

II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2021/1943**of 14 June 2021****on the State aid SA.33797 (2013/C) (ex 2013/NN, ex 2011/CP) implemented by Slovakia for NCHZ***(notified under document C(2021) 4185)***(Only the Slovak version is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of 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 decision 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**1.1. Opening and closing of the formal investigation procedure**

- (1) By letter dated 2 July 2013, the Commission informed Slovakia that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ⁽²⁾ ("TFEU") into several measures in favour of Novácke chemické závody, a.s. v konkurze ("NCHZ") allegedly implemented by Slovakia.
- (2) By its decision (EU) 2015/1826 ⁽³⁾ of 15 October 2014 on the State aid SA.33797 (2013/C) (ex 2013/NN) (ex 2011/CP) implemented by Slovakia for NCHZ ("the initial decision"), the Commission concluded in Article 2 that the decision adopted by the creditors' committee to allow continued operation of NCHZ after the expiry of the Act on Strategic Companies, did not constitute State aid within the meaning of Article 107(1) TFEU.
- (3) The procedure that preceded the adoption of the initial decision is set out in recitals (1) to (9) thereof.

⁽¹⁾ Commission Decision C(2013) 3555 final of 2 July 2013 (OJ C 297, 12.10.2013, p. 85).

⁽²⁾ OJ C 297, 12.10.2013, p. 85.

⁽³⁾ OJ L 269, 15.10.2015, p. 71.

1.2. The judgment of the General Court in Case T-284/15

- (4) Following an action brought by AlzChem AG, the General Court, by its judgment of 13 December 2018 in Case T-284/15 ⁽⁴⁾, annulled Article 2 of the initial decision on the grounds that the Commission failed to adequately state reasons for its assessment of the existence of economic advantage and imputability to the State, with respect to the decision to allow the continued operation of NCHZ after 31 December 2010 ('the measure'). In particular, the inadequate statement of reasons concerned (i) the role of the District Court of Trenčín ('the bankruptcy court') in deciding on the continuation of NCHZ's operation, (ii) the existence of veto rights of public creditors in deciding on the continuation of NCHZ's operation, (iii) the risk of creditors' claims accumulating after 31 December 2010, and (iv) the relevance of the economic analysis and of the NCHZ's management presentation for the decision-making of creditors in January 2011.
- (5) As regards the first point, i.e. the role of the bankruptcy court in deciding on the continuation of NCHZ's operation, the General Court held that in the initial decision the Commission should have explained how it had considered the bankruptcy court's role in the decision-making process and the reasons which led it to conclude that the decision to continue NCHZ's operation was not attributable to the bankruptcy court. Specifically, the General Court pointed out that the initial decision mentions in several instances the creditors' decision of 26 January 2011 ⁽⁵⁾, by which they agreed that NCHZ should continue to operate, without referring to the intervention of the bankruptcy court on 17 February 2011 that made the decision of 26 January 2011 binding for the bankruptcy administrator. Also, the assessment of imputability in the initial decision did not mention the court's decision of 17 February 2011.
- (6) In addition, the General Court recalled that at the hearing on 11 April 2018, when it enquired from the Commission whether the bankruptcy court was merely to assess compliance with the formal aspects of the creditors' decision or whether it was also required to check the validity of the decision and could arrive at a different conclusion, the Commission was not able to provide an answer in that regard. The General Court also pointed to the particular circumstances in which the bankruptcy court intervened in the present case, namely as a member of the competent body ⁽⁶⁾.
- (7) Concerning the second point, i.e. the veto rights of public creditors, the General Court held that the initial decision contained inconsistent explanations as to whether the secured creditors who were members of the competent body ⁽⁷⁾ constituted a 'body' that took decisions by a majority, or whether it made views known individually; in the latter case, the initial decision did not set out the reason why they did not have a right of veto ⁽⁸⁾.
- (8) As regards the third point, i.e. the risk of claims' accumulation, the General Court held that, although the initial decision had established the existence of a risk of increasing claims for certain secured public creditors after 31 December 2010, it was not clear whether and how the Commission took that risk into account when applying the private creditors test. The General Court further pointed out that the Commission's finding that the decision of the public creditors on NCHZ's continued operation was taken at the same time and under the same conditions (*pari passu*) as the decisions of the comparable private creditors, was inconsistent with an indication elsewhere in the initial decision that some of those public creditors were in a different situation as their claims had increased during NCHZ's bankruptcy already in the period up until 31 December 2010.

⁽⁴⁾ Judgment of the General Court of 13 December 2018, *AlzChem AG v Commission*, T-284/15, EU:T:2018:950.

⁽⁵⁾ In particular, recitals (14), (26) and (32), and Article 2 of the initial decision.

⁽⁶⁾ As defined in recital (18) and referred to in the judgment as the 'relevant committee'.

⁽⁷⁾ As defined in recital (18) and referred to in the judgment as the 'relevant committee'. The General Court noted that the plea concerning the right of veto concerned only those secured public creditors which were members of the relevant committee and not those which were members of the creditors' committee (see paragraph 84 of the judgement).

⁽⁸⁾ Judgment of the General Court of 13 December 2018, *AlzChem AG v Commission*, T-284/15, EU:T:2018:950, paragraphs 94 and 95.

- (9) Concerning the fourth point, i.e. the relevance of the economic analysis and NCHZ's management presentation for the decision-making of creditors in January 2011, the General Court noted that, according to the initial decision, both of these documents informed the decision of pre-bankruptcy creditors. As regards the economic analysis, the General Court held that the Commission was correct in finding that the economic analysis could serve as a basis for the creditors' decision; however it also noted that the initial decision did not indicate that this analysis took into account the cost of NCHZ's continued operation to those creditors whose claims had increased during the bankruptcy procedure. It was therefore not clear why the conduct of those creditors was to be examined in a private creditor test based on that analysis. Given the above, the General Court further found ineffective the argument by AlzChem that the management presentation was not relevant for the purpose of assessing the conduct of public creditors. In the General Court's view, the initial decision inadequately stated reasons as to the relevance of these two documents – the economic analysis and the management presentation – for the purposes of the Commission's analysis of the position of those public creditors whose claims had increased during the bankruptcy procedure.

1.3. Court procedure concerning the first bankruptcy period

- (10) A related court procedure concerned the first period of NCHZ's bankruptcy, during which NCHZ enjoyed the status of a strategic company under the Act on Strategic Companies. On 24 September 2019, the General Court confirmed the Commission's finding of incompatible aid and thereby rejected the application for annulment against Article 1 of the initial decision in case T-121/15 ⁽⁹⁾. On 29 April 2021, the Court of Justice dismissed the appeal lodged against the judgment of the General Court by Fortischem, a.s. ('Fortischem') ⁽¹⁰⁾.

1.4. Reopening of the formal investigation procedure

- (11) In view of the General Court's annulment of Article 2 of the initial decision, the formal investigation procedure remains open as regards the decision to allow the continued operation of NCHZ after the expiry of the relevant section of the Act on Strategic Companies.
- (12) The Commission invited Slovakia and interested parties that had submitted observations to submit again comments on the measure, taking into account the judgment of the General Court of 13 December 2018. Slovakia provided comments on 14 February 2020.
- (13) The Commission further received comments from three interested parties on 5 December 2019, 19 December 2019 and 6 January 2020, respectively. It forwarded them to Slovakia, which was given the opportunity to react. The comments of Slovakia were received by letter submitted on 28 May 2020.

2. BACKGROUND AND DESCRIPTION OF THE MEASURE

2.1. The beneficiary

- (14) NCHZ was a Slovak producer of specialty chemicals (e.g. calcium carbide, PVC, basic chemicals), employing ca. 1 400 staff by 2008, the activities and operations of which are further set out in detail in recitals (10) to (11) of the initial decision ⁽¹¹⁾. The company was privately owned ⁽¹²⁾.

2.2. Bankruptcy proceedings of NCHZ and the competent body

- (15) After NCHZ entered into bankruptcy on 8 October 2009, the Act on Strategic Companies ⁽¹³⁾ was adopted, which applied to NCHZ after the Government declared NCHZ a strategic company on 2 December 2009 ('the first bankruptcy period').

⁽⁹⁾ Judgment of the General Court (Sixth Chamber) of 24 September 2019, *Fortischem, a.s. v Commission*, Case T-121/15, EU:T:2019:684.

⁽¹⁰⁾ Judgment of the Court of Justice of 29 April 2021, *Fortischem v Commission*, Case C-890/19 P, EU:C:2021:345.

⁽¹¹⁾ For reference to the initial decision, see recital (1) of the present Decision.

⁽¹²⁾ The owner of the company was Disor Holdings Limited. In the meantime, activities of NCHZ were taken over by Fortischem, so NCHZ no longer produces chemicals.

⁽¹³⁾ Act No 493/2009 Coll. on several measures concerning the strategic companies, as amended ('Act on Strategic Companies'), published in the Official Journal on 1 December 2009.

- (16) After the Act on Strategic Companies ceased to apply to NCHZ on 31 December 2010 ('the second bankruptcy period'), the continued operation of NCHZ was no longer guaranteed by virtue of this Act. As a result, the bankruptcy administrator ('the administrator') was no longer legally obliged to continue the operation of the company.
- (17) NCHZ's losses had been mounting continuously since the opening of bankruptcy proceedings against NCHZ and the costs of operating the business were higher than the proceeds from its operation. Under the Act on Bankruptcy ⁽¹⁴⁾, when the costs of operating the undertaking in bankruptcy exceed the proceeds from its operation, the administrator is obliged to inform about this situation the competent relevant body ('the competent body') ⁽¹⁵⁾, which is a collective body, and ask it for instructions on whether and to what extent to continue operating the undertaking ⁽¹⁶⁾.
- (18) The composition of the competent body is set pursuant to the provisions of the Act on Bankruptcy and is specific to each bankruptcy case. In the case of NCHZ, the competent body consisted of (i) the creditors' committee, an elected body representing the pre-bankruptcy non-secured creditors, (ii) secured pre-bankruptcy creditors, and (iii) the bankruptcy court. ⁽¹⁷⁾
- (19) According to the Act on Bankruptcy ⁽¹⁸⁾, the creditors with the so-called 'acknowledged claims' ('zistené pohľadávky'), i.e. claims registered with the bankruptcy administrator which were not rejected by the administrator, elect the members of the creditors' committee at the creditors' meeting. Through the creditors' committee, the creditors of acknowledged non-secured claims can exercise their rights in the bankruptcy proceeding. ⁽¹⁹⁾ The members of the creditors' committee are obliged to act in the best interest of all unsecured creditors ⁽²⁰⁾, maximising satisfaction of their claims ⁽²¹⁾. Besides the creditors' committee, also the bankruptcy court and the bankruptcy administrator must under the Act on Bankruptcy proceed in dealing with the debtor's insolvency in such a way as to achieve the highest possible recovery rate for creditors ⁽²²⁾.
- (20) In the case of NCHZ, the creditors' committee at the relevant time was composed of five entities, namely (i) INVEST-KREDIT, s.r.o., (ii) Nováčka Energetika, a.s., (iii) M-ENERGO, s.r.o., (iv) the Slovak National Property Fund ('Fond národného majetku SR'), and (v) DAK KIABA, s.r.o. Four of the members of the creditors' committee were privately owned ⁽²³⁾; the only public entity in the creditors' committee was the Slovak National Property Fund ('Fond národného majetku SR'). Except for INVEST - KREDIT, s.r.o., the private members of the creditors' committee did not have any capital ties with the owner of NCHZ, as was established in the proceedings before the General Court ⁽²⁴⁾.
- (21) The competent body further included six secured pre-bankruptcy creditors ('the affected secured creditors') who had acknowledged claims secured by a collateral and with regard to property forming a separate bankruptcy estate. The two private secured creditors were Post Bank ('Poštová banka, a.s.') and NLB Factor, a.s. The remaining four creditors were public entities, namely (i) City Nováky ('mesto Nováky'), (ii) the Slovak National Property Fund, (iii) the Slovak Guarantee and Development Bank ('Slovenská záručná a rozvojová banka, a.s.'), and (iv) the Environmental Fund ('Enviromentálny fond').

