



Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 3 May 2017¹

Case C-300/16 P

European Commission
v

Frucona Košice a.s.

(Appeal — State aid — Private operator test — Criteria pertaining to the applicability and application of that test — Overall assessment — Burden of proof — Assessment of evidence)

1. By its appeal, the European Commission asks the Court to set aside the judgment of the General Court in Case T-103/14.² In that judgment, the General Court annulled Commission Decision 2014/342/EU of 16 October 2013 on State aid No SA.18211 (C 25/2005) (ex NN 21/2005) granted by the Slovak Republic for Frucona Košice a.s.³

2. This appeal concerns the following question: when and how is the Commission to apply the so-called ‘private operator test’?⁴ More specifically, this case turns on the extent of the Commission’s obligations in applying that test and in assessing the behaviour of a public authority that has the status of creditor vis-à-vis the beneficiary of the alleged aid.

I. Background to the proceedings

3. Regarding the background to the present proceedings, the following can be inferred from the judgment under appeal.

4. The respondent, Frucona Košice a.s. (‘Frucona’), is a company incorporated under Slovak law which was active, amongst other things, in the production of alcoholic beverages.

5. Between November 2002 and November 2003, Frucona benefited from several deferrals of payment of tax debts. Those tax debts consisted in unpaid excise duties. The Košice IV tax office (‘the local tax office’) had granted the deferrals after Frucona had provided it with financial guarantees.

6. On 25 February 2004, owing to financial difficulties, Frucona was unable to pay the excise duties for which it was liable in respect of January 2004. Following a change in the law from 1 January 2004, Frucona could no longer obtain a deferral regarding the payment of those excise duties.

¹ Original language: English.

² Judgment of 16 March 2016 in *Frucona Košice v Commission*, T-103/14, EU:T:2016:152 (‘the judgment under appeal’).

³ OJ 2014 L 176, p. 38 (‘the decision at issue’).

⁴ Depending on the circumstances, that test is also referred to as, inter alia, the private investor, the private creditor or the private vendor test.

7. As a consequence, Frucona found itself in a position of indebtedness within the meaning of the Zákon č. 328/1991 Zb. o konkurze a vyrovnaní (Slovak Law No 328/1991 on bankruptcy and arrangements with creditors).

8. On 8 March 2004, Frucona filed an application for the initiation of an arrangement procedure before the Krajský súd v Košiciach (Regional Court, Košice, Slovakia). In that application, Frucona proposed to pay each of its creditors 35% of the amount that it owed them. The total debt amounted to approximately 644.6 million Slovak koruny (SKK). The tax debts constituted the large majority of that amount, approximately SKK 640.8 million.

9. By decision of 29 April 2004, the Krajský súd v Košiciach (Regional Court, Košice) authorised the arrangement procedure.

10. On 9 July 2004, Frucona's creditors, including the local tax office, accepted the proposed arrangement at an arrangement hearing. During the arrangement procedure, the local tax office acted as a separate creditor. It enjoyed that status on account of the guarantees provided to it by Frucona in return for the abovementioned deferrals of payment of the excise duties.

11. Prior to 9 July 2004, Frucona had submitted to the local tax office an audit report drafted by an independent auditing company ('the E report'). That report was designed to enable the local tax office to assess the advantages of, on the one hand, the arrangement, and, on the other, bankruptcy.

12. On 21 June 2004, the Slovak tax authorities carried out an on-the-spot inspection at Frucona's premises. During that inspection, Frucona's financial situation on 17 June 2004 was determined.

13. By decision of 14 July 2004, the Krajský súd v Košiciach (Regional Court, Košice) confirmed the arrangement. Under the arrangement, 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.

14. By letter of 20 October 2004, the local tax office indicated to Frucona that the arrangement conditions, whereby a part of the tax debt did not have to be repaid, constituted indirect State aid, which was subject to the approval of the European Commission.

15. On 17 December 2004, Frucona paid to the local tax office a sum of SKK 224.3 million, corresponding to 35% of its total tax debt. By decision of 30 December 2004, the Krajský súd v Košiciach (Regional Court, Košice) declared the arrangement procedure to be terminated. On 18 August 2006, that court reduced the amount to be paid to the local tax office to SKK 224.1 million.

A. Administrative procedure

16. On 15 October 2004, a complaint was lodged with the Commission concerning alleged unlawful State aid granted to Frucona.

17. By letter of 4 January 2005, the Slovak Republic informed the Commission, following a request for information, that Frucona may have been granted unlawful aid and asked it to approve that aid as rescue aid to a company in difficulties.

18. The Commission, after receiving additional information, notified the Slovak Republic, by letter of 5 July 2005, of its decision to initiate the formal investigation procedure within the meaning of what is now Article 107(2) TFEU with regard to the measure in question.⁵

⁵ State aid No C 25/2005 (ex NN 21/2005) — Measure in favour of Frucona Košice (OJ 2005 C 233, p. 47).

19. By letter of 10 October 2005, the Slovak Republic submitted its observations on the measure in question to the Commission. Likewise, by letter of 24 October 2005, Frucona sent its comments on the measure in question to the Commission. Those comments were forwarded to the Slovak Republic to allow it to respond, which it did by letter of 16 December 2005.

B. Initial decision

20. On 7 June 2006, the Commission adopted Decision 2007/254/EC on State aid C 25/2005 (ex NN 21/2005) implemented by the Slovak Republic for Frucona Košice a.s.⁶ According to that decision, the State aid which the Slovak Republic had granted to the applicant (SKK 416 515 990), was incompatible with the common market and was to be recovered.

C. Proceedings before the General Court and the Court of Justice

21. On 12 January 2007, Frucona brought an action before the General Court seeking annulment of the initial decision.

22. By judgment of 7 December 2010 in *Frucona Košice v Commission*,⁷ the General Court dismissed that action as unfounded.

23. By judgment of 24 January 2013 in *Frucona Košice v Commission*⁸ the Court of Justice set aside the General Court's judgment on appeal. The Court of Justice held that, by failing to take into account, in the assessment of the private operator test, the duration of the bankruptcy procedure, the Commission had made a manifest error of assessment or, in so far as it had taken that factor into consideration, had failed to state to the requisite legal standard the reasons for the initial decision. The Court of Justice referred the case back to the General Court for it to give judgment on the pleas on which that court had not ruled.

