II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 26 September 2006

on State aid C 42/2005 (ex NN 66/2005; ex N 195/2005) implemented by the Slovak Republic for Konas, s.r.o.

(notified under document number C(2006) 4205)

(Only the Slovak version is authentic)

(Text with EEA relevance)

(2007/204/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having called on interested parties to submit their comments pursuant to the provision cited above [1] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter of 11 April 2005, registered as received on 19 April 2005, Slovakia notified the Commission that it intended to grant restructuring aid to the company Konas, s.r.o. It provided additional information by letters of 30 June 2005, registered as received on 12 July 2005, and of 5 September 2005, registered as received on 8 September 2005, replying to the Commission's letters of 31 May 2005 and 28 July 2005 respectively.

(2) In the course of this Exchange of Letters it became apparent that the aid in question had been implemented in contravention of Article 88(3) of the EC Treaty. The aid was therefore classified as unlawful aid and given a new case number (NN 66/2005).

(3) By letter of 9 November 2005, the Commission informed Slovakia that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

(4) The Commission decision to initiate the procedure laid down in Article 88(2) of the EC Treaty was published in the *Official Journal of the European Union* [2]. The Commission invited interested parties to submit their comments on the measure.

(5) The Slovak authorities submitted their observations by letter of 13 December 2005, registered as received on 20 December 2005. Slovakia submitted additional information by letter of 3 January 2006, registered as received on 10 January 2006. The Commission received comments from one interested party (the recipient) by letter of 30 November 2005, registered as received on 6 December 2005. It forwarded them to Slovakia, which was given the opportunity to react and did so by sending its own comments by letter dated 9 March 2006, registered as received on 15 March 2006.

[1] OJ C 323, 20.12.2005, p. 25.

[2] See footnote 1.

II. DETAILED DESCRIPTION OF THE AID

1. Relevant undertaking

(6) The recipient of the financial support is Konas, s.r.o. (hereinafter Konas), a manufacturer of machinery and equipment operating principally in four sectors: shaping and press tools, single-purpose machines, protection shields and other mechanical engineering products. The company is situated in a region eligible for regional aid under Article 87(3)(a) of the EC Treaty.

(7) According to the information provided by the Slovak authorities, a number of domestic competitors and competitors elsewhere in the European Union operate in all these sectors. The company sees possibilities for exports in the shaping tools segment.

(8) Konas employs 37 people. Its turnover was SKK 19 million (EUR 500 000 ([3])) in 2004 and SKK 15 million (EUR 395 000) in the first three quarters of 2005. According to the Slovak authorities, the recipient fulfils the criteria of a small enterprise.

2. Applicable national legislation

(9) The measure in question comprises a write-off of a tax debt by the Lučenec Tax Office (tax office) under what is known as an arrangement with creditors. This procedure is governed by Act No 328/91 on Bankruptcy and Arrangements with Creditors (Bankruptcy Act).

(10) Arrangement with creditors (arrangement or arrangement procedure) is a court-supervised procedure which, like the bankruptcy procedure, aims at settling the financial situation of indebted companies ([4]). Under the bankruptcy procedure, the company ceases to exist and either its assets are sold to a new owner or the company is liquidated. In contrast, under the arrangement procedure, the indebted company continues its business without change of ownership.

(11) The arrangement procedure is initiated by the indebted company. The aim is to reach an agreement with the creditors (agreement) whereby the indebted company pays off part of its debt and the remainder is written off. The agreement has to be approved by the supervising court.

(12) Creditors whose receivables are secured, e.g. by means of a mortgage, act as separate creditors. For the arrangement proposal to be accepted, all the separate creditors have to vote in favour, whereas for other creditors a qualified majority suffices. Separate creditors vote individually and have a right to veto the proposal.

(13) Separate creditors have a privileged position also in the bankruptcy procedure. The proceeds from the sale of the secured assets in the bankruptcy procedure are meant to be used exclusively to satisfy the claims of the separate creditors. If the claims of the separate creditors cannot all be met from this sale, the outstanding amounts are incorporated into the second group with the claims of the other creditors. In the second group, the creditors are satisfied proportionally.