⁽¹⁴⁾ Act No 7/2005 Coll. on Bankruptcy and Restructuring ('Act on Bankruptcy'), as amended, and as applicable to the bankruptcy of NCHZ.

⁽¹⁵⁾ 'Príslušný orgán' as defined in Section 82(2) of the Act on Bankruptcy. In the present case, the competent body was composed under Section 82(2) c) and e) of the Act on Bankruptcy.

⁽¹⁶⁾ Under Section 88 of the Act on Bankruptcy.

⁽¹⁷⁾ The composition of the competent body in NCHZ's bankruptcy proceeding was established pursuant to Section 82(2)(c) and 82(2)(e) of the Act on Bankruptcy.

⁽¹⁸⁾ Sections 32 and 35(4) of the Act on Bankruptcy.

⁽¹⁹⁾ See Section 33 of the Act on Bankruptcy.

⁽²⁰⁾ See Section 37(4) of the Act on Bankruptcy.

⁽²¹⁾ See Section 5 of the Act on Bankruptcy.

⁽²²⁾ Also Section 5 of the Act on Bankruptcy.

⁽²³⁾ The ownership of the private members of the creditors' committee, as already listed in footnote 9 of the initial decision, was the following: INVEST-KREDIT, s.r.o. (owned by DISOR HOLDINGS LIMITED, the sole shareholder of NCHZ); Nováčka Energetika, a.s. (originally a subsidiary of NCHZ, its 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.

⁽²⁴⁾ See Judgment of the General Court of 13 December 2018, *AlzChem AG v Commission*, T-284/15, EU:T:2018:950, paragraphs 174, 175 and 180.

By the plea addressed in those paragraphs of the judgment, AlzChem referred to the capital ties between some private creditors and 'the owners' of NCHZ, thereby questioning the use by the Commission of the decision of the creditors' committee as a benchmark for applying the private creditor test.

- (22) Under the Act on Bankruptcy ⁽²⁵⁾, the bankruptcy court is also a member of the competent body when, with regard to the property constituting a separate (as opposed to general) bankruptcy estate, an administrator rejects a secured claim of a secured creditor ⁽²⁶⁾. In the case of NCHZ, the administrator rejected the alleged claim of the secured private creditor REDQUEST LIMITED ⁽²⁷⁾, who appealed this rejection. Therefore, and (solely) by reason of the existence of the contested claim of REDQUEST LIMITED, the bankruptcy court was also part of the competent body together with the creditors' committee and the secured creditors. In its role as a member of the competent body, the bankruptcy court looks after the legitimate interests of affected creditors and their statements as well as the statements of other members of the competent body (see also recital (42) below). From the above-mentioned composition of the competent body it follows that the public creditors that were represented in the competent body were the City Nováky, the Slovak National Property Fund, the Slovak Guarantee and Development Bank, and the Environmental Fund.

2.3. Description of the measure

- (23) The measure under assessment is the decision of the competent body to instruct the bankruptcy administrator to continue the operation of NCHZ. The measure was adopted on 26 January 2011 unanimously by the creditors' committee and the secured creditors. The bankruptcy court acting as a member of the competent body after the expiry of the Act on Strategic Companies on 31 December 2010, made the measure binding on 17 February 2011.
- (24) NCHZ's outstanding liabilities towards public or state-owned creditors incurred during the bankruptcy proceedings totalled ca. EUR 13 400 000 on 1 August 2012, the date of end of the second bankruptcy period. This increase in liabilities vis-à-vis public creditors that NCHZ incurred in the first and second bankruptcy period (as already listed in recital (23) of the initial decision) is shown in Table 1. These liabilities are defined as 'claims against the estate' ⁽²⁸⁾ NCHZ's outstanding liabilities towards its public creditors incurred during the bankruptcy proceedings are further described in recitals (22) to (25) of the initial decision.

Table 1

NCHZ liabilities towards public creditors (incurred in the first and second bankruptcy period, position as at 1 August 2012) ⁽²⁹⁾

Public authorities/State-owned companies	Amount of liability in EUR
Social Insurance Company (Sociálna poisťovňa)	9 297 270,28
General Health Insurance Company (Všeobecná zdravotná poisťovňa)	1 549 019,98
State Water Management Undertaking (Slovenský vodohospodársky podnik, š.p.)	1 354 321,00
City of Nováky (fee for waste, real estate tax)	650 158,75
Environmental Fund	475 678,64
RTVS, s.r.o.	14 870,72

⁽²⁵⁾ Section 82(2)(e) of the Act on Bankruptcy.

⁽²⁶⁾ A secured claim can be rejected for example due to the claim's legal basis, its enforceability, etc.

⁽²⁷⁾ A company based in London, UK.

⁽²⁸⁾ Section 87 of the Act on Bankruptcy.

⁽²⁹⁾ The table reflects the position at 1 August 2012. As such, for some creditors that had active relations with NCHZ in the bankruptcy period (e.g. Environmental Fund, City of Nováky), it does not reflect all liabilities incurred, as the post-bankruptcy claims, including claims from the business's operation, were satisfied in the bankruptcy procedure with priority. Thus, some of the post-bankruptcy claims were satisfied before 1 August 2012.

Several municipalities (fee for waste, real estate tax)	5 704,40
Common Health Insurance Company (Spoločná zdravotná poisťovňa)	4 463,19
Motor Vehicle Tax Authority (Daň z motorových vozidiel)	2 390,50
TOTAL	13 353 877,46

- (25) NCHZ's outstanding liabilities towards public or state-owned creditors incurred during the bankruptcy proceeding at specific points in time are presented in Table 2.

Table 2

NCHZ liabilities towards public creditors: as of the date of declaring bankruptcy, and those incurred during the bankruptcy proceeding outstanding as of 31 December 2009 and 31 December 2010 ⁽³⁰⁾

Public authorities/State-owned companies	Amount of liability in EUR as of the date of declaring bankruptcy	Amount of liability incurred during the bankruptcy proceeding in EUR at 31 December 2009	Amount of liability incurred during the bankruptcy proceeding in EUR at 31 December 2010
Social Insurance Company		544 001,99	3 878 065,44
General Health Insurance Company	72 442,24	91 694,96	626 702,68
State Water Management Undertaking	91 213,48	66 595,2	732 177,68
City of Nováky	67 645,53 *	156,34	48 367,11
Environmental Fund	1 019 792,01 **	29 762,71	222 954,21
RTVS, s.r.o.		929,42	6 041,23
Several municipalities (waste fee)			470,00
Common Health Insurance Company	2 484,19	2 676,82	4 463,19
Union Health Insurance Company	7 212,77	9 015,66	67 529,73
DOVERA Health Insurance Company	81 369,57	116 377,21	827 004,92

* of which EUR 43 781,67 as secured claim and EUR 23 863,86 as unsecured claim;

** 949 879,66 as secured claim and EUR 69 912,35 as unsecured claim.

- (26) The post-bankruptcy claims of the Environmental Fund incurred in the first bankruptcy period consisted mainly in the air pollution fee in the amount of EUR 192 454, which was imposed on behalf of the Environmental Fund in May 2010 for polluting air in 2009. The air pollution fee in 2011, imposed in May 2011 for polluting in 2010, was set at EUR 170 070. By end-2010, the post-bankruptcy claims due to the partial non-payment of the yearly fee for air pollution amounted to EUR 222 954.

⁽³⁰⁾ Submission of the Slovak authorities of 12 May 2014.

For creditors with active relations with NCHZ in the bankruptcy these amounts do not reflect all liabilities incurred, as the post-bankruptcy claims, including claims from the business's operation, were satisfied in the bankruptcy procedure with priority.

- (27) The main post-bankruptcy claim of the City of Nováky in the first bankruptcy period was the real estate tax for the year 2010, imposed in March 2010, and set at EUR 523 793. By end-2010, the post-bankruptcy claims were in the amount of EUR 29 762 (mainly NCHZ's real estate tax obligation).
- (28) As indicated in recital (17), when the costs of operating NCHZ exceeded the proceeds and the Act on Strategic Companies no longer applied to NCHZ, the administrator was required to inform the competent body and to request instructions. As provided for in the Act on Bankruptcy, the administrator informed the members of the creditors' committee and all secured creditors of the situation at a joint meeting held on 26 January 2011.
- (29) At the meeting of 26 January 2011, NCHZ's management presented a study entitled 'NCHZ Nováky – Feasibility Study Reengineering' ('the management presentation'), which explored, among other points, the fallout of ceasing NCHZ's operations for meeting the company's liabilities, the impact on the region as well as on the revenues of the State and of the city. The management presentation found that ceasing operations would be disadvantageous to the creditors' interests, in particular given that the costs of ceasing operations would certainly exceed the balance after meeting operating liabilities and that resuming operation thereafter would involve very high costs.
- (30) The management presentation also explored the chances of selling NCHZ as a going concern. The presentation found that the net present value of NCHZ made it impossible to sell. However, the presentation outlined that the company could be successfully sold following the adoption of certain restructuring measures. Specifically, since the Act on Strategic Companies prevented laying off staff, NCHZ could implement the staff cuts reducing operating costs only after this Act ceased to apply at the beginning of the second bankruptcy period.
- (31) The presentation further explored the scenario whether discontinuing operations would meet NCHZ's liabilities and found that the expected real value of the company's assets would amount to EUR 15 500 000 only.
- (32) The management presentation also contained a brief overview of the impact of stopping NCHZ's operations on the region and third parties ⁽³¹⁾. Among the direct impacts were layoffs of ca. 1 700 staff and increase in unemployment. The drop in the revenues of the City of Nováky just due to fallout in municipal taxes and payments was estimated at EUR 572 000 annually, of which EUR 526 000 for real estate tax and EUR 46 000 for municipal waste fee ⁽³²⁾. The expected fallout in the revenues of the State was estimated at EUR 7 400 000 annually, mostly from contributions from wages (EUR 6 400 000), waste water charges (EUR 747 000), and air pollution fee (EUR 192 000).
- (33) Furthermore, the creditors had at their disposal an economic analysis prepared by the administrator dated 23 December 2010 ('the economic analysis', or 'the analysis'), which concluded that ceasing NCHZ's operations would run counter to the common interest of NCHZ's creditors. The analysis identified several possible scenarios ⁽³³⁾ and compared the aggregated costs and revenues of NCHZ's creditors as a whole, without exploring the situation of individual creditors. The total losses from operating NCHZ in bankruptcy until 15 December 2010 were set at ca. EUR 15 800 000 ⁽³⁴⁾ (EUR 4 400 000 net of write-offs).

