



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

16 March 2016 *

(State aid — Excise duties — Partial remission of a tax debt in the context of an arrangement — Decision declaring the aid to be incompatible with the internal market and ordering its recovery — Rights of the defence — Procedural rights of the interested parties — Private creditor test — Burden of proof)

In Case T-103/14,

Frucona Košice a.s., established in Košice (Slovakia), represented by K. Lasok QC, B. Hartnett, Barrister, O. Geiss, lawyer, and J. Holmes, Barrister,

applicant,

v

European Commission, represented by L. Armati, P.-J. Loewenthal and K. Walkerová, acting as Agents,

defendant,

APPLICATION for annulment of 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. (OJ 2014 L 176, p. 38),

THE GENERAL COURT (Second Chamber),

composed of M.E. Martins Ribeiro, President, S. Gervasoni and L. Madise (Rapporteur), Judges,

Registrar: C. Heeren, Administrator,

having regard to the written procedure and further to the hearing on 8 September 2015,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

The change in the applicant's situation and the arrangement procedure

- 1 The applicant, Frucona Košice a.s., is a company incorporated under Slovak law which was active in, inter alia, the production of spirits and spirit-based beverages.
- 2 Between November 2002 and November 2003, the applicant benefited from several deferrals of payment of tax debts made up of excise duties for which it was liable. Those payment deferrals were granted to it after financial guarantees had been provided to its local tax office, namely the Košice IV office ('the local tax office').
- 3 On 25 February 2004, as a result of the financial difficulties facing it, the applicant was unable to pay the excise duties for which it was liable in respect of January 2004. Following a legislative change from 1 January 2004, the applicant could no longer obtain a deferral of the payment of those excise duties.
- 4 Consequently, the applicant's licence to produce and process alcohol and spirits was revoked. Since then, it has restricted its activity to distributing, under the trade mark Frucona, spirits purchased from O.H., a company which, pursuant to an agreement with the applicant, produced those alcoholic beverages under licence in the latter's spirit distilleries.
- 5 The applicant also found itself in a position of indebtedness within the terms of the zákon č. 328/1991 Zb. o konkurze a vyrovnaní (Slovak Law No 328/1991 on bankruptcy and arrangements with creditors).
- 6 On 8 March 2004, the applicant 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 them ('the proposed arrangement'). The applicant's total debt amounted to approximately 644.6 million Slovak koruna (SKK), approximately SKK 640.8 million of which represented a tax debt.
- 7 By decision of 29 April 2004, the Krajský súd v Košiciach authorised the initiation of the arrangement procedure.
- 8 On 9 July 2004, the applicant's creditors, including the local tax office, accepted the proposed arrangement at an arrangement hearing. In the course of that arrangement procedure, the local tax office acted as a separate creditor, a status which it enjoyed as a result of the guarantees provided to it at the time of the deferrals of payment of the excise duties owed by the applicant (see paragraph 2 above).
- 9 Prior to 9 July 2004, the applicant states that it submitted to the local tax office, inter alia, an audit report drafted by an independent auditing company ('the E report'), which was designed to enable that office to assess the respective advantages of the arrangement and bankruptcy.
- 10 On 21 June 2004, the Slovak tax authorities carried out an on-the-spot inspection at the applicant's premises. During that inspection, the latter's financial situation as at 17 June 2004 was determined.
- 11 By decision of 14 July 2004, the Krajský súd v Košiciach confirmed the arrangement. In accordance with that 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.

- 12 By letter of 20 October 2004, the local tax office indicated to the applicant, inter alia, that the arrangement conditions, according to which a part of the tax debt did not have to be repaid, constituted indirect State aid, which was subject to the approval of the Commission of the European Communities.
- 13 On 17 December 2004, the applicant, inter alia, 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 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.

Administrative procedure

- 14 On 15 October 2004, a complaint was lodged with the Commission concerning alleged unlawful State aid granted to the applicant.
- 15 By letter of 4 January 2005, the Slovak Republic informed the Commission, following the latter's request for information, that the applicant may have been granted unlawful aid and asked it to approve that aid as rescue aid to a company in difficulties.
- 16 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).
- 17 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, the applicant 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.

Initial decision

- 18 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. (OJ 2007 L 112, p. 14; 'the initial decision'). The operative part of that decision provided, in Article 1, that the State aid which the Slovak Republic had implemented for the applicant, amounting to SKK 416 515 990, was incompatible with the common market and ordered, in Article 2, the recovery of that aid.

Proceedings before the General Court and the Court of Justice

- 19 On 12 January 2007, the applicant brought an action before the General Court seeking annulment of the initial decision.
- 20 By judgment of 7 December 2010 in *Frucona Košice v Commission* (T-11/07, ECR, EU:T:2010:498), the General Court dismissed that action as unfounded.
- 21 On appeal by the applicant pursuant to Article 56 of the Statute of the Court of Justice of the European Union, the Court of Justice, by judgment of 24 January 2013 in *Frucona Košice v Commission* (C-73/11 P, ECR, EU:C:2013:32), set aside the judgment in *Frucona Košice v Commission*, cited in paragraph 20 above (EU:T:2010:498). In the context of the assessment of the substance of the dispute at first instance, the Court of Justice held that, by failing to take into account, in the assessment of the private creditor test, the duration of the bankruptcy procedure, the Commission had committed 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. Lastly, the Court of Justice referred the case back to the General Court for it to give judgment on the pleas raised before it on which it had not ruled.

- 22 Following the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32), and in order to remedy the shortcomings identified by the Court of Justice, on 16 October 2013, the Commission adopted Decision 2014/342/EU on State aid No SA.18211 (C 25/2005) (ex NN 21/2005), granted by the Slovak Republic for Frucona Košice a.s. (OJ 2014 L 176, p. 38; ‘the contested decision’). Article 1 thereof states that the initial decision ‘is repealed’.
- 23 Subsequently, by reasoned order of 21 March 2014 in *Frucona Košice v Commission* (T-11/07 RENV, EU:T:2014:173), the General Court, seised in accordance with Article 117 of its Rules of Procedure of 2 May 1991 by the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32), found that there was no longer any need to rule on the action for annulment of the initial decision.

Contested decision

- 24 As mentioned in paragraph 22 above, the Commission adopted the contested decision, which replaced the initial decision, in order to remedy the defects affecting the latter, as identified by the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32) (recital 10 of the contested decision).
- 25 In the contested decision, the Commission took the view, in particular, that it was necessary to examine the question, whether, in essence by accepting the proposed arrangement and therefore the remission of 65% of its claim, the local tax office had behaved towards the applicant like a private creditor in a market economy. The Commission stated in that regard that the position of that office as the applicant’s creditor was unusually strong in so far as that office was in a legally and economically more advantageous position than the applicant’s private creditors. 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 sale of the secured assets (recital 80 of the contested decision).
- 26 In the first place, as regards the private creditor 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, and that, if a Member State relied on that test during the administrative procedure, it must, where there is doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented fell to be ascribed to the State acting as a private market operator. It made reference in that regard to the judgment of 5 June 2012 in *Commission v EDF* (C-124/10 P, ECR, EU:C:2012:318, paragraphs 81 to 85) (recital 82 of the contested decision).
- 27 In recital 83 of the contested decision, the Commission observed as follows:
- ‘In brief, the Slovak Republic submits that, in its view, the measure constitutes state aid. It acknowledged that, at the time of the arrangement, the question of state aid was simply not considered and requested that the disputed measure be treated as rescue aid. It therefore appears that the requirements of the case-law referred to above have not been complied with in this case and the disputed measure constitutes state aid within the meaning of Article 107(1) TFEU.’

- 28 In the second place, having noted, in recital 84 of the contested decision, that ‘it is the [applicant] who argued that the measure [was] free of aid and submits the documents described above, in particular reports from two auditors’, the Commission determined whether the Slovak Republic had behaved, in relation to the applicant, like a private creditor.
- 29 To that end, the Commission, first, compared, with regard to the evidence submitted by the applicant, the arrangement procedure and the bankruptcy procedure (recitals 88 to 119 of the contested decision), secondly, compared the arrangement procedure and the tax execution procedure (recitals 120 to 127 of the contested decision) and, thirdly, assessed the other evidence produced by the Slovak authorities and the applicant (recitals 128 to 138 of the contested decision). 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 authorities, more advantageous alternatives compared to the proposed arrangement (recitals 119, 124 and 127 of the contested decision).
- 30 The Commission concluded, in recital 139 of the contested decision, that the private creditor test was not satisfied and that the Slovak Republic had conferred on the applicant an advantage that it would not have been able to obtain in market conditions. In recital 140 of that decision, the Commission concluded that the debt write-off agreed to by the local tax office under the arrangement constituted State aid within the meaning of Article 107(1) TFEU. Lastly, in recital 182 of that decision, the Commission concluded that that State aid was not compatible with the internal market.
- 31 The operative part of the contested decision comprises five articles.
- 32 Article 1 of the contested decision states that ‘[the initial] decision is repealed’ (see paragraph 22 above).
- 33 According to Article 2 of the contested decision, the State aid which the Slovak Republic implemented in favour of the applicant, totalling SKK 416 515 990, is incompatible with the internal market.
- 34 In Article 3 of the contested decision, the Commission orders the Slovak Republic to recover the aid in question unlawfully made available to the applicant, together with default interest.
- 35 According to Article 4 of the contested decision, 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.
- 36 In accordance with Article 5 of the contested decision, that decision is addressed to the Slovak Republic.
- 37 The applicant received a copy of the contested decision from the Slovak authorities on 24 October 2013.
- 38 On 14 June 2014, the contested decision was published in the Official Journal.

Procedure and forms of order sought

- 39 By application lodged at the Court Registry on 17 February 2014, the applicant brought the present action.
- 40 By separate document lodged at the Court Registry on 18 February 2014, the applicant submitted an application for interim measures seeking, in essence, to obtain the suspension of the operation of Article 3(1) and (2) and Article 4 of the contested decision. That application was rejected by order of the President of the Court of 6 May 2014 and the costs were reserved.

- 41 By separate document lodged at the Court Registry on 28 July 2014, the applicant submitted a new application for interim measures seeking, in essence, to obtain the suspension of the operation of Article 3(1) and (2) and Article 4 of the contested decision. That application was rejected by order of the President of the Court of 18 September 2014 and the costs were reserved.
- 42 On a proposal from the Judge-Rapporteur, the Court (Second Chamber) decided to open the oral part of the procedure and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure of 2 May 1991, requested the applicant to lodge certain documents and put to the Commission a question in writing. The parties complied with those requests within the prescribed period.
- 43 The parties presented oral argument and their answers to the questions put by the Court at the hearing on 8 September 2015.
- 44 The applicant claims that the Court should:
- annul the contested decision;
 - order the Commission to pay the costs.
- 45 The Commission contends that the Court should:
- dismiss the action;
 - order the applicant to pay the costs.

Law

- 46 The applicant puts forward four pleas in law in support of its action. In essence, these are based, first, on an infringement of the rights of the defence, secondly, on an error of law vitiating recital 83 of the contested decision, thirdly, on errors of fact and of law vitiating the conclusion that the bankruptcy procedure was more advantageous than the arrangement procedure and, fourthly, on errors of fact and of law vitiating the conclusion that the tax execution procedure was more advantageous than the arrangement procedure.

The first plea, alleging infringement of the rights of the defence

- 47 In the first plea, the applicant essentially alleges that the Commission infringed its rights of defence and the rights of defence of the Slovak Republic. It submits in particular that the Commission should have heard it on certain material in the file following the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32), and on certain aspects of that judgment and should have heard the interested parties and the Slovak Republic on the legal assessments and the considerations set out in the contested decision. In the reply, the applicant adds that the present plea should be understood more broadly as challenging an infringement of essential procedural requirements, which the Court should examine of its own motion, since the Commission refused, when adopting the contested decision, to gather all the relevant information and referred, as it acknowledged in the defence, solely to the information at its disposal at the time of the adoption of the initial decision.
- 48 The Commission disputes the merits of all those arguments.
- 49 The Court will assess, in turn, the applicant's claims relating to an infringement of the rights of the defence and an infringement of essential procedural requirements.

- 50 First of all, the applicant claims that there was an infringement of its rights of defence.
- 51 According to settled case-law, respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of EU law which must be guaranteed even in the absence of specific rules. That principle requires that the undertaking concerned be afforded the opportunity during the administrative procedure to make known in an effective manner its views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (judgments of 10 July 1986 in *Belgium v Commission*, 234/84, ECR, EU:C:1986:302, paragraph 27; 9 July 2008 in *Alitalia v Commission*, T-301/01, ECR, EU:T:2008:262, paragraph 169; 15 December 2009 in *EDF v Commission*, T-156/04, ECR, EU:T:2009:505, paragraph 101; and 12 May 2011 in *Région Nord-Pas-de-Calais and Communauté d'Agglomération du Douaisis v Commission*, T-267/08 and T-279/08, ECR, EU:T:2011:209, paragraph 70).
- 52 However, the administrative procedure relating to State aid is initiated solely against the Member State concerned. The undertakings receiving aid are regarded solely as 'interested parties' in that procedure. They cannot themselves seek to engage in an adversarial debate with the Commission in the same way as is offered to the abovementioned Member State (judgments of 24 September 2002 in *Falck and Acciaierie di Bolzano v Commission*, C-74/00 P and C-75/00 P, ECR, EU:C:2002:524, paragraphs 81 and 83; *Alitalia v Commission*, cited in paragraph 51 above, EU:T:2008:262, paragraph 170; and *EDF v Commission*, cited in paragraph 51 above, EU:T:2009:505, paragraph 102).
- 53 Thus, the case-law confers on the parties concerned essentially the role of information sources for the Commission in the administrative procedure instituted under Article 108(2) TFEU. It follows that, far from enjoying the same rights of defence as those which individuals against whom a procedure has been instituted are recognised as having, the parties concerned have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case (see judgments in *Alitalia v Commission*, cited in paragraph 51 above, EU:T:2008:262, paragraph 172 and the case-law cited; *EDF v Commission*, cited in paragraph 51 above, EU:T:2009:505, paragraph 103 and the case-law cited; and *Région Nord-Pas-de-Calais and Communauté d'Agglomération du Douaisis v Commission*, cited in paragraph 51 above, EU:T:2011:209, paragraph 74 and the case-law cited).
- 54 It follows that the applicant cannot claim an infringement of its rights of defence, given that such rights are in no way conferred on it in the context of the administrative procedure relating to State aid. That conclusion is inevitable even if the Member State which granted the State aid and the applicant, as the recipient thereof, may have diverging interests in the context of such a procedure (see, to that effect, judgment in *EDF v Commission*, cited in paragraph 51 above, EU:T:2009:505, paragraph 104).
- 55 However, it is necessary to determine whether the applicant was involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case (see, to that effect and by analogy, judgments in *Alitalia v Commission*, cited in paragraph 51 above, EU:T:2008:262, paragraph 173, and of 30 April 2014 in *Tisza Erőmű v Commission*, T-468/08, EU:T:2014:235, paragraph 206).
- 56 In that regard, first, it must be borne in mind that it is settled case-law that, in the context of an examination under Article 108(2) TFEU, the Commission is required to give notice to the parties concerned to submit their comments (see judgment of 8 May 2008 in *Ferriere Nord v Commission*, C-49/05 P, EU:C:2008:259, paragraph 68 and the case-law cited). With regard to that duty, the Court of Justice has ruled that the publication of a notice in the Official Journal is an appropriate means of notifying the persons concerned that the procedure is to be initiated, while also pointing out that the sole aim of this communication is to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action (see judgment of 6 March 2003 in

Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission, T-228/99 and T-233/99, ECR, EU:T:2003:57, paragraph 124 and the case-law cited; judgment in *Alitalia v Commission*, cited in paragraph 51 above, EU:T:2008:262, paragraph 171).