24. Following the judgment in *Frucona I*, and in order to remedy the shortcomings identified by the Court, the Commission adopted the decision at issue on 16 October 2013. By that decision, the initial decision was repealed.

25. Consequently, by reasoned order of 21 March 2014 in *Frucona Košice v Commission*,⁹ the General Court ruled that there was no longer any need to rule on the action for annulment of the initial decision.

D. Decision at issue

26. The decision at issue was taken to remedy the errors vitiating the initial decision identified in *Frucona I* (recital 10 of the decision at issue).

27. The Commission took the view, in particular, that it was necessary to examine whether, by accepting the proposed arrangement and therefore a write-off of 65% of its claim, the local tax office had behaved towards Frucona like a private operator in a market economy. The Commission stated in that regard that the position of that office as Frucona's creditor was unusually strong. The local tax

⁶ OJ 2007 L 112, p. 14 ('the initial decision').

⁷ Judgment of 7 December 2010, *Frucona Košice v Commission*, T-11/07, EU:T:2010:498.

⁸ Judgment of 24 January 2013, *Frucona Košice v Commission*, C-73/11 P, EU:C:2013:32 ('*Frucona I*').

⁹ Order of 21 March 2014, *Frucona Košice v Commission*, T-11/07 RENV, EU:T:2014:173.

office was in a legally and economically more advantageous position than Frucona's private creditors. In fact, the local tax office held more than 99% of all claims registered and was a separate creditor whose claims could be satisfied at any time during the bankruptcy procedure from the proceeds arising from the sale of the secured assets (recital 80 of the decision at issue).

28. As regards the private operator test, the Commission noted, in particular, that the applicability of that test depended on the Member State concerned having conferred, other than in its capacity as public authority, an economic advantage on an undertaking. In addition, the Commission observed that if a Member State relied on that test during the administrative procedure, it must, in the event of doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented falls to be ascribed to the Member State acting as a private operator. In that regard the Commission referred to the judgment in *Commission v EDF*¹⁰ (recital 82 of the decision at issue).

29. It then observed that '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 ... have not been complied with in this case and the disputed measure constitutes State aid within the meaning of Article 107(1) TFEU' (recital 83 of the decision at issue).

30. It went on to observe that Frucona had contested the characterisation of the measure as State aid. It had also provided documents by auditors to support that view (recital 84 of the decision at issue).

31. The Commission then determined whether the Slovak Republic had behaved like a private creditor towards Frucona.

32. First, the Commission compared, with regard to the evidence submitted by Frucona, the arrangement procedure and the bankruptcy procedure (recitals 88 to 119 of the decision at issue). Second, it compared the arrangement procedure and the tax execution procedure (recitals 120 to 127 of the decision at issue). Third, it assessed the other evidence produced by the Slovak authorities and Frucona (recitals 128 to 138 of the decision at issue). In essence, the Commission considered that both the bankruptcy procedure and the tax execution procedure were, from the point of view of the local tax office, more advantageous alternatives as compared with the proposed arrangement (recitals 119, 124 and 127 of the decision at issue).

33. The Commission concluded that the conditions of the private operator test were not fulfilled and that the Slovak Republic had conferred on Frucona an advantage that it would not have been able to obtain from the market (recital 139 of the decision at issue). The Commission concluded that the write-off of debt agreed to by the local tax office under the arrangement constituted State aid within the meaning of Article 107(1) TFEU (recital 140 of the decision at issue). The Commission also concluded that the aid was incompatible with the internal market (recital 182 of the decision at issue).

34. In Article 1 of its operative part, the decision at issue states that the initial decision is repealed. In Article 2, it states that the State aid which the Slovak Republic implemented in favour of Frucona, totalling SKK 416 515 990, is incompatible with the internal market. In Article 3, the Commission orders the Slovak Republic to recover the aid together with default interest. In Article 4, the Slovak Republic is required to inform the Commission, within two months of notification of that decision, of the measures taken to comply with it. Article 5 specifies that the decision is addressed to the Slovak Republic.

¹⁰ Judgment of 5 June 2012, *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraphs 81 to 85.

II. Procedure before the General Court

35. By application lodged on 17 February 2014, Frucona requested the General Court to annul the decision at issue.

36. In the judgment under appeal, the General Court annulled the decision at issue and ordered the Commission to pay the costs.

III. Procedure before the Court and forms of order sought

37. By its appeal, lodged with the Court on 26 May 2016, the Commission claims that the Court should:

- set aside the judgment under appeal;
- dismiss the action for annulment and order Frucona Košice to pay the costs;
- in the alternative, refer the case back to the General Court and reserve the costs.

38. Frucona claims that the Court should dismiss the appeal and order the Commission to pay the costs.

39. The parties presented oral argument at the hearing held on 15 February 2017.

IV. Analysis

40. The Commission relies on six grounds in support of its appeal. The first four grounds concern the General Court's finding that the private operator test was applicable. The remaining two grounds of appeal concern the application of the private operator test.

41. More specifically, the grounds that concern the applicability of the private operator test deal with the following issues. The first ground of appeal alleges that the General Court misinterpreted the decision at issue. It claims that the General Court was wrong in reading the decision as concluding that the private operator test was applicable in relation to the measure in question. The second ground alleges that the judgment under appeal is vitiated by an error in law because the General Court found that that test can be relied on by the beneficiary of the measure in question. The third ground alleges a breach of the principles of *res judicata* and *ne ultra petita*. The Commission argues that the General Court breached those principles in considering that, because the Court of Justice had applied the private operator test in *Frucona I*, it had also, implicitly but necessarily, considered the private operator test to be applicable. Lastly, the fourth ground alleges that the General Court erred in law in considering that the Commission could not make a distinction, regarding the applicability of the private operator test, between the different alternatives to the contested measure.

42. As concerns the two remaining grounds, they turn on the way the private operator test was applied. The fifth ground alleges that the judgment under appeal is vitiated by an error in law because the General Court devised a new requirement that the Commission must fulfil in applying the private operator test. The Commission argues that the judgment under appeal requires, contrary to well-established case-law, that that institution reconstruct *ex officio* the behaviour of the ideal, rational and fully informed hypothetical private operator. By the sixth ground, the Commission claims that the General Court erred also in so far as the judgment under appeal can be understood as concluding that the Commission breached its obligation to conduct a diligent and impartial investigation.

