# COMMISSION DECISION

## of 16 October 2013

## on State aid No SA.18211 (C 25/2005) (ex NN 21/2005) granted by the Slovak Republicfor Frucona Košice a.s.

*(notified under document C(2013) 6261)*

**(Only the Slovak text is authentic)**

**(Text with EEA relevance)**

(2014/342/EU)

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 [1],

Having called on interested parties to submit their comments pursuant to the provision referred to above and having regard to their comments [2],

Whereas:

### I. **PROCEDURE**

#### 1. PROCEDURE BEFORE THE COMMISSION

(1) By letter of 15 October 2004 registered on 25 October 2004, the Commission received a complaint concerning alleged unlawful state aid granted to Frucona Košice, a. s.. The complainant sent additional information on 3 February 2005. A meeting with the complainant took place on 24 May 2005.

(2) On the basis of the information provided by the complainant, by letter of 6 December 2004 the Commission asked Slovakia to provide information on the disputed measure. Slovakia responded by letter of 4 January 2005, registered on 17 January 2005, informing the Commission about the potentially unlawful aid granted to Frucona Košice a. s. in the context of an arrangement with creditors and asking the Commission to approve the aid as rescue aid to a company in financial difficulties. Slovakia submitted additional information by letter of 24 January 2005, registered on 28 January 2005. The Commission asked for additional information by letter of 9 February 2005, to which it received answers by letter of 4 March 2005, registered on 10 March 2005. A meeting with the Slovak authorities took place on 12 May 2005.

(3) By letter of 5 July 2005, the Commission informed Slovakia that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the aid.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* [3]. The Commission invited interested parties to submit their comments on the measure.

(5) The Slovak authorities submitted their observations by letter of 10 October 2005, registered on 17 October 2005. The Commission received comments from one interested party (the beneficiary) by letter of 24 October 2005, registered on 25 October 2005. It forwarded them to Slovakia, which was given the opportunity to react; Slovakia's comments were received by letter dated 16 December 2005, registered on 20 December. A meeting at which the beneficiary was given the opportunity to explain its submission took place on 28 March 2006. Slovakia submitted additional information by letter of 5 May 2006, registered on 8 May 2006.

---

[1] With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Decision.

[2] OJ C 233, 22.9.2005, p. 47.

[3] See footnote 2.

(6) The Commission adopted a decision ordering recovery of the aid on 7 June 2006 ([4]). Since that date, in the course of its contacts with the Slovak authorities concerning execution of that decision, the Commission was notified of the outcome of the national judicial proceedings relating to the amount of debt to be entered into the arrangement with the creditors. That information should be taken into account in this decision.

### 2. THE PROCEEDINGS BEFORE THE GENERAL COURT

(7) On 12 January 2007 Frucona Košice a.s. appealed against the decision to the General Court of the European Union, contesting, inter alia, the classification of the debt write-off as state aid by claiming that it was in line with the market economy creditor principle. By judgment of 7 December 2010 (Case T-11/07) the General Court dismissed the arguments of the applicant and confirmed the Commission decision on the grounds that bankruptcy would have been more advantageous for the State than the arrangement with the creditors.

### 3. PROCEEDINGS BEFORE THE COURT OF JUSTICE

(8) Frucona Košice a.s. appealed against the judgment of the General Court to the Court of Justice, claiming in particular that the General Court had failed to assess correctly the Commission's application of the private creditor test and had inadmissibly sought to substitute its own reasoning for that of the Commission as regards the private creditor test (Case C-73/11 P).

(9) On 24 January 2013 the Court of Justice set the judgment of the General Court aside. The Court of Justice concluded that the Commission had committed a manifest error of assessment by failing to take into account the duration of bankruptcy proceedings in its assessment of the private creditor test or, if it had taken that factor into account, by failing to set out sufficient grounds for its decision. The case was referred back to the General Court for judgment on the company's pleas concerning the tax execution procedure which it had not yet ruled on.

### 4. REVOCATION

(10) In view of the judgment of the Court of Justice, the Commission therefore considers it appropriate to revoke the original decision of 7 June 2006 and replace it with this decision in order to remedy the shortcomings identified by the Court of Justice.

## II. **DETAILED DESCRIPTION OF THE AID**

### 1. THE COMPANY

(11) The beneficiary of the financial support is Frucona Košice a. s., a company which was active in the production of spirit and spirit-based beverages, non-alcoholic beverages, canned fruit and vegetables, and vinegar. After losing its licence the beneficiary stopped producing spirit and spirit-based beverages. Nevertheless, it continued to be active on the wholesale market for spirit and spirit-based beverages. The company is situated in a region eligible for regional aid under Article 107(3)(a) TFEU.

(12) At the time of the relevant events, the beneficiary employed about 200 people. In its comments on the decision to open the formal investigation, the company provided the Commission with data on turnover (including excise duties and VAT), shown in the following table.

*Table 1*

**Turnover in different segments of production, including excise duties and VAT [SKK]**

| | 2002 | 2003 | 2004 |
|---|---|---|---|
| Vinegar | 28 029 500 | 27 605 100 | 11 513 600 |
| Fruit and vegetable production | 37 112 500 | 32 584 500 | 22 696 400 |
| Cabbage | 2 878 340 | 503 030 | 201 310 |

([4]) Commission Decision 2007/254/EC of 7 April 2006 on State aid C 25/2005 (ex NN 21/2005) implemented by the Slovak Republic for FRUCONA Košice, a.s. (OJ L 112, 30.4.2007, p. 14).

| | 2002 | 2003 | 2004 |
|---|---|---|---|
| Carbonated non-alcoholic beverages | 9 373 800 | 17 601 600 | 17 560 100 |
| Non-carbonated non-alcoholic beverages | 2 877 700 | 6 420 420 | 7 920 010 |
| Juices – 100 % | 51 654 900 | 43 421 600 | 22 706 600 |
| Spirits | 696 193 500 | 743 962 700 | 728 837 400 |
| Cider | 1 495 640 | 106 360 | 0 |
| Syrup | 5 928 100 | 6 502 920 | 5 199 540 |
| Other products/services | 59 476 000 | 99 635 000 | 63 680 000 |
| **TOTAL** | **895 019 980** | **978 343 230** | **880 314 960 (*)** |

(*) In EUR, the turnover is said to have been EUR 23,6 million in 2002, EUR 25,7 million in 2003 and EUR 23 million in 2004. The exchange rate used for information purposes in this Decision is EUR 1 = SKK 38.

(13) These data differ considerably from the data obtained by the Commission from the Slovak authorities and stated in the decision to open the formal investigation [5]. In their reaction to the comments of the beneficiary after the opening of the formal investigation, the Slovak authorities did not dispute the accuracy of the above figures. According to the Slovak authorities, the beneficiary qualifies as a medium-sized enterprise.

## 2. APPLICABLE NATIONAL LEGISLATION

(14) The disputed measure is a write-off of a tax debt by the Košice IV Tax Office under an arrangement with creditors. This process is governed by Bankruptcy and Arrangement Act No 328/91 (the 'Bankruptcy Act').

(15) An arrangement with creditors is a court-supervised process, which, like bankruptcy, is designed to settle the financial situation of indebted companies [6]. Under bankruptcy proceedings, the company ceases to exist and either its assets are sold to a new owner or the company is liquidated. In contrast, under arrangement proceedings, the indebted company continues to trade with no change of ownership.

(16) Arrangement proceedings are initiated by the indebted company. The purpose is to reach an agreement with its creditors whereby the indebted company pays off part of its debt and the remainder is written off. The agreement has to be approved by the supervising court.

(17) Creditors whose receivables are secured, for example by means of a mortgage, act as separate creditors. For the arrangement proposal to be accepted, all the separate creditors have to vote in its favour, whereas for other creditors a qualified majority suffices. In other words, separate creditors vote separately and have a right to veto the proposal.

(18) Separate creditors have a privileged position also in bankruptcy proceedings. The claims of the separate creditors may be satisfied at any time during the bankruptcy proceedings and any proceeds from sale of secured assets under the bankruptcy proceedings are meant to be used exclusively to satisfy the claims of the separate creditors. If the claims of the separate creditors cannot be covered from this sale, the remaining parts are put into the second group with the claims of the remaining creditors. In the second group, the creditors are satisfied on a *pro rata* basis.

[5] The total turnover was said to have been SKK 334 million (EUR 8,8 million) in 2002, SKK 360 million (EUR 9,5 million) in 2003 and SKK 720 million (EUR 19 million) in 2004.

[6] A company is considered indebted when it has a number of creditors and is not able to settle its obligations within 30 days from their due date.

(19) Under the Bankruptcy Act, the company applying for an arrangement with creditors has to submit to the supervising court a list of measures for its reorganisation and for continued financing of its activity after the arrangement.

(20) Under Act 511/92 on Administration of Taxes and Fees and Changes to the System of Local Financial Authorities (the 'Tax Administration Act'), a company may ask the tax authorities to defer payment of taxes. Interest is charged on the deferred amount and the deferred debt has to be secured.

(21) The Tax Administration Act also governs tax execution, the aim of which is to recover the tax receivables of the State through sale of real estate, movable assets or of the firm as a whole.

## 3. THE FACTS

(22) Between November 2002 and November 2003 the beneficiary availed itself of the possibility offered by the Tax Administration Act to have its obligation to pay excise duty on spirit deferred ([7]). The deferred debt totalled SKK 477 015 759 (EUR 12,6 million). Before agreeing to defer these payments, as prescribed by law the Tax Office secured each of its receivables against the beneficiary's assets. The Slovak authorities submit that the value of these securities based on the beneficiary's accounts was SKK 397 476 726 (EUR 10,5 million). The beneficiary, however, claims that the value of these securities, as estimated by experts at the end of 2003, was SKK 193 940 000 (EUR 5 million). This is, according to the beneficiary, the value of the secured assets (movable property, real estate and receivables) expressed in what are known as 'expert prices'.

(23) As of 1 January 2004, the amended Tax Administration Act limited the possibility of requesting a tax deferral to only once a year. The beneficiary availed itself of this for the December 2003 excise tax payable in January 2004. However, it was not able to pay or have deferred the January 2004 excise duty payable on 25 February 2004. As a result, the beneficiary became an indebted company within the meaning of the Bankruptcy Act. As a result, the beneficiary lost its licence for production and processing of spirit.

