

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 (notified under document C(2014) 7359) (Only the Slovak text is authentic) (Text with EEA relevance)

COMMISSION DECISION (EU) 2015/1826

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on the State aid SA.33797 — (2013/C) (ex 2013/NN) (ex 2011/CP) implemented by Slovakia for NCHZ

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1) (a) thereof,

Having regard to the decisions by which the Commission initiated the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union⁽¹⁾,

Having called on interested parties to submit their comments pursuant to the provisions cited above, and having regard to their comments,

Whereas:

1. **PROCEDURE**

- (1) By e-mail of 13 October 2011 the Commission received a complaint⁽²⁾ alleging that Slovakia had granted unlawful aid to a company called Novácké chemické závody, a.s. v konkurze ('NCHZ').
- (2) The Commission forwarded the complaint to Slovakia on 17 October 2011 together with a request for information. The Slovak authorities requested a Slovak version of the documents, which was sent to them by e-mail on 16 January 2012.
- (3) The Slovak authorities submitted the requested information by letter dated 17 February 2012. Further requests for information were sent by the Commission on 22 March 2012 and 21 June 2012. Slovakia responded on 23 April 2012 and 11 September 2012.

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- (4) The complainant sent further information on its complaint on 14 June 2012. At the request of the complainant, a meeting between the Commission and the complainant was held on 24 January 2013. Additional information was submitted by the complainant by e-mails of 8 and 22 March 2013.
- (5) By letter dated 2 July 2013 the Commission informed Slovakia that it had decided to open the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the aid.
- (6) The Commission decision to open the procedure was published in the *Official Journal of the European Union*⁽³⁾. The Commission invited interested parties to submit their comments on the alleged aid measure.
- (7) Slovakia provided comments on the decision to open the procedure on 3 September 2013 and on 2 and 30 December 2013. At the request of the Slovak authorities a meeting between Slovakia and the Commission was held on 7 October 2013 and 17 February 2014.
- (8) The Commission received two comments from interested parties (both on 12 November 2013). It forwarded them to Slovakia on 2 December 2014, together with a set of additional questions. Slovakia was given the opportunity to react; its comments were received by letter dated 14 January 2014.
- (9) The Commission asked Slovakia further questions on 2 May 2014, to which Slovakia replied on 14 and 30 May 2014. The Commission also sent an additional request for clarification by e-mail to one of the interested third parties on 20 March 2014, to which the third party eventually replied on 6 May 2014.

2. BACKGROUND TO AND DESCRIPTION OF THE MEASURES

2.1. Beneficiary

- (10) NCHZ (whose activities are now pursued by the company Fortischem, a.s.) was a chemical producer with three divisions. The company's main activities were the production of calcium carbide and technical gases, the production of polyvinylchloride (PVC) and its processing products and — to an increasing extent — basic and special low tonnage chemicals.
- (11) NCHZ operated a chemical plant (founded in 1940) located in the Trenčín region in western Slovakia, which is a region eligible for assistance under Article 107(3)(a) TFEU. The company was privately owned⁽⁴⁾.

2.2. Bankruptcy proceedings of NCHZ

- (12) NCHZ entered bankruptcy proceedings on 8 October 2009, claiming that it was unable to sustain its operations due to a fine of EUR 19,6 million imposed by the Commission for its participation in a calcium carbide cartel⁽⁵⁾. The

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Commission notes, however, that the fine was not the only major liability of NCHZ and that NCHZ filed for bankruptcy before the cartel fine became due.

2.2.1. *Strategically Important Companies Act*

- (13) One month after NCHZ entered into bankruptcy proceedings, Slovakia adopted Act No 493 of 5 November 2009 on certain measures regarding strategically important companies, giving a pre-emption right to the State to buy strategic companies out of bankruptcy proceedings and requiring the bankruptcy administrator to ensure continued operation of the strategic company during the proceedings. The Government declared NCHZ to be a strategic company under that Act on 2 December 2009, i.e. one day after the Act entered into force. The Act expired on 31 December 2010. NCHZ was the only company to which the Act was applied.

2.2.2. *Decision to continue operation in bankruptcy*

- (14) In January 2011, on the basis of a decision of the creditors' committee and the secured creditors, the bankruptcy administrator of the company was instructed to continue the operation of NCHZ in bankruptcy even after the Act expired. This decision was based on an economic report analysing the situation of the company and concluding that the outcome of the bankruptcy proceedings would be more favourable to the creditors if the company continued operating. The decision to continue the operation was also approved by the Trenčín Court in February 2011.

- (15) There were two relevant creditors' bodies involved in deciding whether to continue operation of NCHZ: the Creditors' Committee, consisting of 5 entities⁽⁶⁾, four of which were privately owned. The one public entity in the Committee was the Slovak National Property Fund (Fond národného majetku Slovenskej Republiky). In addition, NCHZ had six secured creditors. Of these six secured creditors, four were public entities — the National Property Fund, the Environmental Fund (Environmentálny fond), the Slovak Guarantee and Development Bank (Slovenská záručná a rozvojová banka, a. s.) and the Town of Nováky.

2.2.3. *Sale of the NCHZ business*

- (16) During the bankruptcy proceeding, there were two open tenders organised by the administrator for the sale of the business of NCHZ. The first one was unsuccessful since only one bidder participated in the final stage, offering EUR 2 million. The administrator refused that bid and the tender was cancelled by a decision of the Trenčín Court. The business was sold following a second tender organised in 2011. In that tender, two bidders qualified for the final stage, one offering EUR 2 046 000 and the other EUR 2 200 000. The bidder with the highest bid was selected. The winning bidder was a Czech company called Via Chem Slovakia. The sale contract with Via Chem Slovakia was concluded on 16 January 2012 and the sale was closed on 31

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July 2012. NCHZ received [...] ⁽⁷⁾, which was included in the proceeds of the sale. In addition, Via Chem Slovakia agreed to take over private commitments of the NCHZ business incurred during the bankruptcy proceedings, totalling EUR [10-13] million.

- (17) According to the conditions of the second tender potential bidders had two options: they could submit a bid either undertaking the ‘Commitments of the Transferee’ specified in Article 1.7 of the tender conditions or without undertaking those commitments. The commitments included the conditions that:
- during a period of five years after the acquisition of the NCHZ business, production would be maintained at a level of at least 75 % of 2010 production;
 - an investment of at least EUR 11 million would be made in environmental rule compliance measures necessary for the continuation of chemical production; and
 - the purchaser would not resell or transfer the NCHZ business during a period of five years in a way that could jeopardise the continuation of its operations.
- (18) The rules of the tender stipulated that, if the highest bid were from a bidder not undertaking the commitments, the highest bidder who did take them over would have the possibility to match the highest bid. According to the information provided by the Slovak Republic, none of the participants in the second tender submitted a bid undertaking the commitments. Therefore, the business of NCHZ was sold to a bidder who did not undertake the commitments.
- (19) On 1 August 2012, one day after the conclusion of the transaction between NCHZ in bankruptcy and Via Chem Slovakia, the main business of NCHZ — the chemical division — was sold by Via Chem Slovakia to Fortischem for EUR [...]. Fortischem also took over all commitments and contracts related to the chemical division. Most of NCHZ's 1 412 employees were also transferred to Fortischem. Slovakia claims that less than 60 % of the original property of NCHZ was transferred, since no immovable assets were included in the transfer. However, on the basis of the contract, Fortischem is allowed to use the immovable property originally belonging to the transferred business but left in the ownership of Via Chem Slovakia.
- (20) Even though all the assets of NCHZ were sold during the bankruptcy proceedings, the proceedings have not yet been finalised (one reason being ongoing court cases with respect to certain claims). In 2012, part of the claims of the public creditors, of around EUR 4,0 million, was repaid from the proceeds of the sale of NCHZ's business. However, there are still proceeds from the asset sale that have not yet been distributed.

2.3. **Description of the measures**

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- (21) The measures under assessment are the non-payment of liabilities towards various state entities in the course of NCHZ's bankruptcy proceedings.
- (22) NCHZ's outstanding liabilities towards public entities or state-owned companies incurred during the bankruptcy proceedings totalled EUR 13 353 877,46 on 1 August 2012, the date of the sale of NCHZ's business. These liabilities represent only the liabilities incurred during the bankruptcy proceedings (they are not the total liabilities due to the State). Such liabilities are defined in Section 87 of the Slovak Bankruptcy Act⁽⁸⁾ as 'claims against the estate'. Claims against the estate include claims arising after bankruptcy is declared in respect of the administration and liquidation of assets in bankruptcy and claims arising after bankruptcy is declared in respect of taxes, charges, duties, health insurance premiums, social insurance premiums, and wages or salaries of employees of the bankrupt company. Any liabilities incurred from the continued operation of the company during the bankruptcy proceedings that cannot be paid from the revenue from such continued operation are also treated as claims against the estate.
- (23) NCHZ's public liabilities that arose during the bankruptcy proceedings are set out in Table 1 below.

