



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

24 January 2013 *

(Appeal — State aid — Cancellation of 65% of a tax debt in a collective bankruptcy procedure — Decision declaring the aid to be incompatible with the internal market and ordering its recovery — Private creditor test — Limits of judicial review — Substitution by the General Court of its own grounds for those set out in the contested decision — Manifest error of assessment — Distortion of evidence)

In Case C-73/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 17 February 2011,

Frucona Košice a.s., established in Košice (Slovakia), represented by P. Lasok QC, J. Holmes and B. Hartnett, Barristers, and by O. Geiss, Rechtsanwalt,

appellant,

the other parties to the proceedings being:

European Commission, represented by K. Walkerová, L. Armati and B. Martenczuk, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

supported by:

St. Nicolaus – trade a.s., established in Bratislava (Slovakia), represented by N. Smaho, lawyer,

intervener at first instance,

THE COURT (Second Chamber),

composed of A. Rosas, acting as President of the Second Chamber, U. Løhmus, A. Ó Caoimh, A. Arabadjiev (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 5 July 2012,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2012,

* Language of the case: English.

gives the following

Judgment

- 1 By its appeal, Frucona Košice a.s. ('Frucona Košice') seeks to have set aside the judgment of the General Court of the European Union of 7 December 2010 in Case T-11/07 *Frucona Košice v Commission* [2010] ECR II-5453 ('the judgment under appeal'), by which the General Court dismissed its action seeking annulment of Commission Decision 2007/254/EC of 7 June 2006 on State aid C 25/05 (ex NN 21/05) implemented by the Slovak Republic for Frucona Košice a.s. (OJ 2007 L 112, p. 14; 'the contested decision').

Background to the dispute and the contested decision

- 2 Frucona Košice is a company incorporated under Slovak law which was active in, inter alia, the alcohol and spirits production sector.
- 3 On 25 February 2004, Frucona Košice, which had benefited, in the past, from several deferrals of payment of its tax debt, was unable to pay the excise duties for which it was liable in respect of January 2004.
- 4 Consequently, on 6 March 2004, its licence to produce and process alcohol and spirits was revoked. Since then, it has confined itself to distributing, under the 'Frucona' brand, spirits bought from an undertaking which, in accordance with an agreement, produced them under licence in the Frucona Košice distilleries.
- 5 Frucona Košice also found itself in a position of indebtedness within the terms of Slovak Law No 328/1991 on bankruptcy and arrangement with creditors (zákon č. 328/1991 Zb. o konkurze a vyrovnaní).
- 6 According to the contested decision, the procedures governing bankruptcy and arrangement with creditors are placed under the supervision of a court, which seeks to resolve the financial situation of indebted companies. Whereas the bankruptcy procedure has the result that the indebted company ceases to exist, the arrangement allows it to pursue its activities, leading to an agreement under which the indebted company repays a portion of its debt in return for the balance being written off.
- 7 The general director of Frucona Košice had met, on 16 December 2003 and on 23 and 30 January 2004, representatives of the Slovak Directorate-General for Taxation and the Slovak Minister for Finance, in order, in particular, to propose to them a settlement of that company's tax liabilities by means of an arrangement procedure.
- 8 On 8 January 2004, that company had also contacted, in regard to this matter, its local tax office, the Košice IV Office ('the local Tax Office'), which did not object to the drawing-up of an arrangement.
- 9 On 8 March 2004, Frucona Košice filed an application for the initiation of an arrangement procedure before the Krajský súd v Košiciach (Košice Regional Court) (Slovakia), proposing to its creditors to pay each of them 35% of the amount of the sum that it owed to each ('the proposed arrangement'). The total debt of Frucona Košice amounted to approximately SKK 644.6 million, SKK 640.8 million of which was a tax debt.
- 10 By decision of 29 April 2004, the Krajský súd v Košiciach authorised the initiation of the arrangement procedure and, inter alia, reproduced the proposed arrangement.