⁽³¹⁾ Slides 34-36 of the management presentation.

⁽³²⁾ The total fallout for the City of Nováky was estimated at EUR 757 000 annually.

⁽³³⁾ The explored scenarios were: (i) selling the undertaking as a whole while keeping it in operation, (ii) selling the undertaking in parts while keeping it in operation, (iii) selling the undertaking in parts while keeping some parts of it in operation, and (iv) selling the assets and completely ceasing operations.

⁽³⁴⁾ Calculated as a difference between total costs of operating the undertaking of EUR 202 200 000 and total revenues of EUR 186 400 000, for the period starting with the declaration of NCHZ's bankruptcy by the bankruptcy court on 2 October 2009 (following the commencement of bankruptcy proceedings on 24 September 2009) and until 15 December 2010.

- (34) In particular, the analysis indicated that discontinuing the operation of NCHZ would lead to significant costs amounting to more than EUR 48 000 000, of which the bulk related to the closure and environmental clean-up of the chemical production sites (around EUR 37 300 000) and staff costs (EUR 10 500 000 if all legal obligations were fulfilled ⁽³⁵⁾). These costs of around EUR 48 000 000 would not need to be incurred if NCHZ's operation continued. The analysis further states that, besides these direct costs of discontinuing NCHZ's operation, the (as of then) unpaid (and mostly not yet due) claims arising from the operation of NCHZ of ca. EUR 16 000 000 ⁽³⁶⁾ would have to be paid in addition. At the same time, the expected revenue from the sale of individual assets in a scenario of ceasing the operation of NCHZ was in the range of EUR 47 000 000-52 000 000 (without taking into account additional costs of dismantling and removing the equipment). In case of discontinuing the undertaking's operation, the unsatisfied claims from operating the undertaking would be satisfied as claims against the bankruptcy estate ⁽³⁷⁾. It follows that discontinuing operation would enlarge the pool of claims to be satisfied from the bankruptcy estate, in general diminishing the claims' satisfaction. The bankruptcy administrator thus viewed the option of ceasing NCHZ's operations and individually selling its assets as the least advantageous option especially given the high costs linked to the fulfilment of all legal obligations in relation to decommissioning and environmental clean-up. Furthermore, the analysis stated that relaunching of NCHZ's operations after their shut-down would be very problematic or impossible ⁽³⁸⁾.
- (35) The analysis also explored the interest of potential buyers in the undertaking. In the first round of tender ('verejné ponukové konanie') for acquiring NCHZ, out of seven interested buyers only the company M-ENERGO, s.r.o. had submitted an offer of EUR 2 000 000. The administrator therefore considered as uncertain whether a new round of tender would attract other interested buyers. In this connection, it was noted that the outstanding public liabilities of ca. EUR 6 100 000 could not be taken over by the buyer, but they would be satisfied as claims against the bankruptcy estate ('pohľadávky proti podstate'). In case of further operation without savings measures, the analysis estimated losses in 2011 at EUR 3 800 000.
- (36) The analysis addressed several factors, which can be viewed as having potential impact on the satisfaction of pre-bankruptcy claims in the case of (at least partially) continuing NCHZ's operation, however without setting out such impact in detail. Firstly, the financial performance would be influenced by cost-cutting measures to be implemented (such as partial layoff of staff). Secondly, proceeds from the sale of NCHZ could vary depending on whether NCHZ would be sold as a whole business or in parts (while maintaining the operation of relevant parts) or as individual assets after closing NCHZ's operations. If selling parts of the business, the analysis considered it likely that only the more lucrative activities of NCHZ's business and related assets could be sold (such as the calcium carbide division) and the bankruptcy estate would need to cover the costs for the closure of other parts of NCHZ's business. The calcium carbide production was technologically linked to other NCHZ's operations (divisions); therefore, keeping the calcium carbide production while closing down other operations would trigger additional costs thus worsening the profitability of the calcium carbide division. The economic analysis thus considered as risky the alternative of selling the undertaking in parts, either while keeping it in full operation (subject to further cost-cutting measures) or keeping only some of its parts in operation.
- (37) Under the Act on Bankruptcy, the creditors' committee adopted decisions by a majority of the members present, with each member having one vote ⁽³⁹⁾. Under the same law, each committee member was obliged to act in the common interest of all unsecured creditors ⁽⁴⁰⁾. This implied voting in the interest of all unsecured creditors, also of those who were not part of the creditors' committee.
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- ⁽³⁵⁾ Depending on the variant of terminating the staff contracts, the staff costs were estimated at EUR 7 700 000, EUR 8 900 000 or EUR 10 500 000.
- ⁽³⁶⁾ This amount does not represent all claims that arose in the first bankruptcy period, because claims from operating the undertaking were being satisfied on a continuous basis, and therefore part of those claims were already satisfied.
- ⁽³⁷⁾ Section 88(8) of the Act on Bankruptcy.
- ⁽³⁸⁾ In particular, in the case of shutting down of operations, electrolysis becomes unusable without the possibility of resuming production. Similarly, if the carbide furnaces used for the calcium carbide production would be cooled down, restarting the furnaces would be problematic.
- ⁽³⁹⁾ Section 38(2) of the Act on Bankruptcy.
- ⁽⁴⁰⁾ Section 37(4) of the Act on Bankruptcy.

- (38) On the basis of the information contained in the management presentation and in the economic analysis, at the meeting of 26 January 2011, all members of the creditors' committee present supported the proposed instruction to the bankruptcy administrator to continue NCHZ's operations on unchanged terms. This meant that NCHZ could operate to the same extent to which it operated until then, because none of the members voted against or abstained. As such, the decision of the creditors' committee was taken unanimously, even though the majority would have sufficed for the approval of the instruction by the creditors' committee. Also, all secured creditors present in the meeting pronounced themselves individually in favour of the same instruction for the administrator. This means that none of the secured creditors either rejected the proposed instruction or abstained from taking a position.
- (39) In addition, the second point on the agenda of the meeting that was discussed was the form and method of disposing of NCHZ's assets. As follows from the meeting minutes, the creditors present reached a preliminary agreement to sell NCHZ as a whole, therefore as a going concern, in a tender.
- (40) Once the decision of the creditors' committee of 26 January 2011 with the instruction for the administrator was published ⁽⁴¹⁾, any public or private unsecured creditor was entitled to challenge the instruction before the bankruptcy court for reasons of conflict of the instruction with the common interest of unsecured creditors ⁽⁴²⁾. However, no creditor challenged the instruction before the bankruptcy court.
- (41) The same instruction for the administrator was subsequently submitted to the bankruptcy court, which could either approve the instruction or decide how the administrator should proceed ⁽⁴³⁾; any possible decision of that court would thus effectively overturn the decision taken by other members of the competent body.
- (42) Under the Act on Bankruptcy ⁽⁴⁴⁾, where the bankruptcy court is a member of the competent body, the administrator or other members of the competent body are to submit the instruction to the court for approval after the other members of the competent body have expressed their views on the instruction. The bankruptcy court can, by means of an order ('uznesenie'), either approve the submitted instruction or decide how to proceed. The administrator is bound by the court order. In issuing an order, the bankruptcy court takes into consideration the legitimate interests of the affected creditors and their statements as well as the statements of other members of the competent body.
- (43) In the case of NCHZ, the bankruptcy court, acting as a member of the competent body, approved the instruction for the administrator by order of 17 February 2011 ⁽⁴⁵⁾. The administrator was legally bound by the court order. The bankruptcy court took note of the fact that the creditors' committee had adopted unanimously an order with the instruction for the administrator to continue the operation of NCHZ and also that all affected secured creditors ⁽⁴⁶⁾ had imposed on the administrator the same instruction as the creditors' committee. The bankruptcy court further explained why it formed part of the competent body in the case at hand, namely due to the fact that the secured claim of the creditor REDQUEST LIMITED had been rejected by the administrator and REDQUEST LIMITED initiated a court proceeding to determine its secured claim. From the reasoning of the bankruptcy court, it follows that it took into account the statements of individual members of the competent body (meaning the creditors' committee and individual secured creditors) and the fact that none of the members of the competent body had objected to the instruction for the administrator. In its reasoning, the bankruptcy court referred to the economic analysis (see recitals (33) to (36)) which the court had instructed the administrator to prepare, and which found that ceasing of NCHZ's operations would be the least advantageous option for satisfying the creditors' claims given the costs related to shutting down the operations. The bankruptcy court concluded that, having regard to these circumstances and statements of members of the competent body, it found no discrepancy or conflict of the proposed instruction with the legitimate interest of affected creditors. As follows from the reasoning of the bankruptcy court, in approving the instruction it did not assess individually the interests of individual creditors, in particular of REDQUEST LIMITED, which is mentioned in the court order solely in connection with the involvement of the bankruptcy court in the competent body as explained.

⁽⁴¹⁾ The decision ('uznesenie') of the creditors' committee together with the minutes of the meeting of 26 January 2011 were published in the Commercial Journal ('Obchodný vestník') on 15 February 2011.

⁽⁴²⁾ Section 38(7) of the Act on Bankruptcy.

⁽⁴³⁾ Section 83 (4) of the Act on Bankruptcy.

⁽⁴⁴⁾ Section 83(4) of the Act on Bankruptcy.

⁽⁴⁵⁾ Order ('uznesenie') No 29K/43/2009-18279.

⁽⁴⁶⁾ The bankruptcy court listed the six secured creditors – members of the competent body (see also recital (21) of this decision).

- (44) Not all (public) pre-bankruptcy creditors of NCHZ were represented in the competent body (the composition of which is described in recitals (18) to (22)) that decided on NCHZ's further operation in the second bankruptcy period. In particular, the Social Insurance Company ('Sociálna poisťovňa') and the General Health Insurance Company ('Všeobecná zdravotná poisťovňa, a.s.') were public creditors that were not represented in the competent body. Those creditors that were not represented in the competent body, as they were neither members of the creditors' committee nor secured pre-bankruptcy creditors, thus had no direct say over the decision on NCHZ's further operation in the second bankruptcy period.
- (45) The continuation of NCHZ's operations after the expiry of the Act on Strategic Companies was thus based on the decision of the competent body acting as a collective entity to instruct the bankruptcy administrator to continue NCHZ's operations, of which the members (namely the creditors' committee and secured creditors) expressed their position at their joint meeting of 26 January 2011, and the remaining member (namely the bankruptcy court) approved the instruction for the bankruptcy administrator in its order of 17 February 2011. Following this decision, NCHZ continued business operations without any interruption until its sale as a going concern to Via Chem Slovakia in July 2012.

