AGENTÚRA NA PODPORU VÝSKUMU A VÝVOJA

SAEP SLOVENSKÁ ASOCIÁCIA EURÓPSKEHO PRÁVA

SLOVAK REPUBLIC

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Public Capital and Private Capital in the internal market. Securing a level playing field for public and private enterprises

III. *National law*

III. A. Constitutional law or other fundamental/framework laws

Q 13. Please state whether the Constitution of your Member State contains rules that require certain goods or services to be provided by the government.

The Constitution of the Slovak Republic does not contain such rules.

Q 14. Are there special laws that lay down similar requirements? The term special laws refers to laws that have a special hierarchical nature in the sense that they have priority over ordinary laws.

There are no such laws in the Slovak legal order.

Q 15. Does the Constitution of your Member State contain guarantees that certain activities are reserved for the private sector?

There are no such guarantees in the Constitution of the Slovak Republic.

Q 16. Are there any rules that prohibit nationalizing undertakings or certain sectors of the economy?

There are no such rules in the Slovak legal order.

Q 17. Are there rules that subject nationalizing to procedures or specific rules?

There are no such rules. However, in this respect, it should be noted that in the context of the financial crisis, the Act No. 493/2009 Coll. on Certain Measures Regarding Strategic Companies was adopted.[2] For the purposes of this act, strategic companies are bankrupt

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[2] Act No. 493/2009 Coll. entered into force on 1st December 2009.

companies that are important with respect to protection of health, state security and due functioning of the economy and have been declared to be strategic by the government in compliance with the criteria laid down in this act.[3] Under this act, before the assets of such strategic companies are sold to any third party, they must be offered for sale to the state. However, this act will remain in effect only until the end of 2010.

Q 18. Are there, in the absence of such rules, other procedures or mechanisms that have to be followed for the nationalization of undertakings?

There are no such procedures or mechanisms in the Slovak legal order.

Q 19. Are there rules for the acquisition or sale of shares of enterprises by the government?

There are no such rules in the Slovak legal order.

Q 20. Are these rules different depending on whether the acquisition leads to control or not? And do different rules apply to a sale leading to a loss of control?

Not applicable (see answer to question 19).

Q 21. Are contracts concluded by state-owned enterprises subject to normal civil law? Please specify.

Yes, contracts concluded by state-owned enterprises are subject to normal civil law. Given the fact that state-owned enterprises are entrepreneurs for the purposes of the Commercial Code, contracts concluded by them within the scope of their business activities are governed by the Commercial Code, unless the contract in issue is a contract specifically subject to the Civil Code or a specific law.

Q 22. Is there a rule or practice that one ministry is responsible for enterprises that are controlled by the government or are there different ministries responsible according to their sectoral responsibilities?

In the Slovak Republic, there are different ministries responsible for enterprises controlled by the government according to their sectoral responsibilities.

Q 23. Are there rules that restrict the possibilities for other governmental bodies, states, provinces, municipalities etc. to participate in the capital of private enterprises?

There are no such rules in the Slovak legal order.

Q 24. Is there any indication that the exceptions provided for under the mandatory requirements have been perceived as insufficient to protect public interests?

There is so such indication.

[3] See e.g. the Decision of the Slovak Government No. 534/2009 Coll. regarding Novácke chemické závody, a. s. Bankruptcy of this company was caused by the fine of EUR 19 600 000 imposed by the European Commission (see Commission decision of 22 July 2009, OJ C 301, 11.12.2009, p. 18).

Q 25. Has there been any discussion about the need to have recourse to Art. 295 EC for the protection of national public interests?

There has been no such discussion.

III.B. Company law

26. What was the reaction to the ECJ judgments in the *Golden Share* cases in your Member State? Have there been measures taken to amend legislation?

The ECJ judgments in the *Golden Share* cases had no direct consequences in the Slovak legislation. However, it is interesting to draw a comparison between the relevant Slovak and Czech legislations. Section 10a (4)(b) of the Czech Act No. 92/1991 Coll. on Conditions of Transfer of State Property to Third Parties provided that shares with special rights could be created in the context privatizing state property. Such shares with special rights could be held only by the National Property Fund of the Czech Republic and the Land Fund of the Czech Republic in companies established by these entities, which could exercise the special voting rights attached to the shares, i.e. the golden shares could not be transferred to third parties.

This type of shares with special rights was, however, not mentioned in the Commercial Code prohibiting the issuance of any shares not governed by the Commercial Code,[4] which constituted a major discrepancy in the Czech legal order, along with concerns regarding the incompatibility of golden shares with the principle of equality of ownership guaranteed by the Czech Constitution and the Charter of Fundamental Rights and Freedoms as well as with the principle of equal treatment of shareholders laid down in Article 42 of the Council Directive No. 77/91/EEC.[5]

Nonetheless, on the basis of the above provision of the Czech Act No. 92/1991 Coll., golden shares held by the National Property Fund of the Czech Republic were issued in more than 30 companies. The existence of such shares gave rise to a resolution of the Czech Constitutional Court.[6] Since the resolution was given when the relevant provision had already been repealed by statute (as of 1 January 2006),[7] the Constitutional Court did not decide on the merits and stayed the proceedings.