TABLE 1

NCHZ liabilities towards the State or state-owned companies arising during the bankruptcy proceedings (position as at 1 August 2012)

Public authorities/State-owned company	Amount of liability in EUR
Social Insurance Institute	[...]
Všeobecná zdravotná poisťovňa (Health insurance company owned by the State)	[...]
State water management undertaking (Slovenský vodohospodársky podnik, š.p.)	[...]
City of Nováky (fee for waste, real estate tax)	[...]
Environmental Fund	[...]
RTVS, s.r.o.	[...]
Several municipalities (fee for waste, real estate tax)	[...]
Common health insurance company (Spoločná zdravotná poisťovňa)	[...]

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Motor vehicle tax authority (Daň z motorových vozidiel)	[...]
TOTAL	13 353 877,46

- (24) Under Section 88(5) of the Slovak Bankruptcy Act, liabilities arising as a result of operation of the business are settled by the administrator from the proceeds of that operation in the order in which they fall due.
- (25) From the information available to the Commission it appears that at least certain state institutions (e.g. the Social Insurance Company) did try to enforce receivables under the bankruptcy proceedings. However, the continued operation of NCHZ did not bring in sufficient revenue to cover all operating costs including the social security contributions and other state receivables generated during the bankruptcy proceedings. NCHZ's revenue was used primarily to cover costs directly related to the operation of the business (supply of raw materials, energy etc.) in order to maintain its commercial activity, while the liabilities vis-à-vis the State were not paid and continued to grow during the continued operation of NCHZ in bankruptcy.
- (26) The continued operation of NCHZ, which was the principal cause of these accumulated liabilities, was based on two different measures during the bankruptcy proceedings: on the Act — between December 2009 and December 2010 — and on the decision of the creditors as of January 2011.

2.3.1. *Operation under the Act*

- (27) From the entry into force of the Act on 1 December 2009 and the Government Decision of 2 December 2009 until the expiry of the Act on 31 December 2010, NCHZ benefited from the status of a 'strategic company'. Under the Act, a bankruptcy administrator was obliged to: (i) ensure the continued operation of a strategic company, even if its revenue did not fully cover its operating costs including taxes and social security contributions; and (ii) prevent the unjustified collective dismissal of employees.
- (28) The Act was to apply to commercial companies of strategic importance that were subject to bankruptcy proceedings. The purpose of the Act was to maintain in operation undertakings that were in bankruptcy but had been declared by the Slovak Government to be strategically important. In addition, the Act gave the Slovak Government a pre-emption right to purchase strategic companies that had gone into bankruptcy.
- (29) In order for a company to fall within the scope of the Act, all of the following requirements had to be met:
- the company had to be a commercial company whose assets were the subject of declared bankruptcy proceedings;

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- the company had to be important for protecting health, national security or the proper functioning of the economy;
 - the company had to have more than 500 employees, or in a significant way supply energy, gas, heat or products of the refinery industry to the public, other industries and nationwide transportation, or operate waterworks, a public wastewater treatment plant, a public sewer or a public water supply;
 - the company had to be declared as being of strategic importance by the Slovak Government.
- (30) NCHZ was the only company to benefit from the Act. The Act was adopted on 5 November 2009 and took effect on 1 December 2009. On 2 December 2009 the Slovak Government proclaimed NCHZ a strategic company by decision No 534/2009.
- (31) In deciding that NCHZ was of strategic importance, the Slovak Government pointed to the fact that the company's bankruptcy could lead to a loss of more than 1 700 direct jobs, and endanger a further 5 000 jobs with NCHZ's suppliers in Slovakia. It also stated that stopping production at NCHZ would negatively affect the performance and competitiveness of the chemical industry in Slovakia and thus significantly worsen the position of the whole Slovak economy⁽⁹⁾.
- 2.3.2. *Operation under the decision of the creditors' committee*
- (32) After the Act expired on 31 December 2010, the bankruptcy administrator, who was bound by the instructions of the creditors' committee, decided to continue the operations of NCHZ in line with the provisions of the Slovak Bankruptcy Act.
- (33) Under the Slovak Bankruptcy Act, the creditors of all unsecured receivables registered in the bankruptcy proceedings must elect a creditors' committee in order to exercise their rights in the course of the bankruptcy. The committee has the power to issue instructions to the bankruptcy administrator in the circumstances explicitly provided for in the Slovak Bankruptcy Act, including where the costs of the operation of the bankrupt business exceed the revenue from its operations and its continued operation thus leads to a further accumulation of liabilities. In such a situation the administrator must seek instructions regarding the extent to which the continued operation of the company is to be pursued (Article 88 of the Slovak Bankruptcy Act). Such instructions have to be voted on by the creditors' committee together with the secured creditors and then approved and made binding by a bankruptcy court.
- (34) In the case of NCHZ's bankruptcy proceedings the committee consisted of five entities, four of which were privately owned⁽¹⁰⁾. The public member of the committee was the National Property Fund (Fond národného majetku). In addition, according to the information available to the Commission, NCHZ had six secured creditors. Four of these secured creditors were state-

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owned/public undertakings: the National Property Fund, the Environmental Fund (Environmentálny fond), the Slovak Guarantee and Development Bank (Slovenská záručná a rozvojová banka, a.s.) and the Town of Nováky.

(35) As required under the Slovak Bankruptcy Act the administrator informed both the unsecured and secured creditors (at their joint meeting on 26 January 2011) that the costs of operating the NCHZ business were higher than the revenue from operation. The administrator also provided the creditors with an economic analysis dated 23 December 2010, identifying several possible scenarios and comparing costs and revenue from the point of view of NCHZ's creditors. The analysis concluded that it was in the interests of the creditors to continue the operation of NCHZ and to sell the business as a going concern. The administrator's analysis was supplemented by an NCHZ management presentation entitled 'NCHZ Nováky — Restructuring Feasibility Study', which also argued that the best solution for the creditors would be to sell NCHZ off as a company in operation. Taking account of these studies, all creditors in the creditors' committee and all the secured creditors agreed on 26 January 2011 with continuing the operation of the company. That decision was approved and thus made binding for the administrator by the Trenčín Court in a ruling of 23 February 2011.

(36) Following the approval by the creditors and by the Trenčín Court, the NCHZ business continued operation without any interruption until its sale as a going concern to Via Chem Slovakia in July 2012.

2.3.3. *The Commission decision to open the formal investigation procedure*

(37) The opening decision of 2 July 2013 found that NCHZ had not fully paid social security contributions for its employees or any other liabilities towards various state entities during the bankruptcy proceedings. The amount of public debt for the period 2009-2011 totalled EUR 12,1 million. In view of the financial difficulties of NCHZ in the lead-up to filing for bankruptcy, by allowing continued operation of NCHZ the State ran a real risk that NCHZ would accumulate public liabilities it would not then be in a position to honour. The non-paid debt could thus have been avoided or at least significantly reduced by discontinuing the operations of NCHZ during the bankruptcy proceedings.

(38) There were also strong indications that the creditors' decision to continue operating NCHZ after the expiry of the Act was attributable to the State and provided the company with an undue, selective, economic advantage.

(39) The Commission thus concluded on a preliminary basis that by being allowed to continue its operations and market activities without having to pay social security contributions and other public liabilities during a significant period of time, NCHZ had been awarded an advantage vis-à-vis its competitors that it would not have received under normal market conditions.

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- (40) The Commission also doubted whether the tender through which NCHZ was sold was unconditional since some of the bidders had the possibility of raising their bids at a later stage, when all the bids had already been submitted. The Commission therefore doubted whether the price paid for the company's assets by the successful bidder represented a market price that ensured maximisation of revenue to satisfy the creditors, including the State. Moreover, there were strong indications that the economic continuity between NCHZ and the new entity had not been interrupted. This would mean that any incompatible state aid granted to NCHZ could be recovered from the new owner of the company's business.
- (41) The Commission therefore decided to open the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

3. COMMENTS FROM INTERESTED PARTIES

- (42) Two third parties commented on the opening decision: the complainant and another interested third party that wished to remain anonymous. Both of these interested parties endorsed the facts and the reasoning set out by the Commission in the decision to open the formal investigation procedure.
- (43) The third parties stressed the evident temporal link between the economic difficulties of NCHZ and the introduction of the Strategic Companies Act, which was adopted in an accelerated legislative procedure. In addition, only one day after the entry into force of the Act, the Slovak Government adopted the decision declaring NCHZ a strategic company within the meaning of the Act. Both interested parties claimed that the State could have prevented the foreseeable risk of non-paid public liabilities accumulating by not granting NCHZ strategic company status.
- (44) In addition, NCHZ had possibly benefited from the advantage of having the status of a firm unable to exit the market by law and thus remained a reliable business partner, whereas other companies in the same situation as NCHZ, i.e. in bankruptcy proceedings, would most likely have had deteriorating business relations with their suppliers and customers owing to the possibility of their market exit.
- (45) As regards the operation of NCHZ following the decision of the creditors' committee, one of the interested parties argues that the state-owned member of the creditor's committee could and should have tried to reach a different outcome — by convincing the other committee members or at least by voting against the continued operation of NCHZ. The same reasoning applies to the State as one of the secured creditors, which according to the interested parties had the right to veto the decision approving the continued operation of NCHZ. The interested parties take the view that this failure to act meant that the decision of the creditors' committee and the secured creditors could be attributed to the State.

