



## Reports of Cases

Case C-697/22 P

**Koiviston Auto Helsinki Oy, formerly Helsingin Bussiliikenne Oy**  
v  
**European Commission**

**Judgment of the Court (Fourth Chamber) of 29 July 2024**

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

1. *Aid granted by a Member State – Examination by the Commission – Administrative procedure – Obligation of the Commission to give notice to the parties concerned to submit their comments – Essential procedural requirement – Scope – Obligation of the Commission to summarise the relevant issues of fact and law in the decision initiating the formal investigation procedure – Undertaking receiving the aid identified in the decision initiating the formal investigation procedure subsequently taken over by another company – Final decision extending the obligation to recover the aid to the acquiring company owing to the economic continuity – Obligation for the Commission to adopt a decision correcting or extending the decision initiating the formal investigation procedure, announcing that extension of the recovery obligation*  
(Art. 108(2) TFEU; Council Regulation 2015/1589, Art. 6(1))

(see paragraphs 45-56, 60, 61)

2. *Aid granted by a Member State – Recovery of unlawful aid – Restoration of the prior situation – Breach of principle of proportionality – None*  
(Art. 108 TFEU)

(see paragraphs 79, 80)

3. *Aid granted by a Member State – Recovery of unlawful aid – Determination of the debtor where assets transferred – Undertaking receiving the aid taken over by another company during the formal investigation procedure – Extension of the recovery obligation to the acquiring company in the event of economic continuity – Observance of the principle of*

*proportionality – Scope – Repayment of the aid limited to the amount of the competitive advantage that the acquiring company has actually retained  
(Art. 108(2) TFEU)*

(see paragraph 81)

4. *Aid granted by a Member State – Recovery of unlawful aid – Calculation of the amount to be recovered – Possibility of the Commission leaving to national authorities the task of calculating the precise amount to recover – Breach of principle of proportionality – None  
(Art. 108 TFEU)*

(see paragraphs 83-85)

5. *Aid granted by a Member State – Examination by the Commission – Administrative procedure – Obligation of the Commission to give notice to the parties concerned to submit their comments – Essential procedural requirement – Scope – Obligation of the Commission to summarise the relevant issues of fact and law in the decision initiating the formal investigation procedure – Infringement – Consequence – Annulment of the decision adopted after the formal investigation procedure  
(Arts 108(2) and 263, second para., TFEU)*

(see paragraph 92)

## **Résumé**

In upholding the appeal lodged by Koiviston Auto Helsinki Oy (formerly Helsingin Bussiliikenne Oy) against the judgment in *Helsingin Bussiliikenne v Commission* ('the judgment under appeal'),<sup>1</sup> the Court of Justice clarifies the procedural obligations incumbent on the European Commission, in the context of the formal investigation procedure provided for in Article 108(2) TFEU, vis-à-vis an entity continuing the economic activity of the initial beneficiary of State aid, which, because of the application of the criterion of economic continuity, is subject to the obligation to repay the aid. Furthermore, it rules on the respective roles of the Commission and the Member State concerned in the calculation of the aid to be recovered from the transferee of the assets of the aid beneficiary. The company Helsingin Bussiliikenne ('the former HelB'), wholly owned by the City of Helsinki (Finland), operated bus routes in the Helsinki area and offered charter transport and bus leasing services. In December 2015, the former HelB was sold to the company Viikin Linja Oy. In accordance with the terms of the deed of sale, Viikin Linja Oy was renamed Helsingin Bussiliikenne Oy ('the new HelB').

Having received a complaint, the Commission initiated a formal investigation procedure concerning several equipment and capital loans granted by the City of Helsinki between 2002 and 2012 in favour of the former HelB and its predecessor HKL-Bussiliikenne ('the measures at issue'). The decision initiating the procedure was published in the *Official Journal of the*

<sup>1</sup> Judgment of the General Court of 14 September 2022, *Helsingin Bussiliikenne v Commission* (T-603/19, EU:T:2022:555).

*European Union* on 10 April 2015,<sup>2</sup> and interested parties were invited to submit their comments within one month of that publication. The Commission, which was informed in June 2015 of the imminent sale of the former HelB to the new HelB, received no comments from the new HelB.