43. I shall begin by examining the second and fourth grounds of appeal. That is because those grounds have a bearing on the subsequent analysis of the first and third grounds of appeal. However, before doing so, some introductory remarks are in order.

A. Introductory remarks

44. First of all, it is useful to call to mind the rationale of the private operator test (in this case: private creditor test) and the purpose it serves.

45. Under Article 107(1) TFEU, 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. Accordingly, the concept of aid employed in EU State aid law is a broad one. It encompasses any type of aid, be it direct or indirect: it includes all measures, irrespective of their form, that mitigate the charges which are normally included in the budget of an undertaking.¹¹

46. However, an important caveat applies here. Even if a measure emanates from State resources it does not fall under the purview of Article 107 TFEU if the beneficiary 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.¹² That principle applies with equal force irrespective of whether the State has acted as an investor, creditor or vendor. To determine whether the beneficiary could have obtained the same advantage under normal market conditions, the Commission uses the private operator test. The purpose of that test is to assess whether the State has granted an advantage to an undertaking by not acting like a private operator with regard to a given transaction.

47. Put simply, the private operator test is a tool that the Commission uses to determine whether there is an economic advantage, one of the necessary features of State aid.

48. That is undoubtedly why the Court has held that it is not an exception that applies only on the request of a Member State, where the constituent elements of State aid referred to in Article 107(1) TFEU have been found to exist.¹³ Where it is applicable, the private operator test is one of the factors which the Commission must take into account for the purposes of establishing whether such aid exists.¹⁴

49. The second brief preliminary point to make here concerns the burden and standard of proof in State aid law.

50. To determine whether a measure constitutes State aid within the meaning of Article 107(1) TFEU, the Commission must undertake a diligent and impartial examination. Such an investigation ensures that the Commission has at its disposal, when adopting the final decision, the most complete and reliable information possible for that purpose. Indeed, it should not be forgotten that it is for the Commission to prove that the contested measure constitutes State aid within the meaning of Article 107(1) TFEU.

51. The present appeal must be examined in the light of those principles.

¹¹ See, amongst many, judgments of 23 February 1961, *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority*, 30/59, EU:C:1961:2, p. 19, and of 15 March 1994, *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraphs 12 and 13. See, more recently, *Frucona I*, paragraphs 68 and 69 and the case-law cited.

¹² *Frucona I*, paragraph 70 and judgment of 5 June 2012, *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraph 78 and the case-law cited.

¹³ See judgments of 3 April 2014, *Commission v Netherlands and ING Groep*, C-224/12 P, EU:C:2014:213, paragraph 32, and of 5 June 2012, *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraph 103.

¹⁴ *Frucona I*, paragraph 71 and the case-law cited.

B. The second and fourth grounds of appeal

1. Arguments of the parties

52. By its second ground of appeal, the Commission claims that the General Court erred in law in holding that a recipient of aid may rely on the private operator test.¹⁵ In its view, the private operator test aims to reveal the ‘subjective state of mind’ of the Member State granting the alleged aid. Therefore, it cannot be invoked by anyone else. In this case, the Member State had clearly and consistently held the view that the measure constituted State aid.

53. Even if the General Court were correct in holding that the recipient of aid can rely on the private operator test, the Commission argues that the General Court erred in law by failing to require the recipient to establish unequivocally and on the basis of objective and verifiable evidence that the Member State acted like a private operator.

54. Frucona submits that the General Court was correct in its findings. The Court’s case-law makes clear that the private operator test may be relied on by the recipient of the aid.

55. As regards the Commission’s argument that the private operator test turns on the state of mind of the Member State concerned, Frucona submits that the case-law emphasises that the Member State should be acting in an economic capacity. Frucona argues that no doubts arise in this case regarding the capacity in which the local tax office acted.

56. Under the fourth ground, the Commission claims that the General Court erred in law in holding that the Commission cannot make a distinction, as regards the applicability of the private operator test, based on the different alternatives to the contested measure.¹⁶

57. The Commission contends that the applicability of the private operator test hinges on evidence being provided either by the Member State concerned or by the beneficiary so that it may be ascertained whether the public authority behaved in the same manner as a private operator faced with the same choice would have done. The Commission argues that the private operator test is not applicable where no evidence has been put forward to show that a particular course of action was considered by the public authority.

58. Frucona submits that the General Court’s analysis regarding the applicability of the private operator test is correct. Where the private operator test is applicable, the Commission cannot limit the assessment to one potential alternative to the measure in question and leave out another one.

2. Assessment

59. By its second and fourth grounds of appeal, the Commission claims that the General Court erred in law in considering that the private operator test may also be applicable where the Member State has not invoked it. According to the Commission, the private operator test is applicable only under strict conditions. In its submission, the test is applicable where (1) the Member State concerned has relied upon it, (2) the ‘subjective state of mind’ of the Member State reveals that it intended to act as a private operator, and (3) the Member State has actually envisaged a particular course of action when adopting the measure in question.

¹⁵ Paragraphs 109 to 118 of the judgment under appeal.

¹⁶ Paragraph 247 of the judgment under appeal.

60. To begin with, I must point out that the present appeal is inherently contradictory. The Commission claims, in essence, that it was not under an obligation to apply the private operator test because the Member State concerned did not rely on that test during the administrative procedure. During the administrative procedure, the Slovak Republic accepted that the measure constituted State aid. It requested that the measure be treated as rescue aid. At the same time, however, the Commission accepts that the decision at issue applies the private operator test to conclude that the write-off of tax debt constitutes State aid within the meaning of Article 107(1) TFEU. In other words, the starting point of the present appeal is that even though the decision at issue applies the private operator test, that test is not applicable.

61. A closer look at the appeal reveals, however, that the Commission is attempting to limit artificially its obligation to apply the private operator test and, in essence, to reverse the burden of proof.