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- (46) In any event, the interested parties also argued that the decision of the Trenčín Court to allow the maintenance of NCHZ's operation was also attributable to the State.
- (47) Both of the interested parties alleged that the continued operation of NCHZ distorted competition, particularly in the calcium carbide market. and that NCHZ had a very aggressive pricing policy during that period.
- (48) As regards the sale of NCHZ, one of the interested parties claimed that the tender commitments made the outcome of the tender uncertain and that this was the reason why it had not participated in the tender, although the acquisition of NCHZ's business might have been interesting.
- (49) Finally, the interested parties stated that Fortischem's overall operation and presence on the market was basically identical with the former NCHZ business. The only observable change was the change in name and owner.

4. **COMMENTS FROM SLOVAKIA**

Existence of an economic advantage to NCHZ

- (50) Slovakia claimed that the administrator of the bankruptcy proceedings of NCHZ was obliged to continue the operation of the company on the basis of the Act until 31 December 2010. As regards the nature of that Act, Slovakia claimed that it constituted a general measure applicable to all companies fulfilling the conditions.
- (51) Slovakia argued that, even though no decision was taken by the creditors or the court during the first period, it was likely that in the absence of the Act the creditors would in any case have decided to continue NCHZ's operation. Slovakia referred to the preliminary analysis and public statements by the administrator of October 2009 (i.e. before the entry into force of the Act) indicating a preference for the continued operation of NCHZ. The Act did not, therefore, have any material effect, since NCHZ would have continued operating — even without the Act being adopted — solely on the basis of the standard bankruptcy rules.
- (52) Subsequently, after the Act expired in December 2010, the administrator requested instructions regarding the continued operation of the company from the creditors' committee. The committee agreed and this decision was confirmed by the Trenčín Court⁽¹¹⁾. Slovakia submitted the economic analysis that had been prepared as the basis for the creditors' committee to take its decision. The company continued to operate until it was sold in 2012.
- (53) Slovakia also provided a hypothetical analysis by the administrator based on the methodology used for the analysis in the second period (continued operation based on the decision of creditors and the court), which shows that if liquidation had been considered at the beginning of the first period (continued operation on the basis of the Act), the outcome of the analysis would have

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been the same. Despite a lower level of current liabilities totalling EUR 8,5 million, the proceeds from liquidation would not have been bigger than the costs and current liabilities.

- (54) In view of the above, Slovakia argued that the behaviour of the State throughout the bankruptcy proceedings was in line with the market economy creditor principle. Therefore, it provided no economic advantage to NCHZ and did not constitute state aid.

Recovery of Slovakia's claims from NCHZ in bankruptcy

- (55) Slovakia claimed that, when administering and recovering claims against NCHZ, the main creditor, the Social Insurance Company (Sociálna poisťovňa), had acted in line with Social Insurance Act No 461/2003, as amended, and in line with the Slovak Bankruptcy Act. Sociálna poisťovňa exhausted all available remedies under the law. It did not accept the non-payment of premiums and duly entered its claim with the administrator.
- (56) The Social Insurance Company had no record of any claims against NCHZ arising before the declaration of bankruptcy that would have needed to be entered in the bankruptcy proceedings in accordance with Section 28 of the Slovak Bankruptcy Act⁽¹²⁾. It could not therefore become a member of the creditors' bodies deciding on the continued operation of NCHZ.
- (57) Therefore, the only available means for ensuring the payment of its claims was to register them in the ongoing bankruptcy proceedings as claims against the estate. So this is what the Social Insurance Company (through its Prievidza branch) did on an ongoing basis, in accordance with Sections 87 and 88 of the Slovak Bankruptcy Act (for details see Table 2).
- (58) Under Section 87(3) of the Slovak Bankruptcy Act, claims against the estate are to be satisfied by the administrator from the proceeds of the liquidation of the assets of the estate in question by payment due date. The administrator is liable to creditors with a claim against the estate for losses sustained by them when their claim against the estate has not been properly and promptly satisfied in accordance with this provision, unless he can prove that he acted with due professional diligence. On 24 August 2011 a meeting of the representatives of the Social Insurance Company and NCHZ was held at the Prievidza branch. At the meeting the administrator informed the Social Insurance Company's representatives that he was not able to meet claims against the estate because he had to prioritise the continuing operation of the business so that the company could be sold at the best possible price.
- (59) Under Section 47(1) of the Slovak Bankruptcy Act, a declaration of bankruptcy suspends all judicial and other proceedings concerning the assets that are subject to the bankruptcy proceedings and belong to the bankrupt party. The time limits established or laid down in these proceedings do not expire during the period of suspension.

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- (60) Under Section 47 of the Slovak Bankruptcy Act, the Social Insurance Company may not assert a claim by means of a decision under the Social Insurance Act nor subsequently recover a claim by initiating enforcement proceedings (see Section 48 of the Slovak Bankruptcy Act). Table 2 below shows an overview of claims registered by the Social Insurance Company in the period from September 2009 to January 2012.
- (61) However, on 15 November 2011 the Social Insurance Company — Prievidza branch made a complaint against persons authorised to act on behalf of NCHZ to the District Public Prosecutor in Prievidza, alleging that during the period from June 2011 to September 2011 they had committed the criminal offence of failing to levy and pay insurance contributions in accordance with Sections 277 and 278 of Act No 300/2005 ('the Criminal Code'), as amended. On 7 February 2012 the investigator at the District Police Directorate in Prievidza suspended the criminal proceedings because it was not possible to establish facts allowing a criminal prosecution of the persons concerned.

TABLE 2

Claims registered in the bankruptcy proceedings (in EUR thousand)⁰ by the Social Insurance Company between September 2009 and January 2012

Description of claim	Date of registration with the bankruptcy administrator	Amount in EUR thousand
Social security insurance and pension insurance	11.10.2010	[...]
Social security insurance and pension insurance	24.6.2011	[...]
Social security insurance and pension insurance	December 2011	[...]
Guarantee insurance	11.10.2010	[...]
Guarantee insurance	24.6.2011	[...]
Guarantee insurance	18.1.2012	[...]
Total amount of claims registered up to 31 January 2012		[...]

a All figures are rounded.

Sale of NCHZ

- (62) As regards the sale of NCHZ, Slovakia argued that the sale was carried out in an open, transparent and unconditional manner and that through the tender the

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highest bidder was duly selected. As regards the type of sale, Slovakia argued that this case should be considered a specific case of an asset deal where all assets are transferred together with their rights and certain liabilities attached to them.

- (63) Slovakia further argued that in this particular case the conditions attached to the second tender were not likely to influence the possibility of obtaining the highest possible price because neither of the two bidders who participated in the second tender were going to undertake the liabilities. Additionally, the price finally obtained (EUR 2,2 million) was very close to the price of the first tender, which was cancelled (EUR 2 million). The first tender did not include any commitments.
- (64) Given that NCHZ was, in Slovakia's view, sold in a sufficiently open, transparent and unconditional tender, a market price was obtained for NCHZ's assets. In Slovakia's view there is no economic continuity link between NCHZ, Via Chem Slovakia and now Fortischem. Slovakia argued that in the transaction between Via Chem Slovakia and Fortischem less than 60 % of the business was transferred, in particular because no immovables were included in the sale. Finally, Slovakia claimed that the Commission did not have any evidence demonstrating that NCHZ was sold as a going concern for the purpose of avoiding the recovery of state aid.
- (65) Slovakia confirmed that all non-monetary commitments relating to contracts with employees had also been transferred to the new buyer — Via Chem Slovakia. Slovakia also clarified that no appraisal report had been produced evaluating the total assets or the company as a going concern. Further, Slovakia confirmed that all liabilities towards the State incurred during the bankruptcy proceedings stayed with NCHZ and would be settled from the proceeds of the sale.

5. ASSESSMENT OF THE MEASURE

5.1. Existence of state aid

- (66) By virtue of Article 107(1) TFEU, any aid granted by a Member State or through state resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (67) In order to conclude whether state aid is present, it must therefore be assessed whether the cumulative criteria listed in Article 107(1) TFEU (i.e. transfer of state resources, imputability to the State, selective advantage, potential distortion of competition and effect on intra-EU trade) are met in the case at hand. This should be assessed in particular in relation to the non-payment of social security contributions and other liabilities vis-à-vis the State during the continued operation of NCHZ in bankruptcy: (i) by virtue of the application

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of the Act following the decision of the Government declaring NCHZ to be a strategic company within the meaning of the Act (see point 5.2) and (ii) by continued operation under the decision of the creditors' committee with the agreement of the public creditors (see point 5.3).