3. COMMENTS FROM INTERESTED PARTIES AND FROM SLOVAKIA

3.1. Comments on imputability

- (46) AlzChem Group AG ('AlzChem') submits ⁽⁴⁷⁾ that the decision to continue the operation of NCHZ is imputable to the State, as the secured creditors had the right to veto NCHZ's further operation. AlzChem derives this veto right from a systematic interpretation of the Act on Bankruptcy, pointing to the provision that each of the secured creditors is part of the competent body. The secured creditors therefore should not be viewed as a collective body, which leads AlzChem to the conclusion that each secured creditor individually was able to instruct the administrator in relation to his own separate assets and to veto the adoption of the instruction. AlzChem contends that each of the secured creditors had to approve the instruction given to the bankruptcy administrator for such an instruction to be binding on it. In addition, AlzChem claims imputability to the State as the decision of the creditors of NCHZ was confirmed and made binding by the bankruptcy court. The national courts exercise public authority and the national court decisions are as such imputable to the State. AlzChem also invokes the case law of the Court of Justice to the effect that national court orders may constitute the legal basis of State aid measures. In the alternative, AlzChem claims imputability due to the unanimous nature of the creditors' decision, as reviewed and confirmed by the bankruptcy court.
- (47) Fortischem denies the presence of imputability ⁽⁴⁸⁾ claiming that the Slovak bankruptcy law provides no veto right for either the members of the creditors' committee or the secured creditors; the public secured creditors of NCHZ thus could not veto the decision on NCHZ's further operation. Secondly, Fortischem contends that the role of the bankruptcy court in the present case was merely to assess the lawfulness and compatibility of the decision of pre-bankruptcy creditors with the bankruptcy law. Invoking the Court of Justice case law in *Pearle* ⁽⁴⁹⁾ and *Doux Elevage* ⁽⁵⁰⁾, imputability can be excluded where the public body concerned only approves and makes binding decisions taken by market operators. In the present case, the economic analysis showed that the sale of business as a going concern was preferable over liquidation and all creditors with voting power voted in favour of continued operation of the company. As a result, in Fortischem's view, the bankruptcy court had a minimal discretion and role to play, which can be summarised as overseeing compliance with bankruptcy rules.
- (48) Slovenská správcovská a reštrukturalizačná, k.s. ('SRS'), as the bankruptcy administrator of NCHZ, submits ⁽⁵¹⁾ that no member of the competent body had a veto right. Irrespective of the actual statements by the creditors, thus both in situations where the creditors shared a common position and where they had diverging views, a binding instruction for the administrator would in the end always take the form of a court order. For SRS this means that no creditor (member of the competent body) could have effectively exercised the right to veto the instruction for the administrator.

⁽⁴⁷⁾ AlzChem's submission of 6 January 2020.

⁽⁴⁸⁾ Fortischem's submission of 19 December 2019.

⁽⁴⁹⁾ Case C-345/02, *Pearle* and others, OJ C 228, 11.09.2004, p. 6.

⁽⁵⁰⁾ Case C-677/11, *Doux Elevage SNC*, OJ C 225, 03.08.2013, p. 21.

⁽⁵¹⁾ SRS's submission of 4 December 2019, referring to SRS submission of 27 August 2013.

- (49) It follows that, in the view of SRS, the decision that NCHZ should further operate was taken by the bankruptcy court and the continuation of NCHZ's operation was the result of the binding decision of the bankruptcy court. Any further activity of individual creditors would have no bearing on NCHZ's operation without a court's decision. The court obligatorily took into account the legitimate interests of affected creditors, and their respective statements, of which the major interest was the early and maximum possible satisfaction of their claims. The bankruptcy court's role was assessing compliance with the collective legitimate interest of creditors and maximizing their claim satisfaction. Nevertheless, as SRS specifies, the competent body forms a single entity under the bankruptcy law even when composed of several members.
- (50) Slovakia submits ⁽⁵²⁾ that the Act on Bankruptcy does not establish a veto right either for a member of the creditors' committee or for a secured creditor. Should a secured creditor express themselves against the proposed instruction for the bankruptcy administrator and thus vote against it, this would be the position of only one creditor, which the bankruptcy court would take into account in its decision-making, but would not be bound by it. However, given the facts in the present case, the court had no relevant reason to reject the proposed instruction. With regard to the role of the bankruptcy court, Slovakia clarifies that the bankruptcy court was not deciding on approving the creditors' decision of 26 January 2011 or on its validity. Rather, the court was deciding as a member of the competent body on whether to approve the proposed instruction for the administrator, after considering the position of the other members of the competent body and the conclusions of the administrator's economic analysis. In general, the court's main role in bankruptcy proceedings is to oversee the administrator and the course of proceedings and it acts as *dominus litis* only in case of a disagreement between the administrator and creditors or among the creditors themselves.

3.2. Comments on the economic advantage

- (51) Beside the question of imputability, the interested parties and Slovakia also provided further comments on the economic advantage, and in particular on the risk of creditors' claims accumulating during the second bankruptcy period and on the relevance of the economic analysis and of the management presentation for the decision-making of creditors in January 2011.
- (52) Alzchem submits ⁽⁵³⁾ that the private creditor test was not met in the case of NHCZ because (i) the relevant public creditors did not act *pari passu* with private creditors and because (ii) the economic analysis and the management presentation were not relevant for the purpose of assessing the conduct of the Slovak Republic regarding NCHZ's continued operations.
- (53) First, Alzchem explains that the only consideration of the majority of the private creditors was the maximisation of the proceeds from NCHZ's sale, as there was no risk of accumulating of receivables during continued operations of NCHZ. Alzchem points out that creditors such as the Slovak State had significant receivables accumulating during the operations under bankruptcy (social security contributions, taxes, etc., which occur by virtue of the company's continued operations) and, therefore, they should have balanced the potential benefits of maintaining NCHZ's operations (potentially higher sales price) against the risk that continued operations may have resulted in a higher amount of unpaid receivables. According to Alzchem, the behaviour of Nováčka Energetika, a.s., the single private creditor whose receivables increased during the bankruptcy proceeding, cannot reasonably justify the behaviour of all public creditors based on the fact that, as opposed to the State creditors, private operators could decide to discontinue the supply to the bankrupt company at any point in time, thereby limiting their exposure to additional unpaid receivables.
- (54) Second, Alzchem submits that the economic analysis and the management presentation were prepared for creditors who were members of the creditors' committee and the secured creditors, hence for those with pre-bankruptcy debts, and that these documents did not take into account the interest of those creditors whose receivables arose from NHCZ's operations during its bankruptcy. According to Alzchem, the Slovak State accumulated EUR 5 500 000 receivables until the end of the first bankruptcy period and further EUR 7 800 000 during the second bankruptcy period.

⁽⁵²⁾ Slovakia's submission of 14 February 2020.

⁽⁵³⁾ Alzchem's submission of 6 January 2020.

- (55) Fortischem is of the view ⁽⁵⁴⁾ that (i) the relevant public creditors acted *pari passu* with private creditors and that (ii) the economic analysis and management presentation were a valid basis on which the public creditors based their decisions when approving the instruction to the administrator.
- (56) First, Fortischem acknowledges that the claims of two secured public creditors (the Environmental Fund and the City of Nováky) had increased during NCHZ's operation in bankruptcy. Fortischem also recalls that the creditors' committee consisted of one public (the National Property Fund) and four private unsecured creditors (INVEST-KREDIT, s.r.o., NCHZ Energetika, a.s., M-ENERGO, s.r.o., DAK KIABA, s.r.o.) all of which voted in favour of continued operation. In Fortischem's view, the comparability of the private and public creditors in the creditors' committee follows from the fact that they were all unsecured pre-bankruptcy creditors. The members of the creditors' committee, in compliance with their legal obligation, voted in the interests of all unsecured pre-bankruptcy creditors, not only those present on the creditors' committee.
- (57) Furthermore, Fortischem considers that the Trenčín Court would have authorised the further operation of NCHZ even in a scenario where the Environmental Fund and the City of Nováky had voted for the liquidation of NCHZ. In assessing the interests of two secured creditors whose pre-bankruptcy claims represented less than 4 % of the value of all secured pre-bankruptcy claims and the interests of the representatives of unsecured creditors for the further operation of NCHZ, it is almost impossible that the interests of the pre-bankruptcy creditors could have been protected through any decision other than the further operation of NCHZ.
- (58) Lastly, with regard to the relevance of the economic analysis for the decision-making of creditors in January 2011, Fortischem submits that it was not necessary to make any specific prediction regarding potential further costs in the second bankruptcy period, as it was clear from the economic analysis that none of the pre-bankruptcy claims would have been satisfied in the case of NCHZ's liquidation. As the sale of NCHZ as a going concern was the only alternative for the satisfaction of the pre-bankruptcy creditors, it implied the full satisfaction of all post-bankruptcy claims. Therefore, this took at least implicitly into account the interests of all of the post-bankruptcy creditors (including the post-bankruptcy claims of the secured public creditors). In addition, Fortischem submits that the specific nature of the pre-bankruptcy claims of the two of the secured creditors (the Environmental Fund and the City of Nováky) made the calculation irrelevant, as any claims increase was unrelated to NCHZ's actual operation.
- (59) In addition, Fortischem claims that if comparing the claim amount at the beginning of the second bankruptcy period to the pre-bankruptcy claims, and comparing interim payments made in the first bankruptcy period to the post-bankruptcy claims, the risk of significant claim increase would have had to be assessed as minimal while there was a chance that at least some of its pre-bankruptcy claims could have been satisfied. Namely, the real estate tax for 2010, imposed by the City of Nováky in March 2010, was EUR 523 793 and still at the end of 2010 NCHZ's tax liability increased only by approximately EUR 48 000. The claims of the Environmental Fund increased in the first bankruptcy period by EUR 193 192, which represented less than 20 % of the original pre-bankruptcy claim.
- (60) SRS recalls ⁽⁵⁵⁾ that, the bankruptcy court in exercising its jurisdiction resolves the conflict between the various legitimate interests of the creditors by applying the principle of proportionality. In general, this means that any possible interest of some creditors in stopping the debtor's operation can be outweighed by the collective interest of other creditors in continuing the operation, especially where continuing the debtor's operation can legitimately be expected to bring higher overall satisfaction of claims. The decisions on continuing further NCHZ's operation, as well as on the extent and the form of liquidating NCHZ and its assets, were guided by the interest of the creditors as a whole in achieving the maximum possible satisfaction of their claims.
- (61) SRS is of the view that the decision to continue NCHZ's operation was indeed based on a thorough assessment of the compliance with the fundamental interest of the creditors as a whole in order to maximise the recovery of their claims, as applied by an independent and impartial judicial body acting within the bankruptcy procedure and applying the general statutory bankruptcy rules to the individual case, justified by the very substance of the bankruptcy proceedings but also by the need to resolve the overlapping rights and interests of the plurality of creditors on the one hand, and the limited assets (common pool) on the other.

⁽⁵⁴⁾ Fortischem's submission of 19 December 2019.

⁽⁵⁵⁾ The submission of 4 December 2019, referring to SRS submission of 27 August 2013.

