The connections between the initial owner and the new owner of NCHZ

269 According to the applicant, the assets were sold to third parties without any connection to NCHZ or its shareholders, which the Commission acknowledged, in essence, in the contested decision. Nor is there any such connection between NCHZ and Via Chem Slovakia. In the reply, the applicant claims that the Commission has not put forward any legal or economic argument explaining why that criterion should be used only to demonstrate economic continuity and not to cast doubt on such existence. That criterion actually makes it possible to determine whether or not the sale was made with a view to circumventing the recovery decision.

270 The Commission, supported by the intervener, maintains that that factor was taken into account in order to assess economic continuity, but submits that no particular conclusion can be drawn from the fact that the identity of the owners remains unknown, particularly since the contested decision does not concern an intention to circumvent the recovery order. In the rejoinder, it disputes, with reference to the judgment of 28 March 2012, *Ryanair* v *Commission* (T-123/09, EU:T:2012:164, paragraph 156), the applicant's argument that, in the absence of identity of the owners, no circumvention and therefore no economic continuity can be established.

271 In the contested decision, the Commission stated that 'in the absence of any evidence to the contrary, [it] presume[d] that there [were] no links between the original and the new owners of […] NCHZ […] transferred to [the applicant]' (recital 162 of the contested decision).

272 It must be noted that the relevant factors cited in the case-law include the identity of the shareholders or owners of the acquiring undertaking and of the original undertaking (see paragraph 208 above). As is apparent from recitals 159 to 162 and 168 to 170 of the contested decision, while the Commission examined that factor, it was correct not to consider that it constituted evidence of economic continuity between NCHZ and the applicant. It was also correct nevertheless to consider, in the

context of the overall assessment of the various factors under consideration, that the lack of a link between the old and new owners of NCHZ did not make it possible to rule out the existence of such economic continuity.

273 Moreover, the applicant's argument that that factor makes it possible to determine whether or not the sale was carried out with a view to circumventing the recovery decision must be rejected as ineffective for the same reason as that set out in paragraph 268 above.

(c) The time of the sale

274 According to the applicant, the creditors and the súd v Trenčíne (Trenčín Court) decided, well before any examination concerning State aid, to sell NCHZ's assets as a going concern via a tender procedure. In addition, it submits that the Commission does not allege that the administrator, the súd v Trenčíne (Trenčín Court), NCHZ, Via Chem Slovakia or the applicant had knowledge, at the time of the sales, about the procedure it had launched. Knowledge of the risk of a decision to recover State aid is a necessary condition for circumvention. In the light of the wording of recital 168 of the contested decision, the applicant claims that it must be interpreted as meaning that the Commission did not wish to base its conclusion on the time of the sale. The Commission implicitly conceded that, in the present case, that factor militated against the existence of circumvention.

275 The Commission, supported by the intervener, claims that it is not on the basis of that factor that it found that there was economic continuity between NCHZ and the applicant and that recital 163 of the contested decision merely records a fact. In addition, it maintains that it did not seek to prove an intention to circumvent the recovery order. In the rejoinder, it claims that the applicant's argument that the recovery obligation could never be extended to an unaware purchaser, despite the objective existence of economic continuity, is not supported by the case-law and that nor can the case-law support the idea that economic continuity cannot be established if the transfer of the assets takes place before the opening of the formal investigation procedure.

276 In recital 163 of the contested decision, the Commission examined the criterion concerning the timing of the sale. It noted that 'the sale [had taken] place after the Commission had opened the preliminary investigation into the complaint and forwarded the complaint for comments to the [Slovak Republic] and that at least the latter 'was aware that there was a possibility that the measures in question could constitute illegal and incompatible aid which would need to be recovered'.

277 It must be noted that the relevant factors in the case-law include 'the moment at which the transfer was carried out (after the start of the investigation, the initiation of the procedure or the final decision)' (see paragraph 208 above). Although the Commission thus examined that factor in recital 163 of the contested decision, it did not cite it, in recitals 168 to 170 of the contested decision, which contain its conclusions concerning economic continuity, as constituting an indication of such continuity in the present case.

278 Moreover, contrary to the applicant's claim, it is in no way apparent from the contested decision that the Commission implicitly conceded that the time at which the sale took place militated against the existence of circumvention. The Commission merely stated that, although it did not have direct evidence that the intention of the transaction was to evade the effects of a potential recovery decision, 'it was however clear to the Slovak authorities that the Commission had been preliminarily investigating a complaint against NCHZ since 17 October 2011 [recital 2 of the contested decision] and that there was the existing claim for the payment of the cartel fine of EUR 19.6 million imposed on NCHZ by a decision of 22 July 2009 [recital 12 of the contested decision]' (recital 131 of the contested decision).