- 57 In the present case, it is not disputed that, following the publication by the Commission of the decision to initiate the formal investigation procedure in the Official Journal, the applicant submitted observations by letter of 24 October 2005 and also submitted oral observations on 28 March 2006, that is to say prior to the adoption of the initial decision which the contested decision replaces. In addition, the applicant does not dispute the fact that it had, with the decision to initiate the formal procedure, sufficient knowledge of the relevant information and was able properly to submit its observations in that regard.
- 58 It follows that, during the formal investigation procedure which resulted in the adoption of the initial decision, the Commission did not infringe the applicant's procedural rights, which, moreover, the applicant does not deny.
- 59 Nor is it disputed that the contested decision is based solely on the information available at the date of adoption of the initial decision, on which the applicant was able to submit its observations or which it itself provided in its observations. In particular, the applicant, whilst claiming that the Commission introduced new grounds and assessments in the contested decision, acknowledges however in the reply, and confirmed at the hearing in response to a question from the Court, formal note of which was taken in the minutes of the hearing, that the Commission had not taken into consideration any information other than that available to it at the time of the adoption of the initial decision.
- 60 Therefore, it must be held that the Commission was able to use that information with a view to the adoption of the contested decision without being required, contrary to what the applicant argues, to obtain once more the applicant's observations on it.
- 61 Secondly, it should be added that, according to the case-law, the procedure for replacing an illegal measure may be resumed at the very point at which the illegality occurred, and the Commission is not required to recommence the procedure by going back further than that precise point (see, to that effect, judgments of 12 November 1998 in *Spain v Commission*, C-415/96, ECR, EU:C:1998:533, paragraph 31; 3 October 2000 in *Industrie des poudres sphériques v Council*, C-458/98 P, ECR, EU:C:2000:531, paragraph 82; and in *Alitalia v Commission*, cited in paragraph 51 above, EU:T:2008:262, paragraphs 99 and 142). That case-law relating to the replacement of a measure annulled by the Court also applies, in the absence of the Court's annulment of the measure, when the author withdraws and replaces an illegal measure (see, to that effect, judgment in *Région Nord-Pas-de-Calais and Communauté d'Agglomération du Douaisis v Commission*, cited in paragraph 51 above, EU:T:2011:209, paragraph 83).
- 62 In the present case, it is common ground that, in the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32, paragraphs 101 to 103), the Court of Justice held that the Commission, in so far as it had failed to take account, in its assessment of the private creditor test, of the duration of the bankruptcy procedure, had committed a manifest error of assessment or that, in so far as that factor had been taken into consideration by the Commission, the latter had not set out sufficient reasons for its decision. However, it is in no way apparent from that judgment that the Court of Justice called into question the examination procedure in respect of the contested measure or indeed the accuracy of the basic data gathered during that procedure.
- 63 Moreover, it is also common ground that, as is apparent from recital 10 of the contested decision, the Commission adopted that decision in order to remedy the defects found by the Court of Justice which vitiated the initial decision. Thus, the contested decision contains, inter alia, an assessment of the duration of the bankruptcy procedure from the point of view of the private creditor test.

- 64 In those circumstances, in accordance with the case-law cited in paragraph 61 above, the Commission was in no way required to reopen the formal procedure and to obtain once more the applicant's observations.
- 65 It follows that, by adopting the contested decision on the basis of the information gathered in the administrative procedure which led to the adoption of the initial decision and without obtaining once more the applicant's observations, the Commission did not infringe the applicant's right to be involved in that procedure.
- 66 None of the arguments put forward by the applicant is of such a kind as to disprove that conclusion.
- 67 First, the applicant criticises the Commission for not having given it the opportunity to comment on the new considerations set out in the contested decision, on the effect of the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32), on the bankruptcy of L., a company operating in the same sector, and on certain paragraphs of the judgment in *Frucona Košice v Commission*, cited in paragraph 20 above (EU:T:2010:498). In the reply, it adds that the Commission failed to give the interested parties the opportunity to provide the information necessary in order to establish whether its interpretation of the law was applicable.
- 68 In that regard, first of all, it should be noted that, in paragraphs 141, 145, 146, 148, 177, 180, 181, 190, 191 and 198 of the judgment in *Frucona Košice v Commission*, cited in paragraph 20 above (EU:T:2010:498), cited by the applicant, the Court essentially noted the inadequacy of certain information and claims made by the applicant during the administrative procedure and the lack of any obligation on the part of the Commission to request additional information. Moreover, it is apparent from recital 117 of the contested decision that the applicant had not demonstrated the similarity between its own case and that of L.
- 69 The applicant's line of argument thus amounts in essence to criticising the Commission for having failed to reopen the formal investigation procedure and for having failed to hear it on all the information which it had provided during the administrative procedure which led to the adoption of the initial decision and which was considered inadequate by the Court in the judgment in *Frucona Košice v Commission*, cited in paragraph 20 above (EU:T:2010:498), or by the Commission in the initial decision. That line of argument is at variance with the case-law cited in paragraph 52 above, according to which interested parties, including the recipient of the aid, cannot seek to engage in an adversarial debate with the Commission. If that line of argument were accepted, it would have precisely the effect of establishing such a debate.
- 70 Next, in so far as the applicant criticises the Commission for having failed to hear the interested parties with regard to the legal assessment and the considerations set out in the contested decision, it is important to note that it has already been held that neither the provisions on State aid nor the case-law require the Commission to hear the views of the recipient of State resources on its legal assessment of the measure in question or to inform the Member State concerned — or, a fortiori, the recipient of the aid — of its position before adopting its decision, where the interested parties and the Member State concerned have been given notice to submit their comments (judgments of 8 July 2004 in *Technische Glaswerke Ilmenau v Commission*, T-198/01, ECR, EU:T:2004:222, paragraph 198, and 1 July 2010 in *Nuova Terni Industrie Chimiche v Commission*, T-64/08, EU:T:2010:270, paragraph 168; see also, to that effect, judgment of 21 January 1999 in *Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Commission*, T-129/95, T-2/96 and T-97/96, ECR, EU:T:1999:7, paragraphs 230 and 231). In the present case, it is common ground that the Commission placed the applicant in a position to submit its observations on the decision to initiate the formal procedure.
- 71 Lastly, on the same grounds, the Court must reject the applicant's argument alleging that the Commission failed to hear it regarding the effect of the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32), on its analysis.

- 72 Secondly, the applicant criticises the Commission for having failed to gather all the relevant information for the purpose of adopting the contested decision and for referring solely to the information at its disposal at the time of the adoption of the initial decision.
- 73 Admittedly, it must be noted that, as the applicant submits, the Court of Justice has held, *inter alia*, that, in the context of the review of the complex economic assessments made by the Commission in the field of State aid, the EU judiciary must check whether the evidence relied on 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 (judgment in *Frucona Košice v Commission*, cited in paragraph 21 above, EU:C:2013:32, paragraph 76). It is also true that, according to the case-law cited by the applicant, where it appears that the private creditor test might be applicable, it is for the Commission to ask the Member State concerned to provide it with all the relevant information enabling it to determine whether the conditions for applying that test are satisfied (judgment of 21 March 2013 in *Commission v Buczek Automotive*, C-405/11 P, EU:C:2013:186, paragraph 33).
- 74 However, those considerations form part of the examination of the merits of a Commission decision on State aid. Thus, they were formulated in the examination of the grounds relied on in the appeal proceedings relating to the substance of the assessment by the General Court, of the pleas relating to the substantive legality of the decisions at issue and, more specifically, to the private creditor test. By contrast, the Court of Justice did not rule, in the judgments cited in paragraph 73 above, on the different question of the lawfulness of the procedure for adopting such a decision in the light, in particular, of the procedural rights of the recipient of the aid.
- 75 It follows that the applicant's arguments summarised in paragraph 72 above relate to the substantive legality of the contested decision and cannot establish any infringement of its procedural rights. The same is true of the fact, even if proved, that the Commission's initial examination was not reliable.
- 76 Thirdly, the applicant argues that, although the Member State concerned and the recipient of the aid have different roles at the time of the formal examination procedure, it is necessary to ensure that the recipient's arguments are heard by other means when the Member State does not defend the recipient's interests.
- 77 However, in the light of the case-law cited in paragraph 54 above, it must be held that the fact that the Member State concerned does not defend the interests of the recipient of the aid is not capable of altering the role of the recipient during the administrative procedure or the nature of its participation in that procedure, so as to confer on it, in respect of the rights of the defence, guarantees comparable to those of that Member State.
- 78 Moreover, as regards the right of the recipient of the aid to be involved in the procedure to the extent appropriate in the light of the circumstances of the case, it suffices to note that, in the present case, the applicant was afforded the opportunity to provide all the information which it considered relevant and useful following the publication of the decision to initiate the formal examination procedure in the Official Journal. It is unequivocally clear from the observations submitted by the applicant at that stage that it was aware of the fact that the Slovak authorities did not challenge the provisional conclusions in that decision as regards the classification of the measure in question as State aid. It was therefore, in any event, able to submit its observations notwithstanding the divergence of views.
- 79 It follows from the foregoing considerations that all the applicant's arguments seeking in essence to prove that the Commission should have heard it following the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32), must be dismissed. It also follows that it is not necessary to examine the argument alleging that, if it had been able to submit additional observations, the content of the contested decision might have been different.

- 80 In the second place, the applicant confirmed, in response to a question put to it by the Court at the hearing, that it also intended to rely on an infringement of the rights of defence of the Slovak Republic, which the Commission failed to hear following the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32), and on the new questions raised in the contested decision.
- 81 According to the case-law, a breach of the rights of the defence is an irregularity committed against the holder of those rights (see judgment of 8 July 2004 in *JFE Engineering and Others v Commission*, T-67/00, T-68/00, T-71/00 and T-78/00, ECR, EU:T:2004:221, paragraph 425 and the case-law cited), and which must therefore be raised by the Member State concerned itself (judgment in *Nuova Terni Industrie Chimiche v Commission*, cited in paragraph 70 above, EU:T:2010:270, paragraph 186; see also, to that effect, judgment in *Technische Glaswerke Ilmenau v Commission*, cited in paragraph 70 above, EU:T:2004:222, paragraph 203).
- 82 It follows that the applicant cannot rely on an alleged infringement of the Slovak Republic's rights of defence.
- 83 Secondly, it is appropriate to examine the claim made in the reply that the present plea should be understood more broadly as challenging an infringement of essential procedural requirements, which the Court should examine of its own motion, since the Commission acknowledged in the defence that it had excluded from its analysis all information received after the procedure which led to the adoption of the initial decision.
- 84 In that regard, it should be observed that, admittedly, the infringement of essential procedural requirements within the meaning of Article 263 TFEU constitutes a ground involving a question of public policy, which must be raised by the EU judicature of its own motion (judgment of 13 December 2013 in *Hungary v Commission*, T-240/10, ECR, EU:T:2013:645, paragraph 70; see also, to that effect, judgments of 4 September 2014 in *Spain v Commission*, C-192/13 P, ECR, EU:C:2014:2156, paragraph 103, and 22 October 2014 in *Spain v Commission*, C-429/13 P, ECR, EU:C:2014:2310, paragraph 34).
- 85 However, a plea going to the substantive legality of the contested decision, which falls within the scope of infringement of the Treaties or of any rule of law relating to their application, within the meaning of Article 263 TFEU, can, in principle, be examined by the EU judicature only if it is raised by the applicant (judgments of 10 December 2013 in *Commission v Ireland and Others*, C-272/12 P, ECR, EU:C:2013:812, paragraph 28, and 20 March 2014 in *Rousse Industry v Commission*, C-271/13 P, EU:C:2014:175, paragraph 18; see also, to that effect, judgment of 2 April 1998 in *Commission v Sytraval and Brink's France*, C-367/95 P, ECR, EU:C:1998:154, paragraph 67).
- 86 In the present case, it should be noted that, as is apparent from paragraphs 73 to 75 above, the question whether the Commission took into account all the information relevant for assessing the private creditor test falls within the assessment of the substance of the contested decision and not of any infringement of essential procedural requirements.
- 87 It follows that the Court must reject the applicant's arguments alleging an infringement of essential procedural requirements, and there is no need to assess their admissibility in so far as they were put forward for the first time at the stage of the reply.
- 88 In the light of all the foregoing considerations, the first plea must be dismissed in its entirety.

The second plea, alleging an error of law vitiating recital 83 of the contested decision

- 89 In the second plea for annulment, the applicant submits that recital 83 of the contested decision is vitiated by an error of law on the ground, in essence, that the Commission wrongly inferred from the judgment in *Commission v EDF*, cited in paragraph 26 above (EU:C:2012:318, paragraphs 81 to 85), that the mere fact that a Member State does not comment on the aid at the material time or that it asks for that measure to be treated as rescue aid means that it must necessarily be State aid. In that regard, first, the applicant observes that the concept of State aid is an objective concept and that statements to which the Member State agrees may not be reliable and cannot be relied upon as against an interested party who disputes the classification of the measure at issue as State aid. Secondly, the issue of ascertaining the capacity in which the Slovak Republic acted in the present case does not arise, given that the latter could act only in its capacity as creditor. Therefore, the only issue which arises is whether, having regard, in particular, to the criteria laid down in paragraphs 70 to 73 of the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32), the applicant would have clearly been unable to obtain the advantage at issue from a private creditor. Thirdly, the Commission has no evidence that the local tax office had not dealt with the tax debt at issue in its capacity as creditor, by seeking to optimise the amount which could be recovered. According to the applicant, only the decision of that office, and not the assessment of the Slovak authorities, as indicated in recital 83 of the contested decision, is relevant in that regard. Fourthly, the applicant argues that it is apparent from the case-law that the Commission errs in taking the view that it is for the Member State to rely on the private creditor test.
- 90 The Commission disputes the validity of those arguments on the ground, in essence, that recital 83 of the contested decision is consistent with the case-law relating to the applicability of the private creditor test and that, in any event, it examined the information at its disposal in order to assess whether the conditions relating to the application of that test had been satisfied in the present case. First, the Commission submits that, according to the case-law, the applicability of the private creditor test depends on the capacity in which the Member State concerned confers an economic advantage on an undertaking, it being for that State to plead and to establish unequivocally and on the basis of objective and verifiable evidence that it took its decision in its capacity as market operator and not as public authority. According to the Commission, if it were to be accepted that the recipient of aid could rely on the private creditor test, that case-law would, a fortiori, apply in the same way. Secondly, the applicant's argument is based on the erroneous assumption that the private creditor test may be applied without first establishing its applicability, given the Member State's intention to act as a private operator. In the present case, the Slovak Republic provided evidence tending to show that that test was not applicable. Thirdly, as regards the applicant's arguments based on a divergence between the views of the Slovak authorities and those of the local tax office, the Commission observes that the Member State alone is party to the procedure for examining State aid.
- 91 As a preliminary point, it should be recalled that, according to 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.
- 92 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 (judgments of 1 December 1998 in *Ecotrade*, C-200/97, ECR, EU:C:1998:579, paragraph 34; *Frucona Košice v Commission*, cited in paragraph 21 above, EU:C:2013:32, paragraph 69; and *Commission v Buczek Automotive*, cited in paragraph 73 above, EU:C:2013:186, paragraph 30).

