



EUROPEAN COMMISSION

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<p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>	<p>PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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Subject: State aid SA.33797 (2013/NN) – Slovakia
Alleged aid to Novácké chemické závody, a.s. v konkurze

Sir,

The Commission wishes to inform Slovakia that, having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

1. PROCEDURE

- (1) By e-mail of 13 October 2011, the Commission received a complaint concerning alleged unlawful aid granted to Novácké chemické závody, a.s. v konkurze (hereinafter referred to as "NCHZ").

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- (2) The Commission forwarded the complaint to Slovakia on 17 October 2011 together with a request for information. A Slovak version of the documents was requested by the Slovak authorities and was sent to them via email on 16 January 2012.
- (3) The Slovak authorities submitted the requested information on 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.
- (4) The complainant supplemented its complaint on 14 June 2012. At the request of the complainant, a meeting between the Commission and the complainant took place on 24 January 2013. Additional information was submitted by the complainant by emails of 8 and 22 March 2013.

2. BACKGROUND

2.1. The beneficiary

- (5) NCHZ (the activities of which are now pursued by the company Fortischem, a.s.) is a chemical producer which has its business organised into three divisions. The company's primary line of business includes the production of calcium carbide and technical gases, the production of polyvinylchloride (PVC) and its processing products, and an increasing share of basic and special low tonnage chemicals.
- (6) NCHZ was a chemical plant (founded in 1940) located in the Trenčín region in western Slovakia (a region eligible for assistance under Article 107(3)(a) TFEU). It had around 2 000 employees. The company, which appears to be privately owned¹, entered bankruptcy proceedings on 8 October 2009, claiming that it was unable to sustain its operations due to a fine amounting to EUR 19.6 million imposed by the Commission for its participation in the calcium carbide cartel.² The Commission notes, however, that the fine was not the only major liability of NCHZ and that NCHZ filed for bankruptcy prior to the cartel fine becoming due.
- (7) One month after the entry of NCHZ into bankruptcy proceedings, Slovakia adopted Law 493 of 5 November 2009 on certain measures regarding strategically important companies (hereinafter referred to as the "Law"), which gives a pre-emption right to the State to buy strategic companies out of bankruptcy proceedings and requires the bankruptcy administrator to ensure continued operation of the strategic company during the proceedings. NCHZ was proclaimed to be a strategic company according to the Law on 2 December 2009.
- (8) The business of the company NCHZ was sold in a tender to the Czech company Via Chem Slovakia on 16 January 2012. The business of NCHZ continued its operation throughout the bankruptcy proceedings and was transferred to Via Chem Slovakia as a going concern. The new entity which

¹ The owner of the company was Disor Holdings Limited, a company with no declared business activity registered in Cyprus.

² The fine was imposed by Commission decision of 22.7.2009 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).

continues the business of NCHZ under the new owner is called Fortischem, a.s.

2.2. Sale of NCHZ

- (9) During the bankruptcy proceedings, there were two open tenders organised for the sale of the business of NCHZ. One was unsuccessful since only one bidder participated in the final stage and the administrator refused its offer. The business was sold in the second tender in January 2012.
- (10) The sale was publicised in both local and international media. Five bidders submitted an offer. One out of the five did not fulfil the formal conditions for participation in the tender. Two bidders qualified for the final stage³, one offering EUR 2.046 million and the other EUR 2.2 million. The highest bid was selected. The tender was won by Via Chem Slovakia, a company registered in the Czech Republic.
- (11) According to the conditions of the tender potential bidders had two options: they could submit an offer either assuming the "Commitments of the Transferee" specified in article 1.7 of the tender conditions (hereinafter referred to as "the commitments") or without the assumption of the commitments. The commitments included the conditions that,
 - (i) during a period of five years after the acquisition of NCHZ business, production will be maintained at a level of at least 75% of that in 2010;
 - (ii) an investment of at least EUR 11 million will be made into environmental compliance measures necessary for the continuation of chemical production; and
 - (iii) the purchaser will not resell or transfer the NCHZ business during a period of five years in a way that would prejudice the continuation of its operations.
- (12) The rules of the tender stipulated that if the highest bid is from a bidder not assuming the commitments, the highest bidder who assumes them has the possibility to match the highest bid. According to the information available to the Commission it appears that the business of NCHZ was sold to a bidder who did not assume the commitments.
- (13) All of the company's assets were sold en bloc to the winning bidder – Via Chem Slovakia. All employees seem to have been transferred and at least a part of the current liabilities has been taken over by the purchaser. NCHZ as an entity has thus apparently been left without any business activities and continues to be subject to the bankruptcy proceedings in which the revenues from the sale of the NCHZ chemical business will be used to satisfy, to the extent possible, the creditors. The business of NCHZ acquired by Via Chem Slovakia is now operated under the company name Fortischem, a.s.

3. DESCRIPTION OF THE MEASURES

³ The other two were not able to present a sufficient deposit/guarantee for the amount of EUR 1 million.