- 11 In order to enable the local Tax Office to assess the respective advantages of the proposed arrangement, bankruptcy and tax execution, Frucona Košice submitted to it, on 26 April 2004, an audit report drawn up by its internal auditor ('the K report') and, on 7 July 2004, an audit report drawn up by an independent audit company ('the E report').
- 12 On 21 June 2004, the Slovak tax authorities carried out an on-the-spot inspection at the appellant's premises. In the course of that inspection, they found that, as at 17 June 2004, the appellant had, inter alia, liquid assets amounting to SKK 161.3 million.
- 13 By letter of 6 July 2004, the Director-General of the Slovak Directorate-General for Taxation requested the local Tax Office not to accept the proposed arrangement on the ground that it was unfavourable to the Slovak Republic.
- 14 On 9 July 2004, Frucona Košice's creditors, including the local Tax Office, accepted the proposed arrangement during an arrangement hearing.
- 15 By decision of 14 July 2004, the Krajský súd v Košiciach confirmed the arrangement and noted, inter alia, that it provided that 35% of the claim of the Slovak tax authorities was to be repaid, that is to say, an anticipated payment of approximately SKK 224.3 million.
- 16 On the same day, the Slovak Directorate-General for Taxation suspended and replaced the director of the local Tax Office and, on 14 December 2004, he was indicted on fraud and embezzlement charges in connection with the local Tax Office's acceptance of the arrangement proposal. By judgment of 6 March 2006, the Špeciálny súd v Pezinku (Special Court, Pezinok) (Slovakia) acquitted him of all charges.
- 17 By letter of 20 October 2004, the local Tax Office indicated to Frucona Košice that the arrangement conditions constituted indirect State aid which was subject to the approval of the Commission of the European Communities.
- 18 On 17 December 2004, Frucona Košice, inter alia, paid to the local Tax Office a sum of SKK 224.3 million, corresponding to 35% of its total debt. By decision of 30 December 2004, the Krajský súd v Košiciach declared the arrangement procedure to be terminated. On 18 August 2006, the Krajský súd v Košiciach reduced the amount to be paid to the local Tax Office to SKK 224.1 million.
- 19 On 15 October 2004, a complaint was filed with the Commission concerning alleged unlawful aid in favour of Frucona Košice.
- 20 By letter of 4 January 2005, the Slovak Republic informed the Commission, following the latter's request for information, that Frucona Košice may have been granted unlawful aid and asked it to approve that aid as rescue aid to a company in difficulties.
- 21 After receiving additional information, the Commission, by letter of 5 July 2005, notified the Slovak Republic of its decision to initiate the formal investigation procedure provided for in Article 88(2) EC with regard to the measure in question. That decision was published in the *Official Journal of the European Union* (OJ 2005 C 233, p. 47).
- 22 On 7 June 2006, the Commission adopted the contested decision, the operative part of which provides, in Article 1 thereof, that the State aid which the Slovak Republic had implemented for Frucona Košice, amounting to SKK 416 515 990, was incompatible with the common market, and orders, in Article 2 thereof, the recovery of that aid.

- 23 In the part of that decision relating to the assessment of the existence of State aid, the Commission observed that the arrangement contained identical debt-arrangement conditions for both private creditors and the tax authorities, whereas that latter, by virtue of its status as a preferential creditor in the bankruptcy procedure, was in a legally and economically more advantageous position than private creditors.
- 24 The Commission then found that the application of the private creditor test made it necessary to establish whether the local Tax Office was 'better off accepting the conditions of the arrangement as proposed by [Frucona Košice] compared with the possible outcome of a bankruptcy procedure or a tax execution procedure'.
- 25 In studying the proceeds of a bankruptcy, the Commission took the view that the E report did not constitute a reliable basis as it was founded on the status of Frucona Košice's assets as at 31 March 2004 rather than on that status, *inter alia*, as at 17 June 2004. The liquidation factors upheld in the E report were thus too low. Furthermore, the method of their calculation was not explained. In addition, in the light of other available estimations, doubt could be cast on the calculation of the various fees involved in the bankruptcy procedure, to be subtracted from the yield realised by the sale of the assets.
- 26 On the basis of the documents available to it, the Commission concluded that 'the sale of the assets in a bankruptcy procedure would, in all probability, have led to a higher yield' than that of the arrangement and that, having regard to the preferential status of the local Tax Office, 'almost the entire yield obtained in the bankruptcy would accrue' to it. The Commission reached the same conclusion with regard to the yield of a tax execution procedure.
- 27 Subsequently, the Commission pointed out that the Directorate-General for Taxation of the Slovak Republic was opposed to the proposed arrangement and excluded the relevance, for the purposes of the application of the private creditor test, of any long-term interests of the State, such as the continuity of the tax revenue for the State originating from the activities of Frucona Košice.
- 28 The Commission concluded that the test of a private creditor in a market economy had not been met and that the measure under examination therefore constituted State aid equivalent to the amount of the debt written off by the local Tax Office. Lastly, it found that that aid was incompatible with the common market.