By decision of 28 June 2019 ('the decision at issue'),<sup>3</sup> the Commission found that the measures at issue constituted State aid which was incompatible with the internal market and which the Republic of Finland was obliged to recover from the beneficiary. Finding that there was economic continuity between the former HelB and the new HelB, the Commission extended the obligation to repay the unlawful aid to the new HelB.

The action brought by the new HelB against the decision at issue having been dismissed by the General Court, it lodged an appeal against the judgment of that Court.

### *Findings of the Court*

In the first place, the Court of Justice examines the ground of appeal alleging an error of law by the General Court inasmuch as it found that the Commission had not infringed an essential procedural requirement by failing to give the new HelB the opportunity to submit its comments during the formal investigation procedure in respect of the aid at issue.

According to the appellant, the Commission was required, following the transfer of the former HelB, to correct or supplement the decision initiating the formal investigation procedure, since that transfer was a new issue not reflected in that decision.

The Court begins by recalling that, under Article 108(2) TFEU, it is for the Commission, where it decides to initiate the formal investigation procedure in respect of an aid measure, to give interested parties an opportunity to submit their comments. That obligation is in the nature of an essential procedural requirement, since it is intrinsically linked to the correct formation or expression of the intention of the author of the act. In that regard, publication of a notice in the *Official Journal of the European Union* is an appropriate means of informing all the parties concerned that a formal investigation procedure has been initiated and of obtaining from those parties all the information required for the guidance of the Commission with regard to its future action.

However, in order to enable interested parties to submit their comments effectively, the published decision must expressly and clearly mention the relevant issues of fact and law, as provided for in Article 6(1) of Regulation 2015/1589.<sup>4</sup> Those issues are those which the formal investigation procedure is intended to examine with a view to the adoption of the final decision by which the Commission takes a decision on the existence and compatibility of the State aid at issue and, where appropriate, on the obligation to recover that aid.

<sup>2</sup> Decision C(2015) 80 final of 16 January 2015 on measure SA.33846 (2015/C) (ex 2014/NN) (ex 2011/CP) – Finland – Helsingin Bussiliikenne Oy (OJ 2015 C 116, p. 22).

<sup>3</sup> Commission Decision (EU) 2020/1814 of 28 June 2019 on State aid SA.33846 (2015/C) (ex 2014/NN) (ex 2011/CP) implemented by Finland for Helsingin Bussiliikenne Oy (OJ 2020 L 404, p. 10).

<sup>4</sup> Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9).

Where relevant issues of fact or of law arise after the decision initiating the formal investigation procedure, such as, in the present case, the transfer of the former HelB to the new HelB, the Commission's obligation is satisfied only by way of publication of a supplementary opening decision. Thus, by failing to adopt such a decision, the Commission infringed an essential procedural requirement.

In the second place, the Court of Justice analyses the ground of appeal alleging that the General Court failed to observe the principle of proportionality in holding that the Commission was not required to determine to what extent the State aid resulting from the measures at issue had to be recovered from the new HelB.

In that context, the Court of Justice states that the recovery of unlawful aid seeks to re-establish the previous situation and can in principle be regarded as disproportionate to the objectives of the provisions of the FEU Treaty relating to State aid only if the amount that the beneficiary has to repay exceeds the updated amount of aid it received.

Where the company receiving the unlawful aid has been acquired by another company which carries on its economic activity, that aid must be recovered from the latter where it is established that it retains the actual benefit of the competitive advantage associated with the grant of that aid. In that case, the principle of proportionality limits that company's obligation to repay to the amount of the competitive advantage which it has actually retained.

In the present case, although the Commission found, in the decision at issue, that there was economic continuity between the former HelB and the new HelB and concluded from that that the obligation to repay the unlawful aid had to be extended to the new HelB, it did not take a decision on the quantum of the aid granted to the former HelB of which the new HelB had retained the benefit. The Court of Justice notes, as did the General Court, that there is a difference between the establishment of economic continuity and the determination of the proportion in which the unlawful aid must be recovered from the beneficiaries of that aid.

Therefore, the General Court was entitled to hold that it is for the Republic of Finland to determine the amount of State aid to be recovered from the new HelB.

That being so, the Court of Justice sets aside the judgment under appeal and annuls the decision at issue, since the infringement of the essential procedural requirement found in the context of the first ground of appeal entails the annulment of the act by force of law.