(24) On 8 March 2004 the beneficiary applied to the competent regional court for arrangement. After establishing that all the necessary legal requirements were met, the regional court decided to initiate arrangement by a decision of 29 April 2004. The creditors voted in favour of the arrangement proposed by the beneficiary at a meeting on 9 July 2004. The arrangement was confirmed on 14 July 2004 by a decision of the supervising regional court.

(25) In August 2004 the Tax Office appealed against this confirmatory decision of the court. By a decision of 25 October 2004 the Supreme Court decided that the appeal was not admissible and declared the decision of the regional court approving the creditors' agreement to be valid and enforceable as of 23 July 2004. The public prosecutor subsequently appealed against the decision of the regional court under the extraordinary further appeal procedure.

(26) The creditors, including the Tax Office, agreed with the beneficiary on the following arrangement: 35 % of the debt would be repaid by the beneficiary within one month from the validity of the creditors' agreement and the remaining 65 % of the debt would be foregone by the creditors. All the creditors were therefore treated equally. The specific amounts for each creditor are shown in the following table.

*Table 2*

**The beneficiary's debt situation before and after the arrangement [SKK]**

| Creditor | | Debt before the arrangement | Debt after the arrangement (*) | Amount written off |
|---|---|---|---|---|
| Public | Tax Office | 640 793 831 | 224 277 841 | 416 515 990 |

([7]) The excise duty is payable on a monthly basis.

| Creditor | | Debt before the arrangement | Debt after the arrangement (*) | Amount written off |
|---|---|---|---|---|
| Private | Tetra Pak a.s. | 1 004 208 | 351 498 | 652 710 |
| | MTM-obaly, s. r. o. | 317 934 | 111 277 | 206 657 |
| | Merkant družstvo | 332 808 | 116 483 | 216 325 |
| | Vetropack, s. r. o. | 2 142 658 | 749 930 | 1 392 728 |
| **TOTAL** | | **644 591 439 (**)** | **225 607 029** | **418 984 410** |

(*) The amount that the beneficiary is obliged to pay back to its creditors.
(**) In EUR, the total debt before the arrangement was EUR 16,96 million and the total debt remaining after the arrangement EUR 5,93 million.

(27) The claims of the Tax Office entered in the arrangement proceedings totalled SKK 640 793 831 (EUR 16,86 million) and comprised mainly unpaid excise taxes for the period May 2003 – March 2004, VAT for the period January-April 2004, plus penalties and interest. The claims foregone by the Tax Office totalled SKK 416 515 990 (EUR 11 million). The arrangement provided the Tax Office with SKK 244 277 841 (EUR 5,86 million).

(28) The Tax Office acted in the arrangement proceedings as a separate creditor and as such voted separately. Thus, in order for the arrangement to take place, the Tax Office had to vote in favour of it. The privileged position of the Tax Office was due to the fact that some of its receivables were secured in relation to the deferral of the beneficiary's tax debt in 2002-2003 (see paragraph 17). All the other creditors voted in favour of the proposed arrangement. Their receivables were ordinary trade receivables not secured in any manner.

(29) In its proposal for arrangement, in accordance with the requirements of the Bankruptcy Act the beneficiary described reorganisation measures concerning the production, distribution and workforce (including redundancies).

(30) On the organisational and workforce fronts, the beneficiary planned the following measures: creation of a universal production group for all the production activities, reorganisation of its transport facilities by exclusion of vehicles with the lowest residual value and reorganisation of commercial activities. These measures were to be accompanied by laying off 50 employees from March to May 2004. Over the same period, a further 50 employees were to work on 60 % remuneration.

(31) In the production and technical area, the beneficiary stated that, since the company had lost the licence for production of spirit, the production facilities concerned would be rented out as of April 2004. The beneficiary planned to reduce or cease production of some unprofitable non-alcoholic beverages and stated that any introduction of a new product in this category would be preceded by an analysis of profitability of such a production.

(32) The beneficiary also mentions the following measures: the cost restructuring that should result from lower production costs following the abandonment of the production of spirit and from the abolition of part of the company's own transport and the sale of old equipment for scrap.

(33) The beneficiary also planned to sell an administrative building, a shop and a recreation building and mentioned the possibility of selling or renting out the vinegar production facility. In their comments on the decision to open the formal investigation procedure the Slovak authorities confirmed that the sale of the administrative building, the shop and the recreation building had not taken place.

(34) The beneficiary planned an intensive sale of its stocks of ready products [8].

[8] In view of the loss of the licence for production of spirit and derived beverages, and according to the information provided by the complainant, this sale probably concerned mainly the spirit.

(35) According to this proposal, the beneficiary was to finance the arrangement through own resources (sale of stock) of SKK 110 million and through external financing in the form of a loan from a commercial bank of SKK 100 million. From the information submitted by the beneficiary in response to the opening of the formal investigation, the outstanding debt was eventually covered by the revenue from the issue of new shares (SKK 21 million; EUR 0,56 million), revenue from the sale of stock (SKK 110 million; EUR 2,9 million) and a supplier loan from Old Herold s.r.o. (SKK 100 million; EUR 2,6 million). The maturity of the invoices of Old Herold s.r.o. was 40 days, which, according to the beneficiary, was a long period considering the precarious financial situation of the beneficiary. This longer maturity enabled the beneficiary to accumulate the necessary cash.

(36) After the opening of the formal investigation the Slovak authorities informed the Commission that, under the creditors' agreement, SKK 224 277 841 had been paid to the Tax Office on 17 December 2004. The Slovak authorities confirmed that they had suspended the write-off of the debt agreed in the arrangement proceedings pending resolution of the procedure before the European Commission.

(37) In the context of their contacts concerning the execution of the Commission decision ordering recovery of the aid, the Slovak authorities informed the Commission of the outcome of the extraordinary appeal procedure referred to in paragraph 25: by decision of 27 April 2006, the Supreme Court of the Slovak Republic partially overturned the decision of the competent regional court of 14 July 2004 confirming the creditors' agreement on the grounds that road tax arrears of SKK 424 490 had wrongly been included in the arrangement. The Supreme Court dismissed the appeal as to the remainder. By decision of 18 August 2006, the competent regional court implemented the decision of the Supreme Court of 27 April 2006, stating that the corrected amount due to the Tax Office was SKK 640 369 341,4 (35 % of which is SKK 224 129 269,1).

## III. DECISION TO INITIATE PROCEEDINGS UNDER ARTICLE 108(2) TFEU

(38) In its decision to initiate the formal investigation the Commission raised doubts that the disputed write-off was free of state aid. The Commission concluded that the behaviour of the Tax Office in the arrangement proceedings did not meet the market economy creditor test. Specifically, the Commission found that the Tax Office was in a situation legally different from the other creditors, as it possessed secured claims and could initiate tax execution. The Commission doubted that the arrangement proceedings led to the best possible outcome for the State, when compared with bankruptcy proceedings or tax execution.

(39) The Commission then raised doubts on the compatibility of the disputed aid with the internal market. It first raised doubts that the aid could be found compatible as rescue aid, as the Slovak authorities had claimed. Rescue aid can only be liquidity support in the form of loan guarantees or loans. The disputed measure, however, is a debt write-off, which corresponds to a non-repayable grant. In addition, the measure was not granted with the prospect that, no later than six months after the rescue measure had been authorised, the beneficiary would present a restructuring plan or a liquidation plan or reimburse the aid in full.

(40) The Commission then considered the compatibility of the disputed measure as restructuring aid and raised doubts as to whether two of the main conditions were fulfilled: the existence of a restructuring plan ensuring the return to long-term viability within a reasonable time-frame and the limitation of the aid to the minimum necessary.

## IV. COMMENTS FROM INTERESTED PARTIES

(41) In addition to the information on the facts set out in Part II, the beneficiary submitted the following comments.

(42) The beneficiary argues that the reason for its financial difficulties at the beginning of 2004 was the change in the Tax Administration Act, which restricted the possibility of requesting deferral of taxes to only once a year. This was an important change for the beneficiary, which had been, in its own words, relying on this mechanism in previous years.

(43) On the merits of the case, the beneficiary first submitted that the Commission did not have jurisdiction to review the contested measure because the measure had been put into effect before the date of accession and was not applicable after accession. The measure is said to have been put into effect before accession because the arrangement procedure was initiated on 8 March 2004 and, as the beneficiary submits, approved by the court on 29 April 2004, i.e. before Slovakia joined the European Union. Furthermore, the tax authorities are said to have signalled their agreement to the proposed arrangement in the framework of negotiations preceding the initiation of the arrangement procedure. A meeting with the Tax Directorate of the Slovak Republic had taken place in December 2003 and on 3 February 2004 the local Tax Office sent the beneficiary a letter in which it, allegedly, confirmed the possibility of going ahead with an arrangement.

(44) The beneficiary then submitted that, even if the Commission continued to maintain that it was competent to act, the contested measure did not constitute state aid because the market economy creditor principle was met.

(45) First, the beneficiary claims that comparing arrangement with tax execution is misleading because the initiation of the former excludes or suspends the latter. Tax execution was not, therefore, an option for the Tax Office. In addition, according to the beneficiary, had it not voluntarily initiated the arrangement, after some weeks or months it would have had a legal obligation under the law governing insolvency to launch the procedure for bankruptcy or an arrangement.

(46) Second, the beneficiary submits that the decision of the State to avoid bankruptcy but instead to seek a solution through an arrangement met the market economy creditor test. As evidence the beneficiary submits certificates from two auditors and one bankruptcy receiver stating that the Tax Office would receive more – and receive it more quickly – from the arrangement than from bankruptcy proceedings. The beneficiary also submits further material and statistics suggesting that bankruptcy proceedings in Slovakia last on average 3-7 years and bring only a very limited return from the sale of the assets ([9]).

(47) The beneficiary bases its analysis mainly on a report of 7 July 2004 by the auditing company EKORDA, which the Tax Office allegedly had at its disposal before the creditors' vote on 9 July 2004. No evidence, however, was submitted showing that this was indeed the case.