279 In addition, it must be held, by the argument that knowledge of a State aid recovery decision or at least of the risk of such a decision is a necessary condition for circumvention of recovery, the applicant relies on the completion of a sale with the objective of avoiding the recovery of State aid. That argument must be rejected as ineffective for the same reason as set out in paragraph 268 above.

280 For the sake of completeness, it must be noted that, as the applicant claims, the decision to sell NCHZ as a going concern had been taken before there was any evidence that the Commission was conducting an investigation concerning potential State aid. Even considering the date of the 2010 tender procedure, or, after its failure, the date of the order of the súd v Trenčíne (Trenčín Court) requiring the administrator to proceed to sale in June 2011, it must be noted that the Commission had not then received the intervener's complaint. In addition, it is not necessarily significant that the agreement to sell was finally concluded with Via Chem Slovakia on 16 January 2012, that is to say the date on which the Commission sent the Slovak version of the complaint to the Government, which had previously been communicated, in a language other than the Slovak, on 17 October 2011. By contrast, it must be pointed out that, when NCHZ was sold to the applicant in August 2012, the existence of the complaint was known and the investigation preceding the opening of the formal investigation phase was under way. The applicant itself submits that the administrator had had an initial indication of the existence of a preliminary investigation concerning State aid by the Commission on account of a letter of 2 April 2012, sent to it on 10 April 2012. Accordingly, at the time of the second sale, Via Chem Slovakia and the applicant ought to have been aware of it because, contrary to the applicant's claims at the hearing in response to a question put by the Court, it must be noted that any diligent operator is required to inform itself fully of the economic situation of the entity it intends to purchase.

6. The Commission's overall assessment concerning the existence of economic continuity between NCHZ and the applicant

281 In the contested decision, the Commission based its finding of economic continuity on the fact that the prices paid at the time of the two successive sales probably did not represent market prices and on the scope of the transaction, meaning the subject matter of the transfer, and the economic logic of the transaction (recitals 168 and 169 of the contested decision).

282 It follows from the analysis of the contested decision that the Commission did not err in considering, first, that both the scope of the transaction (the subject matter of the transfer) and its economic logic could constitute evidence of the existence of economic continuity between NCHZ and the applicant (see paragraphs 254 to 258 and 261 to 265 above) and, secondly, that it could not be regarded as certain that the two successive sales had been made at market price (see paragraphs 251 above).

283 In that context, in the light of the fact that, in accordance with the case-law, first, even supposing that the transfer price was in line with the market price, it only constituted a single factor in the analysis of the existence of potential economic continuity and, secondly, the payment of a price consistent with market conditions cannot suffice to offset the competitive advantage linked to the receipt of unlawful aid, it must be held that, on account of the circumstances of the present case, the Commission was fully entitled to uphold the extension to the applicant of the recovery obligation, irrespective of any finding of an intention to circumvent recovery.

284 Consequently, the fourth plea in law must be rejected.

G. The fifth plea in law, raised in the alternative, alleging infringement of Article 107(1) and Article 108(2) TFEU, and of Article 14(1) of Regulation No 659/1999, on account of the failure to limit the extension to the applicant of the obligation to recover the alleged State aid to 60% of the amount of that aid

285 The applicant claims, in the alternative, that the contested decision is unlawful in so far as the Commission did not limit the recovery obligation to 60% of the State aid allegedly granted to NCHZ. It argues that it could not be the beneficiary of that amount because it purchased from Via Chem Slovakia only 60% of NCHZ's assets and, moreover, does not benefit indirectly from the proportion that remained in Via Chem Slovakia's ownership, since it pays a lease that is set at the market rate.

286 The Commission, supported by the intervener, disputes the merits of the applicant's arguments.

287 In the contested decision, the Commission stated that the applicant 'leas[ed] the immovable property (land and buildings) necessary for the chemical production' and that 'apart from the immovable property, all other assets, rights and obligations related to the transferred business [had been] taken over by [the applicant, which] thus [ran] the business of NCHZ and continue[d] with the same product portfolio' (recital 153 of the contested decision). It concluded that 'the fact that part of the assets [is] used on the basis of a lease contract[,] rather than direct ownership[,] [did] not change the fact that [the applicant] simply continue[d] with the economic activities of NCHZ in the same scope as before the transaction' (recital 156 of the contested decision).