- (14) On the basis of the information provided by the complainant and by the Slovakian authorities in the context of the case, it appears that NCHZ may have benefited from several measures which may constitute State aid.
- (15) In its letter of 23 April 2012, Slovakia informed the Commission that NCHZ owes EUR 12,094,340.74 to various State entities or State owned companies. These liabilities represent only the liabilities which arose during the bankruptcy proceedings (they are not the total amount of liabilities due towards the State). Such liabilities are defined in article 87 of the Slovak bankruptcy law⁴ (hereinafter referred to as "the Slovak bankruptcy law") as "claims against the estate". They comprise i.a. claims that arise after the declaration of bankruptcy in relation to the administration and liquidation of assets in the bankruptcy, and claims arising after a declaration of bankruptcy such as taxes, charges, duties, health insurance premiums, social insurance premiums, wages or salaries of employees of the bankrupt company. Any liabilities which arise due to continued operation of the company during the bankruptcy proceedings and cannot be paid from the revenues from such continued operation are also treated as claims against the estate.
- (16) The public liabilities of NCHZ that arose during the bankruptcy proceedings are set out in Table 1 below.

Table 1: NCHZ liabilities towards the State or State owned companies and arising during the bankruptcy proceedings (position as at April 2012)

State authorities/State owned company	Amount of liability in EUR
Social insurance company (Sociálna poisťovňa)	[...]*
State water management undertaking (Slovenský vodohospodársky podnik, š.p.)	[...]
State health insurance company (Všeobecná zdravotná poisťovňa)	[...]
Environmental Fund (Enviromentálny fond)	[...]
Income tax authority (Daň z príjmu)	[...]
Agency for management of State reserves (Správa štátnych hmotných rezerv)	[...]
Motor vehicle tax authority (Daň z motorových vozidiel r. 2012 preddavky)	[...]
Common health insurance company (Spoločná zdravotná poisťovňa)	[...]

⁴ Zákon č. 7/2005 Z.z. z 9. Decembra 2004 o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov.

* Confidential information

- (17) According to article 88(5) of the Slovak bankruptcy law the 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.
- (18) From the information available to the Commission it appears that at least certain parts of the State did try to enforce receivables within the bankruptcy procedure. However, the continued operation of NCHZ did not bring sufficient revenues to cover all operating costs including the social security contributions and other State receivables generated during the bankruptcy proceedings. It would appear that revenues were used primarily to cover the costs directly related to the operation of the business (supply of raw material, 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.
- (19) 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 Law between December 2009 and December 2010 and on the decision of the creditors as of January 2011.

3.1. Operation under the Law

- (20) From the entry into force of the Law on 1 December 2009 and the Government Decision of 2 December 2009 until the expiry of the Law on 31 December 2010 NCHZ benefitted from the status of "strategic company". By virtue of the Law, the bankruptcy administrator was obliged to ensure the continued operation of the strategic company, even if its revenues did not fully cover its operating costs including taxes and social security contributions.
- (21) The Law was to apply to commercial companies of strategic importance which are subject to bankruptcy proceedings. The purpose of the Law was to maintain in operation those undertakings which are in bankruptcy but which have been declared by the Slovak government to be strategically important. In addition, the Law gave the Slovak government a pre-emption right to purchase strategic companies which have gone into bankruptcy.
- (22) In order for a company to fall within the scope of the Law all of the following requirements had to be met:
- the company is a commercial company, whose assets are the subject of declared bankruptcy proceedings;
 - the company is important for health, national security or the proper functioning of the economy;
 - the company has more than 500 employees, or in a significant way supplies energy, gas, heat or products of the refinery industry to the public, other industries and nationwide transportation, or operates waterworks, a public wastewater treatment plant, public sewer or public water supply;
 - the company has to be declared as being of strategic importance by the Slovak government.
- (23) NCHZ was the only company which benefitted from the Law. The Law was adopted on 5 November 2009 and became effective as of 1 December 2009.

On 2 December 2009 the Slovak government proclaimed NCHZ a strategic company by its decision No. 534/2009.

- (24) 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 have negatively affected the performance and competitiveness of the chemical industry in Slovakia and thus significantly worsened the position of the whole Slovak economy.⁵