(48) According to the EKORDA report, the revenue from the sale of assets in the case of bankruptcy would be at best SKK 204 million (EUR 5,3 million), which, after deduction of various fees of SKK 45 million, would be only SKK 159 million (EUR 4,2 million). The beneficiary itself corrected the amount of the fees to be deducted (SKK 36 million) and arrived at the figure of SKK 168 million (EUR 4,4 million). Even though the Tax Office as the only separate creditor and by far the largest creditor would receive most of this revenue, it would still be less than what it received after the arrangement.

(49) To arrive at this result EKORDA used as a basis the book value as at 31 March 2004 of fixed assets, stock, cash and short-term receivables after adjustments, taking account of their unrecoverability and low value. EKORDA adjusted the nominal value of the beneficiary's assets by a 'liquidation factor' for each component of the assets in the event of sale in bankruptcy (45 % for fixed assets, 20 % for stock and short-term receivables and 100 % for cash).

(50) EKORDA mentions the future tax revenue from the operation of the beneficiary ([10]), as well as the development of employment in the region and of the food-processing industry in Slovakia as very important factors pleading in favour of the continuation of the beneficiary.

([9]) The beneficiary gives an example of a company owning similar assets and operating in the same sector and some more general statistical averages on the use of bankruptcy proceedings in Slovakia.
([10]) The 2004 figures used by EKORDA in its report show that 98 % is VAT and excise duties.

(51) The beneficiary also mentions two other reports. The auditor Ms Marta Kochová concluded that the maximum revenue from the sale of the assets, which, however, were not evaluated, would be SKK 100 million (EUR 2,6 million), which, after deduction of fees of SKK 22 million, would be only SKK 78 million (EUR 2 million). The bankruptcy receiver Ms Holovačová is said to state that, in her opinion, in general arrangement is more advantageous for creditors than bankruptcy. One consideration is that the creditor has an interest in the debtor staying in business (future revenue from trade or from taxes).

(52) Third, the beneficiary submits that long-term considerations should be taken into account, such as future tax revenue. It is asserted that the case-law excluding socio-political considerations from the market economy creditor test does not apply when the calculation of future tax revenue is considered by a public authority ([11]). According to the beneficiary, the situation of the public authority here is analogous to the situation of a market economy creditor, who is a supplier interested in the survival of a client. The beneficiary then refers to the case-law on the market economy investor principle.

(53) The beneficiary concludes that the market economy creditor test was met and the disputed measure does not constitute state aid.

(54) Should the Commission nevertheless conclude otherwise, the beneficiary argues that the disputed measure is compatible as restructuring aid. The beneficiary submits that the Tax Office had verified the capacity of the business plan of the beneficiary to restore long-term viability before agreeing with the arrangement. The absence of a formal restructuring plan is, according to the beneficiary, irrelevant in the case of an *ex post* assessment by the Commission, because the Commission is now able to see whether the beneficiary did in fact become viable. However, the beneficiary considers that, in the case of an *ex ante* assessment, a detailed restructuring plan is necessary. It then briefly describes the restructuring measures undertaken: increase of own capital, lay-offs, and sale of stock. The beneficiary considers that the halting of the production of spirit and spirit-based beverages and the renting out of the production assets to the company Old Herold s. r. o. was indeed a restructuring measure. Even though originally the halting of production was the result of the loss of the licence, the beneficiary did not ask for a new licence after the arrangement.

(55) According to the beneficiary, the requirement that its contribution to the restructuring be significant was also met.

(56) Finally, the beneficiary submits that the fact that it is active in an assisted region and is one of the largest regional employers should be taken into account when applying the guidelines applicable to restructuring aid.

## V. COMMENTS FROM THE SLOVAK REPUBLIC

(57) In their reply to the opening of the formal investigation, the Slovak authorities made some comments on the facts already referred to in Part II.

(58) The Slovak authorities confirmed that at the time of the vote on the arrangement the Tax Office did not take the state aid aspect into account. The Tax Office did not consider the arrangement as a form of state aid and therefore the beneficiary was not requested to provide a restructuring plan, which differs from the business plan submitted to the court in accordance with the insolvency legislation.

(59) In their reaction to the comments submitted by the beneficiary, the Slovak authorities submitted the following comments of its own.

([11]) The beneficiary refers to joined cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103.

(60) The Slovak authorities would not apply the beneficiary's comments on the average length of bankruptcy proceedings and the average return from the sale of assets in bankruptcy proceedings to this case. According to them, considering the low number of creditors and the existence of assets with a positive liquidation value, which exceeded the amount paid to the State after the arrangement, bankruptcy proceedings would have been completed in a shorter period than the average and the yield of the Tax Office would have been higher than in case of the arrangement. The local Tax Office undertook an inspection at the company on 21 June 2004 and found that, as at 17 June 2004, the beneficiary had cash of SKK 161,3 million, receivables of SKK 62,8 million, stocks of spirit and spirit-based beverages with a value of SKK 84 million and fixed assets with a book value of SKK 200 million.

(61) The Slovak authorities consider that tax execution was a real alternative for the Tax Office. They confirm that the Tax Office could have initiated this procedure prior to the arrangement, as it also could have done if the court had refused to confirm the arrangement (because the Tax Office as a separate creditor would not have voted for it).

(62) The Slovak authorities do not agree with the beneficiary's assertion that its financial difficulties were due to the change in the Tax Administration Act. According to the Slovak authorities, the financial difficulties of the beneficiary were due to its financial strategy of using indirect taxes for the running of its own business, whereas what the beneficiary was supposed to do was simply collect the taxes from its clients and transfer them to the state budget.

(63) The Slovak authorities do not agree that the meeting with the Tax Directorate in December 2003 is evidence of the Tax Office's preliminary agreement with the arrangement. They submitted a letter of 6 July 2004 from the Tax Directorate to the Tax Office, indicating that the Tax Office should not agree to the arrangement proposed by the beneficiary, because it was unfavourable for the State. This letter then referred to another, more general, letter of 15 January 2004 from the Minister of Finance to the Tax Directorate, asking it to ensure that no agreement would be given to proposals for arrangements with creditors that would involve write-offs of tax receivables by tax offices. Moreover the Slovak authorities interpret the letter of 3 February 2004 referred to by the beneficiary (see paragraph 43) as explicitly disagreeing with the arrangement at the level of 35 %.

(64) The Slovak authorities submit that the beneficiary had not paid excise taxes on time from January 2001 to March 2004 and had regularly had its tax obligations deferred.

(65) According to the Slovak authorities, considerable differences in the estimates of the two auditors' reports (see paragraphs 48 and 51) raise doubts as to the credibility of both reports. The authorities have, in particular, doubts on the liquidation factor assigned to current assets by EKORDA. This factor should be higher than 20 %.

(66) Finally, according to the Slovak authorities, the beneficiary had not drawn up a viable restructuring plan and the arrangement measures proposed could not be considered restructuring measures.

## VI. **ASSESSMENT**

### 1. COMPETENCE OF THE COMMISSION

(67) As some of the relevant events took place before Slovakia joined the European Union on 1 May 2004, the Commission first has to determine whether it is competent to act with regard to the disputed measure.

(68) Measures that were put into effect before accession and are not applicable after accession cannot be examined by the Commission either under the interim mechanism procedure, governed by Annex IV, point 3 of the Accession Treaty, or under the procedures laid down in Article 108 TFEU. Neither the Accession Treaty nor the Treaty on the Functioning of the European Union requires or empowers the Commission to review these measures.

(69) However, measures put into effect after accession clearly fall within the competence of the Commission. In order to assess the moment when a certain measure was put into effect, the relevant criterion is the legally binding act by which the competent national authority undertakes to grant aid ([12]).

(70) The beneficiary claimed that the disputed measure was put into effect before accession and is not applicable thereafter (see paragraph 43).

(71) The Commission cannot accept the arguments put forward by the beneficiary. The proposal to initiate the arrangement proceedings is not an act of the granting authority, but an act of the beneficiary. The decision of the court to commence the arrangement proceedings is likewise not an act of the granting authority. This decision only permitted the beneficiary and its creditors to proceed with negotiations on the arrangement but clearly did not constitute the granting event. There is no evidence that the Tax Directorate would have expressed its agreement with the disputed measure at the meeting in December 2003. On the contrary, the Slovak authorities denied any such preliminary agreement. The letter of 3 February 2004 is explicit in refusing to accept the proposal to settle at the level of 35 %.

(72) The decision of the competent authority to write off part of its claims was taken on 9 July 2004, when the Tax Office agreed with the arrangement proposed by the beneficiary.

(73) Accordingly, the question of whether the measure is applicable after accession no longer arises.

(74) The Commission therefore concludes that it is competent to assess the disputed measure pursuant to Article 108 TFEU.

## 2. EXISTENCE OF STATE AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU

(75) Article 107(1) TFEU declares 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 between Member States incompatible with the internal market.

(76) Writing off a debt towards a public authority, such as a Tax Office, is a form of using state resources. Since it benefits an individual undertaking, the measure is selective.

(77) Until the events that triggered the insolvency procedure, the beneficiary was operating in the market of the production of spirit and spirit-based beverages, non-alcoholic beverages and canned fruit and vegetables. In 2003 the beneficiary was the third producer of spirit and spirit-based beverages in Slovakia. After the loss of the licence for the production of spirit and spirit-based beverages in March 2004, the beneficiary was active in the wholesale of spirit and spirit-based beverages, produced by another company, Old Herold s. r. o., using the beneficiary's production assets that Old Herold s. r. o. rents. In all segments in which the beneficiary was active prior to the arrangement and in which it is active at present there is trade between Member States.

(78) In the decision to open the formal investigation procedure, the Commission raised doubts as to whether the measure distorted or threatened to distort competition by conferring on the beneficiary an advantage that it would normally not be able to obtain on the market. In other words, the Commission had doubts as to whether the State behaved in relation to the beneficiary as a market economy creditor.

(79) It was established that the creditors' agreement contained the same conditions of debt arrangement for both the private creditors and the Tax Office (public creditor). 35 % of the debt was to be paid to the creditors by a prescribed date, which is what the beneficiary did in fact do. The remaining 65 % was to be written off.

([12]) Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-132, paragraph 74.