288 As held by the Court, the Commission was fully entitled to conclude that the recovery obligation was extended to the applicant on account of the existence of economic continuity between NCHZ and the applicant. That continuity is based, inter alia, on the fact that the applicant had all the rights and obligations of NCHZ for the purpose of pursuing the same activities.

289 Moreover, as the Commission pointed out, the applicant does not dispute the fact that it leased the immovable property required for chemical production which it did not purchase, which constituted the remaining 40%, owned by Via Chem Slovakia. The fact that it did not own but rather leased that immovable property, according to its claim, at the market price in no way altered the fact that it was able to use it for the purpose of pursuing the activities previously conducted by NCHZ.

290 Accordingly, in the light of the circumstances of the present case which led to the finding of economic continuity between NCHZ and the applicant, it was not necessary to restrict the extension of the recovery obligation to 60% and the fifth plea in law must be rejected.

291 In the light of all of the foregoing considerations, the present action must be dismissed.

Costs

292 Under Article 134(1) of the Rules of Procedure, 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 applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

293 In accordance with Article 138(3) of the Rules of Procedure, AlzChem, which intervened in support of the form of order sought by the Commission, is to bear its own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Fortischem a.s. to bear its own costs and to pay those incurred by the European Commission;**

3. **Orders AlzChem AG to bear its own costs.**

Berardis Papasavvas Spineanu-Matei

Delivered in open court in Luxembourg on 24 September 2019.

E. Coulon
Registrar

G. Berardis
President

Table of contents

I. Background to the dispute 1

II. The contested decision 4

III. Procedure 5

IV. Forms of order sought 6

V. Law 6

A. The third plea in law, alleging infringement of the second paragraph of Article 296 TFEU with regard to the Commission's finding that State aid was granted to NCHZ 7

B. The first and second parts of the first plea in law, alleging respectively that there was no transfer of State resources and no economic advantage conferred on NCHZ 10

1. The relevant case-law 11

2. Contested decision 12

3. Classification by the Commission of the first measure as State aid 12

(a) The conditions for application of the Law on Strategic Companies to NCHZ on account of its classification as a 'strategic company' and the consequences deriving from that application 13

(b) The applicant's claim that the Slovak State's decision to classify NCHZ as a 'strategic company' satisfied the market economy operator test 14

(c) The applicant's claims that the situation would have been the same if NCHZ had been subject to the normal insolvency rules 16

(1) The claim that the first administrator had decided in favour of continuing NCHZ's operations before the adoption of the Law on Strategic Companies 16

(2) The claim that the initial decision of the first administrator would have been upheld by the relevant committee 18

(3) The claim that a decision by the relevant committee would have provided customers and suppliers with the same security as the Law on Strategic Companies 22

(4) The claim that NCHZ did not enjoy any additional advantage in the context of the maintaining its business imposed by the Law on Strategic Companies 25

(d) Conclusion 25

C. The second plea in law, alleging failure to observe the obligation to conduct a diligent and impartial examination and infringement of the Commission's duty of cooperation 26

D. The third part of the first plea in law, alleging a manifest error of assessment in calculating the amount of the alleged State aid 29

E. The sixth plea in law, alleging infringement of Article 296 TFEU with regard to the Commission's finding of economic continuity 31

F. The fourth plea in law, alleging infringement of Article 107(1) and Article 108(2) TFEU and Article 14(1) of Regulation (EC) No 659/1999 on account of the extension to the applicant of the obligation to recover the alleged State aid 32

1. Preliminary observations 33

2. The sale price of NCHZ 35

(a) The burden of proof 36

(b) The sale to Via Chem Slovakia 36

(1) The alleged presumption that a sale was made at market price when it takes place in the context of court-supervised insolvency proceedings 36

(2) The alleged guarantee of the highest possible sale price on account of the sale in the context of an open, transparent and unconditional tender procedure 37

(c) The sale by Via Chem Slovakia to the applicant 39

(d) Conclusion 40

3. The scope of the transaction 40

4. The economic logic of the transaction 41

5. The other factors examined by the Commission 43

(a) The intention to evade the recovery decision 43

(b) The connections between the initial owner and the new owner of NCHZ 43

(c) The time of the sale 44

6. The Commission's overall assessment concerning the existence of economic continuity between NCHZ and the applicant 45

G. The fifth plea in law, raised in the alternative, alleging infringement of Article 107(1) and Article 108(2) TFEU, and of Article 14(1) of Regulation No 659/1999, on account of the failure to limit the extension to the applicant of the obligation to recover the alleged State aid to 60% of the amount of that aid 46

Costs 46