3.2. Operation under the decision of the creditors' committee

- (25) After the expiration of the Law 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 the Slovak bankruptcy law.
- (26) Under the Slovak bankruptcy law, the creditors of all unsecured receivables registered in the bankruptcy proceedings shall elect a creditors' committee in order to exercise their rights in the course of bankruptcy. The committee has the power to issue binding instructions to the bankruptcy administrator in the circumstances explicitly provided for in the Slovak bankruptcy law, i.a. in a situation where the costs of the operation of the bankrupt business exceed the revenues from its operations. In such a situation the administrator shall request instructions regarding the extent to which he shall continue the operations of the company (paragraph 88 of the Slovak bankruptcy law). The instructions have to be approved by the secured creditors and then by a bankruptcy court. Each of the secured creditors has the right to veto the committee's decisions.
- (27) In the case of NCHZ's bankruptcy proceedings the committee consisted of 5 entities, four of which appear to be privately owned⁶. 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 seven secured creditors. Four of these secured creditors were State owned undertakings – National Property Fund, Environmental Fund (Environmentálny fond), Slovak Guarantee and Development Bank (Slovenská záručná a rozvojová banka, a.s.) and the Town of Novaky.
- (28) In accordance with his obligation under the Slovak bankruptcy law the administrator informed both the unsecured and secured creditors of the fact that the costs of operating the NCHZ business were higher than the proceeds from operation. The unsecured creditors decided to continue the operation of the company. None of the secured creditors vetoed that decision. This decision was later approved by the court in a ruling of 23 February 2011.

⁵ Reasoning of the Government Decision No 534/2009 of 2 December 2009 proclaiming NCHZ a strategic company.

⁶ 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 has, as of January 2011, been STUPEFY HOLDINGS LIMITED); M-ENERGO, s.r.o. (majority shareholder STUPEFY HOLDINGS LIMITED) and DAK KABIA, s.r.o.

- (29) The continued operation of NCHZ led to increasing public debt (accumulating further unpaid social security contributions and other taxes) whereas, according to the complainant, the continued operation did not increase the amount of liabilities vis-à-vis the private members of the creditors' committee.

4. COMMENTS OF SLOVAKIA

- (30) Slovakia claims that the administrator of the bankruptcy proceedings of NCHZ was obliged to continue the operation of the company on the basis of the Law on strategic companies until 31 December 2010.
- (31) Subsequently, 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 court of Trenčín.⁷ The company thus continued to operate until its sale on 16 January 2012. Slovakia has not provided any restructuring plan on the basis of which the committee decided to operate the company.
- (32) Slovakia claims that when administering and recovering claims against NCHZ, the main creditor, that is the Social Insurance Company (Sociálna poisťovňa)⁸, proceeded in line with the Act No 461/2003 on social insurance, as amended (hereinafter referred to as "the Social Insurance Act") and in line with the Slovak bankruptcy law. Sociálna poisťovňa has exhausted all available remedies under the law. It did not accept the non-payment of premiums and duly entered its claim with the administrator.
- (33) The Social insurance company had no record of any claims against NCHZ arising before the declaration of bankruptcy which would need to be entered by application in the bankruptcy proceedings in accordance with Article 28 of the Slovak bankruptcy law.
- (34) Therefore, the only available means for ensuring the payment of its claims was to register them in the on-going bankruptcy proceedings as claims against the estate. The Social Insurance Company⁹ (through its Prievidza branch) did so on an on-going basis, in accordance with articles 87 and 88 of the Slovak bankruptcy law (for details see Table 2).
- (35) According to Article 87(3) of the Slovak bankruptcy law, 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 responsible to creditors with a claim against the estate for damage caused to 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 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

⁷ OJ no.37, B, 23.02.2011.

⁸ The replies of the Slovakia contained justification mainly as regards the biggest creditor – the Social Insurance Company.

⁹ The Social insurance Company does not seem to be a secured creditor because the bulk of its liabilities arose after the beginning of the bankruptcy procedure.

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.

- (36) According to Article 47(1) of the Slovak bankruptcy law, a declaration of bankruptcy suspends all judicial and other proceedings concerning the assets which are subject to the bankruptcy proceedings and belonging to the bankrupt party. The time limits established or laid down in these proceedings do not expire during the period of suspension.
- (37) Pursuant to Article 47 of the Slovak bankruptcy law, Sociálna poisťovňa may not impose a claim by means of a decision under the Social Insurance Act nor subsequently enforce a claim in initiation of forced execution proceedings (exekucne konanie) (see Article 48 of the Slovak bankruptcy law).
- (38) However, on 15 November 2011 Sociálna poisťovňa's Prievidza branch made a complaint against persons authorised to act on behalf NCHZ to the District Public Prosecutor in Prievidza alleging that they had committed the criminal act of not levying contributions and non-payment of contributions in accordance with Articles 277 and 278 of Act No 300/2005 ('the Criminal Code') as amended, during the period from June 2011 to September 2011. 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: Amount of claims registered in the bankruptcy proceedings in thousands EUR¹⁰ by the Social insurance company between 09/2009 and 01/2012

Type of claim	Date of registration with the bankruptcy administrator	Amount in 000' EUR
Social security insurance and pension insurance	11/10/2010	[...]
Social security insurance and pension insurance	24/6/2011	[...]
Social security insurance and pension insurance	12/2011	[...]
Guarantee insurance	11/10/2010	[...]
Guarantee insurance	24/6/2011	[...]
Guarantee insurance	18/01/2012	[...]
Total amount of claims registered until 31/01/2012		[...]

¹⁰ All figures are rounded.

