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Recovery of Unlawful State Aid and Insolvency Rules : in Need of Greater Flexibility?

How to assess the risk of being held
liable for reimbursement in case of
acquisition of assets from an insolvent
beneficiary?

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- II. Main Concepts Related to the « Transfer of an Undue Competitive Advantage »
- III. Economic Continuity: Diverging or Converging Legal Concept in the Case Law?
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- Share Deals versus Asset Deals
- Acquisition of Separate Assets versus Acquisition of Assets « en bloc »
- Acquisition before/after Liquidation of the Insolvent Beneficiary
- Nature of the Acquiror : Private or Public Entity

II. Main Concepts related to the « Transfer of an Undue Competitive Advantage » (1)

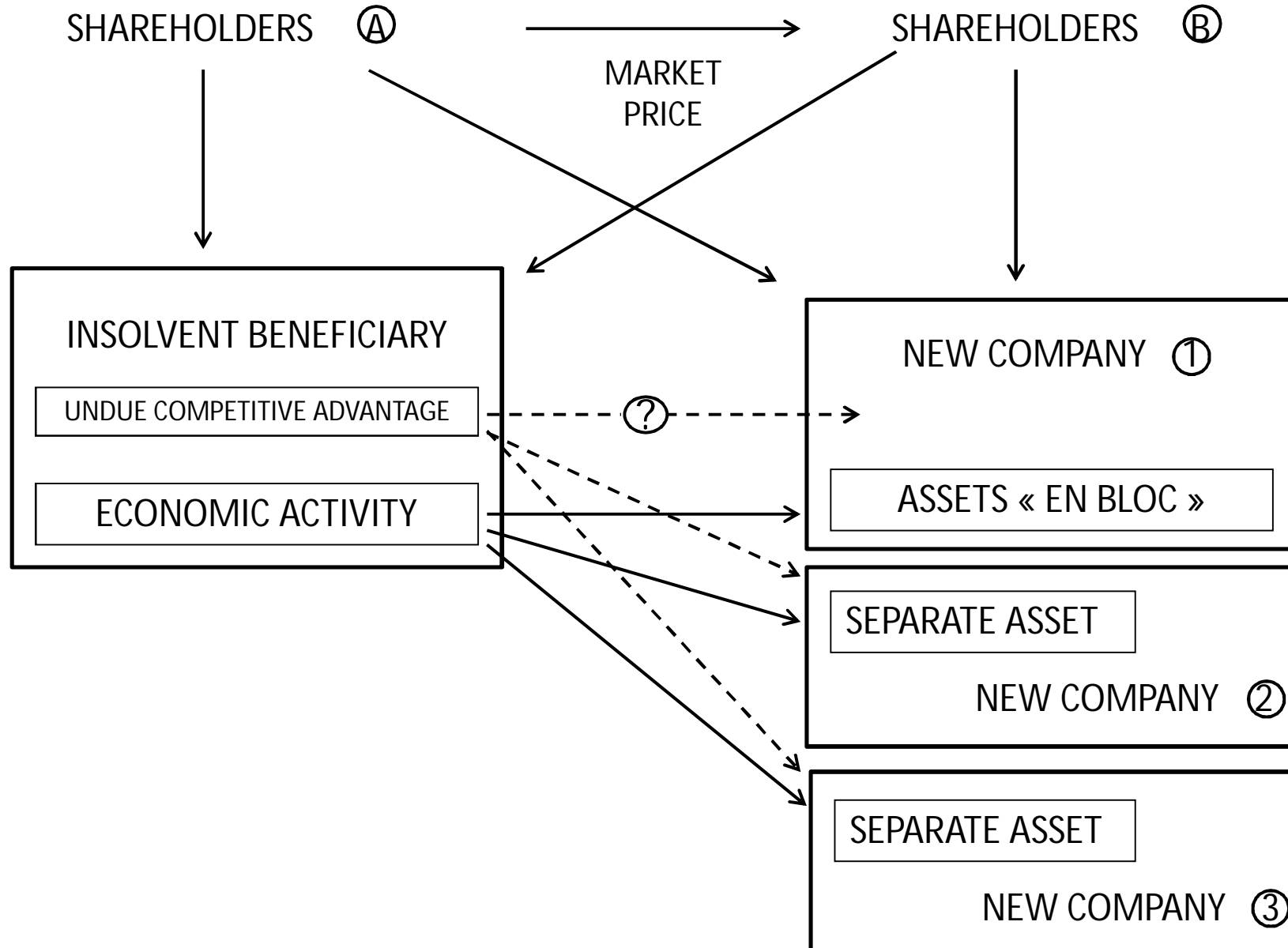
- According to established case law from the ECJ « *the possibility of a company in economic difficulties taking measures to rehabilitate the business cannot be ruled out a priori because of requirements relating to recovery of the aid which is incompatible with the common market* » - **ECJ 08-05-2003, Italy and SIM 2 Multimedia v Commission, C-328/99 and C-399/00, para. 76**
- According to the Commission, « *the Community Courts have given some guidance on the conditions under which the recovery obligation must be extended to companies other than the original beneficiary of the unlawful and incompatible aid. According to the ECJ, a transfer of the undue advantage may occur when the assets of the original aid beneficiary are transferred to a third party at a price that is lower than their market value sometimes to a successor company set up in order to circumvent the recovery order* » and « *to achieve a 'correct transfer of assets', the Member State has to ensure that the undue advantage created by the aid is not transferred to the acquirer of the assets* » - **Commission Notice « Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid » 15-11-2007, para. 33 & para. 68**