- (62) With regard to the second point, SRS submits that the administrator prepared the analysis as a qualified factual basis for the decision-making of the competent body as well as for evaluating the first public tender. The analysis concluded that the only way of disposing with the bankruptcy estate leading to at least partial satisfaction of claims registered with the administrator (pre-bankruptcy claims) was the selling of the undertaking as a going concern. Other alternatives would not only fail to lead to the satisfaction of pre-bankruptcy claims but would give rise to further significant costs to be satisfied in preferential mode, such as for e.g. claims against the bankruptcy estate, which in the end would also not be satisfied. It follows that other alternatives would result in additional unsatisfied (post-bankruptcy) claims in addition to pre-bankruptcy claims which would not be satisfied either.
- (63) Slovakia reiterates its view ⁽⁵⁶⁾ that the action of the public creditors was in line with the market economy creditor principle, since the individual members of the creditors' committee and the secured creditors, both public and private, took the view that, in the event that the administrator was instructed to continue operating the business of NCHZ, the recovery rate would undoubtedly be higher. Slovakia specifies that the Slovak bankruptcy law does not explicitly distinguish between private and public creditors and does not treat them differently for the purposes of bankruptcy proceedings.
- (64) Slovakia further distinguishes between the different types of claims involved in the bankruptcy proceedings, which it groups into two categories: those that arose before declaring bankruptcy and those that arose after ('the pre-bankruptcy claims') and those that arose after ('the post-bankruptcy claims'). The post-bankruptcy claims are (i) claims against the bankruptcy estate ('pohľadávky proti podstate') or (ii) claims resulting from operating the undertaking ('pohľadávky z prevádzkovania podniku').
- (65) The claims against the bankruptcy estate are claims arising in connection with the administration and liquidation of bankruptcy assets, including the administrator's fee. They further include taxes, charges, fees, health and social insurance premiums, salaries and other staff costs and administrator's remuneration. In case that the administrator operates the undertaking, these claims are considered as claims resulting from operating the undertaking. The claims against the bankruptcy estate are satisfied from the liquidation proceeds, prior to the pre-bankruptcy claims.
- (66) The claims resulting from operating the undertaking arise in connection with the operation of the bankrupt undertaking after declaring bankruptcy. The claims from the operation are satisfied from revenues generated from the undertaking's operation. If after ceasing operations, revenues are insufficient to satisfy the claims from operating the undertaking, they shall be satisfied in the same way as claims against the bankruptcy estate, namely from the liquidation proceeds.
- (67) The post-bankruptcy claims (both claims against the bankruptcy estate and those resulting from operation) are thus satisfied before the pre-bankruptcy claims. Slovakia submits that, therefore, post-bankruptcy claims must be fully satisfied before pre-bankruptcy claims are satisfied based on the schedule of proceeds.

4. ASSESSMENT OF THE MEASURE

4.1. Existence of State aid

- (68) Article 107(1) TFEU provides that 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 and affects trade among Member States, is incompatible with the internal market. Those conditions are cumulative. If one of them is not met, the measure at hand does not qualify as State aid within the meaning of Article 107(1) TFEU.
- (69) The qualification of a measure as aid within the meaning of this provision therefore requires that the following cumulative conditions be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

⁽⁵⁶⁾ Slovakia's submission of 14 February 2020.

- (70) In the circumstances of the present case, it is appropriate to confine the assessment to the conditions of imputability and economic advantage, as in the absence of either of those elements, the measure will not amount to State aid, without it being needed to assess whether the other criteria listed in Article 107(1) TFEU are met.

4.2. Imputability

- (71) As described in more detail in recitals (23) to (45), after the Act on Strategic Companies ceased to apply to NCHZ on 31 December 2010, the administrator was no longer legally obliged to continue the operation of the company. As the costs of operating NCHZ in bankruptcy exceeded the proceeds from its operation, as envisaged under the Act on Bankruptcy, the administrator informed the competent body (for its composition see recitals (18) to (22)) about this circumstance and submitted, for the competent body's approval, an instruction obliging the administrator to continue the operation of NCHZ.
- (72) On 26 January 2011, at a joint meeting of the creditors' committee and the secured creditors, all creditors on the creditors' committee, public and private alike, approved the instruction for the administrator to continue the operation of NCHZ, and all secured creditors present in the meeting, public and private alike, expressed themselves in favour of approving the same instruction (see recital (38)). The minutes of the meeting of 26 January 2011, which the Commission verified, confirm that the secured creditors made their views known individually at this meeting. Even though the law required only the majority of members of the creditors' committee to support the proposal, it was demonstrated that none of those members rejected the instruction for the administrator. Neither did any secured creditor pronounce themselves against approving such instruction. It was thus established that the decision of the creditors represented in the competent body was unanimous.
- (73) As described in recital (20), it was not established that private creditors of the creditors' committee, except for INVEST-KREDIT, s.r.o., would have any capital ties with the owner of NCHZ.
- (74) It was further established that no (public or private) unsecured creditor challenged before the bankruptcy court the decision of the creditors' committee to continue NCHZ's operation (see recital (40)), despite the right to do so.
- (75) By order of 17 February 2011, the bankruptcy court as a member of the competent body approved without any substantive change ⁽⁵⁷⁾ the same instruction for the administrator, which thus became binding for the administrator in accordance with Section 83(4) of the Act on Bankruptcy.
- (76) The continuation of NCHZ's operations after the expiry of the Act on Strategic Companies was thus based on the decision of the competent body composed of the creditors' committee (mainly private companies), the secured creditors (mainly public entities) and the bankruptcy court.
- (77) It follows that both the positions taken by the creditors' committee and by the secured creditors of 26 January 2011 (without any involvement by the bankruptcy court on 26 January 2011) and the bankruptcy court's order of 17 February 2011 were relevant with regard to approving the instruction for the bankruptcy administrator. Namely, together they formed the decision-making of the competent body that collectively instructed the administrator to continue NCHZ's operation.
- (78) The Commission considers that the competent body acting as a collective body (including the bankruptcy court) decided on the instruction for the administrator to continue NCHZ's operation, contrary to the views that the decision came from the Trenčín court's decision alone (put forward by SRS and AlzChem) or that the instruction came from the creditors' decision (put forward by Fortischem). Simply the final decision of the bankruptcy court came on 17 February 2011, after other members of the competent body have expressed their views on the instruction following the procedure foreseen under the Act on Bankruptcy (see recital (42)) but in the specific circumstances of the case, where all other members of the competent body approved the instruction for the administrator, there were no grounds for the bankruptcy court to reject approving the proposed instruction.

⁽⁵⁷⁾ The Commission reviewed the court order of 17 February 2011 and found that the only change was non-substantive and referred to correcting the reference to a specific legal provision.

- (79) As regards the possible existence of veto rights of certain creditors, the formal investigation procedure revealed that no member of the creditors' committee and none of the secured creditors had a veto right under the Act on Bankruptcy. Claims of AlzChem pointing to the existence of veto rights proved unfounded as no evidence confirming their existence was submitted. To the contrary, it is clear from the submissions of the other interested parties that no single secured creditor, public or private, could have individually blocked the approval of the instruction for the administrator.
- (80) According to Section 83(4) of the Act on Bankruptcy, the bankruptcy administrator is bound by the court order (see recital (42)). This means that, in a situation where the bankruptcy court is a member of the competent body, the bankruptcy administrator is not bound by the decision of the creditors (neither of the creditors' committee nor secured creditors) concerning the instruction for the bankruptcy administrator, but is bound solely by the order of the bankruptcy court. Moreover, the court, when issuing its order, is not bound by the dissenting positions by individual secured creditors and is not required to follow those: it can approve the submitted instruction even in case of such dissenting positions, as long as the instruction lies in the legitimate interests of the affected creditors (recital (42)). It follows that even if one or several of the secured creditors expressed themselves against approving the instruction for the bankruptcy administrator in the proposed wording, this would not automatically mean that such an instruction cannot be approved. As a result, individual secured creditors could not 'veto' the adoption of the instruction, in the sense of blocking the instruction just by rejecting its proposed adoption.
- (81) In particular, it was not confirmed that the veto right of secured creditors can be derived from the fact that all secured creditors were involved in the decision-making. The right of every secured pre-bankruptcy creditor to express a view and take part in the decision-making cannot imply their veto rights, absent other provision to this effect. It is correct, that in contrast to the creditors' committee, which was a collective elected body (see recitals (18) and (20)), the secured creditors were not represented in a collective body, but rather each secured creditor formed part of the competent body in its own right with regard to each separate bankruptcy estate (see recital (21)). However, contrary to what AlzChem submits (see recital (46)), the fact that each secured creditors was a member of the competent body does not automatically mean that that they could block a decision of the competent body. In other words, veto rights of secured creditors cannot be derived from the fact that each one of them was a member of the competent body.
- (82) Furthermore, the Commission verified the claim by AlzChem that the veto right of secured creditors can be found in the Act on Bankruptcy through its systemic interpretation. The sections of the Act on Bankruptcy that AlzChem refers to in support of its claim contain the rights of secured creditors in the bankruptcy proceedings. As such, they do not provide for the veto right.
- (83) In fact, decisions in the creditors' committee were adopted by majority, and the secured creditors made their position known on an individual basis, but also without any veto right. Therefore, despite having the possibility to reject NCHZ's continued operation (in case of the members of the creditors' committee), or the possibility to pronounce themselves against approving such instruction (in case of secured creditors), no State entity could have enforced its interest in stopping further accumulation of the debts, had such interest existed.
- (84) It follows that neither public nor private creditors were in a position to veto NCHZ's operation in the second bankruptcy period. The decision to continue NCHZ's operation was made by the competent body, acting as a collective body, and no single private or public creditor as a member of the competent body could on its own have blocked the decision to continue NCHZ's operation.
- (85) In conclusion, the argument by AlzChem that the decision to continue the operations of NCHZ is imputable to Slovakia given that the four State-owned secured creditors chose not to exercise their veto rights, must also be rejected.

- (86) It has been further suggested that the decision to continue the operations of NCHZ is imputable to Slovakia given that it has been confirmed and made binding by the Court of Trenčín in February 2011. While in principle it cannot be ruled out that a measure may be regarded as a decision imputable to the State within the meaning of Article 107(1) TFEU because of a decision of a national court,⁽⁵⁸⁾ the specifics of the bankruptcy court's involvement in the present case as assessed in recitals (88) to (92) distinguish it from cases where imputability was found based on a decision of a national court.
- (87) The formal investigation procedure revealed that, in February 2011, the bankruptcy court acted as a member of the competent body with a role clearly defined under the Act on Bankruptcy. The Commission thus examined the role of the bankruptcy court when it is a member of the competent body under Section 83(4) of the Act on Bankruptcy.
- (88) The bankruptcy court was in a unique position of a member of the collective body that was deciding on the continued operation of NCHZ. It did not act in the court's usual capacity as an adjudication body, to which the parties turn to for an authoritative decision; rather its role was to ensure that the instruction for the administrator complies with the positions and legitimate interests of the affected creditors (see recitals (42) and (43)). This is in line with the general role of bankruptcy court in bankruptcy proceedings, which is to act with the aim of achieving the highest claims satisfaction rate for creditors (see recital (19)).
- (89) As stated in recital (42), when the instruction for the bankruptcy administrator is put forward to bankruptcy court for its approval, the bankruptcy court can either approve the instruction or can decide how to proceed by an order. The same section specifies that in issuing its order, the bankruptcy court takes into account the legitimate interests of the affected creditors and their statements as well as the statements of other members of the competent body.
- (90) As described in recital (43), the bankruptcy court examined the proposed instruction for the administrator in view of the legitimate interests of affected creditors and their statements and statements of other members of the competent body. This meant that the bankruptcy court took into account the statements of the creditors' committee and of all individual secured creditors (including all public secured creditors) as well as the content of the economic analysis, which found that ceasing NCHZ's operation appeared as least favourable from the point of view of the possibility of satisfying the claims of the bankruptcy creditors, given the costs connected with ceasing the operation.
- (91) While it is true that the court order made the instruction binding for the bankruptcy administrator, in the specific circumstances of the case there were no grounds for the bankruptcy court to reject the proposed instruction. In a situation in which all of the creditors, the majority of which are private, expressly decide that it is in their economic interest to allow the continued operation of the insolvent undertaking, their decision is not attributable to the State simply because a bankruptcy court subsequently confirms it and makes it binding.
- (92) The decision of the bankruptcy court points to the fact that the decision to continue NCHZ' operations was in the best interest of creditors. In this respect, the court concurred with the positions taken by all other members of the competent body, public and private, secured and unsecured alike, as well as with the proposal submitted by the bankruptcy administrator; none of those actors expressed any alternative view proposing to cease NCHZ's operations. According to case-law, Article 107(1) TFEU refers to *'the decisions of Member States by which, in pursuit of their own economic and social objectives, they give, by unilateral and autonomous decisions, resources to undertakings or other persons or procure for them advantages intended to encourage the attainment of the economic or social objectives sought.'*⁽⁵⁹⁾ In this regard, there is no indication in the case at hand that the bankruptcy court acted in pursuit of other interests than those of the creditors concerned, and that it did not act in full alignment with what the creditors and the bankruptcy administrator considered to be the most economically rational solution.