- 93 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 (judgments in *Frucona Košice v Commission*, cited in paragraph 21 above, EU:C:2013:32, paragraph 70, and *Commission v Buczek Automotive*, cited in paragraph 73 above, EU:C:2013:186, paragraph 31; see also, to that effect, judgment in *Commission v EDF*, cited in paragraph 26 above, EU:C:2012:318, paragraph 78 and the case-law cited).
- 94 When a public creditor grants payment facilities in respect of a debt payable to it by an undertaking that assessment is made, 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 (judgments in *Frucona Košice v Commission*, cited in paragraph 21 above, EU:C:2013:32, paragraph 71, and *Commission v Buczek Automotive*, cited in paragraph 73 above, EU:C:2013:186, paragraph 32; see also, to that effect, judgments of 29 April 1999 in *Spain v Commission*, C-342/96, ECR, EU:C:1999:210, paragraph 46, and 29 June 1999 in *DM Transport*, C-256/97, ECR, EU:C:1999:332, paragraph 24).
- 95 In that regard, it must be borne in mind that, in the context of the private investor in a market economy test, the Court of Justice has held that the applicability of that test ultimately depended on the Member State concerned having conferred, in its capacity as shareholder and not in its capacity as public authority, an economic advantage on an undertaking belonging to it (judgment in *Commission v EDF*, cited in paragraph 26 above, EU:C:2012:318, paragraph 81).
- 96 In a similar manner, the applicability of the private creditor test ultimately depends on the Member State concerned having conferred, other than in its capacity as public authority, an economic advantage on an undertaking (see, to that effect, judgment in *EDF v Commission*, cited in paragraph 51 above, EU:T:2009:505, paragraph 224). According to the case-law, when a public authority grants payment facilities in respect of a debt payable to it by an undertaking, its 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 (judgments of 11 July 2002 in *HAMSA v Commission*, T-152/99, ECR, EU:T:2002:188, paragraph 167, and 17 May 2011 in *Buczek Automotive v Commission*, T-1/08, ECR, EU:T:2011:216, paragraph 70; see also, to that effect, judgments in *Spain v Commission*, cited in paragraph 94 above, EU:C:1999:210, paragraph 46, and *DM Transport*, cited in paragraph 94 above, EU:C:1999:332, paragraph 24). In such situations the private operator test and, therefore, the private creditor test is material because the conduct of the State is capable of being adopted, at least in principle, by a private operator acting with a view to profit (see, to that effect, judgment in *EDF v Commission*, cited in paragraph 51 above, EU:T:2009:505, paragraph 224).
- 97 In the context of the private investor in a market economy test, the Court of Justice has, moreover, held that, if a Member State relies on that test during the administrative procedure, it must, where there is doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented falls to be ascribed to the State acting as shareholder (judgment in *Commission v EDF*, cited in paragraph 26 above, EU:C:2012:318, paragraph 82). That evidence must show clearly that, before or at the same time as conferring the economic advantage at issue, the Member State concerned took the decision to make an investment, by means of the measure actually implemented, in the public undertaking (see judgment in *Commission v EDF*, cited in paragraph 26 above, EU:C:2012:318, paragraph 83 and the case-law cited). In that regard, it may be necessary to produce evidence showing that the decision is based on economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the Member State would have had carried out, before making the investment, in order to determine its future profitability (judgment in *Commission v EDF*, cited in paragraph 26 above, EU:C:2012:318, paragraph 84). By contrast, economic evaluations made after the advantage was conferred, a retrospective finding that the investment made by the Member State concerned was actually profitable, or subsequent justifications of the course of action actually chosen do not suffice to show

that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder (see judgment in *Commission v EDF*, cited in paragraph 26 above, EU:C:2012:318, paragraph 85 and the case-law cited).

- 98 According to that case-law, if the Member State concerned provides the Commission with the requisite evidence, it is for the Commission to carry out a global assessment, taking into account — in addition to the evidence provided by that Member State — any other relevant evidence enabling it to determine whether the Member State took the measure in question in its capacity as shareholder or as a public authority (see, to that effect, judgment in *Commission v EDF*, cited in paragraph 26 above, EU:C:2012:318, paragraph 86).
- 99 In the contested decision, the Commission noted that, in the decision to open the formal investigation procedure, it had raised doubts as to whether the Slovak Republic behaved in relation to the applicant as a private creditor (recital 78 of the contested decision). While noting that the conditions of the arrangement were identical for the private creditors and for the local tax office (recital 79 of the contested decision), the Commission observed that the position of that tax office as creditor was unusually strong. The Commission inferred from this that ‘it therefore need[ed] to be examined in detail whether the Tax Office [had] used all the means available to it to obtain the highest possible repayment of its receivables, as a market economy creditor would do’ (recital 80 of the contested decision).
- 100 To that end, the Commission *inter alia* recalled, in recitals 81 and 82 of the contested decision, the case-law relating to the application of the private creditor test, cited in essence in paragraphs 93 and 94 above, and to the applicability of that test, by analogy with the case-law cited in paragraphs 95 and 97 above. Thereafter, after stating as follows in recitals 83 and 84 of the contested decision, the Commission applied that test:
- ‘(83) In brief, the Slovak Republic submits that, in its view, the measure constitutes state aid. It acknowledge[s] that, at the time of the arrangement, the question of state aid was simply not considered and requested that the disputed measure be treated as rescue aid. It therefore appears that the requirements of the case-law referred to above have not been complied with in this case and the disputed measure constitutes state aid within the meaning of Article 107(1) TFEU.
- (84) It is the [applicant] who argued that the measure [was] free of aid and submits the documents described above, in particular reports from two auditors.’
- 101 In the first place, it should be observed that it follows from the contested decision that, contrary to the reading suggested by the Commission in its written pleadings and at the hearing, the Commission essentially considered the private creditor test to be applicable. That reading is necessary in particular in the light of recitals 78 and 80 of the contested decision, as set out in paragraph 99 above. It is also necessary in the light of recital 84 of the contested decision, in which the Commission refers to the reliance on that test by the applicant itself, since the applicant submitted documents for that purpose, before the Commission decided to apply that test on the merits.
- 102 That reading of the contested decision is not called into question by recital 83 of the contested decision. The reference, in that recital, to the ‘case-law referred to above’ may, owing to its generality and its lack of precision, refer both to the case-law relating to the applicability of the private creditor test and to the case-law relating to the application of that test, set out in recitals 82 and 81 of the contested decision respectively. In other words, the Commission’s conclusion that ‘it therefore appears that the requirements of the case-law referred to above have not been complied with in this case and the disputed measure constitutes state aid’ may be construed as meaning not only that the private creditor test was not applicable, as the Commission at present claims, but also as meaning that, in

view of the information provided by the Slovak Republic, the conditions of that test were not satisfied. Having regard to the considerations set out in paragraph 101 above, the latter reading is necessary, contrary to the position defended by the Commission.

- 103 Although it is true that, in recital 83 of the contested decision, the Commission could not draw, from the mere classification of the disputed measure as State aid by the Slovak Republic, the conclusion that that measure actually constituted such aid, the fact remains that it in any event assessed the merits of private creditor test and examined all the conditions that constitute State aid.
- 104 It follows that the present plea, directed at the conclusion that the disputed measure must be classified as State aid since the Slovak Republic had suggested that was the case, is ineffective. That conclusion is necessary without the need to examine the other arguments, summarised in paragraph 89 above, which the applicant raised in particular in response to the Commission's arguments. Those arguments seek to establish the existence of an error of law vitiating recital 83 of the contested decision and do not have any impact on the fact that the error is of no effect.
- 105 It also follows that the Court cannot, as the Commission essentially invites it to do within the context of both the examination of the second plea and the examination of the third and fourth pleas, which relate to the application of the private creditor test, declare that test inapplicable in the present case. Such a finding would result in it substituting its assessment for that of the Commission.
- 106 According to the case-law, in reviewing the legality of acts under Article 263 TFEU, the Court has jurisdiction in actions brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the TFEU 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 cannot, therefore, under any circumstances substitute its own reasoning for that of the author of the contested act (see judgments in *Frucona Košice v Commission*, cited in paragraph 21 above, EU:C:2013:32, paragraph 89 and the case-law cited, and of 28 February 2013 in *Portugal v Commission*, C-246/11 P, EU:C:2013:118, paragraph 85 and the case-law cited).
- 107 In the second place, it is important to add that, even if recital 83 of the contested decision must be construed as meaning that, as it claims at present, the Commission rejected the applicability of the private creditor test in the present case, that recital is vitiated by an error of law, which is, however, ineffective as regards the lawfulness of the contested decision for the reasons set out in paragraphs 103 and 104 above and in paragraph 127 below.
- 108 In that regard, it should be observed that, by analogy with the case-law cited in paragraph 97 above, if a Member State relies on the private creditor test during the administrative procedure, it must, where there is doubt, establish unequivocally and on the basis of objective and verifiable evidence, such as that referred to in that paragraph, that the measure implemented falls to be ascribed to the State acting as a private operator.
- 109 It should be noted, however, that it does not follow from that case-law that, where the Member State concerned does not rely on the private creditor test and considers that the disputed measure constitutes State aid, the Commission may, on that ground alone, dispense with an examination of that test or consider it to be inapplicable. On the contrary, the private creditor test may be relied on by the recipient of the aid.
- 110 First of all, according to the case-law, when the Commission decides to initiate the formal investigation procedure, it is for the Member State concerned and the beneficiaries of the measure under consideration to put forward the arguments whereby they seek to show that the measure at issue either does not constitute aid or is aid compatible with the internal market, since the object of the formal procedure is specifically to ensure that the Commission is fully informed of all the facts of the case (see judgments of 28 November 2008 in *Hotel Cipriani and Others v Commission*, T-254/00,

T-270/00 and T-277/00, ECR, EU:T:2008:537, paragraph 208 and the case-law cited, and 20 September 2011 in *Regione autonoma della Sardegna and Others v Commission*, T-394/08, T-408/08, T-453/08 and T-454/08, ECR, EU:T:2011:493, paragraph 246 and the case-law cited).

- 111 The private creditor test is not an exception which applies only if a Member State so requests, in situations characterised by all the constituent elements of State aid incompatible with the internal market, as laid down in Article 107(1) TFEU. It follows from paragraph 94 above that, where it is applicable, that test is among the factors which the Commission is required to take into account for the purposes of establishing the existence of such aid (see, by analogy, judgment in *Commission v EDF*, cited in paragraph 26 above, EU:C:2012:318, paragraph 103).
- 112 It follows that, besides the fact that, in the light of the case-law cited in paragraph 111 above, the possibility of relying on the private creditor test is in no way reserved solely for the Member State concerned, an interpretation of the case-law according to which the recipient of the aid is precluded from relying on the private creditor test on the sole ground that the Member State concerned neither relied on that test nor even disputed the classification of the disputed measure as State aid would be incompatible with the case-law set out in paragraph 110 above, according to which the beneficiary may put forward the arguments whereby he seeks to show that the measure at issue does not constitute State aid.
- 113 Next, in paragraph 61 of the judgment of 24 October 2013 in *Land Burgenland and Others v Commission* (C-214/12 P, C-215/12 P and C-223/12 P, ECR, EU:C:2013:682), the Court of Justice observed that, in that case, neither during the administrative procedure nor before the General Court had the authority which had granted an economic advantage, the Member State concerned or the recipient of the aid put forward any evidence showing that the disputed measure was based on economic evaluations carried out by that authority for the purposes of establishing its profitability, from which it may be inferred that, not only the Member State concerned, but also the recipient of aid, may rely on the private creditor test by proving, where appropriate, that the measure at issue was decided by that State in its capacity as market operator.
- 114 Lastly, it should be observed that the case-law set out in paragraphs 97 and 108 above must be read in the context of the circumstances of the case which gave rise to the judgment in *Commission v EDF*, cited in paragraph 26 above (EU:C:2012:318, paragraph 82), namely the reliance on the private investor in a market economy test by the Member State itself. Since the Court of Justice was not called upon to answer the question whether the recipient could rely on that test where the Member State concerned claimed that the disputed measure had to be classified as State aid, it cannot be inferred from that judgment that only that Member State can validly rely on that test.
- 115 Nevertheless, it must be observed that, like a Member State which relies on the private creditor test, where the recipient of the aid relies on the private creditor test, it must, in case of doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented falls to be ascribed to that Member State acting as a market operator.
- 116 In the present case, it is true that the Slovak Republic did not rely on the private creditor test and suggested classifying the disputed measure as State aid. However, the applicant relied on that test during the formal investigation procedure and, as is apparent from recital 84 of the contested decision, submitted documents in support of that claim, in particular the reports from two auditors.
- 117 In those circumstances, having regard in particular to paragraph 112 above, the Commission cannot infer from the mere fact that the Member State considered that the contested measure constituted State aid and did not rely on the private creditor test that that test was inapplicable in the present case.