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

(15) Act No 511/92 on the Administration of Taxes and Fees and Changes to the System of Local Financial Authorities (Tax Administration Act) governs the tax execution procedure, the aim of which is to satisfy the State's tax claims through direct sale of real estate, movable assets or the firm as a whole.

3. Disputed measure

(16) Konas requested the supervising court to commence an arrangement procedure on 15 July 2003, which the court did by a decision of 25 March 2004. The creditors met on 8 June 2004 and agreed to the restructuring of their claims as proposed by Konas. The court confirmed the creditors' agreement by a decision of 25 June 2004, which entered into force on 2 August 2004. The court formally ended the arrangement procedure by a decision of 20 October 2004. It should, however, be noted that the tax office has suspended the write-off pending the procedure before the Commission.

([3]) The exchange rate used is only approximate (EUR 1 = SKK 38) and the figures in euro are included only for information purposes.

([4]) A company becomes indebted when it has several creditors and is not able to settle its obligations within 30 days from maturity.

(17) The creditors agreed with Konas on the following arrangement: 13,3 % of the debt would be repaid by Konas within 90 days of the entry into force of the creditors' agreement and the remaining 86,7 % of the debt would be forgone by the creditors. The claims of all the creditors were treated on equal terms. The claims of the tax office included in the arrangement procedure amounted to SKK 11 223 459 (EUR 295 000) and comprised VAT accrued over the period between the third quarter of 1995 and the end of 1997 and in respect of several months in 1998 and 1999. The tax office, as the sole public creditor, agreed to write off SKK 9 730 739 (EUR 256 000). The actual amounts per creditor are shown in the following table:

Table 1

Konas debt arrangement (in SKK)

Creditor		Debt before the arrangement	Debt after the arrangement (*)	Amount written off
Public	Tax office	11 223 459	1 492 720	9 730 739
Other	4 creditors	827 437	110 049	717 388
Total		12 050 896	1 602 769	10 448 127

(*) The amount that Konas is obliged to pay back to its creditors.

(18) The Slovak authorities confirmed that, under the arrangement in respect of both its public and its private creditors, Konas had fulfilled its obligations within the time limit laid down in the creditors' agreement.

(19) In the arrangement procedure the tax office acted as a separate creditor and, as such, voted separately in favour of the arrangement. The privileged position of the tax office was due to the fact that its receivables included in the arrangement procedure, which amounted to SKK 10 147 939 (EUR 267 051), were secured by means of a mortgage on the assets of Konas. All the other creditors voted in favour of the proposed arrangement. Their receivables were common trade receivables not secured in any manner.

4. **Restructuring**

(20) With its request for the arrangement procedure addressed to the supervising court, Konas also submitted a two-part plan comprising: (a) a financial analysis of the company and organisational measures, and (b) measures to restore the company's financial stability.

(21) In the plan, the company first described its financial situation, claiming that, although it was still indebted, its financial situation had been stabilised in the years preceding the request for an arrangement. It then concluded that its short-term receivables and cash would be sufficient to cover the debt remaining to be paid under the arrangement. The company described its organisational measures as follows: creation of reserves for an amount equal to the debt still to be paid under the arrangement; management of cash flow during the arrangement procedure so as to avoid inefficient expenditure, especially for energy and materials; regular payment of taxes and other public obligations; intensification of marketing activities; increase of sales to the most profitable customers; workforce review; limitation of expenditure for social purposes during the arrangement procedure; better use of existing plant; and energy consumption and cost reductions.

(22) The costs of financial restructuring amounted to SKK 12 050 896 (EUR 317 000), the debt that Konas restructured through the arrangement. In its plan Konas proposed to finance the remaining debt of SKK 1 602 769 (EUR 42 000) through short-term receivables (SKK 1 323 259 or EUR 35 000) and available cash (SKK 2 246 419 or EUR 59 000).