(80) However, the position of the Tax Office as a creditor in this case was unusually strong and cannot be equated to that of a typical creditor in bankruptcy proceedings. The legal and economic situation of the Tax Office before the creditors' agreement was more advantageous than that of the private creditors. Not only was the Tax Office, with more than 99 % of all claims registered in the bankruptcy proceedings, clearly the dominant and decisive creditor, it was also, and more importantly, a separate creditor. Its claims could therefore be satisfied at any time during the bankruptcy proceedings from the proceeds from the sale of the secured assets: as described in paragraph 18 above, those proceeds would be used exclusively to satisfy the claims of the separate creditor. It therefore needs to be examined in detail whether the Tax Office used all the means available to it to obtain the highest possible repayment of its receivables, as a market economy creditor would do.

(81) The conditions which a measure must meet in order to be treated as aid for the purposes of Article 107 TFEU are not met if the recipient undertaking could, in circumstances which correspond to normal market conditions, have obtained the same advantage as that which has been made available to it through state resources [13]. That assessment is made by applying, in principle, the private market creditor test. When a public creditor grants payment facilities in respect of a debt payable to it by an undertaking, such payment facilities constitute state aid for the purposes of Article 107(1) TFEU where, taking account of the significance of the economic advantage thereby granted, the recipient undertaking would manifestly not have obtained comparable facilities from a private creditor in a situation as close as possible to that of the public creditor and seeking to recover sums due to it by a debtor in financial difficulty [14].

(82) The applicability of the private market operator test ultimately depends on the Member State concerned having conferred, otherwise than in its capacity as public authority, an economic advantage on an undertaking. It follows that, if a Member State relies on that test during the administrative procedure, it must, where there is doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented is ascribable to the State acting as a private market operator. That evidence must show clearly that the Member State concerned took the decision to act as it did before or at the same time as conferring the economic advantage. In that regard, it may be necessary to produce evidence showing that the decision was based on economic evaluations comparable to those which would have been carried out in the circumstances by a rational private market operator in a situation as close as possible to that of the Member State. However, it is not enough to rely on economic evaluations made after the advantage was conferred, or on a retrospective finding that the course of action chosen by the Member State concerned was actually beneficial, or on subsequent justifications of the course of action actually chosen [15].

(83) In brief, the Slovak Republic submits that, in its view, the measure constitutes state aid. It acknowledged that, at the time of the arrangement, the question of state aid was simply not considered and requested that the disputed measure be treated as rescue aid. It therefore appears that the requirements of the case-law referred to above have not been complied with in this case and the disputed measure constitutes state aid within the meaning of Article 107(1) TFEU.

(84) It is the beneficiary who argued that the measure is free of aid and submits the documents described above, in particular reports from two auditors.

(85) On the basis of the information submitted both by the beneficiary and the Slovak authorities, the Commission determined the following facts on the financial situation of the beneficiary in the year in question, in as far as relevant for the application of the market economy creditor test. The figures as at 31 March 2004 provided by the beneficiary and the figures as at 17 June 2004 provided by the Slovak authorities cannot be verified by the Commission against the beneficiary's accounts. The Commission, however, has no reason to doubt these figures.

---

(13) C-73/11 P *Frucona Košice*, judgment of 24 January 2013, not yet reported, paragraph 70.

(14) See Case C-342/96, *Spain* v *Commission*, [1999] ECR I-2459, paragraph 46; Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 30; Case C-124/10 P *Commission* v *EDF*, judgment of 5 June 2012, not yet reported, paragraph 79 and Case C-73/11 P *Frucona Košice*, judgment referred to above, paragraph 73.

(15) See Case C-124/10 P *Commission* v *EDF*, referred to above, paragraphs 81 to 85.

*Table 3*

**Financial situation of the beneficiary 2003–2004 [million SKK]**

| | 31.12.2003 ([1]) | 31.3.2004 ([2]) | 28.4.2004 ([3]) | 17.6.2004 ([4]) | 31.12.2004 ([5]) |
|---|---|---|---|---|---|
| Non-current assets ([6]) | 208 | 205 | 204 | 200 | 200 |
| Stocks | 119 | 209 | 176 | 84 | 52 |
| Cash | 3 | 50 | 94 | 161 | 27 |
| Short-term commercial receivables | 128 | 98 ([7]) | 80 | 63 ([8]) | 97 |

([1]) Source: Balance sheet 1 January 31 December 2003, provided by the beneficiary. All the values are book values.
([2]) Source: EKORDA report of 7 July 2004, taking into account the book value, except for the receivables, which are adjusted to their liquidation value.
([3]) Source: Balance sheet 1 January 28 April 2004, provided by the beneficiary. All the values are book values.
([4]) Information provided by the Slovak authorities and obtained during the on-the-spot check by the Tax Office at the beneficiary's premises on 17 June 2004 (see paragraph 60 above).
([5]) Source: Annual report 2004, provided by the beneficiary. All the values are book values.
([6]) Land, buildings, machinery, intangible assets, financial assets.
([7]) According to EKORDA, the book value of short-term receivables of SKK 166 million has to be adjusted to the liquidation value of SKK 98 million (see paragraph 97 below).
([8]) It is not clear whether this figure represents the book value or the liquidation value of the short-term receivables. As a precaution, the Commission assumed it is the book value.

(86) The Commission will first examine the evidence submitted by the beneficiary in support of the statement that bankruptcy proceedings would have left the Tax Office worse off than arrangement proceedings (section 2.1). The Commission will then examine the position in relation to tax execution (section 2.2). Finally the Commission will examine other evidence submitted by the Slovak authorities and the beneficiary (section 2.3).

(87) As described in paragraph 37, the amount of debt to be included in the arrangement was reduced as a result of the extraordinary appeal procedure. However, it should be noted that this judgment came several years after the decision to enter into the arrangement. For the purposes of the market economy creditor test, the information available at the time when a hypothetical creditor would have assessed which course of action was most appropriate remains the standard against which to measure the behaviour of the public creditor. The analysis below therefore uses the figures in the agreement as entered into on 23 July 2004.

### 2.1. **Arrangement with creditors versus bankruptcy**

(88) In order to assess whether an advantage was actually conferred on the beneficiary, the Commission must carry out an overall assessment, taking into account all relevant evidence in the case enabling it to determine whether the beneficiary company would manifestly not have obtained comparable facilities from a private creditor ([16]). In other words, it must examine whether the Tax Office was better off accepting the conditions proposed under the arrangement or whether it would have been more advantageous to initiate bankruptcy proceedings.

(89) The Commission considers that the EKORDA report is not a credible basis for comparing the arrangement proposed with hypothetical bankruptcy proceedings. The Slovak authorities agree with the Commission in this respect.

(90) At the outset, the Commission notes that, when issuing its report on 7 July 2004 (just two days before the creditors' meeting), for its calculations EKORDA used the status of the beneficiary's assets as at 31 March 2004. It is clear from Table 3 that the level of various assets changed considerably after 31 March 2004. In particular a considerable portion of the stock was sold, which led to an increase in cash. These changes are of great importance

([16]) See Case C-124/10 P *Commission* v *EDF*, referred to above, paragraph 86.

when applying liquidation factors ranging from 20 % for stock and short-term receivables to 100 % for cash. Indeed, even if the liquidation factors estimated by EKORDA had been correct (which the Commission contests for the reasons set out below) and using the methodology used by EKORDA, the following table shows how the outcome of EKORDA's calculation would have been different if based on figures from 28 April 2004 and 17 June 2004, i.e. still before the creditors' meeting on 9 July 2004.

*Table 4*

**Comparison of the likely yield from the sale of the beneficiary's assets in bankruptcy proceedings [million SKK]**

| | | Situation on: | | | | | |
|---|---|---|---|---|---|---|---|
| | | 31.3.2004 | | 28.4.2004 | | 17.6.2004 | |
| | Liquidation factor [%] | Book value | Yield | Book value | Yield | Book value | Yield |
| Non-current assets | 45 | 205 | 92 | 204 | 92 | 200 | 90 |
| Stocks | 20 | 209 | 42 | 176 | 35 | 84 | 17 |
| Short-term receivables | 20 | 98 (1) | 20 | 86 (2) | 17 | 37 (3) | 7 |
| Cash | 100 | 50 | 50 | 94 | 94 | 161 | 161 |
| **Total** | | | **204** | | **238** | | **275** |

(1) This is the book value (SKK 166 million) adjusted by EKORDA to reflect the liquidation value of the receivables.
(2) This is a proxy of the liquidation value that the Commission obtained by adjusting the book value of the short-term receivables (SKK 147 million) by the same ratio as EKORDA used in its analysis (see footnote 6, table 3).
(3) This is a proxy of the liquidation value that the Commission obtained by adjusting the book value of the short-term receivables (SKK 63 million; see also footnote 21) by the same ratio as EKORDA used in its analysis (see footnote 16). The Commission, however, notes that, judging from the information provided by the Slovak authorities, the receivables of SKK 63 million were enforceable receivables. It is therefore very doubtful whether any adjusting of their book value is actually necessary. If the liquidation value of these receivables is actually SKK 63 million, the total yield in a bankruptcy procedure as at 17 June 2004 would have been SKK 331 million (EUR 8,7 million).

(91) It should be noted that the business plan submitted by the beneficiary to the court the sale of stock for SKK 110 million was planned for the period March–May 2004. EKORDA must therefore have been aware that the assets of the beneficiary would be subject to considerable changes after 31 March 2004, but did not take this into account.

(92) Had the book value of the beneficiary's assets from 28 April 2004 been taken into account, it would have led to the conclusion that the likely yield from the sale of the beneficiary's assets in a bankruptcy procedure would have been higher than estimated in the report (SKK 238 million, or EUR 6,3 million, instead of SKK 204 million, or EUR 5,3 million). An analysis using the figures from June 2004 would have allowed a clear conclusion to be drawn that the likely yield from the sale of the beneficiary's assets in bankruptcy proceedings (SKK 275 million; EUR 7,2 million) would have been higher than what was proposed under the arrangement, and that the Tax Office should use its veto right and reject the proposal with the effect of terminating the arrangement. Again, the Commission would point out that the above results were obtained using the assumptions and the methodology of EKORDA.

(93) The Commission, however, cannot accept the methodology used by EKORDA and does not find the assumptions of the beneficiary credible. This conclusion is reinforced by the doubts of the Slovak authorities as described in paragraphs 60 and 65.