Procedure before the General Court and the judgment under appeal

- 29 By application lodged at the Registry of the Court of the First Instance (now the General Court) on 12 January 2007, Frucona Košice sought annulment of the contested decision.
- 30 By document lodged at the Registry of the Court of First Instance on 8 June 2007, the company St. Nicolaus – trade a.s. ('St. Nicolaus – trade') sought leave to intervene in the proceedings in support of the Commission. That application was granted by order of the President of the Second Chamber of the Court of First Instance of 11 October 2007.
- 31 In support of its action, Frucona Košice raised 10 pleas, the fourth of which alleged an error of law and of fact on the part of the Commission, which had found, for the purposes of the designation of the measure at issue as State aid, that the bankruptcy procedure was more favourable than the arrangement procedure and that the test of the diligent private creditor had therefore not been satisfied.

- 32 By that plea, Frucona Košice submitted, essentially, that the Commission had failed to take into account, having regard to, inter alia, the evidence which it had produced, the duration of the bankruptcy procedure and its impact on the choice which had to be made by a private creditor in the situation of the tax authorities.
- 33 The General Court, first, held that, since the application of the private creditor test involved complex economic appraisals, the review of the lawfulness of the contested decision had to be restricted to ascertaining whether the Commission had committed a manifest error of assessment.
- 34 Next, it held that, in the present case, it was necessary to take account, for the purposes of that review, of the Slovak tax authorities' status as a preferential creditor, of the Commission's particularly cautious assessment of the proceeds from the sale of Frucona Košice's assets in a bankruptcy procedure, and of the fact that, unlike the arrangement procedure, the bankruptcy procedure did not provide for remission of the debt.
- 35 In the light of those considerations, the General Court held, in paragraphs 123 to 129 of the judgment under appeal, as follows:
- '123 First, as regards [Frucona Košice's] argument that the Commission did not take the duration of a bankruptcy procedure in Slovakia and third party reports in this regard into consideration, the Court would point out first of all that, contrary to [Frucona Košice's] submission, the Commission not only stated, in recital 54 of the contested decision, that, according to the Slovak Republic, the duration of a bankruptcy procedure would have been lower than average in the light of the specific circumstances of the case, but also mentions, in recital 40 of the contested decision, that, according to [Frucona Košice], the bankruptcy procedure lasts on average 3 to 7 years in Slovakia. The Commission stated that [Frucona Košice] based its position on material, statistics and an example of a Slovak company allegedly in a similar situation to its own. It cannot therefore be alleged that the Commission ignored that question and [Frucona Košice's] position in this respect.
- 124 In addition, as regards the evidence available to the Commission, the Court would point out that the data, which were themselves provided by [Frucona Košice], do not satisfy the requirements of reliability and consistency. The assessments of the duration of a bankruptcy procedure in Slovakia that [Frucona Košice] submitted to the Commission were general and did not take account of the characteristics of this case. Similarly, some of those assessments were of an approximate nature and, to a certain extent, were inconsistent with one another. [Frucona Košice] relies on four reports, referred to in paragraph 96 above, in which that duration was assessed variously at 4 years and 8 months, at a period of between 3 years and 7 years, or at more than 6 years.
- 125 The other reports to which [Frucona Košice] refers are the Commission reports of 2002 and 2003 on the Slovak Republic's progress towards accession to the European Union. [Frucona Košice] submits that in those reports the Commission referred to the concerns and improvements necessary as regards bankruptcy and insolvency procedures in Slovakia. However, it must be pointed out that those Commission reports relate to the bankruptcy procedure in Slovakia in general and do not take account of the characteristics of this case.
- 126 Moreover, the Court observes that [Frucona Košice] failed to refer to the results of the K report in relation to the possible duration of a bankruptcy procedure concerning it. In [the K report], which [Frucona Košice] itself submitted in this case, that duration was assessed at "ca. 2 years (depending on conditions and trustee's work)". The Court would point out that not only was that assessment of the duration of such a bankruptcy procedure clearly much more optimistic than the other assessments submitted by [Frucona Košice] but it also referred specifically to [that company].