(23) According to the Slovak authorities, between 1998 and 2000 the tax office issued eight execution orders in exercise of its powers under the Tax Administration Act. In April 2004 the tax office issued a list of Konas's debts outstanding at the time of the arrangement procedure.

(24) The Slovak authorities confirmed that, pending the procedure before the European Commission, they had suspended the debt write-off agreed under the arrangement procedure.

III. DECISION TO INITIATE THE PROCEDURE OF ARTICLE 88(2) OF THE EC TREATY

(25) In its decision to initiate the procedure of Article 88(2) of the EC Treaty, the Commission raised doubts as to whether the disputed write-off had no State aid element. Specifically, it considered that the behaviour of the tax office in the arrangement procedure did not meet the market economy creditor test. In particular, it found that the tax office was in a situation legally different from the other creditors as it possessed secured claims and had the possibility to initiate the tax execution procedure. It doubted that the arrangement procedure led to the best possible outcome for the State as a creditor of Konas when compared with the bankruptcy procedure or the tax execution procedure.

(26) The Commission then raised doubts as to the compatibility with the common market of the disputed aid as restructuring aid. It doubted that the two main conditions were fulfilled: existence of a restructuring plan ensuring a return to long-term viability within a reasonable timeframe and limitation of the aid to the minimum necessary.

IV. COMMENTS FROM INTERESTED PARTIES

(27) On the facts of the case, the recipient submitted that the book value of the assets pledged in favour of the tax office was SKK 3 254 000 on 31 December 2003 and SKK 3 001 000 on 31 December 2004. The assets in question were the only real estate owned by the recipient; all production was carried out in this building.

(28) In its comments the recipient submitted that, according to the Slovak legislation in force at the time of the arrangement, the present measure was not a State aid measure but an act of voluntary agreement with the creditors. Should the Commission conclude otherwise, Konas would be discriminated against, when compared with other cases where companies had applied for an arrangement before the accession of Slovakia to the EU and the resulting debt write-off had not been deemed to be State aid. The recipient adds that, even after accession, the national legislation was not in line with EU law and therefore, however diligent it had been, it could not have known that reaching an arrangement with its creditors required additional conditions to be fulfilled.

(29) The recipient further submitted that the accrued tax debt resulted mainly from unclear legislation.

(30) The recipient claimed that the tax office's assessment of Konas's situation went beyond what was included in the plan submitted to the court in the arrangement procedure.

V. COMMENTS FROM THE SLOVAK REPUBLIC

(31) In their reply to the opening of the formal investigation, the Slovak authorities submitted that State aid would be granted only if the tax receivable were written off in the State's accounts.

(32) The Slovak authorities submitted that the tax office, when agreeing to the arrangement proposed by Konas, had taken into account the following factors, some of which, it is suggested, would also be borne in mind by a market economy creditor. First, the book value of the pledged real estate was, at the time of the arrangement, only SKK 3,2 million, although the secured receivables amounted to SKK 10,1 million. Second, the bankruptcy procedure tends to be rather lengthy and the sale of assets in the region in question is very problematic. As regards the statistics, the yield obtained from bankruptcy by the tax authorities between 1997 and 2005 is claimed to average only 7 %. Third, the tax office took into account the impact of the liquidation of Konas on regional unemployment (around 40 % at the time of the arrangement), bearing in mind not only redundancies at Konas but also at another company in the region which is dependent on Konas and employs some 400 people. Finally, the tax office took into account the expected future tax revenue.

(33) As to the tax execution procedure, the Slovak authorities confirmed that between 1998 and 2000 the tax office issued eight execution orders against Konas and decreased the company's tax debt by SKK 8 106 672,42 to SKK 11 223 459, which was included in the arrangement procedure in 2004. Since 2001, Konas has paid all its taxes regularly and on time.