- (39) 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 highest bidder was duly selected. As regards the type of the sale, Slovakia argues that this case should be considered as a specific case of an asset deal where all assets are transferred together with rights and some liabilities associated to these assets.
- (40) Slovakia confirmed that all non-monetary liabilities relating to contracts with employees have also been transferred to the new buyer. Slovakia also clarified that no appraisal report evaluating the sum of the assets or the company as a going concern has been done. Finally, Slovakia confirmed that all liabilities towards the State which originated during the bankruptcy proceedings stayed with NCHZ and will be settled from the proceeds of the sale.

5. ASSESSMENT

5.1. Existence of State Aid

- (41) 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.
- (42) In order to conclude on whether State aid is present, it must therefore be assessed whether the cumulative criteria listed Article 107(1) TFEU (i.e. transfer of State resources, selective advantage, potential distortion of competition and effect on intra-EU trade) are met in the case at hand, 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 of the Law following the decision of the Government declaring NCHZ to be a strategic company within the meaning of the Law (see below section 5.2); and (ii) by continued operation under the decision of the creditors' committee with agreement of the public creditors (see below section 5.3.).
- (43) In view of the financial difficulties of NCHZ in the lead-up to the filing for bankruptcy, it appears to have been clear that, by declaring NCHZ to be a strategic company, the Government ran a real risk of accumulation of public liabilities which NCHZ may not be in a position to honour. It appears from the information available to the Commission that there existed a substantial risk that the continued operation of NCHZ during the bankruptcy proceedings would not bring sufficient revenues to cover all operating costs including the social security contributions and other State receivables and that mounting liabilities vis-à-vis the State would not be duly paid. As this scenario did indeed 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 Law, the creditors' committee decided to continue NCHZ operations. In fact, the creditors of NCHZ were specifically alerted to this issue by the administrator.

- (44) From the information received from Slovakia it is not clear whether only public liabilities were not paid during the bankruptcy proceedings and whether such different treatment of various liabilities during the bankruptcy proceedings is legitimate under the Slovak bankruptcy law. Therefore, the Commission invites Slovakia to submit more information and evidence in this respect. Nevertheless, it is clear from the facts available to the Commission that the continued operation of the company in bankruptcy led to mounting public debt. The amount of unpaid public debt accumulated over the period of the bankruptcy proceedings (2009-2012) totals more than EUR 12 million.
- (45) It is also noted that the accumulated liabilities (amounting to more than EUR 12 million) are unlikely to be recovered from the proceeds of the sale of the business of NCHZ (EUR 2.2 million). As indicated below, the Commission also doubts whether the tendering procedure for the sale of NCHZ business was aimed at maximising the revenues from the sale.

5.2. Application of the Law to NCHZ

- (46) For 13 months (from the entry into force of the Law on 1 December 2009 until its expiry on 31 December 2010), the Law provided the basis for the continued operation of NCHZ despite the fact that the costs of operating the business were consistently higher than the revenues obtained from it thereby resulting in mounting debt.
- (47) In line with the Article 5(a) of the Law, the bankruptcy administrator was obliged to secure the operation of a company proclaimed by the government as being strategically important. The administrator in his reply to the request for information stated that the continuation of the operation of the bankrupt company was a necessary consequence of adherence to and compliance with his obligations stemming directly from the Law. Thus, despite being in a situation in which the administrator would normally have stopped operations and wound up the business (because it was not able to pay all of its debts), NCHZ was able to continue operating and to maintain its business relationships.

5.2.1. Transfer of State resources

- (48) As indicated above, Slovakia adopted the Law and declared NCHZ to be a strategic company on the basis of that Law. Therefore, the administrator was obliged by application of the Law to continue the operation of NCHZ during the bankruptcy procedure.
- (49) By virtue of that declaration, the operation of the company was maintained even though there was a clear risk (which indeed materialised) that the revenues 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. Indeed, the only certainty concerning continued operation of the commercial activity is the creation of debts vis-à-vis the State, at least in the form of social security contributions.

- (50) Consequently, this foreseeable risk of accumulation of non-paid liabilities towards the State could have been prevented by the State by not granting to NCHZ the status of a strategic company which, in effect, represented an introduction by the Government of the obligation for the administrator to continue operations of NCHZ' business during the bankruptcy proceedings.
- (51) Therefore, the Commission considers at this stage that the declaration as strategic of NCHZ led to a transfer of State resources within the meaning of Article 107(1) TFEU. This transfer occurred in the form of foregone revenues from social security contributions and other public claims not honoured by NCHZ during the bankruptcy proceedings.