- (68) The assessment will have to be carried out keeping in mind that, in view of the financial difficulties of NCHZ in the lead-up to the filing for bankruptcy, by declaring NCHZ a strategic company the Government ran a real risk of NCHZ accumulating public liabilities which it would not then be in a position to honour. There existed a substantial risk that the continued operation of NCHZ during the bankruptcy proceedings would not yield sufficient revenue to cover all operating costs including the social security contributions and other state receivables and that the mounting liabilities vis-à-vis the State would not be duly paid. As this scenario did in fact materialise during 2010, this risk of further mounting non-paid liabilities vis-à-vis the State was even clearer at the beginning of 2011 when, after expiry of the Act, the creditors' committee decided to continue NCHZ's operation. In fact, the creditors of NCHZ were specifically alerted to this issue by the administrator.
- (69) The continued operation of the company in bankruptcy led to mounting debt to the State. The amount of the unpaid debt that accumulated over the period of the bankruptcy proceedings (2009-2012) totals more than EUR 13,3 million.
- (70) It should also be noted that the accumulated public liabilities are unlikely to be fully recovered from the proceeds of the sale of the business of NCHZ (EUR 2,2 million sales price and [...] return of [...]). Indeed, so far only around EUR 4,0 million of claims by public entities have been repaid from the proceeds of the sale.

5.2. **Application of the Act to NCHZ**

- (71) For 13 months (from the entry into force of the Act on 1 December 2009 until its expiry on 31 December 2010), the application of the Act to NCHZ provided the basis for the continued operation of NCHZ despite the fact that the costs of operating the business were consistently higher than the revenue obtained from it, thereby resulting in mounting debt.
- (72) In line with Section 5(a) of the Act, the bankruptcy administrator was obliged to secure the operation of a company declared by the Government as being strategically important. In his reply to a request for information the administrator stated that the continuation of the operation of the bankrupt company was a necessary consequence of compliance with his obligations stemming directly from the Act. Thus, NCHZ was able to continue operating and to maintain its business relationships despite being in a situation in which the administrator would have been obliged to consider the possibility of stopping operations and winding up the business (because it was not able to pay all of its debts).

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5.2.1. *Transfer of state resources and imputability*

- (73) As indicated above, Slovakia adopted the Act and declared NCHZ to be a strategic company on the basis of that Act. Therefore, the administrator was obliged by application of the Act to continue the operation of NCHZ during the bankruptcy proceedings.
- (74) By virtue of that declaration, the operation of the company 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 bankruptcy, including the social security contributions and other liabilities vis-à-vis the State.
- (75) Consequently, this foreseeable risk of accumulation of non-paid liabilities towards the State could have been prevented by the State, by exercising its discretion under the Act and not granting NCHZ the status of strategic company, which obliged the administrator to continue operation of NCHZ's business during the bankruptcy proceedings.
- (76) Moreover, the continuation of operations and the accumulation of additional liabilities as a consequence of the application of the Act made it more difficult for the existing public creditors of NCHZ to recover their existing claims.
- (77) Therefore, the Commission concludes that declaring NCHZ to be a strategic company led to a transfer of state resources within the meaning of Article 107(1) TFEU. This transfer occurred in the form of foregone revenue from social security contributions and other public claims not honoured by NCHZ during the period when the Act applied to it. The Commission also notes that the decision to declare NCHZ a strategic company was adopted by the Government and is therefore clearly attributable to the Slovak State.

5.2.2. *Economic advantage*

- (78) The application of the Act to NCHZ provided it with an economic advantage, as it protected the company from the normal course of bankruptcy proceedings under the standard bankruptcy legislation. For almost 13 months, NCHZ continued its operations exclusively by virtue of the application of the Act. The bankruptcy administrator had to ensure the operation of the undertaking even if its revenue did not fully cover its operating costs including taxes or social security contributions. The application of the Act thus deprived the administrator and the creditors of their discretion to decide whether the continued operation of the company was economically advantageous.
- (79) Due to the loss-making character of the continued operations, NCHZ was not able to fully pay its liabilities, including social security and health insurance contributions for its employees and other liabilities towards various state entities during the bankruptcy proceedings.

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- (80) The application of the Act to NCHZ required the administrator to: (i) ensure the operation of NCHZ and (ii) prevent an unjustified collective dismissal of employees. On that basis, the administrator himself stated that on the basis of the application of the Act he was obliged to continue operating NCHZ in full, without any possibility of analysing alternatives and choosing the one most advantageous for the creditors of the company in bankruptcy.
- (81) While the Act was in force, no creditors' meeting deciding on the economic future of NCHZ could take place and no analysis was made to assess whether the continued operation of NCHZ was at that stage in the creditors' interest. Only when the Act was about to expire did the administrator commission a comprehensive economic analysis and call a meeting of the company's creditors to decide whether to continue operating NCHZ or not.
- (82) In addition, the application of the Act to NCHZ was based, not on considerations which the company's creditors would have taken into account, but on other public policy considerations. The explanatory memorandum to the Government Decision of 2 December 2009 declaring NCHZ a strategic company under the Act mentions the threat of 1 700 jobs being lost directly at NCHZ and an additional 5 000 jobs being lost at NCHZ's suppliers if the company closed down. It also states that stopping production at NCHZ would negatively affect the performance and competitiveness of the whole chemical industry in Slovakia and thus significantly worsen the position of the whole Slovak economy. The application of the Act to NCHZ by the Government was, therefore, evidently not justified on the basis of the market economy creditor principle. Slovakia maintains that, although no decision was taken either by the creditors or the court during the first period, it is likely that the creditors would have decided to continue operating NCHZ even if the Act had not been applied to it. Slovakia refers to a preliminary analysis of 26 October 2009 and public statements made by the administrator in October 2009 (i.e. before the Act entered into force) indicating that the continued operation of NCHZ was his preferred option.
- (83) However, the preliminary analysis by the administrator is rather sketchy, does not contain any analysis of alternative options (sale of assets or liquidation) and cannot therefore be considered a solid basis that the creditors would have used for deciding on the continued operation of NCHZ. Furthermore, in December 2009 the court replaced the original administrator of NCHZ with a new one, who might have reached a different conclusion on the basis of a more in-depth assessment. However, any further assessment of the issue was suspended by the entry into force of the Act and thus the creditors and the court were given no opportunity to discuss and decide on the matter from the point of view of their economic interests.
- (84) Although the creditors and the court decided to continue operating NCHZ after the Act expired, this decision was taken in a different economic

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situation and was based on a significantly more complex and solid economic assessment produced in December 2010 in view of the expiry of the Act. That analysis primarily had to take into account that following the first period NCHZ had outstanding liabilities (both public and private) from its previous continued operation totalling EUR 16 million and these had priority over any pre-bankruptcy liabilities. Therefore, the situation for the creditors was not the same as at the beginning of the bankruptcy proceedings when a large part of those liabilities had not yet been incurred.

- (85) In addition, the uncertainty automatically entailed in decision-making under the standard bankruptcy rules was removed by the application of the Act to NCHZ, which guaranteed that at least until the Act expired at the end of 2010 NCHZ would be fully operational. This sent a strong signal to the company's suppliers and customers, who were assured that they could keep trading with NCHZ, because the company would, owing to its strategic company status under the Act, remain fully operational. Since security of supply is an important element for customers in the chemical sector, the application of the Act provided a significant advantage to NCHZ as compared with the standard bankruptcy procedure. It gave NCHZ's customers significantly more assurance that, despite any further losses and irrespective of the views and interests of its creditors, NCHZ would continue operating at least until the Act expired. NCHZ thus received privileged treatment compared with its competitors in a similar situation.
- (86) The risk of customers switching to other suppliers as a result of bankruptcy is not just a hypothetical one. In fact, even with the shield provided by the application of the Act, some customers were lost in 2009 and 2010, as indicated in the administrator's economic analysis produced after the Act expired. Without the application of the Act the risk that even more sales would be lost owing to the uncertainties created by the bankruptcy proceedings would have been significantly higher. This would also have increased the risk that the creditors might view the continued operation of NCHZ as no longer making economic sense.
- (87) Slovakia provided a hypothetical analysis by the administrator based on the methodology used for the analysis in the second period which shows that, if liquidation had been considered at the beginning of the first period, the outcome of the analysis would not have been different from the outcome of the analysis in the second period. Regardless of the lower level of current liabilities totalling EUR 8,5 million, the proceeds from liquidation would not have been greater than the costs and the current liabilities. However, this analysis is very brief and hypothetical and was produced by the administrator only after the event⁽¹³⁾, as it was not drawn up and submitted until March 2014.
- (88) Slovakia has not demonstrated that the continued operation of NCHZ would really have been approved at the beginning of the bankruptcy period on the basis of a proper in-depth analysis and discussion by all the stakeholders,

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even if the Act had not been applied to NCHZ. In fact, if the Act 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 at that stage.