(34) The Slovak authorities do not dispute that the present measure constitutes State aid. Their claim is that this aid is compatible with the common market as restructuring aid.

(35) The Slovak authorities do not dispute the Commission's conclusion that the write-off of the debt under the arrangement procedure was not made conditional upon the implementation of the plan submitted by Konas to

the supervising court pursuant to the Bankruptcy Act. They have, however, sent to the Commission a document from January 2005 entitled 'Evaluation of the company on the date of the arrangement' (the evaluation), which had been prepared by Konas and submitted to the tax office. The Slovak authorities contend that this evaluation of the company would allow the Commission to assess whether the aid had been limited to the strict minimum necessary.

(36) The evaluation first describes the activity of Konas since it was set up in 1992 and includes information on turnover and operating results between 1993 and 2003.

(37) According to the evaluation, the reason for Konas's difficulties was high credit exposure linked to production start-up in 1993 which the volume of production was not able to cover. Between 1994 and 1996 Konas accumulated debt, in particular towards the tax office, which was then partly collected by execution and partly carried over until it was eventually partly repaid and partly written off under the arrangement procedure.

(38) The evaluation then includes a short market analysis where it examines the competitive environment in all the sectors in which Konas is active ([5]). It describes the position and prospects of Konas in each of these sectors and concludes that there is particular growth potential in the production of tools, protection shields and other mechanical engineering products. In contrast, it proposes cutting back production of single-purpose machinery and small-scale made-to-order production (production of unavailable spare parts, emergency repairs). The prospects for greater demand for the company's products lie in the development of the automobile industry in Slovakia and in the clear signs of greater interest on the part of EU companies, bolstered by Slovakia's EU accession. Konas sees itself competitive with its know-how in respect of technologies that have development potential.

(39) The evaluation further describes Konas's capacity as being under-utilised, a problem that should be addressed by investment in a computerised milling machine. The measures to be adopted between 2004 and 2008 are set out in the following table, together with the financial restructuring undertaken.

Table 2

Restructuring measures according to the evaluation (in SKK)

Measure		Implementation	Cost	Financing
Marketing		2005	500 000	Konas resources
Development of technologies	Wire cutting	2004	1 500 000	Konas resources
	NC milling	2006	4 000 000	Loan
	Sparking	2007	2 500 000	Loan
	NC lathing	2008	1 500 000	Loan
Organisation	Client management IT system	2005	500 000	Konas resources
Training of young workers		2007	500 000	Konas resources
Financial restructuring	Repayment of debt	2004	1 602 769	Konas resources, cash
	Write-off	2004		
	— by the State		9 730 739	State resources
	— by other creditors		717 388	External resources
Total			23 050 896	

([5]) The Commission had already been provided with this information by the Slovak authorities before it adopted the decision to open the formal investigation procedure (see paragraph 4 of that decision).

(40) Finally, the evaluation contains a forecast of Konas's operating results for the period 2005 to 2009, showing that the above measures should contribute to higher profitability. Turnover should grow by 10 % a year as of 2005.

(41) According to the Slovak authorities, the evaluation dates from January 2005. It is clear that the evaluation was prepared to assess Konas's situation before the arrangement and to analyse its prospects after the arrangement.

(42) As to the question of whether the aid was limited to the minimum necessary, the Slovak authorities confirmed that on 31 March 2004 Konas had SKK 3,9 million in cash, which was needed to cover wages (SKK 730 000), the obligations towards the creditors participating in the arrangement (SKK 1 602 769) and the arrangement procedure fees (SKK 140 000).

VI. **ASSESSMENT**

1. **Competence of the Commission**

(43) As some of the relevant events in the present case took place before the accession of the Slovak Republic to the European Union on 1 May 2004, the Commission first has to determine whether it is competent to act with regard to the disputed measure.

(44) Measures that were put into effect before accession and are no longer applicable after accession cannot be examined by the Commission either under what is known as the interim mechanism procedure, governed by Annex IV, point 3 of the Accession Treaty, or under the procedures laid down in Article 88 of the EC Treaty. Neither the Accession Treaty nor the EC Treaty requires or empowers the Commission to review such measures.