- 118 Moreover, having regard to the case-law set out in paragraphs 95, 97 and 98 above, it must be held that, since the applicant had relied on that test and had submitted documents for that purpose, it was for the Commission to establish whether those documents corresponded to the requirements laid down in that case-law and, if so, to carry out a global assessment, taking into account — in addition to the evidence provided — any other relevant evidence enabling it to determine whether the Member State at issue took the measure in question in its capacity as market operator or as a public authority. However, although it is true that, in recitals 47 and 107 of the contested decision, the Commission found that, contrary to what was claimed by the applicant, it was not established that the E report had been available to the local tax office before its acceptance of the arrangement, it must be stated that the Commission did not rule on the characteristics of those documents and did not carry out that global assessment for the purpose of determining the applicability of the test in the present case.
- 119 For the sake of completeness, it must in any event be noted that the judgment in *Commission v EDF*, cited in paragraph 26 above (EU:C:2012:318, paragraphs 81 to 85), which clarified the conditions for the applicability of the private investor in a market economy test and on which the Commission bases its claim that the private creditor test is not applicable in the present case, was delivered on 5 June 2012, that is to say one month before the hearing which took place on 5 July 2012 in the case which gave rise to the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32). It is common ground, moreover, that, in the latter judgment, the Court of Justice took account of certain guidance in the judgment in *Commission v EDF*, cited in paragraph 26 above (EU:C:2012:318).
- 120 It is true that, in the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32), the Court of Justice did not explicitly rule on the applicability of the private creditor test, as the Commission has essentially claimed. In addition, according to the information supplied by the Commission, that issue had not been addressed in the appeal.
- 121 However, it is common ground that, in paragraphs 68 to 91 and 100 to 104 of the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32), the Court of Justice ruled on the merits of the assessment, by the General Court and by the Commission, of the conditions for applying the private creditor test in the judgment in *Frucona Košice v Commission*, cited in paragraph 20 above (EU:T:2010:498) and in the initial decision respectively.
- 122 The applicability of the private creditor test is a necessary pre-condition for its application, as is clear, moreover, from paragraph 71 of the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32), in which the Court of Justice observed that that test, where applicable, is among the factors which the Commission is required to take into account for the purposes of establishing whether aid exists.
- 123 Therefore, since the Court of Justice went on to assess the conditions for applying the private creditor test, it must be held that it implicitly but necessarily considered that test to be applicable.
- 124 That conclusion is all the more compelling since, while, in the initial decision, the Commission had found that the conditions for applying the private creditor test were not satisfied and the General Court had dismissed on the merits the pleas and arguments directed against part of the reasoning underlying that finding, the Court of Justice — ruling after annulment of the judgment in *Frucona Košice v Commission*, cited in paragraph 20 above (EU:T:2010:498), on the dispute at first instance in accordance with the first paragraph of Article 61 of the Statute of the Court of Justice — essentially held that the assessment of that test in the initial decision was vitiated by a manifest error of assessment or, at the very least, by an inadequate statement of reasons (judgment in *Frucona Košice v Commission*, cited in paragraph 21 above, EU:C:2013:32, paragraphs 101 to 103).

- 125 Moreover, the conclusion drawn in paragraph 123 above applies regardless of the fact that, according to the information supplied by the Commission, the applicability of the private creditor test had not been disputed in the case which gave rise to the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32). According to settled case-law, although the EU judiciary must rule only on the application of the parties, whose task it is to define the scope of the dispute, it cannot be bound merely by the arguments relied upon by the parties in support of their claims, or else it might be forced, in some circumstances, to base its decision on erroneous legal considerations (orders of 27 September 2004 in *UER v M6 and Others*, C-470/02 P, EU:C:2004:565, paragraph 69; 13 June 2006 in *Mancini v Commission*, C-172/05 P, ECR-SC, EU:C:2006:393, paragraph 41; and judgment of 21 September 2010 in *Sweden and Others v API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, ECR, EU:C:2010:541, paragraph 65). It follows that, the Court of Justice could have found the private creditor test to be inapplicable, even in the absence of any dispute if it had wished to avoid basing its judgment, by which it essentially declared invalid part of the reasoning supporting the conclusion that the conditions for applying the private creditor test were not satisfied and presupposing the applicability of that test, on erroneous legal considerations. Since the Court of Justice did not do so, it must be considered that it intended to confirm the applicability of that test in the present case.
- 126 Therefore, if, as the Commission suggests, the applicability of the private creditor test to the circumstances of the present case now has to be dismissed, the force of *res judicata* attaching to the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32), would be disregarded.
- 127 It follows that the Commission's line of argument seeking to establish the inapplicability of the private creditor test cannot succeed. Therefore, in so far as recital 83 of the contested decision contains the conclusion that that test is inapplicable in the present case, the contested decision is vitiated by an error of law. However, since the Commission examined that test on the merits, that error is not, by itself, capable of justifying the annulment of the contested decision.
- 128 In the light of all the foregoing considerations, the second plea put forward by the applicant must be rejected as ineffective.

The third plea, alleging errors of fact and of law vitiating the conclusion that the bankruptcy procedure was more advantageous than the arrangement procedure

- 129 In the context of the third plea, the applicant disputes the Commission's conclusion that a private creditor would have opted for the bankruptcy procedure and not for the arrangement. That plea is subdivided into six sets of arguments. The first is a general criticism of the Commission's approach. The second relates to the assessment by the Commission of the proceeds from the sale of the applicant's assets in the context of bankruptcy. The third to fifth relate to the duration of the bankruptcy procedure and the sixth relates to an error vitiating recital 92 of the contested decision.

Preliminary review of the case-law

- 130 Before examining the merits of the Commission's comparative assessment of the bankruptcy and arrangement procedures in the light of the applicant's arguments, it is appropriate to recall, at the outset, the relevant case-law relating to the application of the private creditor test, the allocation of the burden of proof that the conditions for applying that test have been fulfilled and the judicial review of the assessment of that test.
- 131 In the first place, as was observed in paragraphs 92 to 94 of this judgment, the concept of aid embraces measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking. However, the conditions which a measure must meet in order to be treated as 'aid'

are not met if the recipient undertaking could, in circumstances which correspond to normal market conditions, have obtained the same advantage, that assessment being made, in principle, when a public creditor grants an undertaking payment facilities in respect of a debt, by applying the private creditor test to that public creditor.

- ¹³² 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 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 (see judgments in *Frucona Košice v Commission*, cited in paragraph 21 above, EU:C:2013:32, paragraph 72 and the case-law cited, and *Commission v Buczek Automotive*, cited in paragraph 73 above, EU:C:2013:186, paragraph 46 and the case-law cited).
- ¹³³ 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 (judgments in *Frucona Košice v Commission*, cited in paragraph 21 above, EU:C:2013:32, paragraph 73, and in *Commission v Buczek Automotive*, cited in paragraph 73 above, EU:C:2013:186, paragraph 47; see also, by analogy, judgment in *Commission v EDF*, cited in paragraph 26 above, EU:C:2012:318, paragraph 86).
- ¹³⁴ In that regard, 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 (judgments in *Frucona Košice v Commission*, cited in paragraph 21 above, EU:C:2013:32, paragraph 78, and *Commission v Buczek Automotive*, cited in paragraph 73 above, EU:C:2013:186, paragraph 54).
- ¹³⁵ In addition, it is apparent from the case-law that, where, as in the present case, 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 Slovak authorities would have had to choose between several procedures, it would have had to weigh up the advantages and disadvantages of each of those procedures in order to identify the more advantageous alternative (see, to that effect, judgments in *Frucona Košice v Commission*, cited in paragraph 21 above, EU:C:2013:32, paragraphs 79 and 80, and *Commission v Buczek Automotive*, cited in paragraph 73 above, EU:C:2013:186, paragraph 56).
- ¹³⁶ That choice of the private creditor is influenced by number of factors, including the creditor's status as the holder of a secured, preferential or ordinary claim, the nature and extent of any security it may hold, its assessment of the chances of the firm being restored to viability, as well as the amount it would receive in the event of liquidation (judgments in *HAMSA v Commission*, cited in paragraph 96 above, EU:T:2002:188, paragraph 168, and *Buczek Automotive v Commission*, cited in paragraph 96 above, EU:T:2011:216, paragraph 84; see also, to that effect, judgment in *Rousse Industry v Commission*, cited in paragraph 85 above, EU:C:2014:175, paragraph 61), as well as the risks of seeing its losses increase (see, to that effect, judgment of 12 September 2007 in *Olympiaki Aeroporía Ypiresies v Commission*, T-68/03, ECR, EU:T:2007:253, paragraph 283). The decision reached by the private creditor is also liable to be influenced significantly by the duration of the procedures, since it postpones the recovery of the sums due and might thus affect, in the case of lengthy procedures, inter alia, their value (judgment in *Frucona Košice v Commission*, cited in paragraph 21 above, EU:C:2013:32, paragraph 81).
- ¹³⁷ It follows that, in the present case, the Commission had to ascertain whether, in the light of those factors, 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 Slovak authorities would manifestly not have accepted the proposed arrangement (see, to that effect, judgment in *Buczek Automotive v Commission*, cited in paragraph 96 above, EU:T:2011:216, paragraph 85). For that purpose, in order to identify the

more advantageous alternative, it had to compare, on the basis of the interests of a private creditor, the advantages and disadvantages of each of those procedures (see, to that effect, judgment in *Commission v Buczek Automotive*, cited in paragraph 73 above, EU:C:2013:186, paragraph 57).

- 138 In the second place, as regards the determination of the burden of proof that the conditions for applying the private creditor test have been fulfilled, first, it should be recalled that, according to the case-law, when, in the context of the private creditor test, it carries out the overall assessment referred to in paragraph 133 above, the Commission is to take into account, in addition to the evidence provided by the Member State concerned, all other relevant evidence in the case (see, to that effect and by analogy, the case-law cited in paragraph 98 above). Thus, where it appears that the private creditor test might be applicable, it is for the Commission to ask that Member State to provide it with all the relevant information enabling it to determine whether the conditions for applying that test are satisfied (judgment in *Commission v Buczek Automotive*, cited in paragraph 73 above, EU:C:2013:186, paragraph 33).
- 139 It follows that the burden of proof that the conditions for applying the private creditor test have been fulfilled is borne by the Commission (see, to that effect, judgment in *Commission v Buczek Automotive*, cited in paragraph 73 above, EU:C:2013:186, paragraph 34). That applies all the more strongly where the contested decision is based not on a failure to produce evidence which had been requested by the Commission from the Member State concerned, but on the finding that a private creditor would not have behaved in the same way as the authorities of that Member State, a finding which presupposes that the Commission had all the relevant information necessary to draw up its decision (see, to that effect, judgment in *Commission v Buczek Automotive*, cited in paragraph 73 above, EU:C:2013:186, paragraph 35).
- 140 Secondly, it should be borne in mind that it is apparent from the case-law cited by the Commission that the Commission cannot be criticised for not taking into account matters of fact or of law which could have been submitted to it during the administrative procedure but which were not, since it is under no obligation to consider, of its own motion and by supposition, what information might have been submitted to it (judgment of 14 January 2004 in *Fleuren Compost v Commission*, T-109/01, ECR, EU:T:2004:4, paragraph 49; see also, to that effect, judgment in *Commission v Sytraval and Brink's France*, cited in paragraph 85 above, EU:C:1998:154, paragraph 60).
- 141 However, the Commission is required, in the interests of sound administration of the fundamental rules of the Treaty relating to State aid, to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision, the most complete and reliable information possible for that purpose (judgment of 2 September 2010 in *Commission v Scott*, C-290/07 P, ECR, EU:C:2010:480, paragraph 90; see also, to that effect, judgment in *Commission v Sytraval and Brink's France*, cited in paragraph 85 above, EU:C:1998:154, paragraph 62).
- 142 In addition, the legality of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted (see judgment in *Commission v Scott*, cited in paragraph 141 above, EU:C:2010:480, paragraph 91 and the case-law cited).
- 143 In that regard, it is essentially apparent from the case-law that the Commission may ignore information which was not supplied to it during the administrative procedure where it may legitimately consider that it has more reliable information or that that information is not relevant (see, to that effect, judgment in *Commission v Scott*, cited in paragraph 141 above, EU:C:2010:480, paragraphs 95 to 98).
- 144 In the third place, it is important to note that the Commission's examination of whether particular measures can be classified as State aid because the public authorities did not act in the same way as a private creditor requires a complex economic assessment (judgments of 22 November 2007 in *Spain v*

Lenzing, C-525/04 P, ECR, EU:C:2007:698, paragraph 59; in *Frucona Košice v Commission*, cited in paragraph 21 above, EU:C:2013:32, paragraph 74; and in *Commission v Buczek Automotive*, cited in paragraph 73 above, EU:C:2013:186, paragraph 48).

¹⁴⁵ In this connection, it must be observed that, when the European Union Courts review 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 (judgments in *Frucona Košice v Commission*, cited in paragraph 21 above, EU:C:2013:32, paragraph 75, and *Commission v Buczek Automotive*, cited in paragraph 73 above, EU:C:2013:186, paragraph 49; see also, to that effect, judgment in *Commission v Scott*, cited in paragraph 141 above, EU:C:2010:480, paragraphs 64 and 66 and the case-law cited).

¹⁴⁶ Thus, it is settled case-law that, in so far as the Commission's application of the test of a private creditor in a market economy involves complex economic appraisals, the Court's review must be confined to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts have been accurately stated and whether there has been any manifest error of assessment of those facts or a misuse of powers (see, to that effect, judgment in *Spain v Lenzing*, cited in paragraph 144 above, EU:C:2007:698, paragraphs 59 to 61).

¹⁴⁷ However, the Court must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (see judgments in *Commission v Scott*, cited in paragraph 141 above, EU:C:2010:480, paragraph 65 and the case-law cited, and in *Frucona Košice v Commission*, cited in paragraph 21 above, EU:C:2013:32, paragraph 76 and the case-law cited; judgment in *Commission v Buczek Automotive*, cited in paragraph 73 above, EU:C:2013:186, paragraph 50).

¹⁴⁸ The Court must examine, primarily, the merits of the contested decision in the light of the applicant's arguments and of the principles recalled in the case-law mentioned above.

¹⁴⁹ In that regard, it should be observed that, in recital 119 of the contested decision, the Commission concluded that a private creditor would not have accepted the proposed arrangement. That conclusion is based on an assessment of the likely amount which the local tax office would have been able to obtain in a bankruptcy procedure and of the duration of that procedure compared with the amount proposed under the arrangement.

¹⁵⁰ Thus, the Commission essentially took the view that the likely amount which the local tax office would have been able to obtain in a bankruptcy procedure would have been considerably higher than that obtained under the arrangement. After having adjusted the assessments made in the E report, assessed the likely proceeds from a sale of the applicant's assets in the context of bankruptcy and inferred the costs of such a procedure from the latter amount, the Commission took the view, in recitals 104 and 105 of the contested decision, that, in a bankruptcy procedure, the tax office would have been able to obtain an amount of SKK 356.7 million, that is to say SKK 132.4 million more than the amount proposed under the arrangement (SKK 224.3 million). In addition, the Commission added, in recital 106 of the contested decision, that, 'even' if the assessment method of the E report were to be adopted, the tax office would have been able to obtain, in a bankruptcy procedure, an amount of SKK 225.5 million, which is still higher than the amount obtained under the arrangement.

¹⁵¹ Moreover, as regards the duration of the bankruptcy procedure, first, the Commission considered, in recitals 109 to 112 of the contested decision, that that duration would not have influenced the decision of a private creditor in a significant way, given, in essence, that the local tax office as a secured creditor could have obtained satisfaction at any time of at least SKK 194 million owing to the sale of the non-current assets put forward as collateral. Secondly, in recitals 113 to 118 of the

contested decision, the Commission nevertheless assessed (i) the likely duration of a bankruptcy procedure, considering that it would probably be shorter than the average duration of such a procedure, and (ii) its effect on the amount likely to be received by the creditor following such a procedure (SKK 356.7 million after deduction of the costs of the procedure); on the latter point, according to the Commission, owing to the size of the likely proceeds from the sale of the assets in question, even a duration of four to five years would play no significant role in the decision of the private creditor.