(94) To start with, EKORDA does not explain in its report how it determined the three liquidation factors. The purpose of liquidation factors is to calculate the remaining value of assets sold in the liquidation proceedings, taking into account the nature of the sale e.g. assets sold separately, under time constraints, etc. Therefore, it is assumed that the value of the assets obtained through a liquidation sale is usually lower than the book value, depending on the type of the assets. The percentage share of the value of the assets obtained through the liquidation compared to the book value is the liquidation factor.

(95) Furthermore, the liquidation factor of 45 % for non-current assets seems to be too low. According to the beneficiary itself, the value of its assets pledged in favour of the Tax Office was SKK 194 million ([17]). This value is, according to the beneficiary, expressed in prices estimated by independent experts at the turn of the year 2003/2004. In the Commission's view, this kind of 'expert price' should normally reflect the general value of the asset, a proxy expressing for what price the asset can be sold at a given moment. It should be recalled that the expert value of these assets was established in order to ascertain their value as security for the Slovak authorities against the deferred tax debt of the beneficiary, as required by the Tax Administration Act. EKORDA does not provide any clarification as to why the sale of the non-current assets in bankruptcy proceedings would yield only 45 % of their book value of SKK 205 million, whereas the beneficiary itself placed a much higher value on these assets.

(96) In response to the beneficiary's argument that it would be hard to find a buyer because most of the pledged machinery was confined only to the production of spirit and spirit-based beverages, non-alcoholic beverages or canned products, the Commission has the following two comments. First, the 'expert price' of the pledged real estate was SKK 105 million, which is on its own higher than the total yield forecast by EKORDA (SKK 92 million). Second, the actual developments in the company show that some of these production assets quickly found a new user Old Herold s.r.o. Indeed, once the beneficiary lost the licence to produce spirit and spirit-based beverages its production assets were rented to Old Herold. It seems therefore that there was an imminent interest from a competitor for these production assets.

(97) As for stock, the Slovak authorities themselves consider that the liquidation factor should be higher than 20 %.

(98) The beneficiary was able to generate SKK 110 million from the sale of its stock in 2004 (see paragraph 35), i.e. more than 50 % of the book value of the stock on which EKORDA based its assessment. This is a strong indication that the liquidation factor of 20 % was too low. The changes in the balance sheet in 2004 with regard to stock supports this conclusion. In addition, in its business plan the beneficiary itself estimated the yield from the sale of stock over the period March–May 2004 to be SKK 110 million (see paragraph 35). EKORDA ignored this estimate. Finally, from the nature of the beneficiary's activities it can be assumed that the stock comprised final or semi-finished products which could have been sold directly to distributors or consumers, further supporting the use of a higher liquidation factor.

(99) The Commission considers that the liquidation factor for the stock should be 52 %. This figure is based on the beneficiary's estimate of the yield it would receive from the sale of stock for the purpose of financing the agreement (i.e. SKK 110 million). Taking into account the book value at that time (SKK 209 million) the only possible liquidation factor for stock was therefore at least 52 % (52 % of 209 million being 110 million).

(100) Concerning the short-term receivables, EKORDA used double adjusting. First, it adjusted their book value by a factor of 59 % (the book value being SKK 166 million and the value that EKORDA used in its calculations SKK 98 million) and then in addition used the low liquidation factor of 20 %. This methodology is questionable. It can be acceptable to adjust the book value of receivables to reflect their actual value at a given time. EKORDA, however, does not provide any explanation as to why the yield in bankruptcy/liquidation would be only one fifth (SKK 20 million) of what the beneficiary itself believed to be able to obtain from its debtors (SKK 98 million).

(101) The book value of short-term receivables based on March 2004 figures (SKK 166 million) was adjusted to SKK 98 million by EKORDA in order to correct for uncollectible or low-quality receivables. In addition, however, EKORDA applied a liquidation factor of only 20 % to the adjusted book value. If EKORDA's 59 % factor for adjusting the book value of the short-term receivables is applied to the book value based on the June 2004 figures (SKK 63 million), the result is SKK 37 million. However, according to the information provided by the Slovak authorities, there were receivables of SKK 63 million that were enforceable. It is therefore doubtful whether any adjusting of their book value is actually necessary.

([17]) This figure is disputed by the Slovak authorities, as explained below.

(102) In any event, there is no obvious reason why the liquidation value should be even lower than the adjusted figure. The Commission therefore considers that the expected yield from the short-term receivables is certainly not lower than the adjusted figure of SKK 37 million.

(103) Given the above, the Commission adjusted EKORDA's estimates and made a new assessment using the figures from June 2004. This assessment clearly shows that the likely yield from the sale of the beneficiary's assets in bankruptcy proceedings would have been much higher than the yield forecast in EKORDA's report. The figures are summarised in the table below.

*Table 5*

**Comparison of the likely yield from the sale of the beneficiary's assets in bankruptcy proceedings**

**EKORDA figures compared with the Commission's corrected figures (in SKK million)**

| | EKORDA (31.3.2004) | | Correction (17.6.2004) | |
|---|---|---|---|---|
| | Book value | Yield | Book value | Yield |
| Non-current assets | 205 | 92 | 200 | 194 [1] |
| Stock | 209 | 42 | 84 | 43 [2] |
| Short-term receivables | 98 [3] | 20 | 63 | 37 [4] |
| Cash | 50 | 50 | 161 | 161 |
| **Total** | **562** | **204** | **508** | **435** |

[1] Throughout the investigation procedure the beneficiary submitted that the value of its non-current assets pledged in favour of the Tax Office was SKK 194 million. This is the evaluation of an independent valuer, expressed as an 'expert price'. That price should be a proxy for what price the asset could have been sold at the time. It should be noted that this is a minimum price; the Slovak authorities estimated the price of the pledged assets to be SKK 397 million.

[2] The liquidation factor used is 52 %. This liquidation factor can be derived from the fact that the beneficiary had indicated that it intended to raise at least SKK 110 million from the sale of stock for the purpose of financing the arrangement. However, based on a book value of SKK 209 million, this was possible only if the liquidation factor for stock was at least 52 % (SKK 110 million/SKK 209 million).

[3] This is the book value (SKK 166 million) adjusted by EKORDA to reflect the liquidation value of the receivables.

[4] This is the value of the short-term receivables after the adjustment of their book value (SKK 63 million) by a factor of 59 % used by EKORDA. There is no obvious reason why the liquidation value should be lower after such adjustment.

(104) The costs of bankruptcy proceedings, according to the beneficiary's comments on the opening decision, should constitute 18 % of the estimated value of the proceeds from the sale of the beneficiary's assets in those proceedings. This is according to the beneficiary an appropriate rate in the light of the World Bank Report of 2004 [18]. Therefore, by applying this percentage to the corrected value of the likely yield from the sale of the beneficiary's assets, as established by the Commission, the costs of the bankruptcy proceedings would come to SKK 78,3 million. When this amount is deducted from the corrected yield from the sale of the beneficiary's assets, the result is higher than the sum received by the Tax Office under the arrangement (435 million − 78,3 million = 356,7 million; the sum agreed under arrangement was SKK 224,3 million).

(105) As indicated in Table 5, the likely yield from sale of the beneficiary's assets was SKK 435 million. Taking into account that the Tax Office would have received close to 100 % of the proceeds of the sale [19], and even allowing for bankruptcy costs of up to 18 % of these proceeds as claimed by the beneficiary, the Tax Office would still have received SKK 132,4 million more than under the arrangement.

[18] It is noted that the other reports submitted by the beneficiary (namely the reports by EKORDA and Ms Kochová) reckon on a slightly higher percentage of costs around 22 %. However, since proceedings in this case would be likely to be shorter than average bankruptcy proceedings, there appears to be no reason why the costs should be even higher than those for average proceedings as recorded in the World Bank Report. If anything, it might be expected that the low number of creditors and simple structure of the debt (over 99 % in the hands of one creditor) would lead to lower than average costs.

[19] It would have received 100 % of the pledged assets (SKK 194 million), plus over 99 % of the proceeds generated by the sale of the remaining assets.

(106) Moreover, even applying the very low liquidation factors provided by EKORDA to the value of the beneficiary's assets as at June 2004, the likely yield from the sale of these assets (after deducting the costs of the bankruptcy proceedings — 18 %) would be SKK 225,5 million, which is still higher than the sum agreed to by the Tax Office under the arrangement [20].

(107) Finally, it should be noted that the Slovak authorities have not supported the beneficiary's claim that the Tax Office had the EKORDA report at its disposal prior to the creditors' meeting on 9 July 2004 and thus could have used it as a basis for its decision. However, the Tax Office did have the results of its own June 2004 inspection, which showed that Frucona had significant assets as indicated in Table 3. On the basis of these data, the Tax Directorate by letter of 6 July 2004 to the local Tax Office, indicated that the local Tax Office should not agree to the arrangement proposed by the beneficiary, because it was unfavourable for the State.

(108) The other experts' reports provided by the beneficiary failed to meet the standard required to demonstrate that the market creditor test was met. In particular, none of the reports states on what basis the, sometimes exceptionally low, liquidation factors were established. Furthermore, it can be observed that as regards the report of Ms Kochová, whose conclusions were significantly different from the conclusions of EKORDA, that it is not clear for what purpose this report was made and on what period and assumptions it was based. The report by the receiver Ms Holovačová only states that, in general, arrangement proceedings are more advantageous for creditors than bankruptcy proceedings. Therefore, none of the information in either of these two reports can be used either to support or to refute the beneficiary's assertion that the market economy creditor test was met.

(109) In addition, as regards the arguments regarding the duration of bankruptcy proceedings, the circumstances of this case need to be taken into account when considering what impact the possible length of bankruptcy proceedings might have on the decision-making process of a hypothetical private creditor.

(110) The fact that the State was in a privileged position in comparison to the other creditors, due to the fact that its debt was secured against the beneficiary's non-current assets, is a further important aspect in this case. In HAMSA, the Court confirmed that the status as a secured creditor is a relevant factor to be taken into account in applying the private creditor test [21]. In accordance with Section 31(1)(e) of the Bankruptcy Act, the claims of a separate creditor may be satisfied at any time during the bankruptcy proceedings from the sale of the assets which provide the security. Therefore, as regards the assets pledged to the Tax Office, the length of the bankruptcy proceedings overall was, in the Commission's view, irrelevant, since these claims could have been satisfied independently of the progress of those proceedings.