127 In addition, as the Commission maintains, where, as is the case here, the number of the debtor's creditors is small and there are assets with a positive liquidation value, the bankruptcy procedure can be carried out in a shorter than average period. That is especially true in the present case since it is undisputed between the parties that the Slovak tax authorities' claim over [Frucona Košice] represented approximately 99% of [the latter's] liabilities and that those authorities had the status of a preferential creditor. It follows that the Slovak tax authorities would have had a decisive influence on the duration of the bankruptcy procedure. It is true that [Frucona Košice] asserts that the characteristics, the geographical location and the outdated nature of most of its assets would have made it difficult to find a buyer and, therefore, slowed down the course of the bankruptcy procedure. However, as the Commission stated in recital 88 of the contested decision, several factors, and in particular the fact that some of [Frucona Košice's] production assets found a user after the withdrawal of its licence for the production and processing of alcohol and spirits, tend to show that that assertion ... is unfounded.

...

129 It follows from the foregoing that the Commission did not commit a manifest error in its assessment of the duration of the bankruptcy procedure.'

36 Subsequently, the General Court also rejected the other pleas raised by Frucona Košice, consequently dismissing the action brought by that company and ordering it to pay the costs.

Forms of order sought

37 Frucona Košice claims that the Court should:

- set aside the judgment under appeal, in so far as it rejected the fourth and sixth pleas in law;
- uphold those pleas as well founded;
- refer the case back to the General Court so that it may rule upon the fifth, sixth, seventh, eighth and ninth pleas in law, so far as they concern the tax execution procedure; and
- order the Commission to pay the costs.

38 The Commission contends that the Court should:

- dismiss the appeal, and
- order Frucona Košice to pay the costs.

39 St. Nicolaus – trade contends that the Court should dismiss the appeal, confirm the judgment under appeal and order Frucona Košice to pay the costs.

The appeal

40 In support of its appeal, Frucona Košice puts forward two grounds. The first ground of appeal alleges that the General Court erred in law in the application of the private creditor test. This ground can be divided, essentially, into two parts relating (i) to the duration of a bankruptcy procedure and (ii) to the relevance of experts' opinions for the purposes of the assessment of the liquidation factors.

- 41 By its second ground of appeal, Frucona Košice alleges that the General Court substituted its own reasoning for that in the contested decision and distorted the evidence. This ground can be divided, essentially, into four parts relating (i) to the costs of a bankruptcy procedure, (ii) to the duration of such a procedure, (iii) to the caution in the Commission's assessment, and (iv) to the relevance of an outstanding claim following that bankruptcy procedure.
- 42 It is appropriate to examine, in the first place and together, the first part of the first ground of appeal and the second part of the second ground of appeal, relating to the duration of a bankruptcy procedure.

Arguments of the parties

- 43 By the first part of the first ground of appeal, Frucona Košice submits that the General Court erred in law in the application of the private creditor test.
- 44 Frucona Košice takes the view that, in its assessment, the General Court did not examine the situation in the same way as a private creditor would have done, having regard to the information which would have been available to such a creditor at the time when the arrangement was concluded. The General Court confirmed an assessment made *a posteriori* by the Commission which takes no account of certain risks and waiting periods which would have influenced the decision of a private creditor during the examination of the respective advantages of bankruptcy and arrangement procedures.
- 45 Specifically, according to Frucona Košice, the General Court confined itself to examining whether the analysis carried out by the Commission contained errors, and not whether that analysis had been carried out with consideration for the point of view of a prudent private creditor.
- 46 Frucona Košice is of the opinion that that test involves examining whether, taking account of the information which reasonably was available at the time when the arrangement was concluded, the measure at issue was manifestly more generous than the solution chosen by a private creditor in a similar situation.
- 47 Thus, the General Court ought, first, to have determined whether the information on the duration of a bankruptcy could have influenced the decision-making process of a hypothetical private creditor. Next, it was for the General Court to ascertain whether the Commission had taken that information into account. Lastly, the General Court ought to have examined whether it had given proper weight to that information.
- 48 Frucona Košice considers that, for the purposes of choosing between the different means of recovering a debt, a prudent private creditor would have taken account of the various items of information available in the present case concerning the length of a bankruptcy procedure and the uncertainties connected with that procedure. Consequently, the various reports and documents relating to the bankruptcy procedure in respect of the company Liehofruct, which had previously taken place within the same commercial sector, contained, according to Frucona Košice, legally relevant information which the Commission was required to take into account. It had failed to do this, thereby committing an error of law which the General Court had failed to censure.
- 49 Frucona Košice states that, in so far as the General Court took the view that the evaluation of the reports compiled by the Commission concerned a question of fact, namely the duration of the bankruptcy procedures, in respect of which the Commission has a margin of discretion, it committed an error of law, the question raised having been that of the impact which that information would have on the assessment which would have been carried out by a prudent private creditor.