Thus, as of 1 January 2006, the golden shares as well as the National Property Fund of the Czech Republic ceased to exist. However, the fact that the provision allowing the issuance of golden shares was repealed can be considered a side effect of the Czech government's decision to terminate the existence of the National Property Fund of the Czech Republic, the only entity holding such shares, because it has become superfluous.

In Slovakia, there is the same provision as in the Czech Act – Section 10a (4)(b) of the Slovak Act No. 92/1991 Coll. on Conditions of Transfer of State Property to Third Parties also allows shares with special rights to be created in the context of privatizing state property. This provision is still in force. However, in the Slovak Republic, such golden shares have not been issued. Nonetheless, in order to guarantee compliance with the constitutional and

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[4] Section 155(7) of the Czech Commercial Code.

[5] Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 26, 31.1.1977, p. 1).

[6] Resolution of the Constitutional Court of the Czech Republic of 21 February 2006, Pl. ÚS 19/04.

[7] See Czech acts no. 178/2005 Coll. and 179/2005 Coll.

Community principles set out above, the relevant provision of the Slovak legislation should be repealed. Furthermore, just like the Czech government, the Slovak government is considering the idea of terminating the existence of the National Property Fund of the Slovak Republic.

27. Have there been any specific characteristics of the company laws of your Member State that were deemed to be imperiled by the EC company law directives?

No specific characteristics of Slovak company law were deemed to be imperiled by EC company law directives. However, Slovak legislation had to be amended in order to transpose the relevant Community directives. Many substantial amendments were necessary to make the Slovak company legislation fully compatible with the *acquis communautaire* in the field of company law. The relevant directives transposed in the Slovak legislation include:

- First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community as amended,[8]
- Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent as amended,[9]
- Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies as amended,[10]
- Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies as amended,[11]
- Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State as amended,[12]
- Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited-liability companies as amended,[13]
- Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.[14]

28. Do the national company rules provide guarantees that secure a level playing field when the government pursues its objectives by way of undertakings which it controls wholly or partially?

[8] OJ L 65, 14.3.1968, p. 8–12.
[9] OJ L 26, 31.1.1977, p. 1–13.
[10] OJ L 295, 20.10.1978, p. 36–43.
[11] OJ L 378, 31.12.1982, p. 47–54.
[12] OJ L 395, 30.12.1989, p. 36–39.
[13] OJ L 395, 30.12.1989, p. 40–42.
[14] OJ L 310, 25.11.2005, p. 1–9.

Generally speaking, they do. In principle, the Slovak company legislation does not confer on state-owned or state-controlled companies any advantages as compared with private companies. Unless justified by imperative reasons (such as certain ownership prerogatives[15] and expropriation in public interest, to necessary extent and for adequate compensation[16]), such advantages awarded to the state or to its companies would not be compatible, *inter alia*, with the principles of equality of ownership[17] and equality of parties to relationships governed by civil law,[18] socially and ecologically oriented market economy,[19] free competition,[20] prohibition of abusing partner rights and disadvantaging partners in an abusive way in a company[21] and of equal treatment of all shareholders.[22]

See also answers to questions 16 to 19.

29. Are there rules that allow or oblige the government to make use of a special form of company if it wants to pursue public interests?

Slovak legislation distinguishes a specific type of corporation – state enterprise – which is governed by the Act No. 111/1990 Coll. on State Enterprises (hereinafter referred to as the "State Enterprise Act"). State enterprises are legal entities registered in the Business Register, but they are not companies within the meaning of the Slovak Commercial Code. However, just like companies, state enterprises are undertakings since they are established for business purposes. The main distinctive characteristic of state enterprises is that they are established by central public administration authorities (e.g. by ministries), which manage their state enterprises economically. The property of state enterprises is owned by the state. However, in principle, the state cannot be held liable for the debts of state enterprises. State enterprises are not privileged in business relations; their external market operation is not different from companies. Only when it comes to internal operation (management, property ownership), there are certain peculiarities resulting from the fact that state enterprises are entities established by state authorities and their property is owned by the state.

The number of state enterprises has declined substantially over the last decade and many of these entities have been transformed into ordinary companies governed by the Commercial Code, mostly stock companies, the shares of which are completely or partially held by the state. Again, state-owned companies are not privileged in any way with respect to private companies and they are subject to ordinary company legislation.