- (89) The application of the Act thus provided NCHZ with a selective economic advantage, as it protected the company from the normal course of the bankruptcy proceedings under the standard bankruptcy legislation. It deprived the administrator, the creditors and the court of the possibility of discontinuing operation of NCHZ or making significant staff cuts (see recital 27), either at the beginning of the bankruptcy proceedings or later on (i.e. in the course of 2010) in view of developments in NCHZ's economic situation. It also provided NCHZ and third parties (such as customers and suppliers) with a certainty of continued operation, which under standard bankruptcy rules is never guaranteed.
- (90) In the light of the above, the Commission takes the view that the application of the Act provided NCHZ with an undue economic advantage.

5.2.3. *Selectivity of the measure*

- (91) The decision to apply the Act to NCHZ, thereby guaranteeing its continued operation, is an individual measure adopted by the Government specifically concerning NCHZ and is therefore, by definition, selective.
- (92) The Slovak authorities argue that the Act was a general measure applicable to all companies fulfilling the criteria laid down in it. Leaving aside the fact that the relevant measure is not the Act itself but its application to NCHZ by the Government's decision, the Commission notes that in accordance with the established case-law of the EU courts the fact that the Act was a general measure does not exclude the possibility of it conferring a selective advantage on a particular entity.
- (93) First, even though the Act was a general legislative measure the circumstances of the case suggest that it was in fact aimed specifically at NCHZ (some press articles even dubbed the Act 'lex NCHZ'). The Act was adopted one month after the company was declared bankrupt and NCHZ was the only company to which the Act was applied.
- (94) Second, for the Act to be applied to a given company, a decision by the Government declaring the company to be 'strategic' was required, as the Act did not apply automatically to every company fulfilling the conditions set out in Section 1(2) of the Act. In addition, in view of the general wording of those conditions, the Government had significant discretion regarding which companies it considered strategic⁽¹⁴⁾.

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- (95) Therefore, the Commission considers that the measure allowing the accumulation of NCHZ's unpaid debts to the State constitutes a selective measure within the meaning of Article 107(1) TFEU.

5.2.4. *Distortion of competition and effect on trade between Member States*

- (96) The continued operation of NCHZ by virtue of the application of the Act had the effect of reducing costs that NCHZ would otherwise have had to bear. The operation of NCHZ did not yield sufficient revenue to cover all operating costs, including social security contributions and other state receivables incurred during the bankruptcy proceedings. Despite its inability to cover all its liabilities, and in particular those vis-à-vis the State (which remained unpaid for the 13 months that the Act was in force), NCHZ remained active on the market offering its products in competition with other European chemical producers.

- (97) Moreover, as described above, the application of the Act provided NCHZ with economic advantages not enjoyed by other companies in a similar situation. In particular, it was likely to significantly reduce the risks of losing customers and suppliers during the bankruptcy proceedings. The fact that the company was obliged, under the Act, to continue operations encouraged the business partners of NCHZ to maintain their relationship with the company. The security of supply for NCHZ customers, particularly important in the chemical industry, was ensured through the continued operation of the business as provided for by the Act. If the Act had not applied, NCHZ's customers would have been more likely to search for alternative sources of supply for fear of a sudden discontinuation of operations owing to the deteriorating financial and economic situation of the bankrupt company.

- (98) Reducing a single company's costs amounts to operating aid and thus distorts competition as NCHZ's competitors had to bear those costs or the consequences of inability to pay. Furthermore, the measures may have distorted competition by artificially retaining NCHZ on the calcium carbide market and other markets where it was active.

- (99) Since there is only a limited number of producers of calcium carbide in the EU and the products are traded Europe-wide, the measure in question also clearly affects trade between Member States.

5.2.5. *Conclusion on the presence of state aid*

- (100) In the light of the above, the Commission concludes that the declaration of NCHZ as a strategic company under the Act constituted a selective advantage in favour of that company, was imputable to the State and entailed the use of state resources to distort competition in a market open to trade between Member States. The measure therefore constitutes state aid within the meaning of Article 107(1) TFEU.

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(101) The amount of the aid corresponds to the unpaid liabilities due to the State and state entities accumulated during the period when the Act applied to NCHZ. On the basis of the information provided by Slovakia, the unpaid debt at the beginning of the period stood at EUR 735 817,44⁽¹⁵⁾. When the Act expired, the outstanding liabilities stood at EUR 5 519 241,54⁽¹⁶⁾. Therefore, the aid amount is EUR 4 783 424,1.

5.3. Continued operation under the decision of the creditors' committee

(102) After the Act expired, the administrator was no longer legally obliged to continue the operation of the company. He informed the creditors (both secured and unsecured) that NCHZ's losses had been mounting continuously since it was declared bankrupt and that the costs of operating the business were higher than the proceeds from its operation. Despite being aware of the poor condition of the company, all creditors on the creditors' committee and the secured creditors agreed in January 2011 that NCHZ should continue to operate. This decision was subsequently confirmed by the bankruptcy court in accordance with the Slovak Bankruptcy Act and thus became binding for the administrator.

5.3.1. Imputability and economic advantage

(103) The continuation of NCHZ's operations after the expiry of the Act was based on a decision of the creditors' committee (representative body of non-secured creditors), whose members were mainly private companies. The formal investigation procedure revealed that no member of the creditor's committee or the secured creditors had a veto right under the Slovak Bankruptcy Act. In fact, the voting in these bodies took place by majority. Therefore, no state entity could have enforced its interests in stopping further accumulation of the debts.

(104) It can therefore be concluded that the continuation of NCHZ's operations was based on a decision determined by the private creditors, as the public creditors were not in a position to veto NCHZ's continued operation. For this reason, the decision to continue operating NCHZ after the Act expired cannot be considered imputable to the State.

(105) This also shows that the decision of the various public creditors to actively support the continuation of NCHZ's operation in the second period was taken at the same time and under the same conditions (*pari passu*) as the decisions of the comparable private creditors, which means that the public creditors acted in line with the market economy creditor principle.

(106) In addition, for the sake of completeness, the Commission verified the economic analysis produced by the administrator, which was available to the creditors and the court at the relevant point in time. The analysis identifies several possible scenarios and compares the costs and revenue from the point of view of NCHZ's creditors. In particular, the analysis indicates that

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discontinuing the operation of NCHZ would lead to significant costs totalling more than EUR 48 million. The bulk of the costs related to the closure and environmental clean-up of the chemical production sites (around EUR 37,3 million) and staff costs (EUR 10,5 million if all legal obligations were fulfilled). At the same time, the expected revenue from the sale of individual assets was in the region of EUR 47-52 million (without taking into account additional costs of dismantling and removing the equipment).

- (107) As the outstanding (public and private) liabilities incurred from operating during the bankruptcy proceedings (EUR 16 million at that time) had preferential treatment, none of the pre-bankruptcy claims would be satisfied. However, the analysis considers that the sale of the undertaking with continued operation was likely to bring higher revenue, since some of the technological equipment would be irreparably damaged if operation were discontinued. The analysis also states that, despite the failure of the first tender, there were several interested buyers. Overall, the analysis concludes that it was in the interests of the creditors to continue operating NCHZ and sell the business as a going concern.
- (108) The economic analysis by the administrator was also accompanied by an analysis produced by the management of NCHZ. That analysis considered the expected real value of the company's assets in the event of discontinued operation to amount to only EUR 15,5 million, making the discontinuation of NCHZ's operation even less attractive for the creditors. Furthermore, the study argued that the company could be successfully sold following certain restructuring measures to be adopted; since the Act made laying off staff rather difficult, the staff cuts were implemented by NCHZ only after the Act ceased to apply at the beginning of the second period. Overall, the study also concluded that the creditors would be best off if NCHZ were sold as a going concern.
- (109) The proposal for continued operation based on those documents was subsequently accepted by all creditors, both public and private. The Commission notes that the debts owed to at least some of the private creditors had also been increasing during the bankruptcy period, amounting in the end to EUR 11,5 million.
- (110) In addition, the in-depth investigation showed that only two of the four public creditors represented in the creditor bodies (the National Property Fund, the Environmental Fund, the Slovak Guarantee and Development Bank and the Town of Nováky) were directly concerned by the threat of further accumulation of the debts owed to them by NCHZ during its continued operation. These were the Environmental Fund, whose additional claims during the second period were only EUR [100-500] thousand, and the Town of Nováky, whose additional outstanding claims during the second period came to EUR [300-800] thousand. The main public creditors to whom the amounts owed mounted up during the bankruptcy proceedings, in particular the public

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health and social security insurance companies, were not represented on any of the creditor bodies deciding on the continuation of NCHZ's operation. Therefore, they had no possibility of directly influencing the decision-making and thus could not prevent NCHZ's continued operation. Those public creditors did all they could to recover the debts by registering their claims with the bankruptcy administrator and using all the enforcement mechanisms available under the Bankruptcy Act.