(45) However, measures put into effect after accession do fall within the field of competence of the Commission under the EC Treaty. In order to determine the moment when a certain measure was put into effect, the relevant criterion is the legally binding act by which the competent national authority undertakes to grant aid ([6]).

(46) The decision of the competent authority to write off some of the claims was taken on 8 June 2004, when the tax office agreed with the arrangement proposed by Konas, i.e. after accession.

([6]) Case T-109/01 Fleuren Compost v Commission [2004] ECR II 127, paragraph 74.

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

(48) The Commission therefore concludes that it is competent to assess the disputed measure pursuant to Article 88 of the EC Treaty.

2. **State aid within the meaning of Article 87(1) of the EC Treaty**

(49) Article 87(1) of the EC Treaty states that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States is incompatible with the common market.

(50) Writing off a debt towards a public authority such as a tax office involves State resources. Since it benefits an individual undertaking, the measure is selective. The company is active in the production of industrial machinery and equipment, a sector in which trade exists between Member States.

(51) In the decision to initiate the procedure of Article 88(2) of the EC Treaty, the Commission raised doubts as to whether the measure distorted or threatened to distort competition by conferring on the recipient an advantage that it would normally not be able to obtain on the market. In other words, the Commission had doubts as to whether the State had behaved as a market economy creditor in relation to Konas.

(52) It was established that the agreement contained the same debt arrangement conditions for both the private creditors and the tax office: 13,3 % of the debt was to be paid to the creditors within a prescribed period, a requirement with which the recipient complied. The remaining 86,7 % was written off.

(53) However, prior to the arrangement, the tax office was in a legally and economically more advantageous position than the private creditors. It therefore needs to be examined in detail whether the tax office used all the means at its disposal to obtain the highest possible repayment of its receivables, as a market economy creditor would do.

(54) The Slovak authorities submit that, in their view, the measure constitutes State aid. They acknowledge that, at the time of the arrangement, the question of State aid was simply not considered. The recipient, for its part, argues that the measure is an act of voluntary agreement between creditors and not State aid.

(55) The Commission cannot accept the argument that the arrangement procedure and the procedure for granting State aid cannot overlap ([7]). It is not the purpose or the form of the action on the part of the State but its result that determines whether a given action involving State resources confers on a company an advantage that it otherwise would not obtain on the market.

(56) Similarly, the Commission cannot accept the recipient's argument that, however diligent it had been, the company could not have known that the write-off might constitute State aid. The EU rules on State aid were applicable in Slovakia in the form of State Aid Act No 231/1999. In their reply to the recipient's comments, the Slovak authorities rightly pointed out that assessing whether the measure in question constituted State aid was not a matter for the tax office but fell within the remit of the State Aid Office before accession and within that of the Commission after accession.

(57) The Commission's doubts set out in the decision to initiate the procedure of Article 88(2) of the EC Treaty as to whether the market economy creditor test was met have not been allayed.

(58) First, the tax office, unlike the private creditors, was entitled to initiate tax execution on its own initiative through the sale of real estate, machinery or the firm as a whole.

(59) In fact, the tax office had recourse to this legal instrument on a number of occasions to enforce its claims against Konas (see recital 33), and Konas's debt towards the tax office was considerably reduced between 1998 and 2000. In their reply to the decision to initiate the procedure of Article 88(2) of the EC Treaty, the Slovak authorities submitted that the tax office did not issue any further execution orders after 2001 because Konas was complying with its tax obligations regularly and on time. It is not clear, however, for what reason the tax office suspended tax execution with regard to Konas's pre-2001 debt. This debt from previous years was eventually included in the arrangement procedure in 2003.

