COMMISSION DECISION

of 7 April 2006

on State aid C 25/2005 (ex NN 21/2005) implemented by the Slovak Republic for FRUCONA Košice, a.s.

(notified under document number C(2006) 2082)

(Only the Slovak version is authentic)

(Text with EEA relevance)

(2007/254/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 15 October 2004, registered as received on 25 October, the Commission was sent a complaint concerning alleged unlawful state aid in favour of FRUCONA Košice, a.s.. The complainant sent additional information on 3 February 2005. A meeting with the complainant took place on 24 May 2005.

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

(3) By letter of 5 July 2005, the Commission informed Slovakia that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

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

II. DETAILED DESCRIPTION OF THE AID

1. Relevant undertaking

(6) The recipient of the financial support is FRUCONA Košice a.s. (hereinafter referred to as 'the beneficiary'), which, at the time of the decisive events, was active in the production of spirit and spirit-based beverages, non-alcoholic beverages, canned fruit and vegetables, and vinegar. Currently, the beneficiary no longer produces spirit and spirit-based beverages. Nevertheless, it is active on the wholesale market for spirit and spirit-based beverages. The company is situated in a region eligible for regional aid under Article 87(3)(a) of the EC Treaty.

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

[2] See footnote 1.

(7) At the time of the decisive events, the beneficiary employed about 200 persons. In his comments on the decision to open the formal investigation, the beneficiary provided the Commission with data on its turnover (including excise duties and VAT), which are shown in the following table.

Table 1

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

	2002	2003	2004
Vinegar	[…] (*)	[…]	[…]
Fruit and vegetable production	[…]	[…]	[…]
Cabbage	[…]	[…]	[…]
Carbonated non-alcoholic beverages	[…]	[…]	[…]
Non-carbonated non-alcoholic beverages	[…]	[…]	[…]
Juices 100 %	[…]	[…]	[…]
Spirit-based beverages	[…]	[…]	[…]
Apple wine	[…]	[…]	[…]
Syrup	[…]	[…]	[…]
Other products/services	[…]	[…]	[…]
Total	**895 019 980**	**978 343 230**	**880 314 960** ([3])

(8) These data differ considerably from the data obtained by the Commission from the Slovak authorities and given in the decision to open the formal investigation ([4]). In their reaction to the beneficiary's comments after the opening of the formal investigation, the Slovak authorities did not dispute the accuracy of the above figures. According to the Slovak authorities, the beneficiary fulfils the criteria of a medium-sized enterprise.

2. Applicable national legislation

(9) The disputed measure is a write-off of a tax debt by the Košice IV tax office ('tax office') under what is known as an arrangement with creditors. This procedure is governed by Act 328/91 on Bankruptcy and Arrangement 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 ([5]). 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. This agreement has to be approved by the supervising court.

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

(*) Confidential information

([3]) In EUR, the turnover was said to have been EUR 23,6 million in 2002, EU-25,7 million in 2003 and EUR 23 million in 2004. The exchange rate used in this Decision is EUR 1 = SKK 38.

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

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

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

(16) The Tax Administration Act also governs the tax execution procedure, the aim of which is to satisfy the State's tax claims through sale of real estate, movable assets or the firm as a whole.

3. Disputed measure

(17) Between November 2002 and November 2003 the beneficiary benefited from the possibility offered by the Tax Administration Act to have its obligation to pay excise duty on spirit deferred [6]. In total, the deferred debt amounted to SKK 477 015 759 (EU-12,6 million). Before agreeing to defer these payments, the tax office secured each of its receivables against the beneficiary's assets, as stipulated in the Act. The Slovak authorities submit that the value of these securities based on the beneficiary's accounts was SKK 397 476 726 (EU-10,5 million). The beneficiary, however, claims that the value of these securities, as estimated by experts at the end of 2003, was SKK 193 940 000 (EUR 5 million). This is, according to the beneficiary, the value of the secured assets (movables, real estate and receivables) expressed in so-called expert prices.

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

(19) On 8 March 2004 the beneficiary applied to the competent regional court for the arrangement procedure. Having determined that all the necessary legal requirements were met, the regional court decided by a decision of 29 April 2004 to allow the arrangement procedure to go ahead. At the hearing on 9 July 2004 the creditors voted in favour of the arrangement proposed by the beneficiary. The arrangement was confirmed on 14 July 2004 by a decision of the supervising regional court.

(20) In August 2004 the tax office appealed against this confirmatory decision of the court. By a decision of 25 October 2004, the Supreme Court decided that the appeal was not admissible and declared the decision of the regional court approving the arrangement to be valid and enforceable as of 23 July 2004. The public prosecutor subsequently appealed against the decision of the regional court under the extraordinary further appeal procedure. The procedure is still pending before the Supreme Court.

(21) The creditors, including the tax office, agreed with the beneficiary on the following arrangement: 35 % of the debt would be repaid by the beneficiary within one month from the validity of the agreement and the remaining 65 % of the debt would be forgone by the creditors. All the creditors were therefore treated on identical terms. The actual amounts per creditor are shown in the following table.

Table 2

The state of the debts of the beneficiary before and after the arrangement procedure [SKK]

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

[6] The excise duty is payable on a monthly basis.