⁽⁵⁸⁾ See, to that effect, judgments of 26 October 2016, *DEI and Commission v Alouminion tis Ellados*, C-590/14 P, EU:C:2016:797, paragraphs 59, 77 and 81, and of 3 March 2016, *Simet v Commission*, T-15/14, EU:T:2016:124, paragraphs 38, 44 and 45.

⁽⁵⁹⁾ Judgment of 27 March 1980, *Amministrazione delle finanze dello Stato v Denavit italiana*, EU:C:1980:100, paragraph 31; judgment of 5 April 2006, *Deutsche Bahn v Commission*, T-351/02, EU:T:2006:104, paragraph 100.

- (93) As a result, the decision of the competent body (of which the bankruptcy court was a member) to continue operating NCHZ after the Act on Strategic Companies expired cannot be considered imputable to the State given the lack of veto rights of public creditors and the specific role played by the bankruptcy court.
- (94) Furthermore, there are no indications that the State would have tried to influence the decision-making of private creditors. As confirmed by the General Court ⁽⁶⁰⁾, it was not demonstrated that political support to NCHZ existed in January 2011 and that the creditors concerned had formed an assumption of such support. In particular, it was concluded that the failure to repeal the Act on Strategic Companies by the new Slovak government in power in January 2011 could not be interpreted as an indication of its political support for NCHZ. Also, even if political support existed in 2009-2010 (due to the Act on Strategic Companies) and later in 2013, this does not mean that the political support existed in January 2011.
- (95) In the present case, it follows from the bankruptcy court's order of 17 February 2011 (see recital (43), which the Commission examined, that the reasons which led the bankruptcy court to approve the instruction for the bankruptcy administrator were the following: i) the fact that the creditors' committee adopted unanimously and without objection an order with the instruction for the administrator to continue the operation of NCHZ and also that all six secured creditors were in favour of the same instruction; ii) the economic analysis (see recital (29), prepared by the administrator found that ceasing of NCHZ's operations would be the least advantageous option for satisfying the creditors' claims given the costs related to shutting down the operations; iii) absence of discrepancy or conflict of the proposed instruction with the legitimate interest of affected creditors. The bankruptcy court thus examined whether the instruction was in line with the legitimate interest of affected creditors as a whole, without addressing separately individual situation of each creditor or assessing the impact on the rejected claim of REDQUEST LIMITED.
- (96) Under the Act on Bankruptcy, the bankruptcy court in principle had the option to refuse the proposed instruction to the bankruptcy administrator. Namely, depending on an individual factual situation and legitimate interests of the affected creditors, and the statements of those creditors and other members of the competent body, in principle the bankruptcy court had the option not to approve the instruction but to itself decide how to proceed. However, in a situation in which all creditors represented in the competent body considered it in their best economic interest to allow the continued operation of NCHZ and expressed themselves to this effect, and the same view was submitted by the bankruptcy administrator, the fact that the court shared that opinion does not speak in favour of imputability of that decision to the State only because of the binding nature of the bankruptcy court's order. There is ample evidence in the case at hand, including positive views from all the other actors concerned, that the continuation of NCHZ's operations was perceived by creditors to be in their best interest, and it is manifest that in exercising its role, the bankruptcy court was required to act in the interest of NCHZ's creditors. There is, by contrast, no indication whatsoever that the bankruptcy court was pursuing, through the adoption of its order, any objective of the Slovak State.
- (97) Therefore, the Commission concludes that the decision of the competent body in the second bankruptcy period of NCHZ cannot be regarded as a decision imputable to the State within the meaning of Article 107(1) TFEU. Even if one of the cumulative conditions for the finding of State aid is missing, the Commission nevertheless verified whether the measure at issue provided to NCHZ an economic advantage that it would not have otherwise obtained at market conditions, as detailed below.

4.3. Economic advantage

- (98) In general, economic transactions carried out by public bodies (including public undertakings) do not confer an advantage on the counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions ⁽⁶¹⁾.

⁽⁶⁰⁾ See judgment of the General Court of 13 December 2018, *AlzChem AG v Commission*, T-284/15, EU:T:2018:950, paragraphs 129, 130, 134, and 142.

⁽⁶¹⁾ See paragraph 74 of the Commission Notice No 2016/C 262/01 on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union ('NoA') (OJ C 262, 19.7.2016, p. 1).

- (99) To determine whether a transaction is carried out in line with normal market conditions, the behaviour of a public body must be compared to that of a hypothetical private economic operator being in a similar situation (the so-called market economy operator test). The Union courts have developed specific types of that test for different types of economic transactions, in particular the 'private creditor test', in cases of transactions involving debt ⁽⁶²⁾, and the 'market economy investor principle', to identify the presence of an economic advantage in cases of public equity investments ⁽⁶³⁾.
- (100) In the case at hand, given that there were public creditors involved in the decision-making with respect to the continuation of NCHZ's activities but no shareholding in the company by the state, the Commission's assessment focuses on the transaction from the perspective of the hypothetical prudent private creditor ⁽⁶⁴⁾.
- (101) The Commission verified the economic analysis produced by the administrator, which was available to and examined by the creditors and the bankruptcy court when the decision was taken (see recitals (33) to (36)). The analysis identifies several possible scenarios and compares the costs and revenues from the point of view of NCHZ's creditors. In particular, the analysis indicates that discontinuing the operation of NCHZ would have led to significant costs totalling more than EUR 48 000 000. The bulk of the costs related to the closure and environmental clean-up of the chemical production sites (around EUR 37 300 000) and staff costs (EUR 10 500 000 if all legal obligations were fulfilled). At the same time, the expected revenue from the sale of individual assets was in the range of EUR 47 000 000-52 000 000 (without taking into account the additional costs of dismantling and removing the equipment).
- (102) As the outstanding (public and private) liabilities incurred from operating NCHZ during the bankruptcy proceedings (ca. EUR 16 000 000 by mid-December 2010, towards the end of the first bankruptcy period) had a preferential treatment, it follows that none of the pre-bankruptcy claims would have been satisfied if NCHZ's operations had been discontinued. The analysis considers that the sale of the undertaking as a going concern was likely to bring higher satisfaction of pre-bankruptcy claims compared to the scenario of discontinuing NCHZ's operations, which would incur significant additional costs for shutting down NCHZ's operations and relaunching operations would be problematic, if not impossible since some of the technological equipment would be irreparably damaged if operations were discontinued (see recitals (34) and (36)).
- (103) The analysis also evaluated the interest of third parties to participate in tender(s) for NCHZ. In the first tender, out of seven interested buyers only one (company M-ENERGO, s.r.o.) submitted an offer for EUR 2 000 000. The administrator found that it was not clear whether the second tender would attract more interested buyers. Overall, the analysis concluded that it was in the interest of creditors to continue the operation of NCHZ and sell it as a going concern.
- (104) The Commission further examined the contents of NCHZ management's presentation (see recital (29) and following), which was also available to the creditors and the bankruptcy court when the decision was taken. The presentation considered the expected real value of the company's assets in the event of discontinued operation to amount to only EUR 15 500 000, making the discontinuation of NCHZ's operation less attractive for the creditors. Furthermore, the presentation asserts that the company could be successfully sold following certain restructuring measures to be adopted (such as layoffs of staff). Overall, the presentation concluded that the creditors would be best off if NCHZ were sold as a going concern.

⁽⁶²⁾ Judgment of the Court of Justice of 22 November 2007, *Spain v Commission*, C-525/04 P, EU:C:2007:698, paragraphs 59-60; judgment of the Court of Justice of 24 January 2013, *Frucona v Commission*, C-73/11 P, EU:C:2013:32, paragraph 72; judgment of the Court of Justice of 29 June 1999, *DMTransport*, C-256/97, EU:C:1999:332, paragraph 30.

⁽⁶³⁾ See, for instance, judgment of the Court of Justice of 21 March 1990, *Belgium v Commission* ('*Tubemeuse*'), C-142/87, EU:C:1990:125, paragraph 29; judgment of the Court of Justice of 21 March 1991, *Italy v Commission* ('*ALFA Romeo*'), C-305/89, EU: C:1991:142, paragraphs 18 and 19; judgment of the General Court of 30 April 1998, *Cityflyer Express v Commission*, T-16/96, EU: T:1998:78, paragraph 51; judgment of the General Court of 21 January 1999, *Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Commission*, Joined Cases T-129/95, T-2/96 and T-97/96, EU:T:1999:7, paragraph 104; judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission*, Joined Cases T-228/99 and T-233/99, EU: T:2003:57, paragraph 208.

⁽⁶⁴⁾ Judgment of the Court of Justice of 20 September 2017 *Commission v Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 28.

- (105) The proposal for continued operation based on those documents was subsequently accepted by all creditors in the competent body, both public and private, secured and unsecured.
- (106) In the light of the above, the Commission considers that the economic analysis together with the management presentation was duly considered and formed a valid basis for the decision-making of the creditors and the bankruptcy court.

4.3.1. Common considerations

- (107) As follows from Table 1 (see recital (24), the public creditors with the highest post-bankruptcy claims were the Social Insurance Company ('Sociálna poisťovňa') and the General Health Insurance Company ('Všeobecná zdravotná poisťovňa, a.s.'). As described in recital (44), these were not members of the competent body deciding on the continuation of NCHZ's operation. Therefore, they had no possibility of directly influencing the decision-making process and could not prevent NCHZ's continued operation.
- (108) The in-depth investigation further showed that, out of the four public secured creditors forming part of the competent body (see recital (21), only two public creditors were directly concerned by the threat of further accumulation of the debts owed to them by NCHZ during its continued operation, namely the Environmental Fund and the City of Nováky. Specifically, it was established that the Slovak Guarantee and Development Bank and the National Property Fund had no risk of incurring increased claims from NCHZ's continued operation, due to the lack of active commercial relations with NCHZ during the bankruptcy period.
- (109) In this connection, the General Court found that in the initial decision it was not shown that '*the economic analysis raised the question of the possible increase of creditors' claims in the event that NCHZ's operations were continued during the second insolvency period*'⁽⁶⁵⁾. It was therefore not evident how the verification by the Commission of the economic analysis in the light of the private creditor test was linked to the content of recital (110) of the initial decision, which contained the assessment of the threat of further accumulation of the claims of public creditors towards NCHZ during its continued operations⁽⁶⁶⁾. It therefore follows that the economic analysis, and by implication also the management presentation, need to be verified in the light of the private creditor test and the rationality of the creditors' decision, since they knew that the amount of their claims would increase.
- (110) The General Court also held that the assessment of the risk of increase of claims needs to take place at the relevant point in time, which is the period during which the measures were taken and refrain from any assessment based on a later situation⁽⁶⁷⁾. Namely, according to the General Court, '*the analysis of the level of risk of an increase in claims incurred, at the time of the decision of the creditors at the meeting of 26 January 2011 [...] [was] [...] not apparent from the contested decision*'⁽⁶⁸⁾.
- (111) The two public creditors incurring a risk of increased claims were the Environmental Fund and the City of Nováky (see recital (24). However, for most part, the additional claims arising during the second bankruptcy period were not directly related to the activities of NCHZ in the second bankruptcy period but to the first bankruptcy period (see recital (130) and following as well as recitals (141) and following). In addition, both the City of Nováky and the Environmental Fund must have been able to predict the accumulation of additional claims when the decision was made. These were tax- and fee-related, so that the amount could easily be approximated, given these were yearly recurrent payments. Therefore, at the time of their decision-making on further operation of NCHZ on 26 January 2011, the risk of an increase in their claims towards NCHZ must have been known to these creditors. In particular,

⁽⁶⁵⁾ See judgment of the General Court of 13 December 2018, *AlzChem AG v Commission*, T-284/15, EU:T:2018:950, paragraphs 216-217.