=> Clear objective : to avoid the transfer of an undue advantage

II. Main Concepts related to the « Transfer of an Undue Competitive Advantage » (2)

- Market Terms/ Market Conditions/Market Value/Fair Market Value
 - open bid, unconditional, transparent and non discriminatory or through a judicial process for insolvent companies
 - external independent expertise
- Circumvention of the Recovery Order
- Economic Continuity / Financial Continuity

II. Main Concepts related to the « Transfer of an Undue Competitive Advantage » (3)



III. Economic Continuity : Diverging or Converging Legal Concepts in the Case Law ? (1)

- First appeared in **ECJ 08-05-2003, Italy and SIM 2 Multimedia v Commission, C-328/99 and C-399/00, para. 78**: *« in order to prevent the effectiveness of the decision to recover the aid from being frustrated and the market from continuing to be distorted, the Commission may be compelled to require that the recovery is not restricted to the original firm but is extended to the firm which continues the activity of the original firm, using the transferred means of production, in cases where certain elements of the transfer point to economic continuity between the two firms »* - *« the transfer price »* being only one of these elements ...
- But in **ECJ 29-04-2004, Germany v Commission (SMI), C-277/00, para. 90 to 96**, the Court made clear that the extension of the recovery order to a third party could not be approved since the sales at issue there *« were made at the market price »*, the *« claims in respect of recovery of the disputed aid were properly listed among the liabilities of the liquidation »* and the sale procedure of the assets *« was sufficiently open and transparent »*

III. Economic Continuity : Diverging or Converging Legal Concepts in the Case Law ? (2)

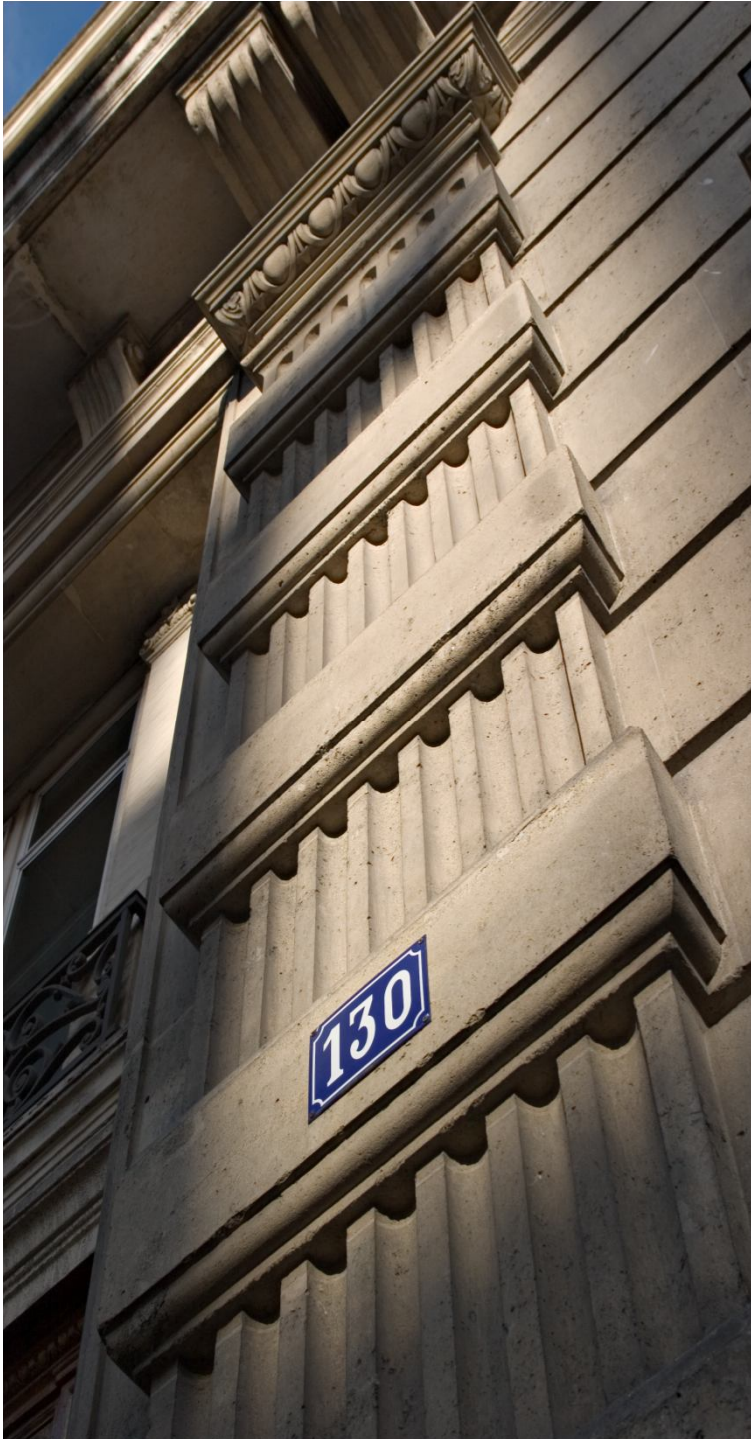
- In **GC 19-10-2005, CDA v Commission, T-324/00, para. 97 – 99**: « *various arguments put forward by the Commission and ODS in these proceedings support the conclusion that, as a result of the transfer of assets, CDA is in fact continuing the business of the joint venture, PA and CD Albrechts. However, that fact does not, as such, prove the existence of an intention to evade the effects of the recovery order in this case. That conclusion is all the more compelling since, as stated in recital 103 of the contested decision, a purchase price in line with the market was paid by CDA for the takeover of LCA's assets, and therefore that transaction does not entail CDA's retaining the actual benefit of the competitive advantage connected with the receipt of the aid granted (...)* »
- In **ECJ Commission v France, 13-11-2008, C-214/07, para. 57 – 61**: « as regards recipients which have ceased their activity and transferred their assets, it is for the national authorities to check whether the financial conditions of the transfer complied with market conditions »