Creditor		Debt before the arrangement	Debt after the arrangement (*)	Amount written off
Private	Tetra Pak a.s.	[…]	[…]	[…]
	MTM-obaly s.r.o.	[…]	[…]	[…]
	Merkant družstvo	[…]	[…]	[…]
	Vetropack s.r.o.	[…]	[…]	[…]
TOTAL		**644 591 439** ([7])	**225 607 029**	**418 984 410**

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

(22) The claims of the tax office included in the arrangement procedure amounted to SKK 640 793 831 (EUR 16,86 million) and comprised unpaid excise duties for the period May 2003–March 2004, VAT for the period January-April 2004 and added penalties and interest. The claims forgone by the tax office amounted to SKK 416 515 990 (EUR 11 million). The arrangement provided the tax office with SKK 224 277 841 (EUR 5,86 million).

(23) 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 some of its receivables included in the arrangement procedure were secured in connection with the deferral of the beneficiary's tax debt in 2002 and 2003 (see paragraph 17). All the other creditors voted in favour of the proposed arrangement. Their receivables were common trade receivables not secured in any manner.

(24) In its arrangement proposal, in accordance with the requirements of the Bankruptcy Act, the beneficiary spelt out reorganisation measures relating to production, distribution and the workforce (including redundancies).

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

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

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

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

(29) The beneficiary planned an intensive sale of its stocks of ready-to-sell products ([8]).

(30) According to this proposal, the beneficiary was to finance the arrangement through its own resources (sale of stocks) of SKK [less than 150] million and through external financing in the form of a loan from a commercial bank of SKK 100 million. From the information submitted by the beneficiary in response to the opening of the formal investigation, the outstanding debt was eventually covered by the revenue from the issue of new shares (SKK 21 million; EUR 0,56 million), the revenue from the sale of stock (SKK [less than 150] million; EUR [less than 3,9] million) and a supplier loan from Old Herold s.r.o. (SKK [70-130] million; EUR [1,8-3,4] million). The maturity of the invoices of Old Herold s.r.o. was 40 days, which, according to the beneficiary, was a long period considering the beneficiary's precarious financial situation. This prolonged maturity permitted the beneficiary to accumulate the necessary cash.

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

(31) The Slovak authorities informed the Commission after the opening of the formal investigation that the outstanding debt of the beneficiary towards the tax office amounting to SKK 224 277 841 was paid on 17 December 2004. They confirmed that they had suspended the debt write-off agreed in the arrangement procedure pending the procedure before the European Commission.

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

(32) In its decision to initiate the formal investigation, the Commission raised doubts that the disputed write-off did not involve state aid. 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, when compared with the bankruptcy procedure or the tax execution procedure.

(33) The Commission then raised doubts as to the compatibility of the disputed aid with the common market. It first raised doubts that the aid could be considered to be compatible as rescue aid, as the Slovak authorities had claimed. Rescue aid can only be liquidity support in the form of loan guarantees or loans. The disputed measure, however, is a debt write-off, which corresponds to a non-refundable grant. In addition, the measure was not granted with the prospect that the beneficiary would present a restructuring plan or a liquidation plan or reimburse the aid in full within six months of authorisation of the rescue measure.

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

IV. COMMENTS FROM INTERESTED PARTIES

(35) In addition to the facts described in Part II above, the beneficiary submitted the following comments.

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

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

(38) The beneficiary further submitted that, even if the Commission found itself competent to act, the contested measure did not constitute state aid because the market economy creditor principle was met.

(39) First, the beneficiary submits that the comparison of the arrangement procedure with the tax execution procedure is misleading because the initiation of the former excludes or suspends the latter. The tax execution procedure was not, therefore, an option for the tax office. In addition, according to the beneficiary, had it not voluntarily initiated the arrangement procedure, after some weeks or months it would have had a legal obligation to launch the bankruptcy procedure or an arrangement procedure pursuant to the insolvency legislation.

(40) Second, the beneficiary submits that the decision of the State to avoid bankruptcy and instead to seek a solution through the arrangement procedure met the market economy creditor test. By way of evidence, it submits statements from two auditors and one bankruptcy receiver that the tax office would receive more and would receive it more quickly under the arrangement procedure than under the bankruptcy procedure. It also submits further material and statistics to demonstrate that the bankruptcy procedure in Slovakia lasts on average 3-7 years and brings only a very limited return from the sale of assets ([9]).

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

(42) According to the report by EKORDA, the revenue from the sale of assets in the case of bankruptcy would be, at best, SKK 204 million (EUR 5,3 million), and, after deduction of various fees of SKK 45 million, only SKK 159 million (EUR 4,2 million). The beneficiary himself corrected the amount of the fees to be deducted (SKK 36 million) and arrived at

([9]) The beneficiary gives an example of a company owning similar assets and operating in the same sector and some more general statistical averages for the use of the bankruptcy procedure in Slovakia.

the figure of SKK 168 million (EUR 4,4 million). Even though the tax office as the only separate creditor and by far the largest creditor would receive most of this revenue, it would still be less than what the tax office received after the arrangement.

(43) To arrive at this result, EKORDA used as the basis the book value as at 31 March 2004 of fixed assets, stocks, cash and short-term receivables after adjustment, reflecting their unrecoverability and low value. It adjusted the nominal value of the beneficiary's assets by a so-called liquidation factor for each component of the assets in the event of sale under bankruptcy proceedings (45 % for fixed assets, 20 % for stocks and short-term receivables, and 100 % for cash).

(44) EKORDA mentions the future tax revenue accruing from the operation of the beneficiary ([10]) as well as the employment trend in the region and the trend in the food-processing industry in Slovakia as very important factors affecting the decision to keep the beneficiary in business.