(111) In particular, even taking the value placed on the secured assets by the beneficiary, the Tax Office could have obtained early satisfaction through the sale of the securities of at least SKK 194 million, or 86 % of the sum proposed in the creditors' agreement. Only if there had been some prospect of it not receiving the full amount agreed under the arrangement would the Tax Office have had to consider whether it was worth waiting for the end of the bankruptcy proceedings. What is more, upon final distribution to the creditors, the Tax Office would then have received around 99 % of the yield from the sale of the remaining assets (SKK 185 million in the worst case scenario, that is applying EKORDA's liquidation factors; see Table 4). It should have been clear to the Tax Office that the resulting debt recovery would have been well in excess of the sum on offer under the arrangement and that only a small part of that total would have entailed a wait as compared to under the arrangement.

(112) Therefore, it can be concluded that the information concerning the duration of bankruptcy proceedings in Slovakia would not have influenced the decision of a hypothetical private creditor in any significant way.

(113) Furthermore, in any event, at the time of the arrangement the beneficiary had: (i) a very low number of creditors and (ii) assets with a liquidation value higher than the amount agreed by the State under the arrangement (as shown in Table 5, the likely yield from the sale of the unsecured assets alone was SKK 241 million).

---

[20] The yield from the sale of the beneficiary's assets would amount to SKK 275 million (see Table 4). After deducting the costs of the bankruptcy proceedings, which according to the beneficiary constituted 18 % of the yield from the assets' sale, i.e. SKK 49,5 million, the Tax Office would have received SKK 225,5 million.

[21] Case T-152/99 *HAMSA* [2002] ECR II-3058, paragraph 168.

(114) The number of creditors involved in the arrangement was low, there being only five of them. Of these five creditors, four were private and their share of the total debt was only 0,6 % (SKK 3 797 608 out of SKK 644 166 949) as shown in Table 2. The State therefore represented by far the largest creditor with 99,4 % of the total claims. Such circumstances would significantly reduce the risk of any disagreements between creditors and consequent litigation and would, therefore, tend to shorten the length of the bankruptcy proceedings.

(115) With regard to the argument presented by the beneficiary, based on a report by the World Bank called 'Doing business in 2004' claiming that bankruptcy proceedings in Slovakia last on average 4,8 years, it should be noted that the report refers to a general 'closing a business indicator', which measures the overall time to go through bankruptcy proceedings as well as court powers in bankruptcy proceedings. This duration is not strictly the same as the average length of bankruptcy proceedings. The Slovak authorities themselves expressed the view that given the circumstances of this case, the duration of the bankruptcy proceedings would be shorter than the average (see paragraph 60). This assessment by the Slovak authorities is particularly relevant given the fact that the proceedings in question would be conducted in accordance with Slovak bankruptcy law and practice. Moreover, the Slovak government was itself the creditor of the beneficiary.

(116) In addition, the length of the bankruptcy proceedings in the reports provided by the beneficiary varies significantly from two years to more than six years ([22]). Therefore the assessments of the duration of bankruptcy proceedings in Slovakia that the beneficiary submitted to the Commission were generalisations and did not take account of the specifics of the case at hand. Some of those assessments were of an approximate nature and, to a certain extent, were inconsistent with each another.

(117) As regards the specific example of a Slovak company in the same sector as the beneficiary whose bankruptcy proceedings lasted for more than five years, it should be noted that the beneficiary failed to demonstrate how that example relates to this case and in particular whether that company was in the same or a very similar legal and material situation as the beneficiary ([23]). Given the fact that the beneficiary had one large creditor with privileged status the State and a number of assets with a significant appraisal value, the bankruptcy proceedings in the case of the beneficiary could have been concluded in a relatively swift manner and would thus present a preferred course of action for the largest creditor the State.

(118) Lastly, even assuming that the bankruptcy proceedings would have lasted four to five years, as claimed by the beneficiary, the difference between the likely amounts to be recovered and the amounts agreed under the arrangement was so big, that the length of those proceedings would not have played a significant role in the decision of a private creditor as to whether to accept the arrangement. Considering a discount rate of 5,14 % ([24]), the present value of the future cash flow of SKK 356,7 million even after five years is SKK 277,6 million, i.e. well above the amount agreed under the arrangement. Under such conditions, the bankruptcy proceedings would have had to take more than 9 years in order for the present value to be lower than the amount agreed under the arrangement. Such a long liquidation procedure would not have been considered likely in this case by any private market operator. In addition, the present value of the total amounts to be recovered would be further increased if it is taken into account that a significant part of the debt would likely have been repaid earlier through the sale of the secured assets (see paragraph 111111)).

(119) On the basis of the evidence available, it can be concluded that a private creditor would not have entered into the arrangement on the terms agreed by the Tax Office in this case; given that the Tax Office could be satisfied as a separate creditor at any time during the bankruptcy proceedings and, in addition, obtain over 99 % of the yield distributed to the remaining creditors (due to the size of its claims when compared to the other creditors), it can be concluded that almost the entire yield obtained in the bankruptcy proceedings would go to the Tax Office and, as demonstrated above, would be higher than the amount agreed in the arrangement between the creditors.

([22]) Ms Kochová's report – 2 years, Ms Holovačová's report more than 6 years, World Bank 2004 report – 4,8 years, Slovak Ministry of Justice report and World Bank 2002 report – 3 to 7 years.

([23]) The example provided by the beneficiary in its comments of 25 October 2005 refers to the declared bankruptcy of Liehofruct White Lady Distillery, s.r.o. Levoča.

([24]) In 2004, the interest rate for government bonds with maturity between 3 and 5 years ranged between 4,06 % and 5,14 %. To keep on the conservative side, the calculation takes into account the highest amount of 5,14 %.

### 2.2. **Arrangement with creditors versus tax execution**

(120) The Tax Office, unlike the private creditors, was entitled on its own initiative to proceed with tax execution through the sale of real estate, machinery or the firm as a whole. No evidence, within the meaning of the case-law referred to above in paragraph 82, was provided to indicate that the Tax Office had considered this course of action and concluded that it would be less advantageous than agreeing to the arrangement.

(121) In any event, the Commission finds irrelevant the beneficiary's argument that the arrangement proceedings shelter the company from tax execution. As confirmed by the Slovak authorities, tax execution was an option for the Tax Office, either prior to the launch of the arrangement proceedings or after the Tax Office's veto on the proposed arrangement. This option therefore needs to be considered when applying the market economy creditor test. The beneficiary does not compare the proposed arrangement with the potential outcome of tax execution.

(122) The Commission bases its analysis on data provided by both the beneficiary and the Slovak authorities. In this context it is noted that the Slovak authorities confirmed that the pledge in favour of the Tax Office was SKK 397 million as mentioned in the decision to open the formal investigation procedure. This value is said to be obtained from the beneficiary's accounts. The beneficiary, for its part, submits that the value of the pledged assets expressed in 'expert prices' is SKK 194 million (see paragraph 22). While the Commission does not need to determine which figure is correct, the following conclusions can nevertheless be made.

(123) First, the pledge was a counterpart against the deferred tax debt of the beneficiary, as required by the Tax Administration Act. If the value of the beneficiary's assets was in reality only half of the pledge, as suggested by the expert opinion submitted by the beneficiary, it means that the securities required by the State for those deferrals were insufficient. In these circumstances, the tax deferrals permitted by the Tax Office between November 2002 and November 2003 totalling SKK 477 million therefore in all probability failed to meet the market economy creditor test. For the purpose of this case it is not necessary for the Commission to determine whether those measures were free of state aid. However, if the earlier deferrals already constituted state aid, the market economy creditor principle can no longer be referred to when the deferred amounts are later (partly) written off.

(124) Second, even if the lower figures submitted by the beneficiary are used in the calculation of the proceeds from tax execution, the market economy creditor, had he had the possibility, would have favoured this procedure over arrangement.

(125) In the case of tax execution a tax office can directly sell the debtor's assets (receivables and other current assets, movable assets, real estate). At the time when the Tax Office voted in favour of the arrangement, the beneficiary had stock worth SKK 43 million, enforceable receivables of at least SKK 37 million and SKK 161 million in cash (see Table 5). It is noted that the value of those current assets alone (SKK 241 million; EUR 6,3 million) ([25]) would exceed the yield proposed in the arrangement (SKK 224,3 million; EUR 5,93 million). In addition, the beneficiary had other assets, the value of which was at least SKK 194 million.

(126) Furthermore, tax execution would not involve administrative fees as in the case of bankruptcy proceedings. It is a procedure that is initiated and controlled by the tax office, so it can also be assumed that it would be conducted in a speedy manner.

(127) The Commission therefore concluded that tax execution against the beneficiary's assets would have led to a higher return than the arrangement.

([25]) Value of the current assets = stocks (SKK 43 million) + short-term receivables (SKK 37 million) + cash (SKK 161 million) = SKK 241 million.

2.3. **Further evidence**

(128) The Commission takes note of the letter submitted by the Slovak authorities from the director of the Tax Directorate to his subordinate, the director of the tax office in question (see paragraph 63). The letter clearly shows that the Tax Directorate (which had prior direct contacts with the beneficiary) opposed the proposed arrangement and gave a clear indication that the local Tax Office should not vote in favour of the arrangement. The reason mentioned in the letter was that the proposed arrangement was 'not advantageous' for the State.

(129) It was also demonstrated by the Slovak authorities that there was a clear policy instruction given by the Ministry of Finance at the beginning of 2004 to the tax authorities to the effect that they should not accept arrangements proposing write-offs of tax authorities' receivables ([26]). This policy choice was communicated in connection with the amendment of the Tax Administration Act as of 1 January 2004, in an effort to strengthen discipline in tax collection.

(130) In addition, it should be noted that the Tax Office itself appealed against this arrangement as early as 2 August 2004, i.e. not even one month after the arrangement was agreed upon.

(131) The beneficiary submitted that the Tax Office had signalled its agreement to the arrangement even prior to the beneficiary launching the procedure. The Commission considers that the evidence submitted by the beneficiary indicates quite the opposite. In his letter of 3 February 2004 to the beneficiary, the director of the Tax Office writes that, although in principle he is not against the use of the arrangement procedure, he does not agree with the beneficiary's proposal for arrangement with 35 % repayment of the debt.