- 50 By the second part of the second ground of appeal, Frucona Košice submits that, in respect of the duration of a bankruptcy procedure, the General Court, *inter alia*, justified, on the basis of its own reasoning, the Commission's failure to examine those elements.
- 51 In paragraph 123 of the judgment under appeal, it claims, the General Court failed to have regard to the content of the contested decision, since the recitals to which the General Court refers in that paragraph do not purport to express the Commission's position as regards the duration of the various procedures but record the positions of Frucona Košice and of the Slovak Republic.
- 52 In holding, in paragraph 124 of the judgment under appeal, that the data provided by Frucona Košice did not satisfy the requirements of reliability and consistency, the General Court, in order to reject those arguments, unlawfully supplemented the reasoning set out in the contested decision with new grounds. Furthermore, the General Court's assertion that the Commission had before it several estimates of the likely length of a bankruptcy procedure in Slovakia provides no answer to the arguments set out by Frucona Košice.
- 53 In rejecting, in paragraph 125 of the judgment under appeal, the relevance of the Commission reports of 2002 and 2003 on the Slovak Republic's progress towards accession to the European Union on the ground that they did not take account of the characteristics of the case, the General Court also put forward an argument on which the Commission had not relied as a basis for the contested decision. Moreover, that reasoning is not valid because, when it applies the private creditor test, the Commission often relies partly on general information relating to the economic conditions in the Member State concerned.
- 54 In observing, in paragraph 126 of the judgment under appeal, that one of the reports submitted by Frucona Košice estimated the duration of a bankruptcy procedure at approximately two years, the General Court again sought to provide a reason of its own to explain the failure to take into account the duration of a bankruptcy. In addition, a duration of two years is still well in excess of the four-month period required in order to obtain funds under an arrangement procedure.
- 55 Likewise, it was solely on the basis of its own reasons that the General Court held, in paragraph 127 of the judgment under appeal, that if, in the present case, a bankruptcy procedure had taken place, its duration would have been shorter than the average duration of such a procedure.
- 56 So far as concerns the first part of the first ground of appeal, the Commission takes the view that, in respect of the application of the private creditor test, it is necessary to establish whether the payment facilities granted by a Member State would also have been granted by a private creditor or whether it is clear that such a creditor would not have offered comparable facilities. That interpretation is corroborated by the Commission's discretion when it makes complex economic assessments, such as those which are involved in the application of the private creditor test.
- 57 In the Commission's opinion, the General Court applied the correct legal test, which consists in establishing whether the public authority has acted in the same way as a private creditor placed in the same situation would have done, in the light of the circumstances, and correctly held that its power of review was limited to revealing manifest errors committed by the Commission in the assessment of the facts.
- 58 Lastly, the Commission contends that Frucona Košice's arguments relating to the failure to refer to the private creditor test and to the scope of the review by the General Court of the Commission's assessments concern the manner in which the Commission and the General Court assessed the evidence and thus do not affect the General Court's reasoning relating to the applicable legal test.

- 59 In respect of the second part of the second ground of appeal, the Commission observes, as a preliminary point, that the assessment of the facts in the light of the private creditor test must be based on an evaluation of all of the relevant factors, whereas Frucona Košice has challenged only the assessment of some of those many factors.
- 60 So far as concerns the duration of the bankruptcy procedure, the Commission observes that, in paragraph 123 of the judgment under appeal, the General Court held, in fact, that the Commission had not, in the contested decision, ignored that issue, but had nevertheless held that, having regard to the information in recitals 17, 40 and 54 of the contested decision, it was unnecessary to regard the duration of the bankruptcy procedure as being a factor militating against the conclusion of such a procedure.
- 61 In paragraph 124 of that judgment, the General Court did no more than confirm the evidence which the Commission had before it. The reference made by the General Court, in paragraphs 125 and 126 of the judgment under appeal, to reports which are not mentioned in the contested decision is merely an *obiter dictum*.
- 62 In paragraph 127 of the judgment under appeal, also, the General Court merely examined the evidence which was before the Commission in order to ascertain whether the latter had made a manifest error of assessment. The Commission submits, in this regard, that it is not obliged to respond specifically to every argument put forward by the beneficiary of alleged aid and that it did not develop at length considerations relating to the duration of the bankruptcy procedure since, taking account, in particular, of the local Tax Office's status as a preferential creditor, the issue would not have been such as to worry a hypothetical private creditor.
- 63 Consequently, Frucona Košice's arguments raised in the context of the first part of the first ground of appeal, seeking to establish that the General Court substituted its own reasoning for that of the Commission, are unfounded.
- 64 St. Nicolaus – trade submits that, for the purposes of applying the private creditor test, the relevant question is whether a private investor would have carried out the transaction at issue on the same terms and, if not, to examine what those terms would have been.
- 65 It observes that, for the local Tax Office, the immediate payment by Frucona Košice of its debt would not have been a necessity at the time when it accepted the arrangement proposal. A private creditor in a situation similar to that of the local Tax Office would therefore not have been inclined to relinquish the possibility of having that payment satisfied to a greater extent than that offered under the arrangement.
- 66 In respect of the duration of the bankruptcy procedure, St. Nicolaus – trade contends that it is apparent from paragraph 123 of the judgment under appeal that the Commission examined that issue. That institution, it submits, has a wide discretion in that regard and, in the present case, it assessed the situation of fact before it principally in the light of the complexity of a bankruptcy procedure, of the number of creditors and of the fact that the tax authorities were not only the majority creditor but also the preferential creditor of Frucona Košice. On that basis, the Commission and the General Court were fully justified in concluding that the bankruptcy procedure would most probably have been completed in a shorter period than the period normally necessary for the conclusion of such a procedure.