(45) The beneficiary also mentions two other reports. The auditor Marta Kochová concluded that the maximum revenue from the sale of the assets, which, however, were not evaluated, would be SKK 100 million (EUR 2,6 million) or, after deduction of fees of SKK 22 million, only SKK 78 million (EUR 2 million). No further information on this report was provided. The receiver Mrs Holovačová is said to state that, in her opinion, the arrangement procedure is generally more advantageous for creditors than bankruptcy. One consideration is the fact that the creditor has an interest in the continuity of the economic activity of the debtor (future revenues from trade or from taxes).

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

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

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

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

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

V. COMMENTS FROM THE SLOVAK REPUBLIC

(51) In their reply to the opening of the formal investigation, the Slovak authorities made some comments on the factual issues, which have already been mentioned in Part II above.

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

(53) In their response to the comments submitted by the beneficiary, the Slovak authorities submitted the following observations.

(54) The Slovak authorities would not find relevant in the present case the beneficiary's observations on the average length of the bankruptcy procedure and the average return from the sale of assets in a bankruptcy procedure. According to them, given the low number of creditors and the existence of assets with a positive liquidation value which exceeded the amount paid to the State after the arrangement, the bankruptcy procedure would have been

([10]) From the 2004 figures used by EKORDA in its report it transpires that 98 % is VAT and excise duties.

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

completed in a shorter-than-average period and the yield of the tax office would have been higher than in the case of the arrangement. The Slovak tax authorities carried out an on-the-spot inspection at the company on 21 June 2004 and found that, as at 17 June 2004, the beneficiary had cash amounting to SKK 161,3 million, receivables of SKK 62,8 million, stocks of spirit and spirit-based beverages with a value of SKK 84 million and fixed assets with a book value of SKK 200 million.

(55) The Slovak authorities consider that the tax execution procedure was a genuine alternative for the tax office. They confirm that the tax office had the possibility of initiating this procedure prior to the arrangement procedure, as it could have done even if the court had refused to confirm the arrangement (because the tax office as separate creditor would not have voted in its favour).

(56) The Slovak authorities do not agree with the assertion of the beneficiary that his financial difficulties were due to the change in the Tax Administration Act. According to them the financial difficulties of the beneficiary were due to the financial strategy of using indirect taxes for the running of its own business. Instead, the beneficiary should have simply collected the taxes from its clients and transferred them to the state budget.

(57) The Slovak authorities do not agree that the meeting with the Tax Directorate of the Slovak Republic in December 2003 is evidence of preliminary agreement with the arrangement on the part of the tax office. They submitted a letter of 6 July 2004 that had been sent by the Tax Directorate of the Slovak Republic to the subordinate tax office, instructing it not to agree with the arrangement proposed by the beneficiary because it was unfavourable for the State. This letter then referred to another, more general, letter of 15 January 2004 from the Minister of Finance to the subordinate Tax Directorate, instructing it not to agree to proposals for arrangements with creditors that would involve the tax authorities writing off tax receivables. Moreover, the Slovak authorities interpreted the letter of 3 February 2004, referred to by the beneficiary (see paragraph 37), as explicitly disagreeing with the 35 % arrangement.

(58) The Slovak authorities submit that the beneficiary had not paid excise duties within the prescribed deferment period (January 2001 to March 2004) and had had its tax obligations regularly deferred.

(59) According to the Slovak authorities, significant differences in the estimates of the two auditors' reports raise doubts as to the credibility of both reports. They have, in particular, doubts regarding the liquidation factor assigned to current assets by EKORDA. This factor should be higher than 20 %.

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

VI. ASSESSMENT

1. Competence of the Commission

(61) 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.

(62) Measures that were put into effect before accession and are no longer applicable after accession cannot be examined by the Commission either under the so-called 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 these measures.

(63) However, measures put into effect after accession clearly 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 ([12]).

(64) The beneficiary claimed in the present case that the disputed measure was put into effect before accession and is not applicable thereafter (see paragraph 37).

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

(66) The decision of the competent authority to write off some of its claims was taken on 9 July 2004, when the tax office agreed to the arrangement proposed by the beneficiary.

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

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

(68) 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

(69) 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.

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

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

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

(73) It was established that the arrangement contained the same debt arrangement conditions for both the private creditors and the tax office. The creditors were to be paid 35 % of the debt within a prescribed period, a requirement with which the beneficiary complied. The remaining 65 % was written off.

(74) However, prior to the arrangement, the tax office was in a legally and economically more advantageous position than the creditors before the arrangement. 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.

(75) In order to determine whether the market economy creditor test was met, the Commission has to determine whether the tax office was better off accepting the conditions of the arrangement as proposed by the beneficiary compared with the possible outcome of a bankruptcy procedure or a tax execution procedure.

(76) In brief, the Slovak Republic submits that, in its view, the measure constitutes state aid. It acknowledges that, at the time of the arrangement, the question of state aid was simply not considered. Contrary to this, the beneficiary argues that the measure is free of aid and submits documents described above, in particular reports from two auditors.