(60) Moreover, the Commission notes that, according to the information provided by the Slovak authorities in their comments on the decision to initiate the procedure of Article 88(2) of the EC Treaty, the book value of the pledged real estate (SKK 3,2 million) did not correspond to the level of the receivables secured by this pledge (SKK 10,1 million). This means that the securities required by the State were insufficient.

(61) It is established case-law that a continuous absence of enforcement on the part of the State of obligations arising from tax and social security legislation might *in itself* create an advantage by mitigating the burden that the recipient should normally bear ([8]). It indeed appears that the tax office's non-enforcement of Konas's tax obligations, combined with manifestly insufficient security for the State's receivables over a period of two years (2001 to 2002), constituted State aid. As these events took place before the date of accession and were not applicable thereafter, the Commission is not competent to assess the compatibility of the action in question with the common market. However, if the earlier non-enforcement already constituted State aid, the market economy creditor principle can no longer be referred to once the debt is later (partly) written off.

(62) Under the tax execution procedure, a tax office can directly sell the assets (receivables and other current assets, movable assets, real estate) of the debtor. At the time of the arrangement, the recipient had cash of SKK 3,9 million ([9]). The value of the recipient's cash alone would have exceeded the tax office's yield from the arrangement (SKK 1,5 million). In addition, the recipient had short-term receivables with a book value of SKK 1,4 million and real estate with a book value of SKK 3 million.

(63) Lastly, unlike bankruptcy proceedings, tax execution would not involve administrative fees. Since it is a procedure that is initiated and controlled by the tax office itself, it can be assumed that it would be conducted in a speedy manner.

([7]) Case T-152/99 Hamsa v Commission, p. 158: Article 87(1) of the EC Treaty does not distinguish between State intervention measures by reference to their causes or aims, but defines them in relation to their effects.

([8]) Case C-256/97, DM Transport.

([9]) Balance sheet on 24 March 2004, one day before the supervisory court issued the decision permitting the initiation of the arrangement procedure.

(64) The Commission does not have sufficient information to be able to assess what the yield would be from the sale of the assets under bankruptcy proceedings in the event of the recipient being liquidated. To the Commission's knowledge, neither Konas nor the tax office considered the option of bankruptcy, which is why no further calculations were made in this respect.

(65) The Commission therefore concludes that, if nothing else, tax execution against the recipient's assets would have produced a higher yield than the arrangement.

(66) Finally, the Commission notes that it is established case-law ([10]) that socio-economic factors, such as regional employment and expected future tax revenue, are excluded from the market economy creditor test. The tax office cannot be compared to a commercial partner, such as a supplier who is a creditor of the recipient. It is important to note that the receivables of a supplier and those of the State are fundamentally different in nature. Since the relationship between the supplier and the insolvent firm has a contractual basis, exceptionally the supplier may genuinely suffer from the loss of the business partner. If the insolvent company were liquidated, the supplier would have to find a new client or conclude a contract with the new owner. The greater the supplier's dependency on the insolvent company, the higher the risk involved. In contrast, the relationship between the State and the insolvent firm is based on public law and is, therefore, not dependent on the will of the parties. Any new owner who took over the assets of the liquidated firm would automatically be obliged to pay taxes. Furthermore, the State is never dependent on a single taxpayer. Finally and most importantly, when levying taxes, the State is not profit-driven and does not act on a commercial basis or on commercial considerations. The analogy with a business partner is therefore not well-founded.

(67) The Commission therefore concludes that the loss of future taxes cannot be taken into account when applying the market economy creditor principle.

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

([10]) See mutatis mutandis Cases C-278/92, C-279/92 and C-280/92 Spain v Commission, pp. 21 and 22; Case T-198/01 Technische Glaswerke Ilmenau GmbH, pp. 106 to 108.

(69) The Commission therefore concludes that the measure in question constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

(70) The State aid granted to the recipient comprises the amount of the debt written off by the tax office under the arrangement procedure, which is SKK 9 730 739 (EUR 256 000).