- (111) In view of the above, the Commission considers that the behaviour of the different state entities was in line with the private creditor test.
- (112) Therefore, the Commission concludes that NCHZ did not benefit from an advantage over its competitors that it would not have received under normal market conditions in the second period when the Act was no longer applicable and NCHZ continued its operation on the basis of the decision of the creditors' committee.

5.3.2. *Conclusion on the presence of state aid*

- (113) Since at least two of the cumulative conditions for defining state aid (imputability to the State and existence of an economic advantage) are not fulfilled, the Commission concludes that the continued operation of NCHZ under the decision of the creditors' committee does not constitute state aid within the meaning of Article 107(1) TFEU.

5.4. **Unlawful aid**

- (114) The Commission notes that, since the application of the Act to NCHZ constitutes state aid, it was granted in breach of the notification and stand-still obligations laid down in Article 108(3) TFEU. Thus, the Commission notes that the aid granted to NCHZ constitutes unlawful state aid.

5.5. **Compatibility of the measures with the internal market**

- (115) Since the measure identified above constitutes state aid within the meaning of Article 107(1) TFEU, its compatibility must be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that Article.
- (116) According to the case-law of the Court of Justice, it is up to the Member State to cite possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met⁽¹⁷⁾. The Slovak authorities consider that the measures do not constitute state aid and have not cited any possible grounds on which to assess compatibility.
- (117) The Commission has none the less assessed whether any of the grounds laid down in the TFEU would be applicable *prima facie* to the measures under assessment.
- (118) Since NCHZ was the subject of bankruptcy proceedings at the time when the measures were granted, it was clearly a firm in difficulty within the meaning

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of the Community guidelines on state aid for rescuing and restructuring firms in difficulty ('the R&R Guidelines')⁽¹⁸⁾.

- (119) Therefore, any assessment of the compatibility of state aid with the internal market should in principle be made on the basis of the criteria set out in those guidelines.
- (120) The Commission notes that the conditions for rescue aid laid down in point 3.1 of the R&R Guidelines do not seem to be met: in particular, the measures do not consist of liquidity support in the form of loan guarantees or loans and they were not accompanied by a commitment from Slovakia to communicate to the Commission a restructuring plan or a liquidation plan and so on.
- (121) In relation to restructuring aid as defined in point 3.2 of the R&R Guidelines, the Commission observes that Slovakia did not notify any of the measures identified above as restructuring aid and that it has failed to demonstrate that any of the necessary elements for them to be considered as such are present (restructuring plan, own contribution, compensatory measures and so on).
- (122) Point 34 of the R&R Guidelines requires the granting of the aid to be conditional on implementation of a restructuring plan, which must be endorsed by the Commission in all cases of individual aid. The aid in the case at hand had been granted without a credible restructuring plan satisfying the conditions laid down in the R&R Guidelines. This circumstance would in itself be sufficient to exclude compatibility of the measures with the internal market.
- (123) In addition, the Commission observes that Slovakia has not brought to the attention of the Commission any facts that would ensure compliance with the necessary requirements for finding restructuring aid compatible: restoration of the long-term viability of NCHZ, acceptable levels of own contribution, adequate compensatory measures, and so on.
- (124) The Commission concludes that the measure identified above is not compatible on the basis of the R&R Guidelines and thus constitutes state aid which is incompatible with the internal market.

5.6. **Recovery of the aid**

- (125) According to the Treaty and the Court's established case-law, the Commission should normally decide that the Member State concerned must abolish aid illegally granted when such aid has been found to be incompatible with the internal market⁽¹⁹⁾. The Court has also consistently held that the obligation on a Member State to abolish aid declared incompatible with the internal market is designed to re-establish the previously existing situation⁽²⁰⁾.
- (126) In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus

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forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored⁽²¹⁾.

- (127) In line with the case-law, Article 14(1) of Council Regulation (EC) No 659/1999 states that ‘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 ...’⁽²²⁾.
- (128) Thus, given that none of the measures in question were notified to the Commission, in violation of Article 108 of the Treaty, but are to be considered unlawful and incompatible aid, the amounts granted must be recovered in order to re-establish the situation that existed on the market before they were granted. Recovery should cover the time from when the advantage accrued to the beneficiary, that is to say when the aid was put at the disposal of the beneficiary, until effective recovery, and the sums to be recovered should bear interest until effective recovery. Recovery will take into account the amounts of outstanding debts constituting state aid which have been demonstrated to have been already repaid from the proceeds of the sale of NCHZ's assets.
- (129) In view of the sale of the business of NCHZ to Via Chem Slovakia and Fortischem, the Commission will examine possible economic continuity between these companies in order to analyse whether the recovery of aid should be extended to them or not.

5.7. **Economic continuity of NCHZ through the sale of the business**

- (130) As indicated, in the event of a negative Commission decision regarding the recovery of incompatible aid to an undertaking in the context of Articles 107 and 108 TFEU, the Member State in question is required to recover the incompatible aid. The recovery obligation may be extended to a new company to which the company in question has transferred or sold part of its assets, where that transfer or sale structure leads to the conclusion that there is economic continuity between the two companies⁽²³⁾.
- (131) As regards the purpose of the transaction, the Commission notes that, although it does 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 (see recital 2) 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 (see recital 12).
- (132) According to the Court decision in *Italy and SIM 2 v Commission*⁽²⁴⁾, on which the Commission based its decisions concerning the companies Olympic Airlines, Alitalia and SERNAM⁽²⁵⁾, the assessment of economic continuity between the aid beneficiary and the undertaking to which its assets were transferred is established based on a set of indicators. The following factors may be taken into consideration: the sale price corresponding to a market

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price or not, the scope of the sold assets (assets and liabilities, maintenance of workforce, the assets as a whole), the identity of the buyer(s), the timing of the sale (after the initiation of preliminary assessment, the formal investigation procedure or the final decision) and the economic logic of the operation. This set of indicators was confirmed by the Court in its decision of 28 March 2012 in *Ryanair v Commission*, which confirmed the *Alitalia* decision⁽²⁶⁾.

- (133) In view of the sale of the NCHZ business to Via Chem Slovakia, and subsequently to Fortischem, the Commission will thus analyse, on the basis of the above listed criteria, whether there is an economic continuity between NCHZ and the business ultimately acquired and currently operated by Fortischem.
- (134) The Commission considers that it is not appropriate to analyse separately the economic continuity of the two transactions leading to the acquisition of NCHZ's business activities by Fortischem, i.e. first the sale to Via Chem Slovakia and then the sale to Fortischem. Via Chem Slovakia sold the business to Fortischem in the second transaction on 1 August 2012, i.e. only one day after closing the first transaction. Therefore, Via Chem Slovakia never actually managed and operated the NCHZ business activities it acquired.
- (135) The Commission acknowledges that the scope of the two transactions is not exactly the same, since Via Chem Slovakia retained ownership of certain immovable assets (buildings and land). However, it is evident from the information provided that all the economic activities of NCHZ acquired by Via Chem Slovakia were immediately transferred to Fortischem. With the sole exception of the immovable assets, Fortischem took over from Via Chem Slovakia all assets and rights related to chemical production (production machines and equipment, contracts etc.) as well as commitments related to chemical production (including all employment contracts). The immovable assets that were not sold to Fortischem but were necessary for the continuation of the NCHZ economic activities were made available to Fortischem on the basis of a lease contract. Therefore, the Commission will directly analyse whether there is economic continuity between NCHZ and its business activities acquired by Fortischem. The specific features of the two transactions will be taken into account to the extent that they are relevant to this assessment.

5.7.1. *Selling price*

- (136) In its decision to open the formal investigation procedure the Commission expressed doubts as to whether the price of EUR 2,2 million paid for the company's assets by Via Chem Slovakia, the successful bidder, represented a market price.
- (137) The tender came with conditions attached that appear likely to have lowered the value of the assets. According to the tender conditions potential bidders

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could choose whether to make their bid with or without undertaking the ‘Commitments of the Transferee’ (for details see recitals 17 and 18).