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

Table 3

Financial situation of the beneficiary 2003-04 [SKK million]

	31. 12. 2003 ([13])	31. 3. 2004 ([14])	28. 4. 2004 ([15])	17. 6. 2004 ([16])	31. 12. 2004 ([17])
Non-current assets ([18])	208	205	204	200	200
Stocks	119	209	176	84	52

	31. 12. 2003 ([13])	31. 3. 2004 ([14])	28. 4. 2004 ([15])	17. 6. 2004 ([16])	31. 12. 2004 ([17])
Cash	3	50	94	161	27
Short-term commercial receivables	128	98 ([19])	80	63 ([20])	97

([13]) Balance sheet 1 January — 31 December 2003, provided by the beneficiary. All the values are book values.
([14]) Source: EKORDA report of 7 July 2004, taking into account the book value, except for the receivables, which are adjusted to their liquidation value.
([15]) Source: Balance sheet 1 January — 28 April 2004, provided by the beneficiary. All the values are book values.
([16]) Information provided by the Slovak authorities and obtained during the on-the-spot check by the tax office at the beneficiary's premises on 21 June 2004 (see paragraph 54 above).
([17]) Source: Annual report 2004, provided by the beneficiary. All the values are book values.
([18]) Land, buildings, machinery, intangible assets, financial assets.
([19]) According to EKORDA, the book value of short-term receivables of SKK 166 million has to be adjusted to the liquidation value of SKK 98 million (see paragraph 86).
([20]) It is not clear whether this figure represents the book value or the liquidation value of the short-term receivables. To err on the side of caution, the Commission took it to be the book value.

(78) The Commission will first examine the evidence submitted by the beneficiary in support of its opinion that the bankruptcy procedure would leave the tax office worse off than the arrangement procedure. As neither the Slovak authorities nor the beneficiary submitted any calculation with regard to the tax execution procedure, the Commission will examine what the tax office could have obtained via this procedure. Finally, it will examine circumstantial evidence submitted by both the Slovak authorities and the beneficiary.

2.1. *Comparison of the arrangement procedure and bankruptcy*

(79) The Commission does not consider the EKORDA report a reliable basis for comparing the proposed arrangement with a potential bankruptcy procedure. The Slovak authorities share these doubts.

(80) At the outset, the Commission notes that, in issuing its report on 7 July 2004 (just two days before the creditors' meeting), EKORDA used for its calculations the status of the beneficiary's assets as at 31 March 2004. It is clear from Table 3 that the level of the various assets changed considerably after 31 March 2004. In particular, a considerable portion of the stocks was sold, which led to an increase in cash. These changes are of great importance when applying EKORDA's liquidation factors, ranging from 20 % for stocks and short-time receivables to 100 % for cash. Assuming that the liquidation factors estimated by EKORDA are correct and applying the methodology used by EKORDA, the following table shows how the outcome of EKORDA's calculation would have been different if based on figures from 28 April 2004 and 17 June 2004, i.e. still before the creditors' meeting on 9 July 2004. These figures also show that the liquidation factors proposed by EKORDA are not realistic.

Table 4

Comparison of the probable yield from the sale of the beneficiary's assets in a bankruptcy procedure [SKK million]

		Situation on:					
		31.3.2004		28.4.2004		17.6.2004	
	Liquidation factor [%]	Book value	Yield	Book value	Yield	Book value	Yield
Non-current assets	45	205	92	204	92	200	90
Stocks	20	209	42	176	35	84	17
Short-term receivables	20	98 ([21])	20	86 ([22])	17	37 ([23])	7

		Situation on:					
		31.3.2004		28.4.2004		17.6.2004	
	Liquidation factor [%]	Book value	Yield	Book value	Yield	Book value	Yield
Cash	100	50	50	94	94	161	161
Total			**204**		**238**		**275**

([21]) This is the book value (SKK 166 million) adjusted by EKORDA to reflect the liquidation value of the receivables.
([22]) This is an approximation of the liquidation value that the Commission obtained by adjusting the book value of the short-term receivables (SKK 147 million) by the same ratio as EKORDA used in its analysis (see footnote 19).
([23]) This is an approximation of the liquidation value that the Commission obtained by adjusting the book value of the short-term receivables (SKK 63 million; see also footnote 20) by the same ratio as EKORDA used in its analysis (see footnote 19). The Commission, however, notes that, judging from the information provided by the Slovak authorities, the receivables of SKK 63 million were enforceable receivables. It is therefore very doubtful whether any adjustment of their book value is actually necessary. If SKK 63 million were the liquidation value of these receivables, the total yield in a bankruptcy procedure as at 17 June 2004 would have been SKK 331 million (EUR 8,7 million).

(81) It must be noted that the business plan submitted by the beneficiary to the court forecast the sale of stocks at [less than SKK 150] million over the period March-May 2004. EKORDA must have therefore been aware that the assets of the beneficiary would be subject to significant changes after 31 March 2004 and did not take this into account.

(82) If EKORDA had taken into account the book value of the beneficiary's assets from 28 April 2004, it would have arrived at the conclusion that the yield obtained in bankruptcy would have been higher (SKK 238 million; EU-6,3 million) than what the beneficiary proposed in the arrangement (SKK 225 million; EUR 5,93 million ([24]). This conclusion would have been even stronger if the analysis had been made in June 2004 (SKK 275 million; EUR 7,2 million), still well in time for the tax office to exercise its right of veto and reject the proposal, with the effect of terminating the arrangement procedure. Again, it is noted that these results were obtained using EKORDA's assumptions and methodology.

(83) The Commission, however, is unable to accept the methodology used by EKORDA and does not find the assumptions of its analysis credible. This conclusion is reinforced by the doubts of the Slovak authorities as described in paragraphs 55 and 60.