3. **Compatibility of aid: Derogation under Article 87(3) of the EC Treaty**

(71) The primary objective of the measure is to assist a company in difficulty. In such cases, it is possible to apply the exemption laid down in Article 87(3)(c) of the EC Treaty provided that the relevant conditions are met; under the exemption, State aid may be granted to facilitate the development of certain economic activities provided that it does not adversely affect trading conditions to an extent contrary to the common interest.

(72) Rescue and restructuring aid to ailing companies is currently governed by the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([11]) (the New Guidelines), which replaced the previous text adopted in 1999 ([12]) (the 1999 Guidelines).

(73) Under their transitional provisions, the New Guidelines apply to the assessment of any rescue or restructuring aid granted without the authorisation of the Commission (unlawful aid) where some or all of the aid is granted after 1 October 2004, the date of publication of the New Guidelines in the *Official Journal of the European Union* (point 104, first subparagraph). Aid unlawfully granted before 1 October 2004 is to be assessed on the basis of the guidelines applicable at the time when it was granted (point 104, second subparagraph).

(74) The Commission notes that the tax office's approval of the arrangement was issued on 8 June 2004 and took effect on 2 August 2004. Therefore, the aid was unlawfully granted before 1 October 2004. This means that the applicable guidelines are the 1999 Guidelines in force at the time when the aid was granted.

([11]) OJ C 244, 1.10.2004, p. 2.
([12]) OJ C 288, 9.10.1999, p. 2.

(75) The Commission takes note that the recipient is a small enterprise within the meaning of Commission Regulation (EC) No 70/2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises ([13]).

3.1. *Eligibility of the firm*

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

(77) The recipient was a party to an arrangement procedure, which is one of the options available for insolvent companies under the Bankruptcy Act. The recipient is therefore eligible for restructuring aid.

3.2. *Restructuring aid*

(78) In its decision to initiate the procedure of Article 88(2) of the EC Treaty, the Commission raised doubts as to whether the aid was compatible as restructuring aid within the meaning of the 1999 Guidelines on the grounds described in Part III above.

3.2.1. Return to long-term viability

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

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

(81) In its decision to initiate the procedure of Article 88(2) of the EC Treaty, the Commission expressed doubts that the tax office had made its decision to write off Konas's debt conditional on implementation of a restructuring plan of the type described in paragraph 80. These doubts have not been allayed. Formally speaking, the tax office as the granting authority did not have any obligation or competence to evaluate the list of measures addressed by Konas to the supervising court (see recital 20) under the arrangement procedure or to make the write-off of its receivables conditional on duly monitored implementation of these measures. There is no direct link between the granting of the aid by the tax office and the measures proposed by the recipient. The Commission therefore concludes that the first formal condition was not met.

(82) However, after the opening of the formal investigation procedure, the Slovak authorities submitted an evaluation of the company as described in recital 35. The evaluation clearly addresses the situation of Konas at the time of the arrangement with its creditors. It describes the circumstances that led to the recipient's difficulties and identifies measures to address these difficulties.

(83) The restructuring is not limited to debt restructuring. The recipient plans to undertake investments in new technologies and IT and to implement forward-looking measures in the area of training and marketing. The evaluation analyses the position and prospects of Konas on the specific market segments in which it is active.

(84) Unlike the list of measures submitted to the court under the arrangement procedure, the evaluation contains the elements required for a restructuring plan under the 1999 Guidelines. The Commission considers the evaluation to be essentially a restructuring plan for the period 2004 to 2008; it is designed to restore the long-term viability of Konas and is appropriate in view of the size of the recipient. The financial restructuring in the form of the arrangement with the creditors is the first step in this restructuring. Konas's main problem was the debt incurred in the second half of the 1990s. Since 2001, Konas has been paying its current liabilities under public law correctly and in due time. The Commission has no reason to doubt Konas's ability to restore its long-term viability after the measures included in the evaluation, including the debt restructuring, are implemented.