5.2.2. Economic advantage

- (52) NCHZ did not pay social security contributions for its employees, nor was it able to satisfy other liabilities arising in relation to various state entities during the bankruptcy proceedings. Although claims were registered in the bankruptcy procedure, the outstanding receivables have not been collected since October 2009. The administrator was obliged, under the Law, to continue operating the company. The Commission understands this as an obligation to keep the company in existence without laying off the staff. It is clear that being able to continue operations without paying, for example, social security contributions constitutes an economic advantage for NCHZ.
- (53) NCHZ's operations have been consistently loss-making and the amount of debt towards the State has increased every month since the declaration of bankruptcy. A private creditor in the position of the State would have attempted to maximise the amount that it can effectively collect from NCHZ and to minimise further exposure to mounting debt. Therefore, the Commission cannot exclude that such a private creditor would not have endorsed the declaration as strategic of NCHZ and the resulting continuation of the operations in bankruptcy. Indeed, the unpaid debt could have been avoided or at least significantly reduced by discontinuing the operations of NCHZ upon commencement of, or at any point during bankruptcy proceedings.
- (54) Furthermore, according to the information available to the Commission, it appears that only the Social insurance company proactively registered and tried to enforce its claims against NCHZ. The Commission has doubts in relation to whether the other State controlled creditors enforced their claims against the estate in the manner that a private creditor would have. The Commission invites Slovakia to submit evidence on this point.
- (55) Therefore, the preliminary assessment of the Commission is that by being allowed to continue its operations by virtue of the Law despite not being able to pay social security contributions and other public liabilities over a significant period of time, NCHZ benefitted from an advantage vis-à-vis its competitors, which it would not have received under normal market conditions.
- (56) In addition, the application of the Law to NCHZ was not based only on considerations which a private creditor in a similar situation would have taken into account but included also other policy considerations. The reasoning of the Decision of the Government of 2 December 2009 proclaiming NCHZ a

strategic company within the meaning of the Law mentions the threat of 1 700 jobs lost directly at NCHZ and an additional 5 000 jobs lost at NCHZ suppliers in case of its liquidation. Further, it considers that stopping production at NCHZ would have negatively affected the performance and competitiveness of the whole chemical industry in Slovakia and thus significantly worsened the position of the whole Slovak economy.

- (57) It thus appears that the application of the Law to NCHZ provided an advantage to the company by protecting it from the results of standard bankruptcy proceedings. Indeed, if the Law had not applied to NCHZ, the creditors of the company might have requested an immediate end to operations rather than the continued operation of the company which further exacerbated the company's losses.

5.2.3. Selectivity of the measures

- (58) As regards the continued operations of NCHZ based on the Law, according to the established case law of the EU courts, the fact that the Law was a general measure does not exclude the possibility of it conferring a selective advantage to a particular entity. Even though the Law was a general legislative measure the circumstances of the case suggest that it was in fact aimed specifically at NCHZ. In particular, it was up to the Slovak government to decide whether a commercial company can be regarded as a company of strategic importance. The Law thus did not apply automatically to every undertaking fulfilling the criteria set out in article 1.2 of the Law. The criteria on the basis of which the government was to proclaim the undertaking strategically important were constructed in such a way that gave the State a wide leeway in adopting the decision.
- (59) This observation also seems to be confirmed by the fact that the Law was adopted one month after the declaration of the company's bankruptcy and that NCHZ seems to be the only company to which the Law was applied. If this is not the case, the Commission invites the Slovak authorities to indicate other companies to which the Law has been applied and describe the circumstances of each case.
- (60) Therefore, the Commission considers that the measures allowing the accumulation of non-paid liabilities of NCHZ vis-à-vis the State constitute selective measures within the meaning of Article 107(1) TFEU.

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

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

- (62) Moreover, the Law was likely to significantly reduce the risks of loss of customers and suppliers during the bankruptcy procedure. The fact that the company was obliged, under the Law, 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 Law. In the absence of the Law, the customers of NCHZ would have been more likely to search for alternative sources of supply in fear of sudden discontinuation of operations due to the deteriorating financial and economic situation of the bankrupt company.
- (63) Mitigating the costs of one undertaking amounts to operating aid and thus distorts competition as NCHZ's competitors had to bear those costs, or the consequences of an inability to pay. Further, the measures may have distorted competition by artificially retaining NCHZ on the calcium carbide market and other markets where it was active. In addition, the complainant claims that during this period NCHZ was significantly undercutting the market price.
- (64) 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 existence of State aid

- (65) In light of the above the Commission considers at this stage that the declaration as strategic of NCHZ 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. That measure thus constitutes State aid within the meaning of Article 107(1) TFEU.

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

- (66) After the expiry of the Law, 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 agreed that NCHZ should continue to operate. That decision constituted a binding instruction to the administrator. It was subsequently confirmed by the bankruptcy court in accordance with the Slovak bankruptcy law.
- (67) Slovakia has not provided any restructuring plan on the basis of which the committee decided to operate the company. Should such a document exist the Commission requests Slovakia to provide it.