(84) To start with, in its report EKORDA does not explain how it determined the three liquidation factors. The Slovak authorities stated that the liquidation factor for the stocks should be higher than 20 %.

(85) The Commission observes that in 2004 the beneficiary was able to generate SKK [less than 150] million from the sale of its stocks (see paragraph 30). This is more that [40-50] % of the book value of stocks on which EKORDA based its assessment. This strongly suggests that the liquidation factor of 20 % was too low. The changes in the balance sheet in 2004 with regard to stocks supports this conclusion. In addition, the beneficiary itself in its business plan estimated the yield from the sale of stocks over the period March-May 2004 to be SKK [less than 110] million (see paragraph 30). EKORDA ignored this estimate. Finally, from the nature of the beneficiary's activities it can be assumed that the stocks comprised final products that could have been easily sold direct to distributors or consumers, rather than semi-finished products requiring further processing.

([24]) Including both the tax office and the private creditors.

(86) Furthermore, EKORDA used double adjusting with regard to the short-term commercial receivables. First, it adjusted their book value by 40 % (the book value being SKK 166 million and the value that EKORDA used in its calculations being SKK 98 million) and then applied the low liquidation factor of 20 %. This methodology is questionable. It is acceptable to adjust the book value of receivables to reflect their actual value at a given time. However, EKORDA does not provide any clarification as to why the yield in the bankruptcy/liquidation would be only one fifth (SKK 20 million) of what the beneficiary itself believed it would be able to obtain from its debtors (SKK 98 million).

(87) Furthermore, the liquidation factor of 45 % for non-current assets seems to be too low. According to the beneficiary, the value of its assets pledged in favour of the tax office was SKK 194 million ([25]). This value is, according to the beneficiary, expressed in prices estimated by independent experts at around the end of 2003/beginning of 2004. In the Commission's view, such an 'expert price' should normally reflect the general price of the asset, expressing the price at which the asset could be sold at the time. EKORDA does not provide any clarification as to why the yield from the bankruptcy sale of the non-current assets would generate only 45 % of their book value of SKK 205 million ([26]) whereas the beneficiary himself valued these assets much higher.

([25]) This figure is disputed by the Slovak authorities, as will be explained below.
([26]) Including both pledged and non-pledged non-current assets.

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

(89) In addition, the credibility of EKORDA's report is also affected by the manner of calculating the various fees involved in a bankruptcy procedure that were to be subtracted from the total yield from the sale of the assets. Whereas EKORDA deducted SKK 45 million in fees, the beneficiary in its submission gave the figure of SKK 36 million and the estimate of the auditor Ms Kochová is SKK 22 million at most. Such discrepancies raise doubts as to the accuracy of EKORDA's assumptions regarding the level of the fees and, therefore, also the level of the yield that could have been obtained in a bankruptcy procedure. It is noted, nevertheless, that, considering the beneficiary's situation on 17 June 2004, even with fees of SKK 36 million, the yield in bankruptcy would have been higher than with the proposed arrangement.

(90) Finally, the Commission notes that the Slovak authorities do not support the beneficiary's claim that the tax office would have had EKORDA's report at its disposal prior to the creditors' meeting on 9 July 2004.

(91) As to the report by Ms Kochová, the Commission cannot assess it because it does not have a copy of it. From the information submitted it is not clear when and for what purpose this report was drawn up or on what assumptions and data it was based. The Commission, however, observes that the conclusions of this auditor are significantly different from the conclusions of EKORDA. The report of the receiver Ms Holovačová states only that, in general, the arrangement procedure is more advantageous for creditors than bankruptcy. The Commission cannot accept either of these two reports as evidence in support of or against the beneficiary's assertion that the market economy creditor test was met.

(92) On the basis of the evidence available, the Commission therefore concludes that the sale of the assets in a bankruptcy procedure would, in all probability, have led to a higher yield for the beneficiary's creditors. Considering that the tax office would be satisfied in the first group as a separate creditor and, in addition, obtain most of the yield distributed in the second group (owing to the size of its claims when compared to other creditors), the Commission concludes that almost the entire yield obtained in the bankruptcy would accrue to the tax office.

2.2. *Comparison of the arrangement procedure and tax execution*

(93) The tax office, unlike the private creditors, was entitled to initiate on its own initiative the tax execution through the sale of real estate, machinery or the firm as a whole. The Commission finds irrelevant the argument of the beneficiary that the arrangement procedure shelters the company from the tax execution procedure. As confirmed by the Slovak authorities, the tax execution procedure was indeed an option for the tax office, either prior to the launch of the arrangement procedure or after the tax office's veto on the proposed arrangement. This possibility therefore needs to be considered when applying the market economy creditor test. The beneficiary does not compare the proposed arrangement with the possible outcome of tax execution.

(94) In its analysis the Commission relies on the data provided by both the beneficiary and the Slovak authorities. In this context it is noted that the Slovak authorities confirmed that the pledge in favour of the tax office equalled SKK 397 million, as stated in the decision to open the formal investigation procedure. This value is said to have been obtained from the beneficiary's accounts. The beneficiary, for its part, submits that the value of the pledged assets expressed in 'expert prices' is SKK 194 million (see paragraph 17). While the Commission does not need to determine which figure is correct, the following conclusions can nevertheless be made.