Findings of the Court

- 67 Frucona Košice alleges, essentially, that the General Court merely reviewed whether the analysis carried out by the Commission included manifest errors of assessment and that it failed to ascertain whether that analysis had been made from the point of view of a private creditor. In particular, it contends, the General Court failed to review whether the available information relating to the duration of a bankruptcy might have influenced the decision-making process of a private creditor and whether the Commission had taken that information into account. Instead of carrying out that review, Frucona Košice argues, the General Court justified the failure to examine those factors in the contested decision on the basis of its own reasons.
- 68 Under Article 107(1) TFEU, save as otherwise provided in the Treaties, 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 is, in so far as it affects trade between Member States, incompatible with the internal market.
- 69 The concept of aid embraces not only positive benefits, such as subsidies, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect (Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 34, and Case C-6/97 *Italy v Commission* [1999] ECR I-2981, paragraph 15).
- 70 However, 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 (see, to that effect, judgment of 5 June 2012 in Case C-124/10 P *Commission v EDF*, paragraph 78 and the case-law cited).
- 71 That assessment is made when a public creditor grants payment facilities in respect of a debt payable to it by an undertaking, by applying, in principle, the private creditor test. That test, where applicable, is among the factors which the Commission is required to take into account for the purposes of establishing whether such aid exists (see, to that effect, Case C-342/96 *Spain v Commission* [1999] ECR I-2459, paragraph 46; Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 24; and *Commission v EDF*, paragraphs 78 and 103).
- 72 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 (see, to that effect, *Spain v Commission*, paragraph 46; *DM Transport*, paragraph 30, and *Commission v EDF*, paragraph 79).
- 73 It is therefore for the Commission to carry out an overall assessment, taking into account all relevant evidence in the case enabling it to determine whether the recipient company would manifestly not have obtained comparable facilities from such a private creditor (see, to that effect, *Commission v EDF*, paragraph 86).
- 74 It is common ground that the Commission is required to make a complex economic assessment when it examines whether particular measures can be described as State aid because the public authorities did not act in the same way as a private creditor (see Case C-525/04 P *Spain v Lenzing* [2007] ECR I-9947, paragraph 59).