5.3.1. Transfer of State resources

- (68) During the bankruptcy procedure of NCHZ, a transfer of State resources to NCHZ took place in the form of foregone revenues from social security contributions and other accumulated liabilities owed to the State. However, the unpaid debt could have been avoided or at least significantly reduced by discontinuing the operations of NCHZ during the bankruptcy proceedings. The

operation of the company was maintained even though the administrator had made it clear that the company revenues were not 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. The State was well aware of the high risk of further accumulation of unpaid public liabilities which could result from the continued operation of NCHZ.

- (69) The creditors' committee is in principle the representative body of unsecured creditors which in the case of NCHZ consisted in a majority of entities which appear to be privately owned. However, NCHZ also had a number of secured creditors. According to the Slovak bankruptcy law secured creditors can veto decisions taken by the creditors' committee in certain matters, i.a. continuity of operations of the company despite recurring losses. Since the four State owned entities included among the secured creditors chose not to exercise their veto over the decision to continue operations, at this stage the Commission cannot exclude the possibility that the continued operation of NCHZ can be attributed to the State. In other words, even though the State appeared to be in a position to block via one of the public secured creditors, the continued operation of NCHZ it did not do so.
- (70) Therefore, the Commission considers at this stage that the risk of further mounting public debts due to continued operation of NCHZ can be attributed to the fact that the public secured creditors did not exercise their veto right and that this situation led to a transfer of State resources within the meaning of Article 107(1) TFEU. At the same time, the Commission invites the Slovak authorities to provide more detailed information concerning the relevant legislative framework governing the election and role of the creditors' committee and the rights of secured creditors and its application in the case of NCHZ (e.g. members of the creditors' committee and their voting with respect to the continued operation of NCHZ, involvement of secured creditors during the bankruptcy of NCHZ, activities of secured and unsecured public creditors aimed at maximising the collection of their individual claims as well as the overall outstanding public debt of NCHZ etc.).

5.3.2. Economic advantage

- (71) NCHZ's operations have been consistently loss-making and the amount of debt towards the State has increased every month since the declaration of bankruptcy,. A private creditor in the position of the State would have attempted to maximise the amount that it can effectively collect from NCHZ and to minimise further exposure resulting from mounting debts. Therefore, the Commission cannot exclude that such a private creditor would not have endorsed the continuation of the operation of the company after the expiry of the Law. Indeed, no evidence has been submitted to the effect that the situation was allowed to persist with a view to better recovery at a later stage.
- (72) Therefore, the preliminary assessment of the Commission is that by being allowed to continue its operations despite not being able to pay social security contributions and other public liabilities over a significant period of time, NCHZ benefitted from an advantage vis-à-vis its competitors which it would not have received under normal market conditions.

- (73) The fact that the creditors' committee, composed of a majority of apparently private creditors, approved the continuation of operations has not allowed the Commission to relieve its doubts as to whether the decision to continue operations is in conformity with the market economy creditor principle. The continued operation of NCHZ led to increasing public debt (accumulating further unpaid social security contributions and other taxes) whereas, according to the complainant, the continued operation did not increase the liabilities owed to the (private) members of the creditors' committee. Indeed, some private creditors may even have been better off since the administrator has an obligation to maintain the operation of the company which translates into continuing to pay only creditors necessary for the survival of the company (such as suppliers of raw materials). The majority of these suppliers is arguably private.
- (74) Therefore, the position of the State was significantly different from the position of other creditors. A private creditor in the same position as the State would have had a much stronger preference for not allowing continued operation of NCHZ than the majority of existing creditors of NCHZ (in particular those represented on the creditors' committee).
- (75) In addition, the complainant claims that there are indications that the members of the creditors' committee were in different ways affiliated to the owner of NCHZ. The Commission invites Slovakia to provide more information on these alleged ownership links. If they were confirmed, they could raise additional doubts as to whether the decision of the creditors' committee was influenced by considerations other than the maximisation of the recovery of debt.
- (76) The Commission considers that the State and the State controlled entities with claims against NCHZ should be primarily assessed as one single entity, such that the decision to refrain from exercising the right to veto the decision of the creditor's committee is, itself, an act imputable to the State that a private creditor in the same position as the State (that is, with significant claims against the estate and the possibility to halt operations) would have taken.
- (77) However, even considering the situation of each public creditor individually, the Commission doubts whether their action with respect to the continued operation of NCHZ under the decision of the creditors' committee would be in line with the market economy creditor principle. At least one of the public creditors whose claims vis-a-vis NCHZ grew during the bankruptcy proceedings (the Environmental Fund), was also a secured creditor with the right to veto the creditors' committee decision. A private investor in the position of such a creditor would likely have a preference for stopping the continued operation of NCHZ in order to prevent accumulation of further debts.
- (78) Furthermore, according to the information in the possession of the Commission, it appears that only the Social insurance company proactively registered and tried to enforce its claims against NCHZ. The Commission therefore has doubts in relation to whether the other State controlled creditors enforce their claims against the estate in the manner that a private creditor would have. The Commission invites Slovakia to submit evidence on this point.