(95) First, the pledge was the countervalue of the deferred tax debt of the beneficiary, required by the Tax Administration Act. If the value of the beneficiary's assets actually amounted to only half of the pledge, as suggested by the expert opinion submitted by the beneficiary, then the securities required by the State for those deferrals were insufficient. In these circumstances, the tax deferrals permitted by the tax office between November 2002 and November 2003 for a total amount of SKK 477 million therefore in all probability did not meet the market economy creditor test. As these tax deferrals were put in effect before the date of accession and are not applicable thereafter, the Commission is not competent to assess the compatibility of those measures with the common market. For the purpose of this case, it is also unnecessary for the Commission to determine whether those measures constituted state aid. However, if the earlier deferrals already constituted state aid, the market economy creditor principle can no longer be referred to when the deferred debts are later (partly) written off.

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

(97) In a tax execution procedure the tax authority can sell the debtor's assets (receivables and other current assets, movable assets, real estate) directly. At the time when the tax office voted in favour of the arrangement, the beneficiary had stocks worth SKK 84 million, enforceable receivables of SKK 63 million and cash of SKK 161 million (see paragraph 54). It should be noted that the value of the current assets alone (SKK 308 million; EUR 8,1 million) would exceed the yield obtained under the arrangement (SKK 225 million; EUR 5,93 million). Even if the receivables were wholly deducted ([27]), the value of the current assets alone (SKK 245; EU-6,4 million) would still exceed the yield obtained under the arrangement. In addition, the beneficiary had other assets, the value of which was at least SKK 194 million.

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

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

2.3 Other evidence

(100) The Commission takes particular note of the letter submitted by the Slovak authorities from the director of the Tax Director to his subordinate, the director of the tax office in question (see paragraph 57). The letter is clear proof that the Tax Directorate (which had had prior direct contacts with the beneficiary) opposed the proposed arrangement and gave the local tax office a clear instruction not to vote in favour of the arrangement. The reason mentioned in the letter was that the proposed arrangement was 'not advantageous' for the State.

(101) It was also shown by the Slovak authorities that there was a clear policy instruction given by the Ministry of Finance at the beginning of 2004 to tax offices to the effect that they should not accept arrangements that propose writing off tax offices' receivables ([28]). This instruction was given in connection with the amendment of the Tax Administration Act as of 1 January 2004, in an effort to strengthen discipline in tax collection.

(102) In addition, the Commission notes that the tax office itself had appealed against this arrangement as early as 2 August 2004, i.e. not even one month after the arrangement was agreed upon.

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

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

(105) The beneficiary submitted that long-term effects, such as the continuity of the tax revenue for the State, should be taken into account (see paragraph 46).

(106) First, it needs to be stressed that the market economy creditor test differs from the market economy investor test. Whereas a market economy investor is in a position to decide whether to enter into a relationship with the company in question and will be driven by the long-term strategic prospect of obtaining an appropriate return from his investment ([29]), a 'market economy creditor', who is already in a commercial or public law relationship with the insolvent company, will aim to obtain the repayment of sums already due to him ([30]) on conditions as advantageous as possible in terms of the degree of repayment and the time-frame. The motivations of the hypothetical market economy creditor and the market economy investor will therefore be different. Accordingly, the case law has defined separate tests for the two situations.

(107) Second, as to the analogy with the creditor-supplier, it is important to note that the nature of his receivables and the nature of those of the State are fundamentally different. Because the relations of the supplier to the insolvent firm have an exclusively contractual basis, he might genuinely suffer from the loss of a business partner. If the insolvent company is liquidated or sold off, the supplier would need to find a new client or contract with the new owner. The

([27]) It is not entirely clear whether SKK 63 million is the book value or the liquidation value of the short-term receivables on 17 June 2004 (see footnotes 20 and 23). Nor it is clear whether the book value does not in fact also correspond to the liquidation value.

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

([29]) Case T-152/99 *Hamsa*, p. 126.

([30]) See, for example, Case C-342/96 *Spain v Commission* ('Tubacex'), p. 46.

risk is higher when his dependency on the insolvent firm is considerable. Such a creditor will indeed consider the future. In contrast, the relations of the State with the insolvent firm are based on public law and therefore are not dependent on the will of the parties. Any new owner taking over the assets of the liquidated firm would automatically be obliged to pay taxes. Moreover, the State is never dependent on one taxpayer. Finally and most importantly, the State is not profit-driven when levying taxes and does not act in a commercial manner or with commercial considerations when doing so. The above analogy is therefore not well founded.

(108) The Commission concludes that the situation of the State in the present case cannot be compared to the situation of a hypothetical market economy investor or to the situation of a hypothetical dependent market economy creditor. The loss of future taxes cannot therefore be taken into account when applying the market economy creditor principle.

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

2.4 *Conclusion*

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

(111) The Commission therefore concludes that the disputed measure constitutes state aid within the meaning of Article 87(1) of the EC Treaty.

(112) The state aid granted to the beneficiary is equal to the amount of debt written off by the tax office in the arrangement procedure, viz. SKK 416 515 990.

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

(113) The primary objective of the measure is to assist a company in difficulty. In such cases, it is possible to apply the exemption of Article 87(3)(c) of the EC Treaty, which allows state aid that facilitates the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest and where the relevant conditions are met.

(114) In view of the beneficiary's production portfolio, the Commission assessed whether the special rules applicable to agriculture apply in the present case. Basing itself on the information on the beneficiary's turnover submitted by the Slovak authorities, the Commission in its decision to open the formal investigation arrived at the conclusion that most of beneficiary's products are not products falling under Annex I to the EC Treaty and that, therefore, the general state aid rules apply.