- (138) The rules of the tender stipulated that, if the highest bid came from a bidder that chose not to undertake the commitments, the highest bidder making those commitments would have the chance to match the highest bid. The Commission considers that this possibility for one bidder to raise his bid after all the bids have been submitted is likely to discourage potential participants and/or have a negative impact on the bids that are made.
- (139) In fact, one of the elements that ensure that the highest price is achieved in a tender is the uncertainty as regards the prices offered by the other bidders. If a bidder submitting a bid with commitments knows that his bid need only be the highest among the bids with commitments and that he will be able to match his bid to that of the highest bidder not undertaking the commitments, he may well put in a lower bid than if no opportunity to match is provided for in the tender conditions.
- (140) Furthermore, this condition could discourage bidders who do not wish to bid with commitments because they know that, even if their bid is the highest, it may be rejected because another buyer who is prepared to undertake the commitments can increase its bid. If this occurs, the bidder without commitments is not given the opportunity to re-bid and offer a higher purchase price.
- (141) In view of the above, the tender conditions seem to give preference to bidders undertaking the commitments, since if two bidders offer the same price, one with commitments and one without, the bid with the commitments is preferred over the other one. This would appear to be an indication that the price that would be achieved in the absence of the commitments could potentially be higher than the price offered by the winning bidder. It can reasonably be presumed that the obligation to fulfil the commitments has financial implications for the buyer which it takes into account when submitting its bid. In the absence of the commitments, the price offered by that buyer would thus likely be higher.
- (142) Slovakia argues that even a bidder offering to accept commitments could not be sure that there would be no other bidder offering commitments with a potentially higher bid. However, this does not undermine the fact that bidders without commitments were in general treated less favourably than bidders with commitments, and that potential bidders not willing to undertake the commitments could thereby have been discouraged from participating.
- (143) Slovakia also argues that, in view of the total volume of the commitments, which exceeded EUR 11 million, it was highly unlikely that any bidder would submit a bid undertaking these commitments. It claims that, in particular in view of the price of only EUR 2 million offered during the first tender, no rational participant in the tender would have undertaken commitments with

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such financial implications. The commitments in fact include investments of at least EUR 11 million. However, the investment is earmarked to finance measures ensuring compliance with the applicable environmental rules necessary for the continuation of chemical production. Any bidder wishing to continue chemical production would need to make such an investment and this amount would thus need to be taken into account also by bidders not undertaking the commitments. While the other two commitments (referred to in recital 17) did have a potential effect on price, a buyer planning to maintain or even expand NCHZ's activities would not find those commitments excessively burdensome, considering the advantage granted in the tender to bidders with commitments. Therefore, the possibility of a bid undertaking commitments cannot be discounted as 'extremely improbable' and this possibility was therefore liable to influence the price offered in the tender.

- (144) Although ultimately no bids with commitments were received, the conditions did not allow for the inclusion of the highest possible number of bidders bidding against each other with their best offers, which is a prerequisite for sale at the highest possible market price.
- (145) In addition, the sale was organised as a sale of the whole business as a going concern, i.e. with all the assets bundled together and no bidder could buy any asset separately. This excluded 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 operations). The Commission observes that the documents submitted by the Slovak authorities indicate that there were potential bidders who were interested in acquiring only some parts of NCHZ's business (for example, bluO Epsilon Limited was interested in acquiring only the carbide production facilities). Therefore, it cannot be excluded that a sale of partial areas of NCHZ's business would not have led to a higher total sales price.
- (146) As regards the sale from Via Chem Slovakia to Fortischem, it was a transaction between two private parties where no tender was organised. The price was simply negotiated between the two private parties without any possibility for other parties to offer a higher price. Therefore, the doubts as to whether the price paid by Via Chem Slovakia corresponded to a market price also relate to the price paid by Fortischem.
- (147) In view of the above, it appears likely that NCHZ's assets were not sold in a manner that ensured the maximisation of revenue for the transferred business.
- (148) In view of the above, the Commission concludes that the price paid by Via Chem Slovakia for NCHZ's business was probably not a true market price, as the conditions of the tender as well as the fact that bidders had to bid for all assets bundled together had an impact on the price.

5.7.2. *Scope of the transaction*

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- (149) In order to avoid economic continuity, the assets and other elements of the business transferred need to represent only a part of the previous company or its activities. The larger the part of the original business that is transferred to a new entity, the higher the likelihood that the economic activity related to these assets continues to benefit from the incompatible aid.
- (150) Although Slovakia claims that the sale was an ‘asset deal’, the terms of the sale actually indicate that the company was sold as a going concern. As indicated in recital 19 above, all assets and at least part of the transferable commitments were sold to the new owner.
- (151) The sale of NCHZ to Via Chem Slovakia was approved by the Slovak Competition Authority on 19 July 2012. From this decision it is clear that the entire business of NCHZ, as a going concern, was the object of the notified merger and thus of the sale⁽²⁷⁾.
- (152) The scope of activity of the business acquired by Fortischem remains the same as the previous scope of NCHZ's activities. This is demonstrated by a comparison of the production programme of NCHZ at the very beginning of the bankruptcy proceedings⁽²⁸⁾ with the current production programme according to the website of Fortischem⁽²⁹⁾. In both cases, the main areas of activity of NCHZ and Fortischem respectively consist of inorganic (electrolytic) chemicals, including calcium carbide, organic chemicals, polymers and PVC processing products. All 14 key products from these production areas, representing 99 % of NCHZ's revenue in 2008⁽³⁰⁾, are also produced by Fortischem. The revenue generated by the above products sold by Fortischem totalled EUR 161,3 million in 2013⁽³¹⁾. This revenue is comparable to NCHZ's revenue of around EUR 150-160 million during the bankruptcy proceedings⁽³²⁾. Therefore, both the production programme and the revenue of the transferred business remained the same as those of NCHZ. More than 95 % of NCHZ's 1 412 employees were also transferred to Fortischem. The employees were not made redundant and then rehired by Fortischem, instead their employment contracts were simply transferred to Fortischem.
- (153) Slovakia argues that less than 60 % of the business was transferred, in particular because no immovable property was included. However, as explained above (see recital 134), Fortischem leases the immovable property (land and buildings) necessary for the chemical production from Via Chem Slovakia. Apart from the immovable property, all other assets, rights and obligations related to the transferred business were taken over by Fortischem. Fortischem thus runs the business of NCHZ and continues with the same product portfolio.
- (154) In addition, Fortischem also kept the existing NCHZ management. For example, the CEO of NCHZ before the transfer of the business has become the Chairman of the Board of Directors of Fortischem.

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- (155) At the time of the acquisition of the NCHZ business, Fortischem also publicly announced in the press that it did not plan any major changes as regards staff or production and that it would keep the existing management⁽³³⁾.
- (156) Therefore, as regards the scope of the transaction, Fortischem effectively took over all the economic activities of NCHZ, together with all the associated assets, rights and obligations. 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 Fortischem simply continues with the economic activities of NCHZ in the same scope as before the transaction.
- (157) In addition, the two interested parties that submitted comments also claim that Fortischem continues to behave in the same way as NCHZ did, offering the same portfolio of products on the same geographic markets and that the only visible change is the change of name.
- (158) Therefore, Fortischem continues the business of NCHZ without any major changes in commercial, staff or production policy.

5.7.3. *Identity of the owners*

- (159) Where the owners of an acquiring company are the same as those of the selling company, this would be a strong indication of economic continuity.
- (160) In this case, the Commission was not able to collect any evidence that would confirm the claims of the complainant that there are links between the original and the new final owners of the NCHZ business. While the direct owners are different, it is not possible to verify from independent and reliable sources who the ultimate owners are behind some of the Cyprus-based direct or indirect parent companies.
- (161) However, the Slovak authorities submitted sworn statements by Energochemica, the current parent company of Fortischem, declaring that the owners of Fortischem are not in any way related to the former owners of NCHZ.
- (162) In the absence of any evidence to the contrary, the Commission presumes that there are no links between the original and the new owners of the NCHZ business transferred to Fortischem.

5.7.4. *Timing of the sale*

- (163) The sale took place after the Commission had opened the preliminary investigation into the complaint and forwarded the complaint for comments to the State. Therefore, at least the Slovak State was aware that there was a possibility that the measures in question could constitute illegal and incompatible aid which would need to be recovered.

5.7.5. *Economic logic of the operation*

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- (164) The purpose of the economic logic criterion is to verify whether the acquirer of the assets uses them in the same way as the seller or whether, on the contrary, it integrates the assets into its own commercial strategy and thus realises synergies justifying its interest in acquiring these assets.
- (165) The acquisition by Fortischem involved the whole chemical division of NCHZ, i.e. the main part of NCHZ's business as a going concern, together with more than 95 % of the employees and related rights and obligations. As demonstrated above, the production portfolio and the scope of activities of Fortischem are identical to those of NCHZ.
- (166) Fortischem also publicly announced in the press that it did not plan any major changes to the way the NCHZ business operated and to its scope of activities⁽³⁴⁾. Even though Fortischem forms part of a larger group of companies, in the Energochemica group, there do not seem to be any major synergy effects with other members of the group. Even though some of them are also active in the chemical industry, their area of activity is different (light stabilisers, phenolic resins, detergents etc.), and consequently there does not seem to be any major connection with the activities of Fortischem.
- (167) Therefore, there was no change in the commercial strategy and Fortischem simply uses the assets in the same way as the seller.