- 75 In this connection, it must be observed that, in the context of the review conducted by the European Union Courts on complex economic assessments made by the Commission in the field of State aid, it is not for those Courts to substitute their own economic assessment for that of the Commission (see, to that effect, Case C-290/07 P *Commission v Scott* [2010] ECR I-7763, paragraphs 64 and 66 and the case-law cited).
- 76 However, the European Union Courts must, inter alia, establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, paragraph 39, and *Commission v Scott*, paragraph 65).
- 77 It follows from the foregoing that, having regard to the arguments put forward by Frucona Košice at first instance, the General Court had to establish, inter alia, whether the available information relating to the duration of a bankruptcy was relevant in the present case for the purposes of an assessment from the point of view of the private creditor test and, if so, whether the Commission took account of it.
- 78 In that regard, all information liable to have a significant influence on the decision-making process of a normally prudent and diligent 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 experiencing difficulty in making the payments, must be regarded as being relevant.
- 79 In the present case, it is common ground that, for the purposes of recovering the sums owed to it, a normally prudent and diligent private creditor in a situation as close as possible to that of the local Tax Office would have had to make the choice, inter alia, between the proposed arrangement and the bankruptcy of Frucona Košice.
- 80 It follows that, in order to identify the more advantageous alternative, such a creditor would have had to weigh up the advantages and disadvantages of each of those procedures.
- 81 As Frucona Košice correctly argues, however, since the duration of the abovementioned procedures postponed the recovery of the sums due and might thus have affected, in the case of lengthy procedures, inter alia, their value, this is clearly a factor which is liable to have a significant influence on the decision-making process of a normally prudent and diligent private creditor in a situation as close as possible to that of the local Tax Office.
- 82 Consequently, the onus was on the General Court to establish whether the Commission had taken into account, in its assessment of the private creditor test, the available information relating to, inter alia, the duration of a bankruptcy procedure.
- 83 In this connection, it is apparent from paragraph 123 of the judgment under appeal, cited in paragraph 35 above, that the General Court found that the Commission had indicated, in recital 54 of the contested decision, the position of the Slovak Republic as regards the duration of such a procedure, and that it referred, in recital 40 of that decision, to that of Frucona Košice. From this it concluded that the Commission had not ‘ignored that question’.
- 84 However, first, the recitals to which the General Court referred are included, as Frucona Košice has correctly pointed out, in Titles IV and V of the contested decision, which summarise the observations of the interested parties and of the Slovak Republic, and not in Title VI, which contains the Commission’s assessment.

- 85 Next, as has been observed in paragraph 82 of this judgment, the onus was on the General Court to establish, not whether the Commission had or had not ignored the available information relating to the duration of a bankruptcy procedure, but whether it had taken that information into account in its assessment of the private creditor test.
- 86 It follows that the General Court ought to have established whether the Commission had devoted part of its reasoning reproduced under Title VI of the contested decision, and in particular under Section 2.1 thereof, relating to the comparison of the arrangement and the bankruptcy, to the duration of a bankruptcy procedure. It is, however, not apparent from the judgment under appeal that any such examination was carried out.
- 87 Lastly, in so far as the General Court examined, in paragraphs 125 to 127 of the judgment under appeal, also cited in paragraph 35 above, various factors relating to the reliability and the consistency of the information produced by Frucona Košice during the administrative procedure and in so far as it held that, in the particular circumstances of the case, the Commission was able to find that the duration of a bankruptcy procedure was not liable to influence the decision-making process of a private creditor, it must be observed that the General Court's examination is not connected with any assessment featuring in the contested decision.
- 88 It follows that, in order to reject the pleas which it was examining, the General Court relied on an assessment of the duration of a bankruptcy procedure that serves to fill a gap in the reasoning for the contested decision by means of grounds which did not form part of that decision. By acting in this way, however, the General Court exceeded the limits of its power of review.
- 89 In reviewing the legality of acts under Article 263 TFEU, the Court of Justice and the General Court have jurisdiction in actions brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty on the Functioning of the European Union or of any rule of law relating to its application, or of misuse of powers. Article 264 TFEU provides that, if the action is well founded, the act concerned must be declared void. The Court of Justice and the General Court cannot, therefore, under any circumstances substitute their own reasoning for that of the author of the contested act (see Case C-164/98 P *DIR International Film and Others v Commission* [2000] ECR I-447, paragraph 38, and Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10515, paragraph 141).
- 90 It follows from the foregoing that, in having failed to establish whether the Commission had taken into account, in its assessment of the private creditor test, the duration of a bankruptcy procedure, and in having filled, in that regard, by means of its own reasoning, a gap in the reasoning in the contested decision, the General Court erred in law.
- 91 The first part of the first ground of appeal and the second part of the second ground of appeal must therefore be declared to be well founded and the judgment under appeal must consequently be set aside.

The proceedings at first instance

- 92 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits.
- 93 In the present case, the Court has the necessary information to give final judgment on the first part of the fourth plea submitted at first instance, relating to the duration of a bankruptcy procedure.