(132) On the basis of this evidence, the Commission cannot but conclude that the Slovak authorities were opposed to the arrangement proposed by the beneficiary, and were opposed to it already prior to the launching of the arrangement proceedings on 8 March 2004, before the creditors' vote on 9 July 2004 and also after the court approved the arrangement.

(133) The beneficiary submitted that long-term effects, such as the continuity of the tax revenue for the State, should be taken into account (see paragraph 52).

(134) First, it needs to be stressed that the market economy creditor test differs from the market economy investor test. Whereas a market economy investor is in a position to decide whether to enter into a relationship with the company in question and will be driven by the long-term, strategic prospect of obtaining an appropriate return from his investment ([27]), a 'market economy creditor', who already is in a commercial or public law relationship with the insolvent company, will aim at obtaining the repayment of sums already due to him ([28]) on conditions that are as advantageous as possible in terms of the degree of repayment and the timeframe. The motivations of the hypothetical market economy creditor and the market economy investor will therefore be different. Accordingly, the case-law has defined separate tests for the two situations.

(135) Second, as to the analogy to the creditor–supplier, it is important to note that the nature of his receivables and those of the State is fundamentally different. Because the relations of the supplier to the insolvent firm have an exclusively contractual basis, he may actually suffer from the loss of a business partner. If the insolvent company is liquidated or sold off, the supplier would need to find a new client or contract with the new owner. The risk is higher when his dependency on the insolvent firm is considerable. Such a creditor will indeed consider the future. In contrast, the relations of the State with the insolvent firm are based on public law and are therefore not dependent on the will of the parties. Any new owner taking over the assets of the liquidated firm would automatically be obliged to pay taxes. Moreover, the State is never dependent on a single taxpayer. Finally and most importantly, the State is not profit-driven when levying taxes and does not act in a commercial way and with commercial considerations when doing so. The above analogy is therefore not well-founded.

([26]) It can be deduced from the letter that the Ministry agreed with arrangements consisting of a deferral of payment of not more than two months for VAT and excise duties and six months for other taxes.

([27]) Case T-152/99 *HAMSA*, referred to above, paragraph 126;

([28]) See, for example, Case C-342/96 *Spain* v *Commission*, referred to above, paragraph 46.

(136) The Commission concludes that the situation of the State in this case is not comparable to the situation of a hypothetical market economy investor or to the situation of a hypothetical dependent market economy creditor. In any event, the loss of future taxes cannot be taken into account when applying the market economy creditor principle [29].

(137) Lastly, it is noted from the overview of taxes submitted by the beneficiary that most of the taxes paid by the beneficiary since 1995 were indirect taxes (excise duties and VAT). As these taxes are paid by final consumers, the liquidation of the beneficiary would have no impact on their collection, as consumers would continue to purchase the taxed products (in this case mainly spirit and spirit-based beverages) from other producers. The beneficiary's argument regarding considerable future tax loss is therefore not credible.

(138) The Commission concludes that none of the other evidence submitted by the beneficiary demonstrates that the behaviour of the hypothetical private creditor would have been influenced. Therefore nothing in this section alters the Commission's assessment of that behaviour in sections 2.1 or 2.2.

### 2.4. **Conclusion**

(139) On the basis of the above evidence, the Commission concludes that in this case the market economy creditor test was not met and the State conferred on the beneficiary an advantage that it would not have been able to obtain from the market.

(140) The Commission therefore concludes that the debt write-off agreed to by the local Tax Office under the arrangement constitutes state aid within the meaning of Article 107(1) TFEU.

## 3. COMPATIBILITY OF THE AID: DEROGATION UNDER ARTICLE 107(3) TFEU

(141) The primary objective of the measure is to assist a company in difficulty. In such cases, the exemption under Article 107(3)(c) TFEU, which allows state aid to be authorised to facilitate the development of certain economic activities where it does not adversely affect trading conditions to an extent contrary to the common interest, can be applied, if the relevant conditions are complied with.

(142) In view of the production portfolio of the beneficiary, the Commission assessed whether special rules applicable to the agriculture sector apply in this case. Basing itself on the information on the beneficiary's turnover submitted by the Slovak authorities, the Commission concluded in its decision to open the formal investigation that most of beneficiary's products were not products falling under Annex I to the TFEU and therefore the general state aid rules apply.

(143) In its comments on the decision to open the formal investigation the beneficiary disputed the data on the turnover provided by the Slovak authorities beforehand (see Table 1), but did not dispute the decision of the Commission to base its assessment on the general state aid rules. Without wishing to determine whether the figures provided by the beneficiary were accurate [30], the Commission verified whether its above conclusion would stand up against the new data. The Commission concluded that the majority of the beneficiary's turnover is generated by products not falling under Annex I to the TFEU. The general, and not the sector-specific, state aid rules therefore apply.

(144) Rescue and restructuring aid to ailing companies is currently governed by the Community Guidelines on state aid for rescuing and restructuring firms in difficulty [31] (the 'New Guidelines'), which replaced the previous text adopted in 1999 [32] (the '1999 Guidelines').

[29] See, by analogy, Case C-124/10 P *Commission* v *EDF*, referred to above, paragraphs 79 and 80.
[30] These figures do not seem to be supported by the annual accounts submitted by the beneficiary.
[31] OJ C 244, 1.10.2004, p. 2.
[32] OJ C 288, 9.10.1999, p. 2.

(145) The transitional provisions of the New Guidelines stipulate that the New Guidelines will apply to the assessment of any rescue or restructuring aid granted without the authorisation of the Commission (unlawful aid) if some of or all the aid is granted after 1 October 2004, the day of publication of the New Guidelines in the *Official Journal of the European Union* (point 104, first subparagraph). However, for aid unlawfully granted before 1 October 2004, the examination will be conducted on the basis of the guidelines applicable at the time when the aid was granted (point 104, second subparagraph).

(146) The approval by the Tax Office of the arrangement was issued on 9 July 2004 and took effect on 23 July 2004. Accordingly, the aid was unlawfully granted before 1 October 2004. The 1999 Guidelines, which were applicable at the time when the aid was granted, therefore apply.

(147) The beneficiary is a medium-sized company within the meaning of Commission Regulation (EC) No 70/2001 on the application of Articles 87 and 88 of the EC Treaty to state aid to small and medium-sized enterprises ([33]).

### 3.1. **Eligibility of the company**

(148) According to point 5(c) of the 1999 Guidelines, a company is regarded as being in difficulty where it fulfils the criteria under domestic law for being the subject of collective insolvency proceedings.

(149) The beneficiary was the subject of the arrangement proceedings, which, under the definition in the Bankruptcy Act, is only accessible to insolvent companies. It is therefore eligible for rescue and restructuring aid.

### 3.2. **Rescue aid**

(150) The disputed measure was initially described by the Slovak authorities as rescue aid. In accordance with the 1999 Guidelines, the Commission raised doubts as to the compatibility of the aid as rescue aid on the grounds described in part III.

(151) Neither the Slovak authorities nor the beneficiary commented on these doubts. No new facts have been presented to the Commission in this respect.

(152) Since the above doubts have not been allayed, the Commission concludes that the aid is not compatible as rescue aid within the meaning of the 1999 Guidelines.

### 3.3. **Restructuring aid**

(153) The Commission raised doubts as to whether the aid was compatible as restructuring aid within the meaning of the 1999 Guidelines on the grounds described in part III.

(154) The Commission notes that the Slovak authorities, who bear the burden of proving that the state aid is compatible with the internal market, have not submitted any new facts in support of this conclusion. The Commission took due note of the comments submitted by the beneficiary.

#### 3.3.1. *Return to long-term viability*

(155) According to the 1999 Guidelines, the granting of restructuring aid must be linked to and conditional on implementation of a feasible and coherent restructuring plan to restore the firm's long-term viability. The Member State commits itself to this plan, which must be endorsed by the Commission. Failure by the company to implement the plan is regarded as misuse of aid.

([33]) OJ L 10, 13.1.2001, p. 33.

(156) In substance, the restructuring plan must be such as to enable the beneficiary to restore its long-term viability within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. The plan should describe the circumstances that led to the beneficiary's difficulties and identify appropriate measures to address these difficulties. Restructuring operations cannot be limited to financial aid designed to make good debts and past losses without tackling the reasons for the difficulties.

(157) For companies situated in assisted areas and small and medium-sized companies, the 1999 Guidelines stipulate that the conditions for authorising aid may be less stringent as regards the implementation of compensatory measures and the content of monitoring reports. Nonetheless, these factors do not exempt such companies from the requirement to draw up a restructuring plan nor the Member States from the obligation to make the granting of restructuring aid conditional upon implementation of a restructuring plan.

(158) After the opening of the formal investigation, the Slovak authorities confirmed that the business plan that the beneficiary was obliged to draw up as a condition for the launching of the arrangement procedure was only considered by the competent court, i.e. not the granting authority, and that neither the court nor the Tax Office monitored the implementation of the plan.

(159) Contrary to this confirmation, the beneficiary stated that the Tax Office had studied the ability of the business plan to restore long-term viability prior to its approval of the arrangement, but did not submit any evidence of this.

(160) The beneficiary further argued that the absence of a formal restructuring plan is irrelevant in a situation of an *ex post* assessment of the aid by the Commission, when the Commission can assess whether the beneficiary did actually become viable. According to the beneficiary, the formal restructuring plan can only be required in the case of an *ex ante* assessment, to which only the 1999 Guidelines can apply.

(161) This line of argument is not correct. The 1999 Guidelines apply to the compatibility assessment of both notified and unlawful aid. Whenever the assessment takes place, the condition that the restructuring aid be subject to the establishment of a viable restructuring plan is valid. The Commission has to conduct its assessment on the basis of the information available at the time when the aid was granted.

(162) It may be concluded that the Tax Office as the granting authority did not have any opportunity to evaluate a restructuring plan and to make the write-off of its receivables conditional on duly monitored implementation of such a plan. Therefore, the first, formal, condition, which is fully applicable also to *ex post* assessment, was not met.

(163) As to the substance of the business plan, the Slovak authorities did not submit any information allaying the Commission's doubt that the plan represented a genuine restructuring plan as required by the 1999 Guidelines.