(115) In its comments on the decision to open the formal investigation, the beneficiary disputed the turnover data previously provided by the Slovak authorities (see Table 1) but not the Commission's decision to base its assessment on the general state aid rules. Without wishing to determine whether the figures provided by the beneficiary are accurate ([31]), the Commission verified whether its above conclusion would hold up against the new data. It concludes that most of the beneficiary's turnover is generated by products not falling under Annex I to the EC Treaty. The general, and not the sector-specific, state aid rules thus apply.

(116) Rescue and restructuring aid to ailing companies is currently governed by the Community guidelines on state aid for rescuing and restructuring firms in difficulty ([32]) ('new guidelines'), which replaced the previous text adopted in 1999 ([33]) ('1999 guidelines').

(117) The transitional provisions of the new guidelines stipulate that they will apply for the assessment of any rescue or restructuring aid granted without the authorisation of the Commission (unlawful aid) if 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). Should, however, the aid be unlawfully granted before 1 October 2004, the examination is to be conducted on the basis of the guidelines applicable at the time the aid was granted (point 104).

(118) The Commission notes that the tax office's approval of the arrangement was issued on 9 July 2004 and took effect as of 23 July 2004. This means that the aid was unlawfully granted before 1 October 2004. The 1999 guidelines, which were applicable at the time the aid was granted, therefore apply.

([31]) These figures do not seem to be supported by the annual accounts submitted by the beneficiary.

([32]) OJ C 244, 1.10.2004, p. 2.

([33]) OJ C 288, 9.10.1999, p. 2.

(119) The Commission concludes that the beneficiary is a medium-sized company within the meaning of Commission Regulation (EC) No 70/2001 on the application of Articles 87 and 88 of the EC Treaty to state aid to small and medium-sized enterprises ([34]).

3.1 *Eligibility of the firm*

(120) According to 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.

(121) The beneficiary was party to the arrangement procedure, which is applicable to insolvent companies as defined in the Bankruptcy Act. It is therefore eligible for rescue and restructuring aid.

3.2 *Rescue aid*

(122) The disputed measure was initially described by the Slovak authorities as rescue aid. Pursuant to the 1999 guidelines, the Commission raised doubts as to the compatibility of the aid as rescue aid on the grounds described in Part III above.

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

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

3.3 *Restructuring aid*

(125) 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.

(126) The Commission notes that the Slovak authorities, with whom lies the burden of proof to show that the state aid is compatible with the common market, have not submitted any new facts in support of this conclusion. It took due note of the comments submitted by the beneficiary.

3.3.1 Return to long-term viability

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

([34]) OJ L 10, 13.1.2001, p. 33. Commission Regulation (EC) No 70/2001 was amended by Commission Regulation (EC) No 364/2004 of 25 February 2004 as regards the extension of its scope to include aid for research and development (OJ L 63, 28.2.2004, p. 22).

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

(129) For companies situated in assisted areas and for small and medium-sized companies, the 1999 guidelines stipulate that the conditions for authorising aid may be less stringent as regards the implementation of compensatory measures and the content of monitoring reports. Nonetheless, these factors do not exempt such companies from the requirement to draw up a restructuring plan or the Member States from the obligation to make the granting of the restructuring aid conditional upon implementation of a restructuring plan.

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

(131) Contrary to this confirmation, the beneficiary submitted that the tax office had studied the ability of the business plan to restore long-term viability prior to its approval of the arrangement, but it did not produce any evidence to support this claim.

(132) The beneficiary further argued that the absence of a formal restructuring plan is irrelevant in the case of *ex post* assessment of aid by the Commission, as the Commission is then in a position to assess whether the beneficiary actually became viable. According to the beneficiary, a formal restructuring plan can be required only in the case of *ex ante* assessment, the only sort of assessment to which the 1999 guidelines apply.

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

(134) It may be concluded that the tax office as the granting authority did not have any opportunity to evaluate a restructuring plan and to make the writing-off of its receivables subject to implementation of a restructuring plan that would be duly monitored. It follows that the first formal condition, which is fully applicable also to *ex post* assessment, was not met.

(135) As to the substance of the business plan, the Slovak authorities have not submitted any information that would allay the Commission's doubt as to whether the plan represents a genuine restructuring plan as required by the 1999 guidelines.

(136) The Commission cannot but stand by the conclusion it gave in the decision to open the formal investigation. The business plan submitted is merely a plan dealing with the beneficiary's acute problem of mounting debt to the State. The plan does not analyse in any way the circumstances that led to the beneficiary's difficulties or the financial situation of the company at that time or its financial prospects. Since this analysis was missing, the beneficiary did not propose any concrete steps addressing the individual reasons that led to the difficulties. The only measure described in detail is the proposed financial restructuring through the arrangement with the creditors.

(137) The plan does not mention at all the increase in the beneficiary's own capital, mentioned by the beneficiary as one of the restructuring measures. There is nothing in the file to show that the capital increase by Hydree Slovakia should be considered as a measure ensuring that the beneficiary would not in the long term repeat its strategy of financing its production through VAT and excise duty debt, which is what eventually led to its difficulties. The Slovak authorities themselves confirmed that the capital increase does not in any way decrease the risk of the financial problems being repeated. These doubts are all the stronger when it is considered that the capital increase amounted to SKK 21 million, while the restructured debt was SKK 644 million.