152 In essence and without prejudice to the merits of the assessments made by the Commission, it is thus apparent that, as the case-law cited in paragraphs 133 to 137 above requires, the Commission carried out an analysis of the advantages and disadvantages of the bankruptcy procedure compared with the arrangement procedure, taking into account in particular the likely proceeds from a sale of the applicant's assets in the context of the first procedure and the effect of the likely duration of that procedure, as well as the local tax office's status as a secured creditor.

153 However, the applicant essentially claims that that analysis is erroneous and not supported by sufficient evidence. In particular, first of all, it criticises the Commission's general approach and contests recital 92 of the contested decision (first and sixth sets of arguments). It then challenges the Commission's assessment of the likely proceeds from a sale of its assets in the context of a bankruptcy procedure (second set of arguments). Lastly, it contests the assessment of the likely duration of such a procedure and of its effect on the choice by a private creditor (third to fifth sets of arguments).

154 At the outset, it is necessary to examine the merits of the assessment (i) of the likely proceeds from a sale of the applicant's assets upon bankruptcy and (ii) of the duration of such a procedure and its effect on the choice by a private creditor.

The merits of the assessment of the proceeds from the sale of the applicant's assets in the context of bankruptcy (second set of arguments)

155 The applicant disputes the estimate of SKK 435 million as the proceeds from the sale of its assets in the context of bankruptcy. In essence, noting that the Commission had to assess that issue from the point of view of a private creditor and that it did not have the necessary experience or knowledge, the applicant submits that the Commission merely made estimates without having carried out an investigation into the probable benefits of a sale or having sought to obtain an expert opinion or other evidence supporting its estimate and that the Commission could not replace the liquidation factors in the E report with other factors unless it had obtained relevant evidence from a competent expert.

156 In particular, the applicant contests the Commission's assessment of the proceeds from the sale of its non-current assets, its stocks and its short-term receivables in the context of bankruptcy.

157 First, the applicant observes that, by assessing the likely minimum proceeds from the sale of its non-current assets at SKK 194 million, whereas the E report applied a liquidation factor of 45%, the Commission applied an invented, arbitrary, irrational and unproven factor; it states that that amount is not consistent with an estimate of the proceeds from a sale during a bankruptcy procedure and that the amount of SKK 397 million put forward by the Slovak authorities was assessed on the basis of its accounts. Furthermore, the leasing by O.H. of its production assets does not allow any conclusion to be drawn as to the probable benefits from their sale in the event of bankruptcy and the Commission did not take into account the bankruptcy of L., which is still ongoing.

- 158 Secondly, as for the proceeds from the sale of its stocks, the applicant considers that a private creditor would have taken account of the implications of the revocation of its spirit licence on the sale of unfinished products which represented the majority of its stocks on 9 July 2004. Moreover, the applicant claims that the Commission wrongly, and without refuting the evidence referred to in recital 108 of the contested decision, assumes that the conditions of a bankruptcy sale would be the same as those under which it was able to sell off stocks during the arrangement procedure.
- 159 Thirdly, as regards the proceeds from the sale of its short-term receivables, the applicant takes the view that the Commission wrongly refused to carry out the second adjustment set out in the E report, without providing any reasons or evidence to challenge that adjustment. A private creditor would have carried out that adjustment in order to determine the likely recoverable value of the remaining receivables.
- 160 The Commission disputes the validity of all of those arguments put forward by the applicant. In essence, on the one hand, the Commission claims that it took into consideration and examined in detail the relevant available information and that it cannot be required to consider every expert report to be relevant or to request an expert's opinion. On the other hand, the Commission claims that it came to the conclusion that the information in the E report was not reliable and that it made an adjustment to the liquidation factors contained in that report, in view of the information and evidence available to the local tax office at the material time. In the rejoinder, the Commission adds that its task is not itself to take the steps that a private creditor would have taken but to verify whether the public authority behaved like a private creditor.
- 161 In particular, first, in respect of the applicant's non-current assets, the Commission takes the view that, in the absence of an explanation of the liquidation factor used by the E report, it was appropriate to take into consideration all the other information available relating to the value of those assets which a private creditor would have examined. Since it is for the applicant to establish that its claim relating to the logic of a private creditor is well founded, the Commission is not required to provide the correct liquidation factor, but to assess all the information available to determine whether the applicant's claim is substantiated in a credible manner. In addition, in respect of the reference to O.H., the Commission states that, in recital 96 of the contested decision, it merely rejected the argument alleging that no buyer could be found. In addition, that reference illustrates the applicant's tendency to focus on certain details without regard for the finding that, even taking into consideration the liquidation factors in the E report, the proceeds from the sale of its assets would have been higher than the amount proposed under the arrangement and that the unfavourable nature of the arrangement appears flagrant in the light of the Commission's corrected estimates.
- 162 Secondly, as regards the applicant's stocks, in the first place, the Commission observes that the contested decision rejects the liquidation factor in the E report, for which no explanation was provided, and bases the reasonable valuation of the proceeds from the sale of stocks on other available information, namely an indication by the applicant that it could obtain SKK 110 million from the sale of stocks and the actual changes in those stocks. A sale of stocks in those circumstances to finance the arrangement might be compared to the circumstances of a sale during bankruptcy; moreover, the applicant had already had its licence revoked at the time of that sale. In the second place, the sole purpose of recital 108 of the contested decision was to reject the reports produced as evidence.
- 163 Thirdly, in respect of the short-term receivables, the Commission considers that, while it was necessary to adjust their book value to reflect their actual value and to take into account irrecoverable or poor-quality claims, nothing justified a value below that which the applicant had itself expected to obtain from its debtors. Furthermore, the applicant still provides no justification for the second adjustment; according to the Commission, the fact that an undertaking is bankrupt does not alter the collectability of receivables from the debtors of that company.

- 164 For the purpose of examining the merits of the Commission's assessment of the proceeds from the sale of the applicant's assets during bankruptcy, it should be observed that that assessment is based, both in the E report and in the contested decision, on 'liquidation factors' which were applied to the applicant's various assets.
- 165 As is apparent from recital 94 of the contested decision, such factors express the percentage share of the value of the assets obtained through the liquidation compared to their book value. Their purpose is to calculate the remaining value of assets sold in the liquidation proceedings, taking into account the nature of the sale; it is assumed that the value of the assets obtained through a liquidation sale is clearly lower than their book value, depending on the type of the assets. Neither the application of liquidation factors nor their definition is contested in the present case.
- 166 The estimate proposed in the E report and the estimate made by the Commission differ, however, in two respects. According to the Commission, that report did not constitute a credible basis for comparing the bankruptcy and arrangement procedures (recital 89 of the contested decision).
- 167 Whilst the E report took as its starting point the condition of the applicant's assets on 31 March 2004, the Commission used the condition of those assets on 17 June 2004 (recitals 90 and 103 of the contested decision); the applicant does not dispute this. On the latter date, as is apparent from Table 5 which is found in the contested decision, the book values of the applicant's various assets were as follows:
- non-current assets (land, buildings, machinery, intangible assets, financial assets): SKK 200 million;
 - stocks: SKK 84 million;
 - cash: SKK 161 million;
 - short-term commercial receivables: SKK 63 million.
- 168 Moreover, the Commission stated that it could not accept the methodology used in the E report to assess the proceeds from a sale of the applicant's assets in the context of a bankruptcy procedure (recital 93 of the contested decision). In particular, it stated that that report contained no explanation as to how the liquidation factors had been determined (recital 94 of the contested decision) and that the factors applied in that report to the non-current assets (45%), the stocks (20%) and the short-term receivables (20%, applied on 59% of the book value of those assets) had been assessed at too low levels (recitals 95, 98 and 101 of the contested decision).
- 169 In those circumstances, the Commission itself determined the relevant liquidation factors for estimating the likely proceeds from a sale of the applicant's assets in the context of a bankruptcy procedure.
- 170 The applicant disputes that assessment. In order to examine its merits, it is appropriate, having regard to the parties' arguments, to determine the importance of expert opinions in the Commission's assessment before evaluating the Commission's appraisals.
- 171 As a first step, with regard to expert opinions, first, it should be observed that, contrary to the applicant's arguments, the Commission could reject the liquidation factors used by the E report.
- 172 According to the case-law, although the Commission may, if it so wishes, commission outside consultants, it must nevertheless assess their work (judgments of 16 September 2004 in *Valmont v Commission*, T-274/01, ECR, EU:T:2004:266, paragraph 72, and 13 September 2010 in *Greece and Others v Commission*, T-415/05, T-416/05 and T-423/05, ECR, EU:T:2010:386, paragraph 251). Only

on the basis of its objective content may the Commission and the Court consider an expert report to be probative. A mere unsubstantiated statement in such a document does not make it possible to conclude that State aid exists (judgment in *Valmont v Commission*, EU:T:2004:266, paragraph 71).

- 173 In the present case, it must be found that the E report contains, as the Commission stated in the contested decision (see paragraph 168 above), no explanation regarding the liquidation factors used to determine the maximum possible proceeds from a sale of the applicant's assets in the context of a bankruptcy procedure. It follows that, in the light of the case-law cited in paragraph 172 above, the liquidation factors used in that report cannot be regarded as probative.
- 174 In so far as the applicant claims in that regard that assessments such as those in the E report are based on experience and judgment, it is important to add that, in the light of the case-law cited in paragraph 172 above, such a claim is inadequate to establish the probative value of an expert report and to oblige the Commission to take account of the assessments which it contains.
- 175 Therefore, the Commission was right not to accept the methodology of the E report. It should however be noted that the Commission took account of the assessments found in that report at a subsidiary level for the purposes of a minimum assessment.
- 176 It also follows that all of the arguments which the applicant bases on the liquidation factors used in the E report, complaining that the Commission failed to use them or arguing that a private creditor would have taken account of them, must be rejected as unfounded.
- 177 Secondly, in so far as the applicant complains that the Commission did not request a new expert opinion, it should be observed that, according to the case-law, the complaint that the Commission failed to seek assistance from external experts when drafting the contested decision cannot succeed as such, since no provision of the Treaty or of EU legislation imposes any such obligation on the Commission (see, to that effect, judgments of 25 June 1998 in *British Airways and Others v Commission*, T-371/94 and T-394/94, ECR, EU:T:1998:140, paragraph 72, and 16 March 2000 in *Astilleros Zamacona v Commission*, T-72/98, ECR, EU:T:2000:79, paragraph 55).
- 178 In so far as the applicant refers, in that context, to paragraphs 13, 14 and 20 to 28 of the judgment of 21 November 1991 in *Technische Universität München* (C-269/90, ECR, EU:C:1991:438), from which it infers that, even when it carries out a discretionary appraisal of the facts and evidence, the Commission has to equip itself with the relevant expertise, it is sufficient to note that, unlike the relevant legislation in the present case, the legislation applicable in the case which led to the judgment relied on by the applicant provided that the Commission was to consult, if necessary, a group of experts. It follows that, in the light of the case-law cited in paragraph 177 above, no consequence can be inferred from that judgment for the purpose of the present case.
- 179 As a second step, it is necessary, however, to assess the merits of the estimates made by the Commission. In particular, it should be noted in that regard that, although, as is apparent in essence from paragraph 177 above, the Commission is not required as a matter of principle to seek assistance from external experts when drafting the contested decision, the fact remains that it was for the Commission to determine whether a private creditor would manifestly not have accepted the proposed arrangement and that the Commission bore the burden of proof that the conditions for applying the private creditor test were not fulfilled in the present case (see paragraphs 132, 133, 137 and 139 above).
- 180 It is therefore appropriate to recall the main considerations expressed by the Commission in the contested decision and then to assess, in the light in particular of the case-law cited in paragraphs 145 to 147 above, whether those assessments are, as the applicant essentially claims, vitiated by manifest errors of assessment, whether they are substantiated to the requisite legal standard by the evidence in the file and whether the Commission took account of all the relevant information.

- 181 In the contested decision, the Commission evaluated the likely proceeds from a sale of the applicant's assets at SKK 435 million, of which 194 were in respect of non-current assets, 43 in respect of stocks, 37 in respect of short-term receivables and 161 in respect of cash (Table 5 of the contested decision). The Commission thus applied liquidation factors amounting, for each of those asset items, to 97, 52, 59 and 100% respectively; the determination of the first three factors is contested in the present case.
- 182 More specifically, in the first place, the Commission assessed the likely proceeds from the sale of the applicant's non-current assets in the context of a bankruptcy procedure to be SKK 194 million. That amount corresponds to the value of the assets put forward as collateral to the local tax office, as had been proposed by the applicant on the basis of assessments carried out by independent experts in 2003 or in 2004. In the Commission's view, this kind of expert price should normally reflect the general value of the asset, a proxy expressing for what price the asset can be sold at a given moment. That value was established in order to ascertain the value of those assets as security (recital 95 of the contested decision). It is a minimum price, since the value of the applicant's non-current assets had been assessed at SKK 397 million by the Slovak authorities, as is mentioned in the first footnote below Table 5 of the contested decision. In addition, in recital 96 of the contested decision, the Commission responded to the applicant's claim that it would have been difficult to find a buyer, considering that there was an imminent interest from a competitor for the applicant's production assets.
- 183 In the second place, as regards the applicant's stocks, the Commission used a liquidation factor of 52% on the ground, in essence, that the applicant had been able to obtain SKK 110 million from the sale of its stocks in 2004, that factor corresponding to the proportion of that amount in relation to the book value of the stocks at the relevant time. The Commission added that, having regard to the applicant's activity, it could be assumed that its stock comprised final or semi-finished products which could have been sold (recitals 98 and 99 of the contested decision).
- 184 In the third place, in respect of the applicant's short-term receivables, the Commission used a liquidation factor of 59%. That corresponds to an adjustment applied, in the E report, to the book value of those receivables in order to reflect the unrecoverability or the low quality of certain receivables and, therefore, the actual value of the recoverable receivables. However, noting that, according to the information provided by the Slovak authorities, the value thus determined corresponded to enforceable receivables, the Commission did not apply another factor, unlike the E report which had made a second adjustment in respect of a liquidation factor of 20% (recitals 100 to 102 of the contested decision).
- 185 It is apparent from those points in the contested decision that the Commission determined the liquidation factors by way of inference from the evidence in the administrative file. Although it is true that those inferences are made on the basis of evidence put forward by the applicant or not contested by it, the fact remains that the Commission did not carry out any methodological or economic analysis and did not request, during the administrative procedure, additional information intended to verify and substantiate the conclusions which it had drawn from that evidence.
- 186 It should be observed that, in the present case, the evidence in the administrative file is not such as to substantiate, to the requisite legal standard and unequivocally, the conclusions drawn by the Commission for the purposes of the assessment, at SKK 435 million, of the proceeds from the sale of the applicant's assets upon bankruptcy.
- 187 Thus, first, in respect of the assessment of the likely proceeds from the sale of its non-current assets, it should be observed that the applicant stated, in its observations on the decision to initiate the formal examination procedure, that the value of the assets put forward as collateral amounted to approximately SKK 194 million. It explained in that regard that that value was derived from independent evaluation reports prepared in 2003 and 2004 and that it could be verified in the local tax office decisions to defer payment of the taxes between 2000 and 2003. It also added that that

amount did not automatically amount to the likely proceeds from a sale of the assets put forward as collateral in the context of bankruptcy and that, according to several independent evaluations, the maximum likely proceeds would be between 20 and 50% of that value.