- (79) The Commission is at this stage of the opinion that the continued operation of NCHZ after the expiry, constituted an advantage that would not have been available to the company under normal market conditions.
- (80) Therefore, the Commission considers at this stage that even after the expiry of the Law, the State acted in such a way as to grant an economic advantage to NCHZ within the meaning of Article 107(1) TFEU.

5.3.3. Selectivity of the measures

- (81) As regards the decision of the public secured creditors not to veto the continued operation of NCHZ once the Law expired, that measure is clearly selective as it relates directly to the behaviour of the State or State controlled entities vis-à-vis NCHZ.
- (82) Therefore, the Commission considers that the continued operation under the decision of the creditors' committee allowing the accumulation of liabilities vis-à-vis the State constitutes a selective measure within the meaning of Article 107(1) TFEU.

5.3.4. Distortion of competition and effect on trade between Member States

- (83) The continued operation of NCHZ by the decision of its creditors had the effect of mitigating as of January 2011 until the sale of the business those costs which NCHZ would otherwise have had to bear. The operation of NCHZ did not bring sufficient revenues to cover all operating costs including the social security contributions and other State receivables generated during the bankruptcy proceedings. Despite its inability to cover all liabilities, and in particular those vis-à-vis the State (which remained unpaid for the 12 months from expiry of the Law until the sale of the business), NCHZ remained active on the market offering its products in competition with other European chemical producers.
- (84) Mitigating the costs of one undertaking amounts to operating aid and thus distorts competition as NCHZ's competitors had to bear those costs or the consequences of an inability to pay. Further, the measures may have distorted competition by artificially retaining NCHZ on the calcium carbide market and other markets where it was active. In addition, the complainant claims that during this period NCHZ was significantly undercutting the market price.
- (85) 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.

5.3.5. Conclusion on existence of State aid

- (86) In light of the above the Commission considers at this stage that in refraining from exercising the veto enjoyed by secured creditors, a selective advantage, imputable to the State and entailing the use of State resources to distort competition in a market open to trade between Member States, was granted to NCHZ. That measure constitutes State aid within the meaning of Article 107(1) TFEU.

5.4. Unlawful aid

- (87) The Commission notes that, if the measures identified were indeed found to constitute State aid, they would have been granted in breach of the notification and stand-still obligations laid down in Article 108(3) TFEU. Thus, the Commission considers at this stage that the measures granted in favour NCHZ appear to constitute unlawful State aid.

5.5. Compatibility of the measures with the internal market

- (88) Insofar as the measures identified above constitute State aid within the meaning of Article 107(1) TFEU, their compatibility must be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that Article.
- (89) According to the case-law of the Court of Justice, it is up to the Member State to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met.¹¹ The Slovakian authorities consider that the measures do not constitute State aid and have not invoked any possible grounds on which to assess compatibility.
- (90) The Commission has nonetheless assessed whether any of the grounds laid down in the TFEU would *prima facie* be applicable to the measures under assessment.
- (91) In view of the fact that 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 of the Community guidelines on state aid for rescuing and restructuring firms in difficulty¹² (hereinafter "the R&R Guidelines").
- (92) 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.
- (93) 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, etc.
- (94) 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 thus 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, etc.).
- (95) Point 34 of the R&R Guidelines requires that the grant of the aid is conditional on implementation of a restructuring plan, which must be endorsed by the Commission in all cases of individual aid. If the measures identified were to constitute State aid, it would appear that they have 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.

¹¹ Case C-364/90 *Italy v Commission* [1993] ECR I-2097, at para 20.

¹² OJ C 244, 1.10.2004, p. 2.

- (96) In addition, the Commission observes that Slovakia has not brought to the attention of the Commission any elements 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, etc.
- (97) The Commission thus lacks evidence to conclude whether the measures identified above could be found compatible on the basis of the R&R Guidelines.
- (98) At this stage the Commission has doubts on the compatibility of the measures granted in favour of NCHZ with the internal market.

5.6. Object of the tender to maximise revenues from the sale

- (99) The Commission also has doubts whether the price of EUR 2.2 million paid for the company's assets by the winner of the tender represents a market price ensuring the maximisation of the revenues destined to satisfy the creditors, including the State.
- (100) The tender came with conditions attached that appear likely to have lowered the value of the assets. According to the tender conditions potential bidders could choose whether to make their offer with or without assuming the "Commitments of the transferee" (for details see above paragraphs (11)-(13)).
- (101) The fact that the rules of the tender stipulated that if the highest bid came from a bidder that chose not to assume the commitments, the highest bidder making those commitments would have the chance to match the highest bid. The complainant claims that this condition renders the tender incapable of guaranteeing that the highest price would be achieved as a result of the tender process. At this stage, the Commission cannot exclude that this possibility for one bidder to raise his bid after all the offers have been submitted is likely to discourage potential participants and/or have a negative impact on the bids that are made.
- (102) Indeed, one of the elements that ensures that the highest price is achieved in a tender is the uncertainty as regards the prices offered by the other bidders. If the bidder who submits a bid with commitments knows that his bid need only be highest among those bids with commitments and that he will be able to match his bid to that of the highest bidder that did not undertake the commitments, his offer is potentially lower than if no opportunity to match is provided for in the tender conditions.
- (103) Furthermore, this condition could discourage bidders who do not wish to bid without commitments because they know that even if their bid is the highest, their offer might be rejected because another buyer who is prepared to assume the commitments can increase their bid. What is more, it would appear that if this occurs, the bidder without commitments is not given the opportunity to re-bid himself and to offer a higher purchase price.
- (104) Finally, the tender conditions seem to give preference to the bidders assuming the commitments as it seems that in case two bidders offer the same price, one with commitment and one without, the bid with the commitments is preferred over the other one. This would appear to be a clear indication that the price that would be achieved in the absence of the commitments could be higher