62. As I shall explain below, the case-law does not lend support to the Commission's position.

(a) The private operator test is applicable when the Member State concerned acts in an economic capacity

63. At the outset, it is helpful to point out that the question as to whether the private operator test is applicable is determined on the basis of objective criteria pertaining to the capacity in which the State has acted. More specifically, the test is applicable where the Member State has acted, in conferring an economic advantage on an undertaking, in an economic capacity (that is, not in its capacity as a public authority).¹⁷

64. As concerns specifically a public *creditor*, the Court has already held in *Frucona I* that the private operator test is applied where 'a public creditor grants payment facilities in respect of a debt payable to it by an undertaking'.¹⁸ In such circumstances, the public authority's conduct must be compared with that of a private creditor who is seeking to obtain payment of sums owed to it by a debtor in financial difficulties.¹⁹ Put another way, the private operator test needs to be applied where the State's conduct could be adopted, at least in principle, by a private operator acting with a view to profit or to limit losses. Otherwise, the application of that test would make little, if any, sense.

65. In the present case, a public creditor (the local tax office) has granted 'payment facilities in respect of a debt payable to it by an undertaking'. On the face of it, therefore, one might think that the need to apply the private operator test is clear.

66. However, the Commission, drawing the inference from the Court's judgment in *Commission v EDF*, argues that the private operator test is not applicable in the present case.

67. That case is of no assistance to the Commission.

68. In *Commission v EDF*, doubts arose regarding the capacity in which the Member State concerned had acted. It was unclear whether the Member State had acted in an economic capacity (that of a shareholder in a public undertaking), or as a public authority. That was because of the form of the measure adopted. Although the Member State claimed to have acted like a shareholder, it employed fiscal means to grant a tax exemption to the undertaking in question. It was in that arguably singular context that the Court held that if the Member State has relied on the private operator test, it must also establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented falls to be ascribed to the State acting as a private operator rather than as a public

¹⁷ See, regarding a public investor, judgment of 5 June 2012, *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraph 81.

¹⁸ *Frucona I*, paragraph 71 and the case-law cited.

¹⁹ *Frucona I*, paragraph 72 and the case-law cited.

authority.²⁰ After giving some consideration to the evidence that may need to be put forward in that regard, the Court clarified that it is then for the Commission to carry out a global assessment, taking into account — in addition to the evidence provided by that Member State — all other relevant evidence enabling it to determine whether the Member State took the measure in question in its capacity as a shareholder or as a public authority. The Court accepted that, for the purposes of that (preliminary) assessment, the objective pursued by the measure could constitute a relevant circumstance.²¹

69. There are three points to be made here.

70. First, in *Commission v EDF*, the Court simply stated that where doubts exist as to the capacity in which the Member State has acted *and* where the Member State concerned has relied on that test, that State must provide evidence to support its position. However, it cannot be inferred from that statement that only a Member State can rely on the private operator test.

71. The Court's judgment in *Land Burgenland and Others*, where similar doubts existed as to the capacity in which the Member State had acted, underscores the correctness of that interpretation. In the particular context of that case, the Court held that the Commission was not under an obligation to apply the private operator test. The Court explained that that was because neither the Member State, nor the authority which granted the alleged aid nor the beneficiary of the alleged aid, had put forward evidence concerning the applicability of the private operator test during the administrative procedure.²² As the General Court observed in the judgment under appeal, that also supports the view that not only the Member State, but also the beneficiary of the measure in question, can invoke the private operator test.²³

72. Leaving aside the particularities of those cases, accepting that the private operator test can be invoked by the beneficiary of the alleged aid reflects the rationale of the administrative procedure: that procedure is designed to ensure that the Commission possesses all the relevant facts in order to perform an objective assessment for the purposes of Article 107(1) TFEU. It would run counter to the aim of that procedure to limit the possibility for interested parties, and in particular the beneficiary of the alleged aid, of advancing arguments and evidence concerning the existence of aid (or as here, the absence thereof) by, for example, invoking the private operator test. That is so despite the fact that, strictly speaking, only the Member State is a party to that procedure.

73. Second, the argument that the applicability of the private operator test hinges on the 'subjective state of mind' of the Member State appears to stem from the Court's statement in *Commission v EDF* that, in assessing whether the private operator test is applicable, the objective of the measure (and thus, the intention of the State) may be relevant. However, as explained above, the private operator test is applicable where the Member State has acted in an economic capacity. The Court's judgment in *Commission v EDF* simply explains how that capacity is to be determined, on the basis of a global assessment, in a case in which doubts exist regarding the capacity in which the public authority has acted. It is in that context that the intention of the State may be a relevant factor.

20 Judgment of 5 June 2012, *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraph 82.

21 Judgment of 5 June 2012, *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraphs 86 and 87.

22 Judgment of 24 October 2013, *Land Burgenland and Others v Commission*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraphs 57, 60 and 61.

23 Paragraph 113 of the judgment under appeal.

74. In the present case, whether the Slovak Republic considered the proposed arrangement to constitute aid or whether the local and central tax authorities were in disagreement as to whether the write-offs should be accepted is beside the point.²⁴ The starting point for determining whether the private operator test is to be applied must be the (economic) nature of the Member State's action, not how that State, subjectively speaking, thought it was acting or which alternative courses of action it considered before adopting the measure in question. Seen through that prism, the 'subjective state of mind' of the Member State (be it that of the central authorities or that of their local branch) may be a relevant circumstance in determining, to the extent that doubts exist in that regard, the capacity in which the Member State has acted.

75. Nothing in the case file suggests that such doubts existed.²⁵

76. Third, I must stress that, in *Commission v EDF*, the Court went on to clarify that it is for the Commission to determine whether the test is to be applied. Accordingly, where it appears that the private operator test *could* be applicable, the Commission must ask the Member State concerned to provide it with all relevant information enabling it to determine whether that test does have to be applied.²⁶ In other words, irrespective of who invokes the private operator test, it falls, as a matter of principle, to the Commission to assess — if the applicability of that test is not evident (owing, for example, to the form of the impugned measure) — whether the test needs to be applied. It must do so by asking the Member State (or any other relevant party) concerned to submit the information it needs to make the necessary assessment. Under no circumstance can it be for the beneficiary of the alleged aid to show, unequivocally and on the basis of the objective and verifiable evidence, that the test is applicable. Indeed, as I have already pointed out above, it falls to the Commission to prove that a measure constitutes State aid.