- 188 In response to a measure of organisation of procedure, by which the Court had asked the applicant to produce the reports mentioned in paragraph 187 above, the applicant produced a report drawn up by Ms K. and 13 decisions to defer payment of the taxes drawn up for the purpose of providing security between July 2000 and September 2003.
- 189 For its part, in response to a written question put by the Court by way of a measure of organisation of procedure, the Commission stated that it had not sought, during the administrative procedure, the production of the reports mentioned in paragraph 187 above. However, it observed that it had available to it decisions to defer payment mentioned in paragraph 188 above and the conclusions of the inspection carried out at the applicant's premises on 21 June 2004, as set out in a letter of the Slovak authorities which it annexed to its response. The Commission also claimed that, since the evaluation reports mentioned in paragraph 187 above had been ordered specifically in order to establish the value of the assets for the purposes of providing security, it could use the figure ascertained by the applicant. According to the Commission, when the value of an asset is established for the purposes of its use as collateral, the figure established must necessarily take into account what would happen if the guarantee were called.
- 190 It is true that the factors set out in paragraphs 188 and 189 above show that the parties essentially agree that the assessment of the value of the applicant's non-current assets at SKK 194 million, put forward by the applicant itself, was intended for the provision of security for the benefit of the local tax office at the time of the deferral of payment of the taxes for which it was liable.
- 191 However, first of all, it is important to note that, notwithstanding the factors set out in paragraphs 188 and 189 above, the evidence in the file does not allow a determination of whether that assessment of the assets put forward as collateral reflects the book value of the non-current assets put forward as collateral, their market price or their sale price in the event of bankruptcy. The views of the parties differ on this point. Thus, even though, as is apparent from paragraph 187 above, the applicant questioned whether the amount of SKK 194 million would correspond to the proceeds from a sale of its non-current assets in the context of bankruptcy, the Commission merely presumed, in the contested decision and before the Court, that that amount should reflect the general value of the asset, a proxy expressing the price at which the asset can be sold at a given moment, including in the context of bankruptcy, without seeking to verify the purpose, method or reliability of the assessment on which it relied.
- 192 Next, although some of the decisions relating to the deferral of tax debts produced by the applicant include a quantification of the assets put forward as collateral with reference to assessments carried out in 2002, those decisions, taken together, do not make it possible, however, to accept the total amount of SKK 194 million. In particular, several of those decisions contain only a list of the assets put forward as collateral without, however, assessing their value.
- 193 In addition, the Slovak authorities' letter mentioned in paragraph 189 above refers to the inspection which took place on 21 June 2004 at the applicant's premises and sets out its results. It states that the applicant's non-current assets amounted, as is apparent from an expert assessment, to SKK 200 million. However, even if it were the same assessment as that mentioned by the applicant, that letter does not contain any indication of the value of the non-current assets put forward as collateral. Nor does it state that the amount of SKK 194 million, which is not mentioned in that letter, corresponds to the likely proceeds from a sale of the applicant's non-current assets in the context of bankruptcy.

- ¹⁹⁴ In addition, it should be noted that, in the light of the evidence submitted by the parties, the assessment used by the Commission, which dates from the end of 2003 or from the beginning of 2004, is based on assessments carried out between 2000 and 2003 at the time of the deferrals of payment. The amount of SKK 194 million is therefore not evidenced, as the applicant observed at the hearing, by a contemporaneous assessment. As the applicant contends, the value of the assets put forward as collateral, in particular the value of the vehicles and machinery, depreciates with time.
- ¹⁹⁵ Lastly, it is important to add that the liquidation factor applied by the Commission is particularly high, in that it corresponds to 97% of the book value of all the applicant's non-current assets (194 out of SKK 200 million). However, as the applicant correctly submits, the circumstances of a bankruptcy sale reduce the value of an asset by comparison with a sale under normal trade conditions in which the seller can choose, *inter alia*, the time of the sale. Furthermore, the Commission itself observed, in recital 94 of the contested decision, that, using the liquidation factors, 'it is assumed that the value of the assets obtained through a liquidation sale is usually lower than the book value, depending on the type of the assets'.
- ¹⁹⁶ In the light of the considerations set out in paragraphs 191 to 195 above, the conclusion must be drawn that the evidence in the administrative file does not substantiate, to the requisite legal standard, the liquidation factor applied by the Commission for the purpose of assessing the proceeds from the sale of the applicant's non-current assets.
- ¹⁹⁷ Secondly, as regards the assessment of the proceeds from the applicant's short-term receivables, it must be stated from the outset that the applicant does not contest the adjustment of 59% made by the Commission. That adjustment, deriving from the E report, is intended, according to the Commission, to reflect the unrecoverability or the low quality of certain receivables (see paragraph 184 above).
- ¹⁹⁸ In that regard, without needing to rule on the question, which was not raised by the applicant, whether the Commission could, without contradicting itself, use the factor of 59% applied in the E report even though it considered that report to be unreliable, it should be noted that, in the absence of any explanation in that report and in the light of the applicant's objections, neither the significance nor the merits of that factor can be considered to be established. Thus, whilst, according to the Commission, in essence, that factor makes it possible to determine the good quality short-term receivables which could be recovered or sold without loss upon bankruptcy, a second adjustment is necessary, in the applicant's opinion, in order to take account of the circumstances of such a bankruptcy during which a recovery or sale of the short-term receivables would be made at a lower amount than their recoverable value and would involve costs, risks and delays.
- ¹⁹⁹ There is nothing in the file to substantiate the Commission's claim that the amount of the short-term receivables determined by application of the factor of 59% is recoverable in its entirety and would not be affected by the circumstances of a sale upon bankruptcy.
- ²⁰⁰ In those circumstances, it should be held that the evidence in the file does not establish, to the requisite legal standard, the liquidation factor of 59% applied by the Commission to the short-term receivables.
- ²⁰¹ It follows from the above and, in particular, from the conclusions drawn in paragraphs 196 and 200 above that the evidence in the administrative file is not capable of substantiating, to the requisite legal standard, the Commission's assessment of the likely proceeds from a sale of the non-current assets and short-term receivables in the context of bankruptcy. It is thus apparent that the Commission was not in possession, when the contested decision was adopted, of the necessary, most complete and reliable information possible for adopting that decision and that it should have sought, as the applicant essentially claims, to obtain additional information with a view to verifying and substantiating its conclusions.

- 202 It follows that, without there being any need to examine the merits of the Commission's analysis of the proceeds from the sale of the applicant's stocks, the evidence in the administrative file is not capable of establishing, to the requisite legal standard, the assessment, at SKK 435 million, of the proceeds from the sale of its various assets in the context of bankruptcy.
- 203 That finding is not called into question by the Commission's arguments.
- 204 First, the Commission claims that, since it is not for it to prove that its analysis is correct, but for the applicant to demonstrate that its claim relating to the logic of a private creditor is well founded, the Commission is not required to provide the correct liquidation factor, but to assess all the information available to determine whether the applicant's claim is substantiated in a credible manner.
- 205 However, it should be observed that that argument is at variance with the case-law set out in paragraph 139 above. In accordance with that case-law, the burden of proving that the conditions for applying the private creditor test have been fulfilled is borne by the Commission. The Commission cannot discharge that burden of proof merely by making, with regard to the assessment of the conditions for applying the private creditor test, mere assumptions which are not substantiated to the requisite legal standard.
- 206 In those circumstances, even if were the case, as the Commission observed at the hearing, that the application of the private creditor test entails a 'shift' in the burden of proof, in that it is for the Member State or the recipient of the measure to rebut the evidence put forward by the Commission and in the light of which the conditions for applying that test do not seem to have been met, it must be held that those mere unsubstantiated assumptions put forward by the Commission are insufficient to justify such a reversal of the burden of proof.
- 207 Secondly, the Commission makes reference, both in the contested decision and in its pleadings, to the fact that the proceeds from a sale of the non-current assets assessed at SKK 194 million are only a minimum price, given that the Slovak authorities had estimated the value of the assets put forward as collateral at SKK 397 million.
- 208 Besides the fact that that assessment by the Slovak authorities is contested by the applicant, it should be observed that, as the applicant asserts and as is apparent from recitals 22 and 122 of the contested decision, those authorities stated during the administrative procedure that the amount of SKK 397 million had been determined on the basis of the applicant's accounts. In those circumstances, that amount cannot serve as a basis for the estimate of the proceeds from a sale of the applicant's non-current assets in the context of bankruptcy. In addition, the Commission admitted, in response to a question put by the Court at the hearing, that it had no evidence as regards the veracity of that amount, with the result that it could not be used in the calculations. Moreover, it should be observed that that amount, which, according to the applicant, was assessed prior to the provision of security, no longer corresponds, in any event, to the applicant's financial situation on 17 June 2004 which the Commission used as a basis for its assessment. On that date, the book value of the applicant's non-current assets was SKK 200 million.
- 209 Thirdly, the Commission criticises the applicant's tendency to focus on certain details of the contested decision without regard for the fact that, even taking into consideration the liquidation factors in the E report, the likely proceeds from the sale of the applicant's assets would have been higher than the amount proposed under the arrangement and that the unfavourable nature of the arrangement is flagrant in the light of the Commission's corrected estimates.
- 210 It should be observed that the Commission's assessment of the likely proceeds from the sale of the applicant's assets in the context of bankruptcy is not substantiated to the requisite legal standard by evidence (see paragraphs 201 and 202 above). It follows that the Commission wrongly claims that the attractiveness of the bankruptcy procedure in relation to the arrangement procedure is flagrant in the

light of the estimates made on the basis of its own methodology. Moreover, whilst it is true that, even using the liquidation factors used in the E report, the proceeds from the sale of the applicant's assets remain SKK 1.2 million higher than that obtained under the arrangement, the fact remains that that observation alone is not sufficient to establish that a private creditor would manifestly have preferred the bankruptcy procedure over the arrangement procedure. That conclusion also depends on the effect of the duration of the first procedure on the creditor's choice (see paragraphs 222 to 234 below).

- 211 Fourthly, the Commission's argument relating to O.H.'s interest for the applicant's non-current assets, in so far as it has the sole purpose of showing that the applicant has not established the lack of a potential buyer, has no bearing on the appraisal of the merits of the assessment of the proceeds from the sale of its non-current assets.
- 212 Fifthly, it should be added that the Commission's arguments relating to the applicant's short-term receivables have been essentially dismissed in paragraphs 198 and 199 above.
- 213 In the light of the foregoing considerations, the Court must uphold the applicant's arguments contesting the Commission's assessment of the likely proceeds from a sale of its assets in the context of bankruptcy.

The merits of the assessment of the duration of a bankruptcy procedure and of its effect on the choice of the private creditor (third to fifth sets of arguments)

- 214 The applicant contests the Commission's assessment of the duration of the bankruptcy procedure and of its effect on the private creditor's choice.
- 215 In the first place, it considers that the view that the length of the bankruptcy procedure was irrelevant because of the privileged-creditor status of the local tax office is vitiated by the same error as that set out in the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32). It maintains that the fact that a person has the right to realise an asset immediately does not mean that that person can find a buyer immediately. Despite the L. example, the Commission neither examined that issue nor found that there was a potential buyer prepared to pay the likely proceeds from a sale as established by the Commission. Moreover, the likely proceeds from the sale of the secured assets is only SKK 90 million. In the reply, the applicant adds that, although the privileged-creditor status of the local tax office is of relevance, that element is not sufficient to justify the conclusion drawn by the Commission in recitals 110 to 112 of the contested decision, and it notes that the burden of proof rests on the Commission.
- 216 In the second place, the applicant disputes the Commission's assessment of the possible duration of the bankruptcy procedure. The applicant considers that, having regard to the available evidence, that duration was not foreseeable with any degree of accuracy. Moreover, the example of the L. bankruptcy, relied on by the applicant as evidence of the difficulty in finding a buyer for its assets, was particularly relevant. Where it is informed of a relevant fact, it is for the Commission to carry out an appropriate investigation. In addition, the possibility of bringing a bankruptcy procedure to a rapid conclusion depends, not on the number of creditors, but on the ease with which the assets can be realised.
- 217 In the third place, the applicant disputes the validity of the assessment in recital 118 of the contested decision on the ground that, taking into account the correct amounts, namely SKK 225.5 million in respect of the probable result from a sale of its assets and SKK 90 million in respect of the immediate sale of the secured assets, it appears that the proposed arrangement was manifestly more attractive than the bankruptcy procedure.

218 The Commission disputes the merits of all those arguments.

219 In the first place, the Commission claims, first, that, while it is true that the existence of a right to realise an asset immediately does not mean that it is possible to find a buyer immediately, the applicant cannot criticise the Commission for having failed to establish that there was a buyer prepared to pay the price indicated by it, given that it is for the applicant to establish that the behaviour of the public creditor satisfies rational economic logic. The Commission adds that it is clear from recital 96 of the contested decision that the applicant's non-current assets generated some interest. Furthermore, the Commission considers that, in the light of the information available to it, it had no reason to conclude that it was likely that the applicant was in the same situation as L. Secondly, according to the Commission, the applicant's second argument reiterates arguments to which the Commission has already responded within the context of the second complaint. Thirdly, the Commission asserts that it did not repeat the error noted by the Court of Justice in the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32), but, on the contrary, that it remedied the inadequate statement of reasons which had vitiated the initial decision. Having regard to the privileged-creditor status of the local tax office, the duration of a bankruptcy had no effect on the choice of the private creditor in the present case.

220 In the second place, first of all, the Commission observes that recitals 113 to 117 of the contested decision contain a subsidiary analysis to the main conclusion that the duration of the bankruptcy procedure would not have had any significant influence. Next, concerning the case of L., the Commission considers that the information presented at that stage by the applicant is unsubstantiated, late and, in any event, insufficient. Lastly, in addition to the fact that the applicant failed to explain why the number of creditors was not important for assessing the duration of the bankruptcy procedure, the Commission submits that the conclusion drawn in recital 117 of the contested decision is based on a series of factors.

221 In the third place, the Commission observes that it has already responded to the applicant's arguments seeking to call into question its assessment of the foreseeable proceeds from the sale of the applicant's assets in the event of bankruptcy. It adds that the applicant appears to acknowledge that a private creditor would take into account the fact that he would be able to realise secured assets immediately as a factor that enhances the attractiveness of the bankruptcy procedure.