III. Economic Continuity : Diverging or Converging Legal Concepts in the Case Law ? (3)

- **In GC 13-09-2010, Olympic Airways ea v Commission, T-415/05 and others, para. 143-146:**
 - “to prevent the effectiveness of the decision from being frustrated and the market from continuing to be distorted, the Commission may be compelled to require the recovery is not restricted to the original firm but is extended to the firm which continues the activity of the original firm, using the transferred means of production, in cases where certain elements of the transfer point to economic continuity between the two firms (...)”
 - “the criteria laid down in the case-law for identifying the effective recipient of aid are objective. Indeed it follows from the case-law that financial continuity can be established, for the purposes of the recovery of aid, on the basis of various objective elements such as (...)”

- Instead of conflicting judicial statements, a **Rebuttable Presumption** of lack of transfer of undue competitive advantage in case of fair market price?
 - **GC, 01-07-2009, Operator ARP v Commission, T-291/06, para. 69**: where the applicant claimed it paid more than the market value for the assets *"in those circumstances, the Commission could not assert, without further explanation, that there was a risk of circumvention or that the applicant had enjoyed the actual benefit of a competitive advantage connected with the receipt of the aid in question. At the very least, it should have explained why it regarded as irrelevant the fact that the assets had been acquired at a 'price' which appeared to exclude the benefit of such a competitive advantage. Given that the applicant is not a company belonging to the vendor's group or even a company present on the steel production market, (...) the Commission ought to have demonstrated more specifically a risk of circumvention and actual benefit to the applicant of a competitive advantage connected with the receipt of the aid in question"*

- **GC, 28-03-2012, Ryanair v Commission (Alitalia), T-123/09, para. 155 – 163 (not amended in the ECJ Judgment 13-06-2013):**
 - 155 – first move: *"concerning the obligation to recover aid paid to a company in difficulty, it should be recalled that, as is apparent from the case-law, it may be extended to a new company to which the company in question has transferred part of its assets, where that transfer permits the conclusion that there is an economic continuity between the two companies" ...*
 - 155 156 – second move: *" for a finding of the existence of an economic continuity, the following factors may be taken into consideration : (...) the price of the transfer (...)"*
 - 161 – third and final move: *"it thus concluded, in paragraphs 130 to 132 of the second contested decision, that no undue advantage could be transferred to the buyer of the Alitalia group assets, having regard to the fact that all measures were taken to ensure that the transfer took place at a price not lower than the market price. It must therefore be held, in light of the considerations set out above and in accordance with the case law cited in paragraph 155 above, that the Commission carried out a sufficient and complete examination (...)"*
- **=>rather converging case-law = at least room for creativity!**



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