(85) The Commission notes that, formally speaking, the evaluation was not produced until after the arrangement with creditors had been secured. Nevertheless, it is obvious that the evaluation was directly linked to the arrangement procedure. It was submitted to the tax office before the notification of the measure to the Commission, at a time when the Slovak authorities believed that it would constitute State aid only if the tax receivables were written off from the State's accounts. It nonetheless remains the case that the aid was not formally made conditional on implementation of the plan by the tax office as the granting authority.

([13]) OJ L 10, 13.1.2001, p. 33. Regulation as last amended by Regulation (EC) No 1976/2006 (OJ L 368, 23.12.2006, p. 85).

(86) The Commission considers that, by way of an exception in this specific case, this formal defect can be remedied. This exception is justified firstly in accordance with point 55 of the 1999 Guidelines, which states that the conditions for granting aid for restructuring may be applied less strictly in the case of small businesses, such as the recipient. Second, the exception is permissible because, even though the aid had already been granted, it had not yet been paid out to the recipient (debt write-off requires an additional administrative act on the part of the tax office; see recital 16). Consequently, in accordance with Article 7(4) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([14]), the Commission has decided to attach the following conditions to this Decision.

(87) Firstly, the Slovak authorities are to ensure that the evaluation is properly implemented. Secondly, they are to inform the Commission as to how they will ensure that the evaluation is implemented. Finally, they are not to disburse the aid (i.e. write off the receivables in the tax office's accounts) until they have notified the Commission of their undertaking to ensure that the evaluation is implemented and how they intend to do so.

3.2.2. Aid limited to the strict minimum

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

(89) In its decision to initiate the procedure of Article 88(2) of the EC Treaty, the Commission expressed doubts as to whether this criterion was met. These doubts have been allayed in view of the information on the restructuring of the recipient contained in the evaluation.

(90) According to the evaluation, the restructuring costs amount to SKK 23 050 896. The restructuring was financed partly through a cash contribution by Konas (payment of the debt of SKK 1 602 769 outstanding after the arrangement) and partly through bank loans with no State aid element totalling SKK 8 million. These contributions clearly constitute own resources of the recipient and external resources with no State aid element and cover about 42 % of the restructuring costs. The Commission does not need to determine whether the other sources of financing for the restructuring of Konas (described as resources of Konas in the evaluation, see Table 2 in recital 39) constitute a real and actual contribution to the restructuring costs.

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

(92) In view of its practice in applying the 1999 Guidelines and the change in its policy in this respect towards the introduction of thresholds under the New Guidelines ([15]), the Commission considers that the contribution of 42 % can be termed significant and that the aid was limited to the minimum necessary.

3.2.3. Limitation of undue distortion of competition

(93) For the sake of completeness, the Commission notes that, in accordance with point 55 of the 1999 Guidelines, the granting of restructuring aid to small enterprises is not usually linked to compensatory measures. The distortion of competition caused by the aid at issue is limited and compensatory measures are, therefore, not required.

VII. **CONCLUSION**

(94) The Commission finds that the Slovak Republic unlawfully granted the write-off of Konas's tax debt in breach of Article 88(3) of the EC Treaty. This aid is nevertheless compatible with the common market as restructuring aid, provided that its payment is made conditional on the implementation of the restructuring plan,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which the Slovak Republic has implemented for Konas, amounting to SKK 9 730 739, is compatible with the common market, subject to the conditions set out in Article 2.

Article 2

1. The Slovak Republic shall take all necessary measures to ensure that Konas's restructuring plan is properly implemented.

2. The Slovak authorities shall inform the Commission on how they will ensure that the restructuring plan is implemented.

([14]) OJ L 83, 27.3.1999, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

([15]) The threshold for small enterprises under the New Guidelines is at least 25 %.

3. They shall not grant the aid until they have informed the Commission of their undertaking to ensure that the restructuring plan is implemented and how they will do so.

Article 3

The Slovak Republic shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to the Slovak Republic.

Done at Brussels, 26 September 2006.

For the Commission
Neelie KROES
Member of the Commission