77. In line with that principle, where doubts regarding the nature of the Member State's action exist, the Commission must first determine the capacity in which the Member State acted. To the extent that the requisite global assessment of relevant evidence shows that the Member State acted in an economic capacity, the Commission must then apply the private operator test. In that sense, instead of alleviating the investigative burden of the Commission, the judgment in *Commission v EDF* adds a preliminary step to the assessment of whether an advantage exists.

78. I note that in the present case, the decision at issue contains no trace of such a preliminary assessment and the private operator test was in fact applied to determine whether an advantage existed.

79. In any event, given that no doubts existed regarding the capacity in which the local tax office acted, the General Court was correct to hold that the private operator test was applicable.

80. That brings me to the fourth ground of appeal.

²⁴ It can be seen from recitals 83 and 128 to 132 of the decision at issue that the central tax directorate opposed the proposed arrangement and that the Slovak Republic considered that arrangement to constitute State aid.

²⁵ On the contrary, as shall be explained in more detail below, the decision at issue applies the private market operator test to conclude that the write-off of tax debt constitutes State aid.

²⁶ See, judgments of 5 June 2012, *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraph 104, and of 3 April 2014, *Commission v Netherlands and ING Groep*, C-224/12 P, EU:C:2014:213, paragraph 33.

(b) The application of the private operator test forms part of an impartial and diligent investigation

81. Similarly to what it argues under the second ground of appeal, the Commission claims, under the fourth ground, that the General Court also erred in law because it held that, given that the private operator test is applicable as such, the Commission cannot make a distinction, as regards its applicability, between the different alternatives to the measure in question.²⁷

82. More specifically, the Commission argues that the private operator test is not applicable in relation to the comparison of the tax execution and arrangement procedures. In its view, that is so because neither the Member State nor the beneficiary had provided evidence to indicate that the local tax office had considered an execution procedure and concluded that that procedure would be less advantageous than the arrangement.²⁸

83. The reasons why this ground of appeal should be dismissed have already been explained above. I shall nevertheless make the following additional observations.

84. The fourth ground of appeal is based on the same premiss as the second ground of appeal. It is based on the idea that, because neither the Member State concerned nor the beneficiary of the alleged aid had shown unequivocally and on the basis of the objective and verifiable evidence that the tax execution procedure had been considered by the local tax office, the private operator test is not applicable in relation to that procedure.

85. Given that no doubt existed regarding the capacity in which the local tax office had acted, the General Court was correct to conclude that the private operator test was applicable. Contrary to what the Commission seems to suggest, the question regarding the options that are to be taken into account in assessing whether an advantage exists pertains to the actual application of the private operator test, rather than to whether the test is applicable in the first place.²⁹ Indeed, as the General Court pointed out, since the private operator test is applicable as such, the Commission cannot make a distinction, as regards the applicability of the test, between the different alternatives to the contested measure.³⁰

86. In that regard, the fourth ground of appeal illustrates how the distinction between the applicability and the application of the private operator test is, overall, remarkably unhelpful. It leads, as is the case here, to confusion.

87. Apart from instances such as *Commission v EDF* where the nature of the Member State's action gives rise to doubt, the criteria pertaining to the applicability and the application of the private operator test cannot be separated in a meaningful way. Rather than constituting an exception that only the Member State can employ as a defence during the administrative procedure, the private operator test is precisely the tool that the Commission must apply to determine whether an economic advantage has been conferred on the undertaking in question. Whether, in adopting a measure in an economic capacity, the Member State has actually acted as a private operator would have done, is a question that must be determined by applying that test. It is in that context that the question may arise as to which alternatives must be compared with the measure taken.³¹

²⁷ Paragraph 247 of the judgment under appeal.

²⁸ Paragraph 245 of the judgment under appeal.

²⁹ Judgment of 24 October 2013, *Land Burgenland and Others v Commission*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682.

³⁰ Paragraph 247 of the judgment under appeal.

³¹ It can be seen from recital 121 of the decision at issue that the tax execution procedure was examined as an alternative to the arrangement procedure under the private market operator test even though the local tax office had not specifically considered using that procedure.

88. To reiterate: where, as here, no doubt surrounds the capacity in which the Member State has acted, the private operator test must be applied. As the Court has explained, that test is used to determine whether the beneficiary of the alleged aid would manifestly not have obtained comparable facilities from a private operator. To that end, the Commission must carry out an overall assessment, taking into account all the relevant evidence in the case. As regards, in particular, a public creditor, the Commission must assess whether the beneficiary would manifestly not have obtained a similar advantage from a private creditor in a situation as close as possible to that of the public authority and seeking to recover sums due to it by a debtor in financial difficulty.³² Contrariwise, if the Commission omitted to make that assessment it would actually breach its obligation to conduct an impartial and diligent investigation.

89. For all those reasons, I find no fault in the judgment under appeal as regards the assessment of the conditions under which the private operator test is applicable. The second and fourth grounds of appeal should thus be dismissed as unfounded.

C. The first ground of appeal

1. Arguments of the parties

90. By its first ground of appeal, the Commission claims that the General Court misinterpreted the decision at issue, because it read that decision as containing a conclusion that the private operator test was applicable.³³ The Commission contends that a proper reading of the decision at issue as well as of the case-law cited in the relevant recitals clearly shows that the Commission considered that the test was inapplicable in the case at hand.³⁴

91. Frucona submits, in essence, that the General Court was correct in its reading of the decision at issue.

2. Assessment

92. The first ground of appeal concerns an alleged misinterpretation of the decision at issue. As I shall explain briefly in the following, the first ground, intimately linked to the second and fourth grounds of appeal, must be dismissed too.

93. Firstly, I note that the decision at issue does not expressly state that the private operator test is not applicable. It is true that, taken in isolation, recital 83 of the decision at issue could be read in the sense argued by the Commission.³⁵ However, it can also be read as simply describing the position of the Member State, before doing the same regarding Frucona in the following recital. Be that as it may, I find little else in the decision at issue to lend support to the Commission's interpretation. Rather than clearly explain why the private operator test is not applicable, the decision at issue applies that test. In fact, as already alluded to above, the conclusion reached in the decision at issue concerning the existence of aid is based on the application of the private operator test.³⁶

³² *Frucona I*, paragraph 73 and the case-law cited and, to that effect, judgment of 5 June 2012, *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraph 86.