(164) The Commission cannot but maintain the conclusion it reached in the decision to open the formal investigation. The business plan submitted is merely a plan dealing with the beneficiary's acute problem of mounting debt to the State. The plan does not analyse in any way the circumstances that led to the beneficiary's difficulties nor the financial situation of the company at that time and its financial prospects. Since this analysis was missing, the beneficiary did not propose specific steps addressing the individual reasons that led to the difficulties. The only measure described in detail is the proposed financial restructuring through the arrangement with creditors.

(165) The plan does not mention at all the increase of the beneficiary's own capital, mentioned by the beneficiary as one of the restructuring measures. Nothing in the file demonstrates that the capital increase by Hydree Slovakia should be considered as a measure ensuring that, in the long-term, the beneficiary would not repeat its strategy of financing its production through debt on VAT and excise duties, which is what eventually led to its difficulties. The Slovak authorities themselves confirmed that the capital increase did not in any way decrease the risk of repetition of the financial problems. These doubts are all the stronger, given that the capital increase totalled SKK 21 million while the restructured debt was SKK 644 million.

(166) The capital increase in itself is not proof of market confidence in the beneficiary's return to long-term viability. The Commission notes that the beneficiary did not manage to obtain any loan from a private bank, despite its active efforts.

(167) Furthermore, letting the production assets to the beneficiary's competitor Old Herold s. r. o. was clearly necessitated by the fact that the beneficiary had lost its licence to produce spirit and spirit-based products and not by the fact that this production would have been loss-making and therefore in need of restructuring. It is true that the beneficiary itself could have requested a new licence after the arrangement was finalised and did not do so. The Commission, however, observes that the beneficiary continues to sell the products produced by Old Herold using the beneficiary's assets and brand name and even plans to increase these sales, as is stated in the annual report for the period 29 April 2004 - 30 December 2004. The letting of these production assets therefore cannot be considered as a restructuring measure because, on the basis of all the evidence available, there was no need for restructuring of this part of production.

(168) As to the remaining measures proposed in the business plan, the Commission's doubts have not been allayed. These measures are simply activities in the normal course of business rather than rationalisation measures (sale of old equipment or vehicles). The two proposed structural measures (abandonment of the production of non-profitable non-alcoholic products and the sale of some real estate) were described very vaguely without any indication of the precise products or a timetable. The Slovak authorities confirmed that the real estate intended for sale (an administrative building, a shop and a recreation building) had not been sold as at 10 October 2005, i.e. that this planned measure had not been implemented as announced.

(169) The combination of the absence of a formal restructuring plan and the absence of genuine analysis of the difficulties, of the measures necessary to address these difficulties and of the market conditions and prospects leads the Commission to the conclusion that the business plan submitted by the beneficiary is not a genuine restructuring plan as required by the 1999 Guidelines ([34]). The Commission's doubts that the beneficiary would restore long-term viability have therefore not been allayed.

3.3.2. *Aid limited to the strict minimum*

(170) Although the Commission's conclusion that in the absence of a genuine restructuring plan its doubts on the long-term viability persist is in itself sufficient to conclude that the aid is not compatible with the internal market, the Commission will also analyse the other central criterion of the 1999 Guidelines, i.e. that the aid must be limited to the strict minimum necessary.

(171) In accordance with point 40 of the 1999 Guidelines, the amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken in light of the existing financial resources of the beneficiary. The beneficiary is expected to make a significant contribution to the restructuring from its own resources.

(172) The costs of restructuring came to the total amount of debt restructured through the arrangement. The beneficiary paid 35 % of this amount.

(173) The Slovak authorities did not provide any further explanation in response to the doubts expressed by the Commission in this respect. The beneficiary explained how it financed payment of the debt remaining after the arrangement (see paragraphs 30-35). According to the beneficiary, its own contribution totalled to SKK 231 million (EUR 6,1 million).

(174) First, the resources available to the beneficiary exceeded the amount of debt remaining after the arrangement. This suggests that the aid was not limited to the minimum necessary.

([34]) See also Case C-17/99 *France* v *Commission* [2001] ECR I-2481.

(175) More importantly, however, the Commission considers that the credit provided by Old Herold does not qualify as an own contribution by the beneficiary within the meaning of the 1999 Guidelines. Payables constitute an ongoing source of financing of the operation of the firm. They are short-term loans, which, however, have to be paid back. It is only if suppliers commit to allow payment maturity longer than normal practice that additional resources are available to the company for the restructuring and that this delay constitutes a sign that the market believes in the feasibility of the return to viability.

(176) The beneficiary did not in any way demonstrate that the deferral of payment by Old Herold went considerably beyond what is normal commercial practice between the beneficiary and its suppliers. The maturity of 40 days seems to be standard practice, especially considering the fact that it was given to the beneficiary after the arrangement. The beneficiary was thereby no longer in financial difficulties. The very purpose of the arrangement was to help the beneficiary out of its financial problems.

(177) The Commission therefore concludes that this prolonged maturity cannot be considered as a contribution to restructuring from external resources.

(178) Without this deferral, the own contribution of the beneficiary within the meaning of the 1999 Guidelines is SKK 131 million (EUR 3,4 million) and thus corresponds to 20 % of the restructuring costs.

(179) The 1999 Guidelines did not contain any thresholds indicating when the own contribution of the beneficiary is considered to be significant.

(180) Considering the practice of the Commission in applying the 1999 Guidelines and the change in Commission policy in this respect towards the introduction of thresholds under the 2004 Guidelines [35], the Commission considers that the contribution of 20 % is rather low. Such a contribution might be accepted under the 1999 Guidelines only if all the other conditions for approving the aid were fulfilled. The Commission would then have to take into account such criteria as whether the company is active in an assisted area, to what extent the sources of financing reflect market confidence, beyond the beneficiary itself and its shareholders, in the long-term viability of the company or other specifics of the case.

(181) In light of the above, the Commission cannot accept in this case that the contribution of the beneficiary is significant. The Commission concludes that its doubts as to whether the own contribution of the beneficiary was significant and whether the aid is limited to the minimum necessary have not been allayed.

### 3.4. **Compatibility of the aid: conclusion**

(182) The Commission concludes that the aid is not compatible with the internal market as rescue or restructuring aid. In addition, no other derogation laid down in the TFEU is applicable to this case.

## VII. **CONCLUSION**

(183) The Commission finds that the Slovak Republic unlawfully granted the write-off of tax debt in favour of Frucona Košice a.s. in breach of Article 108(3) TFEU. This aid is not compatible with the internal market under any derogation laid down in the TFEU.

(184) Even though the implementation of the write-off by the Tax Office has been suspended pending resolution of this procedure, the Commission finds that the advantage for the beneficiary was created the moment that the Tax Office decided to forego part of its claims and thus put the aid at the disposal of the beneficiary. This moment was the entry into force of the creditors' agreement on 23 July 2004. The advantage over the beneficiary's competitors lay in the fact that the Tax Office has not enforced its tax claims.

(35) The threshold for medium-size enterprises under the 2004 Guidelines is at least 40 %.

(185) To restore the status *ex ante*, the state aid has to be recovered. Given that the advantage was conferred at the moment of the entry into force of the creditors' agreement on 23 July 2004, the amount of aid to be recovered is the full amount of the write-off as set out in that agreement.

(186) However, it was decided by the Supreme Court of the Slovak Republic that road tax arrears amounting to SKK 424 490 had been wrongly included in the arrangement. As a result, the headline debt in the agreement was reduced by that amount and the amount of debt owing to the Tax Office and entered into the agreement as corrected was SKK 640 369 341.

(187) The road tax arrears, which had in the meantime been treated as having been written off, were paid in full on 2 August 2006. This payment should be taken into account when calculating the amount of aid and the interest on it still to be recovered,

HAS ADOPTED THIS DECISION:

*Article 1*

Decision 2007/254/EC is repealed.

*Article 2*

The state aid which the Slovak Republic implemented in favour of Frucona Košice a.s., totalling SKK 416 515 990, is incompatible with the internal market.

*Article 3*

1. The Slovak Republic shall take all necessary measures to recover from the beneficiary the aid unlawfully made available to it referred to in Article 2, taking into account that SKK 424 490 corresponding to road tax arrears was paid into the account of the local Tax Office on 2 August 2006.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision.

3. The sum recovered shall include interest for the whole period running from the date on which it was put at the disposal of Frucona Košice, a.s. until its actual recovery.

4. The interest shall be calculated in accordance with Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([36]). The interest rate shall be applied on a compound basis throughout the entire period referred to in paragraph 3.

*Article 4*

The Slovak Republic shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it. It shall provide this information using the questionnaire attached in the Annex to this Decision.

*Article 5*

This Decision is addressed to the Slovak Republic.

Done at Brussels, 16 October 2013.

*For the Commission*

Joaquín ALMUNIA

*Vice-President*

---

([36]) OJ L 140, 30.4.2004, p. 1.

*ANNEX*

**INFORMATION REGARDING THE IMPLEMENTATION OF THE COMMISSION DECISION …**

1. **Calculation of the amount to be recovered**

1.1. Please provide the following details on the amount of unlawful state aid that has been put at the disposal of the beneficiary:

| Date(s) (°) | Amount of aid (*) | Currency |
|---|---|---|
| | | |
| | | |
| | | |

(°) Date or dates on which aid or individual instalments of aid were put at the disposal of the beneficiary.
(*) Amount of aid put at the disposal of the beneficiary (in gross aid equivalents).

Comments:

1.2. Please explain in detail how the interests to be paid on the amount of aid to be recovered will be calculated.

2. **Measures planned and already taken to recover the aid**

2.1. Please describe in detail what measures are planned and what measures have already been taken to effect an immediate and effective recovery of the aid. Please also indicate, where relevant, the legal basis for the measures taken/planned.

2.2. What is the timetable for the recovery process? When will the recovery of the aid be completed?

3. **Recovery already effected**

3.1. Please provide the following details on the amounts of aid that have been recovered from the beneficiary:

| Date(s) (°) | Amount of aid repaid | Currency |
|---|---|---|
| | | |
| | | |
| | | |

(°) Date(s) on which the aid was repaid

3.2. Please attach proof of the repayment of the aid amounts specified in the table under point 3.1 above.