222 In the present case, in recitals 109 to 112 of the contested decision, the Commission considered, primarily, that the duration of the bankruptcy procedure would not have had a significant influence on the decision of a private creditor. According to the Commission, regardless of that duration, the local tax office, as a secured creditor, could have obtained satisfaction at any time of at least SKK 194 million owing to the sale of the non-current assets put forward as collateral. The Commission added in that regard that, even applying the assessment method set out in the E report to the applicant's stocks and short-term receivables, that tax office could have expected to obtain an additional SKK 185 million following the bankruptcy procedure. According to the Commission, it should therefore have been clear to the local tax office that the resulting debt recovery in the context of bankruptcy would have been well in excess of the sum on offer under the arrangement and that only part of that total would have entailed a wait when compared with the arrangement.

223 It follows from that account of the contested decision that the Commission's analysis is based on the premiss that the local tax office would have been able to obtain — immediately and irrespective of the course of the bankruptcy procedure — an amount of SKK 194 million owing to the sale of the applicant's non-current assets. However, as is apparent from the conclusion drawn in paragraph 196 above, that premiss is not substantiated to the requisite legal standard by the evidence in the file.

224 It follows that the conclusion, drawn in recital 112 of the contested decision, that the duration of the bankruptcy procedure has no significant influence on the decision of a hypothetical private creditor is vitiated by the same defect.

- 225 In recitals 113 to 118 of the contested decision, the Commission however assessed, for the sake of completeness, the likely duration of a bankruptcy procedure and its effect on the amount likely to be received by the creditor following such a procedure. According to the Commission, the duration of the procedure would probably be more brief than on average in view of the low number of the applicant's creditors and the liquidation value of its assets (recitals 113 to 117 of the contested decision). It added that, owing to the size of the proceeds from the sale of those assets, as estimated following its own methodology, in comparison with the amount proposed under the arrangement, even a duration of the bankruptcy procedure of four to five years would play no significant role in the decision of the private creditor. It would be only in the event that a duration of nine years is exceeded that the present value would be lower than the amount agreed under the arrangement; however, it states, such a long duration would not have been considered likely in the present case by any private creditor (recital 118 of the contested decision).
- 226 First, it must be held that the consideration set out in recital 118 of the contested decision is based on the premiss that, in the event of bankruptcy, a private creditor would have been able to obtain an amount of SKK 356.7 million, corresponding to the proceeds from the sale of the assets assessed by the Commission after deduction of the costs of the procedure. However, as the applicant observes and as was noted in paragraph 201 above, the Commission's assessment of the proceeds from the sale of the applicant's assets is not substantiated to the requisite legal standard by the evidence in the file.
- 227 Secondly, in those circumstances, it is not necessary to assess the validity of the assessment, in recitals 113 to 117 of the contested decision, of the likely duration of a bankruptcy procedure. Even supposing that the fact that that procedure could have been conducted speedily is established, it should be observed that that fact alone is, in any event, insufficient to justify the conclusion, in recital 119 of the contested decision, that a private creditor would have preferred the bankruptcy procedure to the proposed arrangement.
- 228 As has already been stated in paragraph 201 above, the Commission's assessment of the probable proceeds from a sale in the context of that bankruptcy procedure is not substantiated to the requisite legal standard. However, in accordance with the case-law cited in paragraph 136 above, besides the duration factor, the factor of the amount likely to be obtained in the context of an alternative procedure influences the choice of the private creditor.
- 229 In addition, even supposing that, notwithstanding the reservations rightly expressed by the Commission in respect of the E report (see paragraphs 173 to 175 above), that institution had intended to rely, in the alternative, on the updated assessment of that report, the fact remains that, as is apparent from recital 106 of the contested decision, a private creditor could then have expected to obtain SKK 225.5 million in the context of bankruptcy, that is to say barely SKK 1.2 million more than the amount proposed under the arrangement. Besides the fact that the Commission in no way examined the effect of the duration of a bankruptcy, even more brief than on average, on the choice of a private creditor who could expect to obtain such an amount, it should be noted, in any event, that, in view of that slight difference in the substantial amounts concerned, it may reasonably be considered that a private creditor, even if privileged, would manifestly have preferred to receive an amount of SKK 224.3 million immediately rather than awaiting the outcome of a bankruptcy procedure in which he could obtain SKK 1.2 million more, even assuming that that procedure may be conducted within a relatively short period.
- 230 It follows that the applicant's arguments contesting the assessment of the effect of the duration of a bankruptcy procedure must be upheld.
- 231 That conclusion is not called into question by the Commission's other arguments.
- 232 First, the Commission claims that it is for the applicant to establish that the behaviour of the public creditor responded to rational economic logic.

- 233 That argument is at variance with the case-law relating to the allocation of the burden of proving that the conditions of a private creditor have been fulfilled, as set out in paragraphs 138 to 143 above.
- 234 Secondly, in so far as the Commission responds to the applicant's various arguments relating to the possibility of quickly finding a buyer for the non-current assets and to O.H.'s interest for those assets, to the assessment of the duration of a bankruptcy procedure and to the case of the company L., it suffices to note that those arguments are unrelated to the finding that the Commission's analysis of the effect of the duration on a private creditor's choice is vitiated by the fact that it is based on an assessment of the likely proceeds from the sale of the applicant's assets which is itself vitiated because it is based on insufficient evidence. Therefore, all of those other arguments are irrelevant at this stage.
- 235 In the light of all the foregoing considerations, it must be concluded that the evidence in the file is not capable of substantiating the conclusion, in recital 119 of the contested decision, that a private creditor would have preferred a bankruptcy on the part of the applicant rather than the proposed arrangement.
- 236 It follows that the applicant's third plea must be upheld, without the need to examine the applicant's arguments regarding the assessment of the likely proceeds from a sale of its stocks.
- 237 However, it should be added that the conclusion, in recital 139 of the contested decision, that the private creditor test was not met is based not only on the finding that a private creditor would have preferred a bankruptcy to the proposed arrangement, but also on the finding that such a creditor would have preferred a tax execution over that proposal. It therefore suffices that one of those two procedures — bankruptcy or tax execution — is more advantageous than the arrangement procedure in order to justify the conclusion that the private creditor test was not satisfied in the present case.
- 238 Conversely, it follows that it is only if both the bankruptcy procedure and the tax execution procedure were less advantageous than the arrangement procedure that the conclusion, in recital 139 of the contested decision, that the private creditor test was not satisfied would be vitiated by illegality.
- 239 Therefore, the conclusion drawn in paragraph 235 above is not, by itself, capable of justifying the annulment of the contested decision. It is also necessary for the fourth plea, relating to the comparison of the tax execution and arrangement procedures, to be also well founded. It is for that reason necessary to assess it.

The fourth plea, alleging errors vitiating the conclusion that the tax execution procedure was more advantageous than the arrangement procedure

- 240 By the fourth plea, the applicant disputes the conclusion in the contested decision that, in essence, the tax execution procedure was more advantageous than the proposed arrangement. Having set out, first of all, the stages of that procedure as laid down in Slovak law, the applicant puts forward six sets of arguments in support of that plea. They may be grouped into two categories: (i) those relating to the applicability of the private creditor test for the purpose of comparing the tax execution and arrangement procedures (first and second sets of arguments) and (ii) those relating to the application of that test (third to sixth sets of arguments).

The applicability of the private creditor test with a view to comparing the tax execution and arrangement procedures (first and second sets of arguments)

- 241 The applicant considers that the private creditor test was not relevant for the purpose of comparing the tax execution and arrangement procedures since the tax execution procedure was not accessible to a private creditor. Moreover, the applicant disputes the assertion that no evidence establishing the applicability of that test had been submitted in the present case.

242 Those two questions should be examined in reverse order.

243 In the first place, the applicant takes the view that, for the reasons which it set out in the second plea raised in support of the present action, the Commission erred in law in recital 120 of the contested decision.

244 The Commission disputes the merits of that argument and essentially repeats the arguments it made in reply to the applicant's second plea. It thus notes that the information provided by the Member State concerned, namely that the issue of whether the contested measure constituted State aid had not been considered, undermines any attempt to rely on the private-creditor test. It adds that, if the beneficiary of the measure may rely on that test, it is all the more necessary for him to establish unequivocally that that State was aware, prior to or at the time of granting the advantage, that it was conferring the advantage in its capacity as a private operator.

245 In the contested decision, the Commission observed, in line with the case-law cited in paragraphs 95 and 97 above which it transposed to the private creditor in recital 82 of that decision, that no evidence had been provided to indicate that the local tax office had considered a tax execution procedure and concluded that that procedure would be less advantageous than the arrangement (recital 120 of the contested decision). However, it is apparent from the contested decision that the Commission, while stating that the applicant did not compare the proposed arrangement with the potential outcome of tax execution, made that comparison on the ground that, as the Slovak authorities confirmed, the tax execution procedure was an option for the local tax office, either prior to the launch of the arrangement procedure or after the veto which it could have exercised against the proposed arrangement and that 'this option therefore need[ed] to be considered when applying the [private] creditor test' (recital 121 of the contested decision).

246 Without there being any need to rule on whether the applicant may merely refer to the arguments raised in support of another plea seeking to contest other considerations expressed by the Commission in the contested decision, it must be stated that the arguments raised by the applicant in support of the second plea are not such as to invalidate the considerations set out in recital 120 of the contested decision. As is apparent from the examination of the second plea, the applicant essentially contested the conclusion, in recital 83 of the contested decision, that it followed from the fact that the Member State had not relied on the private creditor test and, on the contrary, stated that the contested measure constituted State aid, that the measure in fact constituted State aid. However, no conclusion of that kind was reached by the Commission in recital 120.

247 In addition, in so far as the Commission observed that the private creditor test was inapplicable for the purpose of comparing the tax execution and arrangement procedures and even if recital 120 of the contested decision must be understood as implicitly containing such a conclusion, it should be recalled that it has been held, in the assessment of the second plea raised by the applicant, that that test was applicable to the circumstances of the present case. Since the test is applicable as such, it must be held that the Commission cannot make a distinction, as regards its applicability, based on the different alternatives to the contested measure.

248 In that regard, it is also important to add that, as noted in paragraph 245 above, it is unequivocally clear from recital 121 of the contested decision that the Commission took the view that the tax execution procedure needed to be considered when applying the private creditor test, since that procedure was an option for the local tax office. In other words, the Commission considered it necessary to examine the substance of the private creditor test in that context since the tax execution was an option and, as the Commission states in its written pleadings, in order to strengthen the contested decision.

- 249 In the second place, the applicant asserts that the contested decision is vitiated by an error of law since the tax execution procedure is not accessible to a private creditor and the contested decision makes no mention of any similar procedure from which such a creditor could have benefited. It follows that that procedure cannot be taken into account in respect of the private creditor test.
- 250 The Commission disputes the merits of those arguments.
- 251 It has already been held that the applicability of the private creditor test depended on the classification of the measure taken as a decision adopted by a private operator rather than on the form in which the advantage had been conferred (see, by analogy, judgment of 3 April 2014 in *Commission v Netherlands and ING Groep*, C-224/12 P, ECR, EU:C:2014:213, paragraph 31; see also, to that effect and by analogy, judgment in *Commission v EDF*, cited in paragraph 26 above, EU:C:2012:318, paragraph 93). The decisive factor in this regard is whether the measure in question satisfied an economic rationality test, so that a private creditor, who counts on maximising his chances of recovering his claim or, at the very least, most of that claim, might also agree to take such a measure (see, to that effect and by analogy, judgment in *Commission v Netherlands and ING Groep*, EU:C:2014:213, paragraph 36).
- 252 In the present case, it is common ground that under the arrangement a private creditor was able, in the same way as the local tax office, to agree to waive, in part, its claim. The parties agree that, by contrast, only the local tax office had the option of the tax execution procedure.
- 253 However, by analogy with the case-law cited in paragraph 251 above, it must be held that the mere fact that the tax execution procedure was not accessible to a private creditor does not preclude an analysis of the private creditor test for the purpose of comparing that procedure with the arrangement procedure. It does not preclude the verification of the economic rationality of the local tax office's decision to opt for the arrangement procedure.
- 254 In that context, it is once again necessary to reject as irrelevant the case-law cited by the applicant, according to which, in order to assess whether the same measure would have been adopted in normal market conditions by a private investor in a situation as close as possible to that of the State, only the benefits and obligations linked to the situation of the State as shareholder — to the exclusion of those linked to its situation as a public authority — are to be taken into account (see judgment in *Commission v EDF*, cited in paragraph 26 above, EU:C:2012:318, paragraph 79 and the case-law cited).
- 255 Besides the fact that that case-law does not address the question whether the private creditor test may be applied for the purpose of comparing the respective advantages and disadvantages of two procedures for the recovery of claims, of which only one is open to the private creditor whereas the public creditor may have recourse to both procedures, it should be observed that it is apparent from the judgments cited in support of that assertion in the judgment in *Commission v EDF*, cited in paragraph 26 above (EU:C:2012:318, paragraph 79), namely the judgments in *Belgium v Commission*, cited in paragraph 51 above (EU:C:1986:302, paragraph 14), of 10 July 1986 in *Belgium v Commission* (40/85, ECR, EU:C:1986:305, paragraph 13), 14 September 1994 in *Spain v Commission* (C-278/92 to C-280/92, ECR, EU:C:1994:325, paragraph 22), and 28 January 2003 in *Germany v Commission* (C-334/99, ECR, EU:C:2003:55, paragraph 134), that all social, regional-policy and sectoral considerations should be left aside when applying the private investor test and that other costs or responsibilities of the Member State in its capacity as public authority should not be taken into account.
- 256 In the light of the foregoing considerations, the Court must dismiss the applicant's arguments relating to the applicability of the private creditor test with a view to comparing the tax execution and arrangement procedures.

The application of the private creditor test for the purpose of comparing the tax execution and arrangement procedures (third to sixth sets of arguments)

257 The third to sixth sets of arguments raised by the applicant in support of the present plea relate to a comparative assessment, in the context of the private creditor test, of the tax execution and arrangement procedures.

258 In the first place, the applicant complains that, in recitals 121 and 123 of the contested decision, the Commission erred in determining the moment at which and the transaction to which the private creditor test was to be applied. First, as regards recital 121 of that decision the applicant observes that the tax execution procedure was not legally available following the proposed arrangement and while the arrangement procedure was ongoing, as the Commission implicitly recognised. Moreover, the only relevant question is whether, on 9 July 2004, the tax execution procedure would have been manifestly more advantageous than the arrangement. Secondly, as regards recital 123 of the contested decision, the applicant claims that the Commission was not competent to assess the deferrals of payment between November 2002 and November 2003 and had to confine itself to examining the only relevant transaction in the present case without speculating about matters falling outside the scope of its competence.

259 In the second place, the applicant observes that recital 123 of the contested decision contains only hypothetical and erroneous assertions, as well as matters which are purely speculative and not resolved by the Commission, which cannot serve as a statement of reasons for such a decision. Furthermore, the Commission failed to address the relevant question of whether a private creditor would have deferred payment of the tax debt.