⁽⁶⁶⁾ See judgment of the General Court of 13 December 2018, *AlzChem AG v Commission*, T-284/15, EU:T:2018:950, paragraphs 216-217.

⁽⁶⁷⁾ See judgment of the General Court of 13 December 2018, *AlzChem AG v Commission*, T-284/15, EU:T:2018:950, paragraph 218.

⁽⁶⁸⁾ See judgment of the General Court of 13 December 2018, *AlzChem AG v Commission*, T-284/15, EU:T:2018:950, paragraph 221. 'Contested decision' means the 'initial decision' as used in the present decision.

they could derive the amount of risk from the management presentation which laid out an estimation of drop in revenues to the City of Nováky and to the State in case NCHZ stopped operation (see recital (32), and which could be understood to indicate which additional claims (and in what amount) the City of Nováky and the Environmental Fund would incur, should NCHZ continue operations. Likewise, they could not ignore that, compared to the likely prospect of losing all their pre-bankruptcy claims in case of liquidation, the additional claims would be limited in scope. Also, both creditors must have been aware of the preferential treatment that these additional (i.e. post-bankruptcy) claims would get. Thus, the economic analysis, complemented by the management presentation, actually informed and constituted a valid basis for their decision-making.

- (112) As explained in recital (19), the creditors' committee consisted of one public and four private unsecured creditors, all unsecured pre-bankruptcy creditors, which all supported the proposal to continue operations. As further explained in recital (37), under the Act on Bankruptcy, the members of the creditors' committee were obliged to act in the common interest of all unsecured creditors. This means that they were obliged to act in the interest of all unsecured pre-bankruptcy creditors, and not only in the interest of those represented in the creditors' committee. It is therefore established, in the absence of evidence to the contrary, that the decision to continue the operation of NCHZ in the second bankruptcy period was in the interest of the unsecured pre-bankruptcy creditors.
- (113) In this connection, it needs to be recalled that the General Court rejected the argument put forward by AlzChem AG alleging that the vote by the public creditors on the relevant committee influenced the private creditors, which are members of that committee. The Court noted that AlzChem AG did not provide any evidence in support of its claim and that private creditors must be presumed to have acted pursuant to their interests ⁽⁶⁹⁾.

4.3.2. *Absence of economic advantage provided by each of the individual public creditors of NCHZ*

- (114) The Commission has assessed separately for each of the public creditors forming part of the competent body (see recital (21) their individual situation and whether their behaviour satisfied the private creditor test. The General Court held that, when applying the private creditor test, the individual situation of the public creditors needs to be examined and their specific characteristics should be taken into account, in particular based on its status as a preferential or unsecured creditor; it follows that the public creditors should not be considered as a single entity ⁽⁷⁰⁾. Furthermore, the Court pointed to the need to take account of a private creditor which was in a situation as close as possible to that of the public creditor and seeking to obtain payment of the sums owed to it by a debtor.
- (115) The Commission does not assess the situation of public creditors which were not part of the competent body, in particular the Social Insurance Company and the General Health Insurance Company, which were the public creditors with highest amounts of claims incurred in the bankruptcy proceedings (see Table 1, recital (24)). Those creditors could not directly intervene in the decision-making process relating to the continuation of NCHZ's operations, thus had no direct say over the decision on NCHZ's further operation (see recital (44). In this

⁽⁶⁹⁾ Judgment of the General Court of 13 December 2018, *AlzChem AG v Commission*, T-284/15, EU:T:2018:950, paragraph 143.

⁽⁷⁰⁾ Judgment of the General Court of 13 December 2018, *AlzChem AG v Commission*, T-284/15, EU:T:2018:950, paragraphs 188, 190, and 192 (see extracts below). See also judgment of the General Court of 11 July 2002, *HAMSA v Commission*, T-152/99, EU:T:2002:188, paragraphs 166 to 172; judgment of the General Court of 17 May 2011, *Buczek Automotive v Commission*, T-1/08, EU:T:2011:216, paragraph 84.

The Court held that: '[...] it is apparent from the judgment of 11 July 2002, *HAMSA v Commission* (T-152/99, EU:T:2002:188), and in particular paragraphs 166 to 172 thereof, that the EU judicature called for an examination of the individual situation of the public creditors, in particular based on its status as a preferential or unsecured creditor, to determine, in essence, whether the choices made by them went beyond what was justified by commercial constraints or if it could be explained by the desire to confer an advantage on the undertaking concerned. It follows that the EU judicature found that the public creditors should not be considered as a single entity, but that their specific characteristics should be taken into account.' Also, '[...] it must be observed that the considerations set out in the judgment of 11 July 2002, *HAMSA v Commission*, T-152/99, EU:T:2002:188, paragraphs 168 and 170), were referred to in the judgment of 17 May 2011 in *Buczek Automotive v Commission* (T-1/08, EU:T:2011:216, paragraph 84). Finally, '[...] the Court indicated the need to take account, when applying the private creditor test, of a private creditor which was in a situation as close as possible to that of the public creditor and seeking to obtain payment of the sums owed to it by a debtor experiencing financial difficulties, which entails not having to look at the State as a single creditor, bringing together all the public creditors concerned.'

connection, the General Court rejected the arguments by AlzChem that i) the Social Insurance Company could and should have intervened before bankruptcy court in order to challenge that continued operation of NCHZ, and that ii) the fact that company had used all the means at its disposal to avoid further losses did not exempt the Slovak Republic from its responsibility to avoid the debts owed to it continuing to accumulate by other means ⁽⁷¹⁾. The General Court held that it was not apparent from the provisions of the Act on Bankruptcy, and in particular Article 83(4) of that act, that, in the circumstances of the case, the Social Insurance Company could intervene in the decision-making process relating to the continuation of NCHZ's operations before the bankruptcy court, and thus concluded that the Social Insurance Company did not have such an opportunity to intervene ⁽⁷²⁾.

4.3.2.1. The Slovak Guarantee and Development Bank

- (116) The Slovak Guarantee and Development Bank ('the Bank') was one of the six secured creditors of NCHZ with a secured pre-bankruptcy claim of approx. EUR 750 000 based on a loan agreement.
- (117) As mentioned in recital (108), the Bank had no active commercial relations with NCHZ during the bankruptcy period. It held no post-bankruptcy claims vis-à-vis NCHZ and had no risk of incurring increased liabilities due to continued operation of NCHZ: its claims could not increase solely by reason of the continued operation of NCHZ.
- (118) In this context, the Commission considers that the economic analysis and NCHZ's management presentation, which were available to the Bank by the time of deciding in January 2011, constituted a valid basis for the Bank's support to the decision. As described in recitals (101) to (104), these documents showed that the continued operation of NCHZ and its sale as a going concern (with an interested buyer available (recital (103) was in the best interest of creditors, hence also for the Bank.
- (119) Furthermore, it was established that (i) as of mid-December 2010, the unsatisfied claims arising from the operation of NCHZ in the first bankruptcy period, which had priority over pre-bankruptcy claims, were in the amount ca. EUR 16 000 000 (recital (33), and (ii) almost all revenues (depending on a scenario) from the sale of NCHZ's assets would need to cover the costs of discontinuing NCHZ's operations (recital (34). This significantly decreased the likelihood of the satisfaction of pre-bankruptcy claims in a liquidation scenario.
- (120) In view of this, it was reasonable to expect that none of the Bank's pre-bankruptcy claims would have been satisfied in case of a liquidation. Thus, based on the information available to it at that time, the Slovak Guarantee and Development Bank could consider that it was better off in case of continued operations compared to losing all its claims in case of liquidation.
- (121) Based on the above, the Commission considers that the decision of the Slovak Guarantee and Development Bank to support continuing NCHZ's operation would have also been taken by a reasonable and diligent private creditor and was, therefore, market conform.

4.3.2.2. The National Property Fund

- (122) The National Property Fund was a secured creditor of NCHZ with a pre-bankruptcy claim on NCHZ of approx. EUR 17 850 000 based on obligations related to privatisation. At the same time, it was the only public creditor on the creditors' committee that represented unsecured creditors, alongside four private unsecured creditors (see recital (19).
- (123) All unsecured pre-bankruptcy creditors in the creditors' committee, including the National Property Fund, supported the continued operation of NCHZ, and they had the legal obligation to act in the interest of all unsecured pre-bankruptcy creditors, not only those present in the creditors' committee. At the same time, the National Property Fund, being also a secured creditor, pronounced itself in favour of continued operation.

⁽⁷¹⁾ Judgment of the General Court of 13 December 2018, *AlzChem AG v Commission*, T-284/15, EU:T:2018:950, paragraphs 145-152.

⁽⁷²⁾ Judgment of the General Court of 13 December 2018, *AlzChem AG v Commission*, T-284/15, EU:T:2018:950, paragraphs 151-152.

- (124) As mentioned in recital (108), the National Property Fund had no active commercial relations with NCHZ during the bankruptcy period. It held no post-bankruptcy claims vis-à-vis NCHZ and had no risk of incurring increased liabilities due to continued operation of NCHZ: its claims could not increase solely by reason of continued operation of NCHZ.
- (125) In this context, the economic analysis and NCHZ's management presentation, which were available to the National Property Fund by the time of the decision in January 2011, constituted a valid basis for its support to the decision. As described in recitals (101) to (104), these documents showed that the continued operation of NCHZ and its sale as a going concern (with an interested buyer available (recital (103) was in the best interest of creditors, hence also for the National Property Fund.
- (126) Furthermore, it was established that (i) as of mid-December 2010 the unsatisfied claims arising from the operation of NCHZ in the first bankruptcy period, which had priority over pre-bankruptcy claims, were in the amount ca. EUR 16 000 000 (recital (33), and (ii) almost all revenues (depending on a scenario) from the sale of NCHZ's assets would need to cover the costs of discontinuing NCHZ's operations (recital (34). This significantly decreased the likelihood of the satisfaction of pre-bankruptcy claims in a liquidation scenario.
- (127) In view of this, any hypothetical creditor in the same situation could have reasonably expected that none of the National Property Fund's pre-bankruptcy claims would have been satisfied in case of a liquidation. Thus, based on the information available to it at that time, the National Property Fund reasonably could consider that it was better off in case of continued operations compared with losing all its claims in case of liquidation.
- (128) Based on the above, the Commission considers that the decision of the National Property Fund to vote in favour of continuing NCHZ's operation would have also been taken by a reasonable and diligent private creditor and, therefore, was market conform.