³³ Paragraphs 99 to 104 of the judgment under appeal.

³⁴ Recitals 80 to 84 and 128 to 132 of the decision at issue.

³⁵ See point 29 above.

³⁶ Recitals 139 and 140 of the decision at issue.

94. Secondly, if doubts existed regarding the applicability of the private operator test, the Commission should have asked the Member State concerned to provide it with all the relevant information enabling it to determine whether the test is applicable. There is no trace of an assessment regarding the applicability of the private operator test in the decision at issue. That the Slovak Republic considered the measure to constitute aid during the administrative procedure (that is, after the arrangement had been agreed to) hardly suffices to determine that the test is not applicable. In any event, as explained above, no such doubt arises here: a public creditor has granted payment facilities in respect of a debt payable to it by an undertaking. For that reason alone, the private operator test had to be applied.³⁷

95. Thirdly, as a corollary to the two previous points, it should not be overlooked that Frucona had submitted that the measure does not constitute aid and presented evidence according to which the bankruptcy proceedings would have left the local tax office worse off. Although it was in any event under an obligation to apply the private operator test here, the Commission appears to have applied that test precisely for that reason.³⁸

96. For those reasons I have little sympathy for the alternative reading of the decision at issue advocated by the Commission. The judgment under appeal cannot be faulted for having misinterpreted the decision at issue on this point. Accordingly, the first ground of appeal must be dismissed too.

D. The third ground of appeal

1. Arguments of the parties

97. By its third ground of appeal, the Commission claims that the General Court wrongly applied the principle *res judicata*, ruled ultra vires and infringed the principle that the subject matter of an action is defined by the parties as well as Article 21 of the Statute of the Court of Justice of the European Union and Articles 44(1) and 48(2) of the Rules of Procedure of the General Court.³⁹

98. In particular, the Commission claims that the General Court erred in law by holding that, in its judgment in *Frucona I*, the Court had ‘implicitly but necessarily considered the private creditor test to be applicable’.⁴⁰ The Commission argues that in *Frucona I*, the parties had not disputed the applicability of the private operator test. Therefore, the Court would have ruled *ne ultra petita* had it held the test not to be applicable.

99. Frucona considers that the General Court was correct in its assessment and that, in any event, the Court of Justice is not bound by the arguments on which the parties rely. Had the Court of Justice considered that the private operator test was not applicable, it would have been erroneous for the Court to assess whether the test was satisfied.

2. Assessment

100. Under the third ground of appeal, the Commission takes issue with the way the General Court applied the principle of *res judicata*. In the judgment under appeal, that court considered that the applicability of the private operator test was already settled in *Frucona I* because in that case the Court of Justice had dealt with the application of that test.

³⁷ See point 73 above.

³⁸ Recitals 84 and 85 of the decision at issue.

³⁹ Paragraphs 119 to 126 of the judgment under appeal.

⁴⁰ Paragraph 123 of the judgment under appeal.

101. If the Court were to dismiss the first, second and fourth grounds of appeal as I suggest, there is no need to consider the third ground of appeal. That is because the third ground addresses an issue which the General Court examined for the sake of completeness.

102. On the substance of that ground, I agree with the Commission.

103. In *Frucona I*, the Court did not rule on the applicability of the private operator test because it could not have done so without ruling *ultra petita*. Suffice it to recall that the Court was asked to rule on the *application* of the private operator test, not on its applicability. In that regard, I find particularly disconcerting the following finding in the judgment under appeal: as the Court could have found the private operator test inapplicable but did not do so, it means that the Court intended to confirm the applicability of that test in the case at hand.⁴¹

104. It is true that applicability is the precondition of application. It is equally true that the Court is not always bound to confine itself to the arguments put forward by the parties in support of their claims. Otherwise it might be forced, in some circumstances, to base its decisions on erroneous legal considerations. Nonetheless, the Court must rule only on the heads of claim put forward by the parties, whose role it is to define the framework of the dispute.⁴²

105. In *Frucona I*, the parties had not disputed the applicability of the private operator test. Had the Court, in such a circumstance, ruled that the private operator test was inapplicable, it would clearly have ruled on an issue that was beyond the scope of the dispute. As the Commission correctly points out, the issue of the applicability of the private operator test cannot be equated with questions of public policy that the Court may raise of its own motion without a claim to that effect by the parties.

106. Therefore, I consider that the General Court erred in law in considering that, given that the Court of Justice had assessed the application of the private operator test in *Frucona I*, the applicability of that test was *res judicata*. However, if the Court agrees with me on the first, second and fourth grounds of appeal, this ground of appeal remains ineffective.

E. The fifth and sixth grounds of appeal

1. Arguments of the parties

107. Under the fifth ground of appeal, the Commission claims that the private operator test requires it to establish the ‘subjective attitude’ of the public authority and compare that subjective attitude with the attitude a private operator would have taken in the same circumstances. It submits that, to apply that test, the only relevant evidence is the information which was available, and the developments which were foreseeable, at the time when the measure in question was adopted. In the Commission’s view, the assessment of the application of the private operator test is vitiated by an error because the General Court required it to compare the behaviour of the public authority with that of the ideal, rational and fully informed hypothetical private operator. In doing so, the General Court created an additional requirement that the Commission must fulfil in applying the private operator test.⁴³

⁴¹ Paragraph 125 of the judgment under appeal.

⁴² Judgment of 21 September 2010, *Sweden and API v Commission and Commission v API*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 65.

⁴³ Paragraphs 137 and 180 to 213 of the judgment under appeal.

108. Frucona argues that the General Court was correct in its assessment. First, the assessment was based on the same test as the one the Commission itself applied in the decision at issue. The judgment under appeal does not create any new requirement. It simply requires the Commission to examine all the relevant factors that were available and foreseeable at the time when the measure was taken.