260 In the third place, the applicant complains, in essence, that the Commission committed a manifest error of assessment and disregarded the guidance given by the Court of Justice in the judgment in *Frucona Košice v Commission*, cited in paragraph 21 above (EU:C:2013:32), in so far as it failed to examine all the available information liable to have a significant influence on a private creditor's decision-making process, as regards both the amount likely to be obtained in the context of tax execution and the costs of that procedure. In the reply, the applicant adds that, contrary to what the Commission claims, the onus was on the Commission to establish in the contested decision the facts justifying its conclusion that tax execution would have led to higher proceeds than the arrangement.

261 In the fourth place, the applicant claims that the Commission made errors as regards the possible duration of a tax execution procedure. In that regard, it asserts that the Commission merely assumed, without analysis or evidence, that that procedure could have been conducted speedily, and failed to examine that question or, at the very least, to state to the requisite legal standard the reasons on which the contested decision was based. Moreover, the applicant claims that a private creditor would have examined the likely timescale of a tax execution procedure under the relevant legislation and would have taken into account all the implications of such a procedure, including the risk of the applicant being declared bankrupt during that procedure and the duration necessary in order to find a buyer willing to pay the minimum amount having regard to the thresholds of Slovak legislation. In response to the Commission's arguments alleging that it adopted the contested decision taking account of all the available information, the applicant asserts in the reply that, according to the case-law, the Commission must take the measures necessary to obtain all the information relevant for the purposes of its analysis.

262 The Commission disputes the merits of all those arguments.

263 In the first place, the Commission contends that the tax execution procedure could have been commenced prior to the initiation of the arrangement procedure and in the event of refusal by the national courts to approve the arrangement. Moreover, the applicant's argument relating to recital 123 of the contested decision is based on a misunderstanding of the comment relating to events prior to

accession of the Slovak Republic to the European Union. The Commission merely suggested that, even before the conclusion of the arrangement, it was questionable that the behaviour of the Member State concerned was compatible with the private creditor test, although the Commission did not find it necessary to rely on that factor to conclude that, in any event, a private creditor would not have chosen the arrangement.

- 264 In the second place, the Commission maintains that the issue of whether the payment deferrals prior to the arrangement were themselves free of aid is not relevant for the purposes of the conclusion that the arrangement constituted State aid. The observations in recitals 122 and 123 of the contested decision are superfluous for the purposes of the reasoning on which the conclusion relating to the existence of aid is based.
- 265 In the third place, the Commission observes that, according to the case-law, it is for the applicant to establish unequivocally and on the basis of objective and verifiable evidence that the advantage was not conferred by the Member State concerned in its capacity as a private operator and could have been obtained on the market. In the absence of any attempt by the applicant to provide the necessary information, the Commission takes the view that it had to take into account all the available information and nevertheless assess the credibility of the claim that there was no aid because the Member State acted in the same way as a private creditor; the Commission examined the tax execution procedure in order to strengthen the contested decision. In any event, the applicant's arguments relating to the amount likely to be obtained in a tax execution procedure and the costs generated by that procedure are unfounded. On the latter point, the Commission observes that it appears to be accepted that a tax execution procedure does not involve as many administrative costs as a bankruptcy procedure and that it had no information on any other costs to be taken into account.
- 266 In the fourth place, the Commission contends that it examined the duration of the bankruptcy procedure and that, despite the lack of information available in that regard, it concluded that, as opposed to the propensity for slowness characteristic of a bankruptcy procedure, the fact that the creditor himself conducts the tax execution procedure has a positive influence on the efficiency and, consequently, the duration of that procedure.
- 267 The validity of the Commission's comparative assessment of the tax execution and arrangement procedures with a view to the application of the private creditor test should be examined in the light of the case-law referred to in paragraphs 131 to 147 above.
- 268 In accordance with that case-law, first of all, the Commission had to ascertain in the present case whether, in the light of the factors mentioned in paragraph 136 above, 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 Slovak authorities would manifestly have preferred the tax execution procedure to the proposed arrangement. For that purpose, in order to identify the more advantageous alternative, the Commission had to compare, on the basis of the interests of a private creditor, the advantages and disadvantages of each of those procedures (see paragraphs 132 to 137 above).
- 269 Next, when, in the context of the private creditor test, it carries out the overall assessment referred to in paragraph 133 above, the Commission is to take into account, in addition to the evidence provided by the Member State at issue, all other relevant evidence in the case. Consequently, where it appears that the private creditor test might be applicable, the Commission is under a duty to ask the Member State concerned to provide it with all relevant information enabling it to determine whether the conditions governing the application of that test are met. Therefore, the burden of proof that the conditions of the private creditor test have been fulfilled is borne by the Commission. That applies all the more strongly where the contested decision is based not on a failure to produce evidence which had been requested by the Commission from the Member State concerned, but on the finding that a

private creditor would not have behaved in the same way as the authorities of that Member State, a finding which presupposes that the Commission had all the relevant information necessary to draw up its decision (see paragraphs 138 and 139 above).

270 Lastly, it is apparent from the case-law cited in paragraph 147 above that it is for the Court in particular to review whether the evidence on which the Commission based its assessment contains all the relevant information which must be taken into account and whether it is capable of substantiating the conclusions drawn by it; in accordance with the case-law referred to in paragraph 134 above, 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 concerned and seeking to recover sums due to it by a debtor experiencing difficulty in making the payments, must be regarded as being relevant.

271 In the present case, it is common ground that, during the administrative procedure, neither the Slovak Republic nor the applicant made a comparison, in respect of the private creditor test, of the arrangement procedure and the tax execution procedure. In particular, it is apparent from the evidence in the file that, in its observations on the decision to initiate the formal procedure, the applicant merely claimed that the tax execution procedure could not have been applied in the present case since the conduct of such a procedure is prevented by the initiation of either a bankruptcy procedure or an arrangement procedure. The applicant added that, if it had not made a proposal for an arrangement, its financial situation would have deteriorated to such an extent that, in the space of a few weeks, it would have been in a state of excessive debt and would therefore have been legally obliged either to file for bankruptcy or to make a proposal for an arrangement. The Slovak authorities stated in particular, in response to that observation of the applicant, that the tax execution procedure could be commenced following the refusal by the national courts to approve the arrangement.

272 Nevertheless, it is apparent from the contested decision that the Commission made that comparison of the tax execution and arrangement procedures on the ground that the first was an option for the local tax office, either prior to the launch of the arrangement procedure or after the veto which it could have exercised against the proposed arrangement (recital 121 of the contested decision). It essentially concluded that tax execution would have led to a higher return than the arrangement (recital 127 of the contested decision) and that a private creditor, had he had the possibility, would have preferred tax execution to the proposed arrangement (recital 124 of the contested decision).

273 In that regard, in the first place, observing that the Slovak authorities and the applicant had differing views as to the value of the non-current assets put forward as collateral and that it was not necessary to determine which figure was correct (recital 122 of the contested decision), the Commission noted that, if the value of the applicant's assets was in reality only half of the pledge, it meant that the securities required for the payment deferrals granted between November 2002 and November 2003 were insufficient. In those circumstances, those deferrals in all probability failed to meet the private creditor test. While taking the view that it was not necessary for it to determine whether those measures were State aid, the Commission nevertheless observed that, if those deferrals already constituted State aid, the private creditor principle could no longer be referred to when the deferred amounts are later partly written off (recital 123 of the contested decision).

274 However, as the applicant rightly submits and without there being any need to determine whether the Commission was competent to rule on the payment deferrals between November 2002 and November 2003, it should be held that that ground of the contested decision, which is purely hypothetical, cannot on its own justify the conclusion that the partial write-off of the tax debt conferred an advantage on the applicant which the applicant would not have been able to obtain under market conditions. At that stage, the Commission merely makes assumptions without however examining the issues thus raised by it, without setting out the slightest evidence in support of them and without drawing any definitive conclusion from them.

- 275 In addition, the Commission accepts in its pleadings that the issue of whether the payment deferrals prior to the arrangement were themselves free of aid is not relevant for the purposes of the conclusion that the arrangement constituted State aid and that the observations in recitals 122 and 123 of the contested decision are superfluous for the purposes of the reasoning on which the conclusion relating to the existence of State aid is based.
- 276 In the second place, in the contested decision, the Commission held that, even if the amount of the non-current assets put forward as collateral amounted only to SKK 194 million, a private creditor would have nevertheless favoured the tax execution procedure (recital 124 of the contested decision). In that regard, the Commission noted that the tax office could directly sell the debtor's assets in the case of such a procedure. According to the Commission, at the time when the arrangement was concluded, the value of the applicant's current assets, namely SKK 43 million in respect of stocks, at least SKK 37 million in respect of enforceable receivables and SKK 161 million in respect of cash, exceeded the amount proposed in the arrangement. The Commission added that the applicant had non-current assets, the value of which was at least SKK 194 million (recital 125 of the contested decision). Lastly, the Commission observed that, unlike bankruptcy proceedings, tax execution would not involve administrative fees and that, since it was initiated and controlled by the tax office itself, it could be assumed that that procedure could have been conducted in a speedy manner (recital 126 of the contested decision). In the light of those factors, the Commission concluded that tax execution would have led to a higher return than the arrangement (recital 127 of the contested decision).
- 277 In that regard, first of all, it should be observed that the Commission's assessment repeats appraisals carried out under the bankruptcy procedure.
- 278 However, it was concluded in paragraph 201 above that that assessment was not substantiated to the requisite legal standard by the evidence in the file.
- 279 Next, in respect of the duration of a tax execution procedure, the Commission merely 'assumed that it would be conducted in a speedy manner', in particular when compared with the bankruptcy procedure, since it was initiated and controlled by the authorities itself. However, the Commission did not carry out any assessment of that duration, whether in the circumstances of the present case or, at the very least, on average in the light of the stages of the procedure as established by Slovak law. In addition, in its pleadings, the Commission acknowledges the inadequacy of the information available regarding the duration of a tax execution procedure.
- 280 It is important to note that the duration of the procedures constitutes a factor which is liable to have a significant influence on the decision-making process of a private creditor (see, to that effect, judgment in *Frucona Košice v Commission*, cited in paragraph 21 above, EU:C:2013:32, paragraph 81).
- 281 Lastly, it should be observed that, according to the case-law, the situation of the beneficiary undertaking may constitute relevant evidence in the overall assessment of the conditions for applying the private creditor test (see, to that effect and by analogy, judgments in *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission*, cited in paragraph 56 above, EU:T:2003:57, paragraph 251, and of 30 June 2015 in *Netherlands and Others v Commission*, T-186/13, T-190/13 and T-193/13, EU:T:2015:447, paragraph 88).
- 282 Even though, during the administrative procedure, the applicant stated that a tax execution procedure could have been stopped because it could have found it necessary to have to file for bankruptcy in view of the deterioration of its financial situation, the Commission in no way took that evidence into account in the contested decision or even assessed the chances that the tax execution procedure might, in the light of that evidence, be completed in the present case. That gap cannot be filled by the assertion, before the Court, that that applicant's claim is purely speculative.

- 283 Moreover, it should be added that, in respect of the costs of a tax execution procedure, the Commission merely noted that that procedure, unlike the bankruptcy procedure, would not involve administrative fees. By contrast, it is in no way apparent from the contested decision that the Commission examined the question whether the tax execution procedure was likely to generate any fees whatsoever. Nor did it address the possible significance of their effect on the amount likely to be obtained in the context of such a procedure.
- 284 It is thus apparent that, on the date of the adoption of the contested decision, the Commission did not have in its possession material evidence enabling it to claim that a private creditor would manifestly have opted for the tax execution procedure on 9 July 2004.
- 285 That conclusion applies without there being any need to examine the applicant's other arguments, which essentially relate to the possibility and probability of a direct sale in the context of tax execution, the value of the assets which an expert would have determined if necessary, the use of the figures ascertained in the assessment of the likely proceeds from a sale of the assets in the context of a bankruptcy procedure, the legal thresholds applicable in the event of tax execution and their effect on the possibility of a sale of the assets in the amounts stated by the Commission, the bankruptcy on the part of L. and the risk of dissipation of the applicant's assets.
- 286 The conclusion drawn in paragraph 284 above is not called into question by the Commission's arguments.
- 287 First, the Commission observes that, according to the case-law, it is for the applicant to establish unequivocally and on the basis of objective and verifiable evidence that the advantage in question was not conferred by the Member State concerned in its capacity as a private operator and could have been obtained on the market. It adds that it compared the two procedures solely on the basis of the information available to it and that it was not in possession of the evidence which the applicant could have provided in order to support its position that the tax execution procedure was less advantageous than the arrangement procedure.
- 288 However, having regard to the case-law cited in paragraphs 138, 139, 141 and 269 above, it should be observed that, since it applied the private creditor test for the purpose of comparing the tax execution and arrangement procedures and since it essentially found that a private creditor would have preferred the first procedure to the second procedure, the Commission could not merely make unsubstantiated and unverifiable assumptions on the ground that it was not in possession of sufficient information. Nor can it rely on the case-law relating to the applicability of that test, according to which it is for the Member State concerned or the interested party which invokes it to establish that that Member State took the contested measure in its capacity as market operator, in order to justify the fact that it merely drew, in the absence of such evidence, imprecise conclusions when applying that test.
- 289 Nor, secondly, is the conclusion drawn in paragraph 284 above called into question by the other arguments raised by the Commission in response to the arguments relied on by the applicant. Those arguments of the Commission essentially relate to the possibility and probability of a direct sale in the context of tax execution, the value of the assets which an expert would have determined in that case, the use of the amounts ascertained in the assessment of the likely proceeds from a sale of the assets in the context of a bankruptcy procedure, the bankruptcy on the part of L., the legal thresholds applicable in the event of tax execution and, finally, the risk of dissipation of the applicant's assets.
- 290 It should be noted that the conclusion drawn in paragraph 284 above is based solely on the finding that the Commission did not have in its possession material evidence enabling it to claim that a private creditor would manifestly have opted for the tax execution procedure on 9 July 2004. Moreover, that conclusion — which follows from the acceptance of the applicant's arguments that the Commission, whose responsibility it is to prove that the conditions of the private creditor test have not been fulfilled in the present case, had failed to assess the duration and the costs as well as its own

economic situation in the context of the comparison of the tax execution and arrangement procedures — has been reached without needing to examine the applicant's other arguments referred to in paragraph 285 above. Since the Commission's arguments mentioned in paragraph 289 above were submitted in response to the latter arguments of the applicant, they cannot in any event serve to reverse the conclusion reached in paragraph 284 above.

291 In the light of all the foregoing considerations, the fourth plea raised by the applicant is well founded.

292 As a result and in particular having regard to the conclusions drawn in paragraphs 236 and 291 above, the contested decision must be annulled.

Costs

293 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs, including those relating to the proceedings for interim measures, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Second Chamber),

hereby:

1. **Annuls 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.;**
2. **Orders the Commission to bear, in addition to its own costs, the costs incurred by Frucona Košice, including those incurred in connection with the proceedings for interim measures.**

Martins Ribeiro

Gervasoni

Madise

Delivered in open court in
Luxembourg on 16 March 2016

[Signatures]

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