4.3.2.3. The Environmental Fund

- (129) The Environmental Fund was a secured creditor of NCHZ with a pre-bankruptcy secured claim on NCHZ of approx. EUR 950 000 based on a loan agreement and a non-secured pre-bankruptcy claim of ca. EUR 70 000 (see Table 2, recital (25).
- (130) As mentioned in recitals (108) and (111), the Environmental Fund was exposed to the risk of incurring increased liabilities due to continued operation of NCHZ and it incurred additional liabilities both in the first and in the second bankruptcy period.
- (131) The Environmental Fund's claims that arose after NCHZ declared bankruptcy were due to the partial non-payment of the yearly fee for air pollution. Pursuant to the legal requirements in force, the fees were imposed on industrial operators for the previous years ⁽⁷³⁾, based on the amount of air pollution caused by the particular plant in the previous year.
- (132) The formal investigation revealed that the air pollution fee in 2010, which was imposed on behalf of the Environmental Fund in May 2010 for polluting air in 2009, was set at EUR 192 454 and by the end of 2010 (end of the first bankruptcy period), the post-bankruptcy claims amounted to EUR 222 954 due to the partial non-payment of the yearly fee for air pollution (see recital (26). However, these claims were not the result of NCHZ's operation in bankruptcy during the year 2010 but in 2009 when NCHZ's operation was secured by means of law.
- (133) The Commission notes, first, that the amount of air pollution fees was to a large extent predictable as it was tied to the level of the undertaking's operation. Second, the public fees that were incurred by the undertaking's operation in bankruptcy had priority treatment over pre-bankruptcy claims.

⁽⁷³⁾ This follows from the Act on Pollution No 401/1998 as amended.

- (134) Therefore, also in 2011, it was to be expected that NCHZ would have incurred additional air pollution liabilities (for year 2010) even if the creditors had decided in favour of liquidation in 2011. Furthermore, given that even in the liquidation scenario the production could not have been shut down immediately, NCHZ would have continued to pollute even if the liquidation scenario had been supported, so it would have had to pay emission fees even in 2012. Taking into account the existence of significant pre-bankruptcy claims, it was prudent for the Environmental Fund to vote for the further operation of its debtor.
- (135) In view of the above, in either scenario, liquidation or continuation of business and sale as a going concern, NCHZ would have incurred additional air pollution liabilities in 2011 and likely in 2012, the tax obligation would have been the same for that period, and the unpaid tax obligation would likely have been in the same range because no sufficient funds even on a going concern sale would have been sufficient to cover the entire tax payments.
- (136) Furthermore, it was established that (i) as of mid-December 2010 the unsatisfied claims arising from the operation of NCHZ in the first bankruptcy period, which had priority over pre-bankruptcy claims, were in the amount ca. EUR 16 000 000 (recital (33), and (ii) almost all revenues (depending on a scenario) from the sale of NCHZ's assets would need to cover the costs of discontinuing NCHZ's operations (recital (34). This significantly decreased the likelihood of the satisfaction of pre-bankruptcy claims in a liquidation scenario.
- (137) In view of this, it could reasonably be expected that none of the Environmental Fund's pre-bankruptcy claims would have been satisfied in case of a liquidation. Thus, based on the information available to it at that time, the Environmental Fund could consider that it was better off in case of continued operations compared with losing all its claims in case of liquidation.
- (138) In this context, the Commission further considers that the economic analysis and NCHZ's management presentation, which the Environmental Fund had at its disposal by the time of voting in January 2011, constituted a valid basis its voting decision. As described in recitals (101) to (104), from both these documents it followed that the continued operation of NCHZ and its sale as a going concern (with an interested buyer available (recital (103) was in the best interest of creditors, hence also for the Environmental Fund. Therefore, the Environmental Fund, whose additional claims during the second bankruptcy period were expected to be smaller than the pre-bankruptcy claim, had solid reasons to base its decision on the economic analysis of the administrator together with the management presentation.
- (139) Thus, the Commission considers that the decision of the Environmental Fund to vote in favour of continuing NCHZ's operation would have also been taken by a reasonable and diligent private creditor and, therefore, was market conform.

4.3.2.4. The City of Nováky

- (140) The City of Nováky was a secured creditor of NCHZ with a pre-bankruptcy claim on NCHZ based on the registration of a pledge right related to real estate tax of approx. EUR 43 781.
- (141) As mentioned in recitals (108) and (111), the City of Nováky was exposed to the risk of NCHZ incurring increased liabilities in the bankruptcy period and, as a matter of fact, NCHZ incurred additional liabilities primarily related to its real estate tax obligation.
- (142) The City of Nováky's claims that arose after NCHZ declared bankruptcy were due to the partial non-payment of the yearly real estate taxes. Pursuant to the legal requirements in force, the taxes were imposed for the given year ⁽⁷⁴⁾ based on the area of the land and buildings (separately for different categories).

⁽⁷⁴⁾ This follows from the Act on Local Taxes No 582/2004 as amended.

- (143) The main claim due by NCHZ to the City of Nováky in the first bankruptcy period was the real estate tax for the year 2010 (imposed in March 2010) set at EUR 523 793 (see recital (27)). Given the nature of this claim as public tax, this claim had priority treatment and was partially satisfied in the first bankruptcy period. By the end of 2010, that is the first bankruptcy period, the post-bankruptcy claims were in the amount of EUR 29 762 (mainly NCHZ's real estate tax obligation) (see recital (27)).
- (144) The management presentation outlined revenues that the City of Nováky was considered to lose if NCHZ stopped its operations of around EUR 572 000 annually (recital (32)), which, on the other hand, can be seen as corresponding to the estimate of additional claims that were to be incurred in the second bankruptcy period.
- (145) At the time of the decision, it was known that the tax amount owed by NCHZ to the City of Nováky was due and payable on a yearly basis, and was not dependent of NCHZ being in operation, but was exclusively based on the land and buildings surface owned by it. Thus, it was to be expected that the unpaid tax obligation would have been the same in both liquidation or on going concern sale scenarios, as there would not have been sufficient funds to cover the entire tax payments due to other concurrent post-bankruptcy creditors' claims.
- (146) Also, it was unlikely that the land surface owned by NCHZ would have substantially changed during the period of time under assessment. A potential land sale was remote, the main reason for that being the considerable environmental burden and the presence of a heavy chemical industry on the land. It would have been highly speculative and hypothetical to consider that a buyer would have acquired all or part of the site and pay at least part of the real estate tax. Thus, purely from the private creditor test perspective, the operation of NCHZ was debt neutral for the City of Nováky.
- (147) The Commission thus notes, first, that the amount of the real estate taxes was to large extent predictable as it was tied to the surface of land and buildings occupied by the undertaking. Second, the taxes that were incurred by the undertaking's operation in bankruptcy had priority treatment over pre-bankruptcy claims.
- (148) Furthermore, it was established that (i) as of mid-December 2010 the unsatisfied claims arising from the operation of NCHZ in the first bankruptcy period, which had priority over pre-bankruptcy claims, were in the amount ca. EUR 16 000 000 (recital (33)), and (ii) almost all revenues (depending on a scenario) from the sale of NCHZ's assets would need to cover the costs of discontinuing NCHZ's operations (recital (34)). This significantly decreased the likelihood of the satisfaction of pre-bankruptcy claims in a liquidation scenario.
- (149) In this context, the economic analysis and NCHZ's management presentation, which were available to the City of Nováky in January 2011, constituted a valid basis for its supporting the decision. As described in recitals (101) to (104), these documents showed that the continued operation of NCHZ and its sale as a going concern (with an interested buyer available (recital (103)) was in the best interest of creditors, hence also for the City of Nováky.
- (150) Therefore, given the likely loss of all pre-bankruptcy claims in case of liquidation, the remoteness of envisaging a land sale due to high environmental costs attached to the land, coupled with the inevitable increase in unpaid taxes for a considerable period of time (more than one year) even in case of liquidation, it was reasonable for the City of Nováky to support the continuation of NCHZ's operations.
- (151) Thus, the Commission considers that the decision of the City of Nováky to vote in favour of continuing NCHZ's operation was market conform.

4.3.3. Conclusion on the presence of an economic advantage

- (152) In view of the above, the Commission considers that the behaviour of the different public entities was in line with the private creditor test.

- (153) 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 bankruptcy period when the Act on Strategic Companies was no longer applicable and NCHZ continued its operation on the basis of the decision of the competent body.
- (154) In any case, given that the public creditors who participated in the decision-making process of the competent body behaved as any other market operator, the Commission is of the view that there is no need to further assess whether the decision of the public creditors was or not *pari passu*, thus whether it was made under the same terms and conditions with private creditors who were in a comparable situation. As a matter of fact, the creditors at issue were not in an identical position. Furthermore, once it can be established whether an economic advantage is provided, it is not necessary to further verify whether the behaviour of the public entity in question was made at *pari passu* conditions ⁽⁷⁵⁾. If the intervention of the public bodies is not *pari passu* with that of private operators, this does not automatically mean that the transaction does not comply with market conditions and compliance with market conditions can be assessed through other methods ⁽⁷⁶⁾. Therefore, there is no need to rely on an examination of *pari passu* conditions as the lack of economic advantage and conformity with market conditions in the case of NCHZ's creditors is shown by other means.

5. CONCLUSION

- (155) In light of the above, following the re-assessment of the measure in favour of NCHZ during its second bankruptcy period, which was the object of the decision to open a formal investigation, referred to in footnote 1 of this decision, the Commission concludes that the measure does not constitute State aid within the meaning of Article 107(1) TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The decision of the competent body to instruct the bankruptcy administrator to continue the operation of NCHZ, adopted on 26 January 2011 unanimously by the creditors' committee and the secured creditors and made binding on 17 February 2011 by the bankruptcy court acting as a member of the competent body after the expiry of the Act on Strategic Companies on 31 December 2010, does not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Slovak Republic.

Done at Brussels, 14 June 2021.

For the Commission
Margrethe VESTAGER
Member of the Commission

⁽⁷⁵⁾ Judgment of 4 September 2014, SNCM and France v Corsica Ferries France, C-533/12 P and C-536/12 P, EU:C:2014:2142, paragraph 54. See also judgments of 1 February 2018, *Larko v Commission*, T-423/14, EU:T:2018:57, paragraph 119, and of 11 September 2012, in *Corsica Ferries France v Commission*, T-565/08, EU:T:2012:415, paragraph 122. See also Case T-93/17 *Duferco Long Products SA v Commission*, EU:T:2018:558, paragraphs 99-106, in which the General Court established the non-compliance of the transaction with market conditions, without having to resort to a *pari passu* analysis.

⁽⁷⁶⁾ Judgment of the General Court of 12 June 2014, *Sarc v Commission*, T-488/11, EU:T:2014:497, paragraph 98. See also judgment of the General Court of 18 September 2018, *Duferco Long Products SA v Commission*, T-93/17, EU:T:2018:558, paragraphs 102-103.