109. The sixth ground of appeal is closely connected to the fifth. Under that ground, the Commission alleges an error in law in so far as the judgment under appeal can be understood as concluding that the Commission has breached its obligation to conduct a diligent and impartial investigation.⁴⁴ The Commission submits that the burden of proof placed on it was too high. In its view, that is so in particular because the judgment under appeal does not provide sufficient guidance on how to reach the required evidentiary threshold.

110. Frucona submits that the General Court clearly criticised the Commission's failure to verify, *inter alia*, the nature and methodology underlying the valuations it employed in applying the private operator test. In its view, the General Court was correct to conclude that the Commission had not substantiated its conclusions to the requisite standard.

2. Assessment

111. A nexus exists between the fifth and sixth grounds of appeal. That is why it is appropriate to deal with them together.

112. The two remaining grounds turn on the comparison of the arrangement procedure with, on the one hand, the bankruptcy procedure, and, on the other, the tax execution procedure. More specifically, those grounds centre on the extent of the Commission's obligations in applying the private operator test. The Commission argues that the judgment under appeal is vitiated by an error in law, because the General Court did not show that the decision at issue contains a manifest error of assessment regarding the application of the private operator test.

(a) *The parameters of assessment*

113. To begin with, the parameters defining the assessment to be carried out when the private operator test is applied have already been defined in the Court's case-law.

114. On the one hand, in *Frucona I*, the Court held that in order to verify whether the recipient undertaking would manifestly not have obtained comparable facilities from a private operator who is in a situation as close as possible to that of the public creditor and is seeking to recover sums due to it by a debtor in financial difficulty, the Commission is to carry out an overall assessment. That assessment must take 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.⁴⁵ In that case, the Court also noted that all information liable to have a significant influence on the decision-making process of a normally prudent and diligent private creditor, who is in a situation as close as possible to that of the public creditor and is seeking to recover sums due to it by a debtor experiencing difficulty in making the payments, must be regarded as being relevant.⁴⁶

⁴⁴ Paragraphs 191 to 195 of the judgment under appeal.

⁴⁵ *Frucona I*, paragraphs 72 and 73 and the case-law cited.

⁴⁶ *Frucona I*, paragraph 78.

115. On the other hand, undoubtedly to circumscribe the obligations weighing on the Commission in applying the private operator test, the Court has held that the only relevant evidence is the information which was available, and the developments which were foreseeable, at the time when the decision to make the investment was taken.⁴⁷

116. Another brief point that I wish to make before examining the Commission's remaining two grounds of appeal concerns the Court's jurisdiction on appeal: it is not for the Court to reassess, in the context of an appeal, the facts or evidence. Indeed, rather than seeking a reassessment of facts or evidence, the Commission argues that in assessing the evidence on the file, the General Court created a new requirement for the Commission with regard to the application of the private operator test.

(b) The General Court's jurisdiction to assess the evidence on the file

117. In the judgment under appeal, the General Court held that, in applying the private operator test, the Commission had to ascertain whether, for the purpose of recovering the sums owed to it, a normally prudent and diligent private operator in a situation as close as possible to that of the Slovak authorities would manifestly not have accepted the proposed arrangement. To that end, in order to identify the more advantageous alternative, it had to compare, on the basis of the interests of a private operator, the advantages and disadvantages of each of those procedures.⁴⁸

118. The judgment under appeal first dealt with the bankruptcy procedure as a potential alternative to the arrangement procedure. The General Court assessed the liquidation factors applied by the Commission in the decision at issue as concerns the short-term receivables and the non-current assets (production plant and machinery).⁴⁹ It concluded that the evidence on the administrative file did not substantiate, to the requisite standard, the Commission's assessment of the likely proceeds in the case of bankruptcy. It further held that, in order to remedy that, the Commission ought to have sought to obtain additional information to verify and substantiate its conclusions.⁵⁰

119. The judgment under appeal then dealt with the tax execution procedure. In that context, the General Court reiterated its view that the conclusions drawn from the assessment of the non-current assets and receivables were not substantiated to the requisite legal standard.⁵¹ It then went on to identify three other issues that, in its view, also vitiated the decision at issue with regard to the assessment of the tax execution procedure: the Commission had failed to consider properly the duration of that procedure, to assess the costs related to that procedure and to consider the possibility that the undertaking might face bankruptcy during the procedure.⁵²

120. The Commission maintains that the General Court's findings amount to a new requirement with which the Commission must comply when it applies the private operator test: it must reconstruct *ex officio* the behaviour of the ideal, rational and fully informed hypothetical private operator.

121. In my view, the Commission's complaints are misplaced.

⁴⁷ Judgment of 5 June 2012, *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraph 105.

⁴⁸ Paragraph 137 of the judgment under appeal.

⁴⁹ Paragraphs 185 to 200 of the judgment under appeal.

⁵⁰ Paragraphs 201 and 235 of the judgment under appeal.

⁵¹ Paragraphs 277 and 278 of the judgment under appeal.

⁵² Paragraphs 279 to 283 of the judgment under appeal.

122. Here, a point of particular importance is that it falls to the General Court to 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.⁵³

123. In essence, the General Court considered that not to be the case. It made that finding both in relation to the assessment of the bankruptcy procedure and in relation to that of the tax execution procedure.⁵⁴

124. Regarding the liquidation factors, the Commission submits that the judgment under appeal provides no indication as to what additional information should have been sought to reach the required evidentiary threshold. The requirement thus placed on the Commission would be contrary to the very rationale of the private operator test; namely to assess the ‘subjective state of mind’ of the public authority at the time of the decision.

125. A closer look at the judgment under appeal does not in my opinion corroborate that view. In fact, it can be inferred from the judgment under appeal that, as regards the non-current assets, the decision at issue is criticised for not substantiating the use of a liquidation factor of 97%.⁵⁵ On the other hand, as regards the issue of receivables, the judgment under appeal criticises the decision at issue for not having substantiated the choice of a liquidation factor of 59%.⁵⁶ In other words, the problem identified by the General Court is that the decision at issue proceeds on the basis of unsubstantiated assumptions regarding the value of the undertaking’s assets in the event of liquidation.

126. That brings me to *Buczek Automotive* to which the judgment under appeal refers. The Commission attempts to distinguish the present case from *Buczek Automotive*. In particular, it points out that the nature of the errors found in that case are not comparable to those found at first instance in the present case: in *Buczek Automotive*, it was found, on one issue, that the administrative file contained no evidence to support the Commission’s conclusion.⁵⁷ The Commission also notes that the present case is different, because the decision at issue does not attempt to establish what a private operator would have done.