(138) The capital increase in itself is no proof of the market's belief in the beneficiary's return to long-term viability. The Commission notes that the beneficiary did not manage to obtain any loan from a private bank, despite its active efforts.

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

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

(141) The combination of the absence of a formal restructuring plan and of a genuine analysis of the difficulties, the measures necessary to address these difficulties and the market conditions and prospects leads the Commission to the conclusion that the business plan submitted by the beneficiary is not a genuine restructuring plan as required by the 1999 guidelines ([35]). The Commission's doubts that the beneficiary would restore long-term viability have therefore not been allayed.

3.3.2 Aid limited to the strict minimum

(142) Although its conclusion that, in the absence of a genuine restructuring plan, its doubts as to the long-term viability persist is in itself sufficient to conclude that the aid is not compatible with the common market, the Commission will also analyse the other central criterion of the 1999 guidelines, i.e. that the aid is limited to the strict minimum necessary.

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

(144) The costs of restructuring amounted to SKK 644 591 440 (EUR 16,96 million), the total amount of debt restructured through the arrangement. The beneficiary paid 35 % of this amount, i.e. SKK 225 607 028 (EUR 5,93 million).

([35]) See also judgment of the Court of 22 March 2001 in Case C 17/1999 *French Republic v Commission*.

(145) The Slovak authorities did not provide any further explanation in respect of the doubts expressed by the Commission in this connection. The beneficiary explained how he financed payment of the debt remaining after the arrangement (see paragraph 30). According to the beneficiary, its own contribution amounted to SKK [less than 300] million (EUR [less than 7,9] million).

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

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

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

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

(150) Without this deferral, the own contribution of the beneficiary within the meaning of the 1999 guidelines amounts to SKK [less than 170] million (EUR [less than 4,5] million) and thus corresponds to [less than 27] % of the restructuring costs.

(151) Unlike the new guidelines, the 1999 guidelines did not contain any thresholds indicating when the own contribution of the beneficiary is considered to be significant.

(152) Considering the practice of the Commission in applying the 1999 guidelines and the trend in Commission policy in this respect towards the introduction of thresholds under the 2004 guidelines ([36]), the Commission considers the contribution of [less than 27] % to be rather low. Such a contribution might be accepted under the 1999 guidelines only if all the other conditions for approving the aid were fulfilled, and the Commission would have to take into account such criteria as whether the company is active in an assisted area and to what extent the sources of financing reflect the belief of the market, other than the beneficiary itself and its shareholders, in the long-term viability of the company or other specific features of the case.

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

3.4 *Compatibility of aid: conclusion*

(154) The Commission concludes that the aid is not compatible with the common market as rescue or restructuring aid. In addition, no other derogation laid down in the EC Treaty is applicable to the present case.

VII. **CONCLUSION**

(155) The Commission finds that the Slovak Republic has unlawfully granted the write-off of tax debt in favour of FRUCONA Košice a.s. in breach of Article 88(3) of the EC Treaty. This aid is not compatible with the common market under any derogation laid down in the EC Treaty.

(156) Even though the implementation of the write-off by the tax office has been suspended pending the present procedure before it, the Commission finds that the advantage for the beneficiary was created at the point at which the tax office decided to forgo part of its claims and thus put the aid at the disposal of the beneficiary. This moment was the entry into force of the creditors' agreement on 23 July 2004. The advantage over the beneficiary's competitors resided in the fact that the tax office had not enforced its tax claims.

(157) To restore the status *ex ante*, the state aid must be recovered,

HAS ADOPTED THIS DECISION:

Article 1

The state aid which the Slovak Republic has implemented for FRUCONA Košice, a.s., amounting to SKK 416 515 990, is incompatible with the common market.

Article 2

1. The Slovak Republic shall take all necessary measures to recover from the beneficiary the unlawfully granted aid referred to in Article 1.

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

3. The sum to be recovered shall bear interest throughout the period running from the date on which it was put at the disposal of FRUCONA Košice, a.s. until its actual recovery.

([36]) The threshold for medium-sized enterprises under the 2004 guidelines is at least 40 %.

4. The interest shall be calculated in accordance with the provisions laid down in Chapter V of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([37]). The interest rate shall be applied on a compound basis throughout the entire period referred to in paragraph 3.

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. It shall provide this information using the questionnaire attached in Annex I to this Decision.

Article 4

This Decision is addressed to the Slovak Republic.

Done at Brussels, 7 June 2006.

For the Commission

Neelie KROES

Member of the Commission

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

ANNEX I

Information regarding the implementation of the Commission Decision on state aid measure C 25/2005 (ex NN 21/2005) implemented by the Slovak Republic for FRUCONA Košice a.s.

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

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

Date(s) (º)	Amount of aid (*)	Currency

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

Comments:

1.2. Please explain in detail how the interest payable on the amount to be recovered will be calculated.

2. **Recovery measures planned and already taken**

2.1. Please describe in detail what measures have been taken and what measures are planned to bring about the immediate and effective recovery of the aid. Where relevant, please indicate the legal basis for the measures taken or planned.

2.2. What is the timetable for the recovery process? By what date will the recovery of the aid be completed?

3. **Recovery already effected**

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

Date(s) (º)	Amount of aid repaid	Currency

(º) Date or dates on which the aid was repaid.

3.2. Please attach supporting documents for the repayments shown in the table at point 3.1.