than the price offered by the winning bidder. It can be reasonably presumed that the obligation to fulfil the commitments has financial implications for the buyer which he takes into account when submitting the bid. In the absence of the commitment, the price offered by that buyer would thus likely be higher. In this respect, the Commission notes that only two bidders participated in the final stage of the tender and that from the information at its disposal it appears that the business was sold to a bidder not assuming any commitments.

- (105) These conditions thus do not seem to allow for the inclusion of the highest possible number of bidders bidding against each other with their best offers, which is the presumption for a sale at the highest possible market price.
- (106) Therefore, it appears likely that NCHZ's assets were not sold in a manner that would ensure maximisation of revenues for the bankrupt estate. Indeed, the low price actually paid for the business by the acquirer significantly reduces the possibility for the State to recover the outstanding social security contributions from the bankruptcy proceedings.

5.7. Economic continuity between NCHZ and Fortischem

- (107) The Commission has doubts as to whether the sale of the business can be considered as having out an end to the advantage granted to the economic activity of NCHZ.
- (108) According to the case law of the Court of, in the event that hive-off companies are created in order to continue some of the activities of the original, bankrupt beneficiary, those companies may also be required to repay the aid, if they continue to benefit from it. The Court also underlined that this can be the case, i.a., where those hive-off companies do not pay the market price for the assets.¹³ The Commission refers to the previous section and the doubts in relation to the price paid for the business.
- (109) It is a matter of established decisional practice of the Commission that assets sold 'en bloc' to a third company are considered to be free from previously granted State aid only if they are transferred following an open, transparent and unconditional tender, otherwise the distortion of competition persists¹⁴.
- (110) In any event, a preliminary analysis of the terms of the sale indicates that although Slovakia claims that the sale was an 'asset deal', in reality the company has been sold as a going concern. As indicated in recital (13) above, all assets and at least part of the transferable liabilities have been sold to the new owner. The scope of activity remains the same and all the employees of NCHZ apparently continue working for the new entity, Fortischem.
- (111) Indeed, it appears that the only changes are the name of the company and the legal entity to which it belongs. Article 1.2 of the tender conditions stipulates that NCHZ was intended to be sold in its entirety as a set of tangible and intangible assets together with its personnel. Article 3.1 of the sales agreement between Via Chem Slovakia and NCHZ dated 16 January 2012 states that 'the

¹³ Case C-227/00 *Germany v. Commission* [2004] ECR I-3925, para 86.

¹⁴ Commission decision of 2. 6. 1999 in Case C 46/1994 *Seleco*, OJ 2000 L 227/24, Commission decision of 8. 7. 1999, in Case C 43/1997 *Groeditzer Stahlwerke*, OJ 1999 L 292/27, Commission decision of 21. 6. 2000, in Case C 42/1998 *CDA*, OJ 2000 L 318/62, Commission decision of 30.10.2001, in Case C 36/2000 *Graf von Henneberg*, OJ 2002 L 307/1.

going concern being transferred according to this Agreement includes all immovable assets, movable assets, other rights and property values that (i) serve to the operation of the going concern or due to their nature shall serve such purpose; and (ii) as of the Decisive Date belong to the Seller'. According to the complainant, Fortischem today is the same entity as NCHZ before and during the bankruptcy procedure, operating with the same employees, having the same product portfolio and selling in the same product and geographic markets. The key difference is that Fortischem is free of the liabilities vis-à-vis the State which were left with the original legal entity NCHZ.

- (112) As a consequence of the above, the Commission is of the preliminary view that, in case the advantage granted by Slovakia to NCHZ constitutes unlawful State aid, recovery of incompatible State aid granted to NCHZ could be claimed from the new owner of the company instead of the 'empty shell' of NCHZ, which is likely to be liquidated with the finalisation of the bankruptcy proceedings.

DECISION

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on Functioning of the European Union, requests Slovakia to submit its comments and provide all such information as may help to assess the measures, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipients of the aid immediately.

The Commission wishes to draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient(s).

The Commission warns Slovakia that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
1049 Brussels
Belgium

Fax No: +32-2-296-1242

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-president of the Commission