127. First, the purported difference between the cases constitutes a distinction without a difference: if anything, it is one of degree. In *Buczek Automotive* no evidence had been provided to support the conclusion that only bankruptcy enabled there to be efficient debt recovery. Similarly, the judgment under appeal found that the decision at issue reached a series of conclusions that were not substantiated with sufficiently robust evidence in the administrative file.⁵⁸ Second, it seems to me that the decision at issue does in fact establish what a private operator would have done. It concludes that a private operator would not have accepted the proposed arrangement: a private operator would have favoured any one of the alternatives over the arrangement.⁵⁹

128. In any event, it must be observed that the judgment under appeal does not merely rely on *Buczek Automotive*. It also relies on well-established principles according to which the Commission’s (overall) assessment should be based on factually accurate, reliable and consistent information.⁶⁰ More fundamentally, as the Court has pointed out, all relevant evidence, which may assist the Commission

⁵³ *Frucona I*, paragraph 76 and the case-law cited.

⁵⁴ Paragraphs 201, 278 and 284 of the judgment under appeal.

⁵⁵ Paragraph 191 of the judgment under appeal.

⁵⁶ Paragraph 198 of the judgment under appeal.

⁵⁷ Judgment of 21 March 2013, *Commission v Buczek Automotive*, C-405/11 P, EU:C:2013:186, paragraph 60.

⁵⁸ Paragraphs 191, 194, 196, 199, 279 and 283 of the judgment under appeal.

⁵⁹ Recitals 119 and 124 of the decision at issue.

⁶⁰ Judgments of 15 February 2005, *Commission v Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraph 39, and of 2 September 2010, *Commission v Scott*, C-290/07 P, EU:C:2010:480, paragraph 65. See also *Frucona I*, paragraph 76.

in determining whether the recipient undertaking would manifestly not have obtained comparable facilities from a private creditor, is to be taken into account in that assessment: all information that may have a significant influence on the decision-making process of a normally prudent and diligent private creditor, who is in a situation as close as possible to that of the public authority, is to be regarded as relevant.⁶¹

129. The EU Courts are not to substitute the complex economic appraisals of the Commission in the field of State aid for their own. Nevertheless, the fact remains that the EU Courts must be able to check whether those appraisals are based on sound evidence.

130. It could be argued that the General Court has adopted a strict approach. However, the Commission is in my view incorrect in claiming that the conclusion reached in the judgment under appeal amounts to creating a new requirement to reconstruct the behaviour of a hypothetical, ideal and rational private operator.

131. Nothing suggests that the judgment under appeal requires the Commission to look beyond the information which was available at the time when the measure in question was adopted. In assessing the evidence on the file concerning the liquidation factors, the General Court simply concluded that the evidence presented was not sufficient to substantiate the conclusions drawn in the decision at issue regarding the fulfilment of the private operator test. In other words, it was not convinced by the evidence presented to establish the existence of an advantage given that not all relevant information had been taken into consideration.

132. Indeed, the situation here is not dissimilar to that in *Tetra Laval* inasmuch as the General Court did not add a condition to the requisite standard of proof in the present case. It merely considered that the evidence provided did not establish convincingly the Commission's case.⁶²

133. The borderline between substantiated and unsubstantiated conclusions can perhaps be difficult to pin down in a general manner. That is why it must be left for the General Court to make the necessary assessment of evidence, in the case at hand, without unnecessary interference from the Court of Justice.

134. That brings me to the Commission's arguments relating to the assessment of the tax execution procedure, which call for the following observations.

135. With regard to the assessment of assets and the liquidation factors employed, the conclusion must be the same as in the case of the bankruptcy procedure: the General Court was justified, in view of its jurisdiction to review the facts and the evidence, in reaching the conclusion that it did.

136. In addition, I observe that the Commission has not specifically called into question the General Court's analysis regarding three other issues that, in its view, also vitiated the decision at issue: the absence of a proper assessment of the duration of the tax execution procedure, of the costs related to that procedure and of the possibility that the undertaking might face bankruptcy during the procedure.

137. It can hardly be argued that a normally prudent and diligent private creditor in a situation as close as possible to that of the local tax office could simply ignore those factors. The Court has already held in *Frucona I* that, as regards bankruptcy, the duration of the procedure is a factor that is liable to have a significant influence on the decision-making process of a normally prudent and diligent private creditor.⁶³ The same must be true for the tax execution procedure. In addition, the costs related to that procedure and the need to consider the possibility of bankruptcy during that procedure are

⁶¹ *Frucona I*, paragraph 78.

⁶² See judgment of 15 February 2005, *Commission v Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraph 41.

⁶³ *Frucona I*, paragraph 81.

undoubtedly highly relevant factors for any normally prudent and diligent creditor seeking to recover sums from a debtor in financial difficulty. Those findings alone are in my view sufficient to justify the conclusion that the Commission had not taken all relevant information into consideration in applying the private operator test, in accordance with the authority devolving from *Frucona I*.⁶⁴

138. As the Commission has not challenged those findings made in the judgment under appeal, its arguments concerning the errors regarding the assessment of the application of the private operator test in relation to the tax execution procedure must in these circumstances be considered ineffective.

139. To conclude, it is for the Commission to conduct an impartial and diligent investigation in order to establish whether a measure constitutes State aid within the meaning of Article 107(1) TFEU. In doing so, it must substantiate its conclusions with factually accurate, reliable and consistent evidence. That evidence must contain all the relevant information for concluding that a measure constitutes aid. In the present case, the General Court found that the conclusions drawn in the decision at issue regarding the advantages and disadvantages of the alternatives to the arrangement procedure were not based on all the relevant information. That does not amount to adding a new requirement to the requisite standard of proof.

140. It is therefore my opinion that the fifth and sixth grounds of appeal should also be dismissed as unfounded.

F. Conclusion

141. In the light of the foregoing considerations, I propose that the Court should dismiss the appeal and order the Commission to pay the costs.

⁶⁴ See, to that effect, *Frucona I*, paragraph 77.