Arguments of the parties

- 94 By the first part of the fourth plea in law submitted at first instance, Frucona Košice submits, essentially, that the Commission failed to take into account the duration of the bankruptcy procedure and the evidence relating to this which it produced during the administrative procedure. A private creditor, however, it argues, would have taken that duration into account and would therefore have preferred to accept the proposed arrangement, given that the bankruptcy procedure would take much longer than that of the arrangement, would thus involve a loss in respect of credit interest as against the proceeds of the arrangement and would thus not ensure the recovery of a sum greater than that offered under the proposed arrangement.
- 95 The Commission contends in reply that, in recitals 40 and 54 of the contested decision, it took account of the duration of a bankruptcy procedure and that, in the circumstances in the present case, it was not necessary to establish precisely the foreseeable duration of such a procedure.
- 96 First of all, even if that bankruptcy procedure would have lasted a long time, which the Commission disputes, having regard to, *inter alia*, the opinion of the Slovak authorities and the small number of creditors, it follows from the findings made in the contested decision that the arrangement would in any event have been less advantageous for the Slovak State than the bankruptcy procedure.
- 97 Next, as the local Tax Office enjoyed the status of preferential creditor, since its debt was guaranteed by Frucona Košice's immovable assets, evaluated by the latter at SKK 194 million and by that office at SKK 397 million, its claims could have been satisfied at any time during the bankruptcy procedure by the sale of the assets constituting the guarantee, in accordance with Law No 328/1991 on bankruptcy and arrangement with creditors. Consequently, as regards those assets, the duration of the bankruptcy procedure would have been irrelevant.
- 98 Lastly, Frucona Košice's calculation is based on a final amount to be received which is significantly less than the real value of the undertaking's assets, minus the costs of the bankruptcy procedure. Since the local Tax Office's claim represented more than 99% of the registered debt, that office could have expected to receive at least SKK 435 million under that procedure. Even taking into consideration the rate of creditor interest put forward by Frucona Košice, if it had been able to recover such a sum, a private creditor would have been prepared to wait for the end of a bankruptcy procedure, even if that procedure were to last for the longest estimated period.
- 99 St. Nicolaus – trade supports the Commission's arguments.

Findings of the Court

- 100 It follows, *inter alia*, from paragraphs 78 to 81 above that, in a situation such as that of the present case, the duration of the bankruptcy procedure is a factor which is liable to have a significant influence on the decision-making process of a normally prudent and diligent private creditor in a situation as close as possible to that of the local Tax Office and that, therefore, the Commission was required to take into account, in its assessment of the private creditor test, the available information relating to, *inter alia*, the duration of such a procedure.
- 101 It must, however, be stated that Title VI of the contested decision, which contains the Commission's assessment and, in particular, Section 2.1 thereof, relating to the comparison of the arrangement and of the bankruptcy, do not contain any reference to the duration of such a procedure.
- 102 In so far as the Commission submits that, in the specific circumstances of the present case, it was entitled to find that the duration of a bankruptcy procedure was not liable to influence the decision-making process of a private creditor, it must be noted that, having regard to the arguments

and to the evidence produced by Frucona Košice during the administrative procedure and to the matters pointed out in paragraphs 78 to 81 above, the Commission was required to set out in the contested decision, at least in summary form, the considerations which led it to that conclusion.

- 103 It follows from the foregoing that, having failed to take account, in its assessment of the private creditor test, of the duration of the bankruptcy procedure, the Commission committed a manifest error of assessment. In so far as that factor was taken into consideration by the Commission, the latter did not set out sufficient reasons for its decision.
- 104 Consequently, the first part of the fourth plea in law submitted at first instance must be declared to be well founded.
- 105 Nevertheless, as the Commission found, in recitals 93 to 99 of the contested decision, that the tax execution procedure was more advantageous for a private creditor in a situation as close as possible to that of the local Tax Office than was the proposed arrangement, the finding in the preceding paragraph cannot, in itself, lead to the annulment of that decision.
- 106 As the General Court noted in paragraph 92 of the judgment under appeal, it is, by reason of that finding, necessary to examine the other pleas in law raised by Frucona Košice on which it did not rule, including, in particular, those concerning the assessment of the private creditor test so far as that tax execution procedure is concerned.
- 107 It must, however, be held that, so far as that examination is concerned, the dispute is not in such a state as to enable final judgment to be given. Consequently, the case must be referred back to the General Court for it to give judgment on the pleas raised before it on which it did not rule.

Costs

- 108 Since the case is being referred back to the General Court, it is appropriate to reserve the costs.

On those grounds, the Court (Second Chamber) hereby:

- 1. Sets aside the judgment of the General Court of the European Union of 7 December 2010 in Case T-11/07 *Frucona Košice v Commission*;**
- 2. Refers the case back to the General Court of the European Union for it to give judgment on the pleas raised before it on which it did not rule;**
- 3. Reserves the costs.**

[Signatures]