5.7.6. *Conclusion on economic continuity between NCHZ and the economic activities acquired and operated by Fortischem*

- (168) Overall, it appears that the only changes concern the name of the company and the legal entity to which it belongs. Article 1.2 of the tender conditions stipulates that NCHZ is intended to be sold in its entirety as a set of tangible and intangible assets together with its staff. Article 3.1 of the sales agreement between Via Chem Slovakia and NCHZ dated 16 January 2012 states that 'the going concern being transferred according to this Agreement includes all immovable assets, movable assets, other rights and property values that: (i) serve the operation of the going concern or, owing to their nature, are meant to serve such purpose, and (ii) as of the decisive date belong to the Seller'. Furthermore, the acquirer continues with the production portfolio and commercial policy of NCHZ. Finally, the price paid for the NCHZ business probably does not constitute a market price.
- (169) Therefore, the Commission concludes that there is economic continuity between NCHZ and Fortischem.
- (170) As a consequence of the above, the Commission is of the view that the advantage granted by Slovakia to NCHZ constitutes unlawful and incompatible state aid, and that the recovery of this incompatible state aid granted to NCHZ is to be extended also to the new owner of the business. With its continuous operational presence in the market, Fortischem continues

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to benefit from the state aid that was received for NCHZ's economic activities and continues to distort the market.

6. CONCLUSION

- (171) The Commission concludes that the decision of the Slovak Government to declare NCHZ a strategic company under the Act, thereby sheltering it from the normal application of bankruptcy law, constituted state aid within the meaning of Article 107(1) of the Treaty.
- (172) The Commission also finds that such aid was unlawfully granted in breach of the notification and standstill obligation provided for by Article 108(3) of the Treaty on the Functioning of the European Union.
- (173) Finally, the Commission concludes that such aid is incompatible with the internal market, because the relevant conditions of the 2004 Rescue and Restructuring Guidelines were not met and no other compatibility grounds were identified.
- (174) This aid has to be recovered from NCHZ and the recovery order should also be extended to Fortischem, which has an economic continuity link with NCHZ,

HAS ADOPTED THIS DECISION:

Article 1

The state aid of EUR 4 783 424,1 provided to NCHZ by declaring it a strategic company in line with the Strategically Important Companies Act, thereby sheltering it from the normal application of bankruptcy law, was unlawfully put into effect by Slovakia in breach of Article 108(3) of the Treaty on the Functioning of the European Union and is incompatible with the internal market.

Article 2

The decision to allow continued operation of NCHZ after the expiry of the Act on the basis of the decision of the creditors' committee did not constitute state aid within the meaning of Article 107(1) TFEU.

Article 3

- 1 Slovakia shall recover the incompatible aid referred to in Article 1 from NCHZ.
- 2 In view of the economic continuity between NCHZ and Fortischem, the obligation to repay the aid should also be extended to Fortischem.
- 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 The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulations (EC) No 794/2004⁽³⁵⁾ and (EC) No 271/2008⁽³⁶⁾ amending Regulation (EC) No 794/2004.

Article 4

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

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2 Slovakia shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 5

1 Within two months following notification of this Decision, Slovakia shall submit the following information:

- a) the total amount (principal and recovery interest) 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 Slovakia 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.

Done at Brussels, 15 October 2014.

For the Commission

Joaquín ALMUNIA

Vice-President

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- (1) Commission Decision C(2013) 3555 final of 2 July 2013 ([OJ C 297](#), 12.10.2013, p. 85).
- (2) The complainant asked for its identity not to be disclosed.
- (3) See footnote 1.
- (4) The owner of the company was Disor Holdings Limited, a company with no declared business activity registered in Cyprus whose ultimate owners are not publicly known.
- (5) The fine was imposed by Commission Decision of 22 July 2009 in Case COMP/39.396 — Calcium carbide and magnesium based reagents for the steel and gas industries ([OJ C 301](#), 11.12.2009, p. 18).
- (6) According to the applicable rules, members of the creditors' committee are non-secured creditors elected at the meeting of all creditors where the votes of each creditor correspond to the amount of its claims.
- (7) Confidential information.
- (8) Zákon č. 7/2005 Z.z. z 9. decembra 2004 o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov [Act No 7/2005 of 9 December 2004 on Bankruptcy and Restructuring and Amending Certain Acts].
- (9) Explanatory memorandum to Government Decision No 534/2009 of 2 December 2009 proclaiming NCHZ a strategic company.
- (10) The private members of the creditors' committee were INVEST — KREDIT, s.r.o. (owned by DISOR HOLDINGS LIMITED, the sole shareholder of NCHZ); Novácká Energetika, a.s. (originally a subsidiary of NCHZ, the majority shareholder since January 2011 being STUPEFY HOLDINGS LIMITED); M-ENERGO, s.r.o. (majority shareholder STUPEFY HOLDINGS LIMITED) and DAK KIABA, s.r.o.
- (11) Obchodný vestník [Commercial Gazette] No 37B, 23 February 2011.
- (12) The Social Insurance Company was not a secured creditor because the liabilities towards it were incurred only after the beginning of the bankruptcy proceedings.
- (13) Judgment of 5 June 2012, *Commission v EDF*, C-124/10, ECLI:EU:C:2012:318, paragraphs 83-85 and 105; judgment of 16 May 2002, *France v Commission*, C-482/99, ECLI:EU:C:2002:294, paragraphs 71 and 72; judgment of 30 April 1998, *City Flyer Express Ltd v Commission*, T-16/96, ECLI:EU:T:1998:78, paragraph 76.
- (14) In this respect, see in particular Case T-152/99, *Hijos de Andrés Molina, SA (HAMSA) v Commission*, ECLI:EU:T:2002:188, paragraph 157.
- (15) This amount corresponds to the outstanding debts due to public creditors on 31 December 2009. The Slovak authorities claim that there is no precise information on the amounts on the exact date when NCHZ was declared to be a strategic company. Therefore, the figure is the most precise available estimate (and a rather conservative one) of the amount of outstanding liabilities at the beginning of the application of the Act.
- (16) This amount corresponds to the outstanding debts due to public creditors on 31 December 2010. The Slovak authorities claim that there is no precise information of the amounts on the exact date when NCHZ ceased to be a strategic company under the Act. Therefore, the figure is the most precise available estimate (and a rather conservative one) of the amount of outstanding liabilities at the end of the application of the Act.
- (17) Case C-364/90, *Italy v Commission*, ECLI:EU:C:1993:157, paragraph 20.
- (18) [OJ C 244](#), 1.10.2004, p. 2.
- (19) See Case C-70/72, *Commission v Germany*, ECLI:EU:C:1973:87, paragraph 13.
- (20) See Joined Cases C-278/92, C-279/92 and C-280/92, *Spain v Commission* ECLI:EU:C:1994:325, paragraph 75.
- (21) See Case C-75/97, *Belgium v Commission*, ECLI:EU:C:1999:311, paragraphs 64 and 65.
- (22) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([OJ L 83](#), 27.3.1999, p. 1).
- (23) Judgment of the General Court of 28 March 2012, *Ryanair Ltd v European Commission*, Case T-123/09, paragraph 155.

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- (24) Judgment of the Court of 8 May 2003, *Italian Republic and SIM 2 Multimedia SpA v Commission of the European Communities*, Joined Cases C-328/99 and C-399/00.
- (25) Commission Decision of 17 September 2008, State aid N 321/08, N 322/08 and N 323/08—Greece — Vente de certains actifs d'Olympic Airlines/Olympic Airways Services; Commission decision of 12 November 2008 State aid N 510/2008 — Italy — Sale of assets of Alitalia; Commission decision of 4 April 2012 SA.34547 — France — Reprise des actifs du groupe SERNAM dans le cadre de son redressement judiciaire.
- (26) Judgment of the General Court of 28 March 2012 in Case T-123/09, *Ryanair Ltd v Commission*.
- (27) See in particular recitals 25 – 29 of the merger approval decision (Decision No 2012/FH/3/1/032) available at <http://www.antimon.gov.sk/2012fh31032/>.
- (28) See the presentation of the bankruptcy administrator of 26 October 2009 'Novácké chemické závody, a.s. — Prezentácia správcu', slides 4 and 5.
- (29) See www.fortischem.sk.
- (30) See slide 5 of the presentation of the bankruptcy administrator of 26 October 2009 'Novácké chemické závody, a.s. — Prezentácia správcu'.
- (31) See 2013 Annual Report of Energochemica Group, of which Fortischem is the largest member, http://www.energochemica.eu/data/files/Vyrocka_ECH_2013.pdf.
- (32) See, for example, the economic analysis produced by the administrator in December 2010, page 3 (see recital 106).
- (33) See, for example, the article 'Novácku chemičku bude prevádzkovať spoločnosť Fortischem' [NCHZ to be operated by Fortischem] of 2 August 2012, published on Webnoviny: <http://www.webnoviny.sk/ekonomika/novacku-chemicku-bude-prevadzkovat-s/526742-clanok.html>
- (34) See footnote 31.
- (35) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).
- (36) Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

Changes to legislation:

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