Besides state enterprises and ordinary companies, there are specific legal entities established by statute with a view to pursuing public interests. These include S*lovenská televízia* (Slovak television)[23] and *Slovenský rozhlas* (Slovak radio),[24] which are both registered in the Business Register. Another example of legal entities established with a view to pursuing public interests are universities.[25] In contrast to state enterprises and state-owned companies, these specific legal entities pursue public interests, but are, in principle

[15] Constitution of the Slovak Republic, Arts. 4 and 20(2).
[16] See the Constitution of the Slovak Republic, Art. 20(4).
[17] Constitution of the Slovak Republic, Art. 20(1).
[18] Slovak Civil Code, Section 2(2).
[19] Constitution of the Slovak Republic, Art. 55(1).
[20] Constitution of the Slovak Republic, Art. 55(2) and Slovak Commercial Code, Section 41.
[21] Slovak Commercial Code, Section 56a.
[22] Slovak Commercial Code, Section 176b(2).
[23] See Act No. 16/2004 Coll. on Slovak Television.
[24] See Act. No. 619/2003 Coll. on Slovak Radio.
[25] See Act. No. 131/2002 Coll. on Universities.

autonomous and not controlled by the state. However, they are bound by specific statutory rules relating e.g. to management and financing, which are not applicable to private companies under the Commercial Code.

Other specific forms of legal entities established by the state (government) to pursue public interests include budget organizations and contribution organizations governed by the Act No. 523/2004 Coll. on Public Administration Budget Rules. Budget organizations and contribution organizations can be established by statute or by a decision of a central public administration authority, a municipality or a self-governing region. Budget organizations are financed from the state budget, municipality budget or self-governing region budget respectively. In principle, all state authorities are budget organizations. Contribution organizations receive a contribution from their respective budgets, but have to cover up to 50% of their costs by their own income. Examples of contribution organizations include research and development centres. Budget organizations and contribution organizations perform certain tasks of the state, municipalities or self-governing regions, but they may not be established with a view to exercise the decision-making powers of the authorities having established them.

30. Are there rules blocking unfriendly take-overs? Discuss the attitude of your Member State towards the take-over directive (Directive 2004/25, the "Volkswagen directive").

The Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids[26] (hereinafter referred to as the „takeover directive") was transposed into the Slovak legislation by these statutory instruments:

- Act No. 566/2001 Coll. on Securities and Investment Services,
- Act No. 513/1991 Coll., Commercial Code,
- Act. No. 566/1992 Coll. on the National Bank of Slovakia,
- Act No. 747/2004 Coll. on Financial Market Supervision,
- Act No. 644/2006 Coll. amending the Act No. 483/2001 Coll. on Banks,
- Act No. 198/2007 Coll. amending the Act No. 431/2002 Coll. on Accounting.

Most provisions relating to takeovers under the takeover directive are contained in the Act No. 566/2001 Coll. on Securities and Investment Services (Section 114 *et seq.*). These include, *inter alia*, rules concerning takeover bids, notification of takeover bids, offers of takeover bids, proceedings concerning offers of takeover bids, mandatory takeover bids, revocation and revision of takeover bids, results of takeover bids, withdrawal from contract, duties of the offeree company bodies, competing takeover bids, failure to exercise certain rights, the right of squeeze-out, the right of sell-out and cooperation in European Union and in the European Economic Area.

31. To what extent are the 2005 OECD Guidelines on Corporate Governance of State-owned Enterprises taken into account?

The 2005 OECD Guidelines on Corporate Governance of State-owned Enterprises as such are not transposed into Slovak legislation, and therefore they are not binding and may be applied on voluntary basis. Since the Guidelines are rather specific to be adopted in form of a generally applicable act, their application is most likely to remain voluntary. However, the main ideas underlying these Guidelines can be found also in Slovak legislation, e.g.

[26] OJ L 142, 30.4.2004, p. 12–23.

distinction between the ownership and management functions of the state, operation in competitive environment, equitable treatment of shareholders.

Given the fact that these Guidelines contain detailed rules that are specific to the governance of state-owned enterprises, even though they are not adopted as a binding document, they should be widely used and complied with by state enterprises.

32. Are there any special features in your Member State's legislation that may be relevant for our topic?

See answer to question 29 concerning various state entities operating in the market.

III.C. Competition law

Article 81, 82 and 86 EC

Q 33. Has there been a debate about whether the provision of certain goods or services should be undertaken by the government or by the private sector? Please specify whether and to what extent such a debate has taken place on a general level or on a specific level, i.e in the context of sector specific regulation? To the extent that there is no general legislative framework for answering such fundamental questions, there may be specific laws or policy documents.

Yes, such a debate has taken place mainly as far as public-private partnership projects are concerned. This debate was originally focused on infrastructure (in particular construction of motorways). However, since the possibilities of using public-private partnerships also apply to other areas, such as health care, culture or sports, this debate is not confined only to one sector. Thus, possibilities of using public-private partnerships in various areas are being assessed. In fact, some projects concerning e.g. water management and waste management that are already in place are based on public-private partnerships, but are not as widely known as motorway construction projects. As far as legal regulation is concerned, the functioning of public-private partnerships is governed both by statute and policy documents.

Q 34. Please identify such laws and/or policy documents.

The legal basis of public-private partnerships is the Public Procurement Act No. 25/2006 Coll. (hereinafter referred to as the "Public Procurement Act"), which governs, *inter alia*, construction works concessions[27]. However, this act does not apply to service concessions awarded by contracting authorities or construction works concessions and service concessions awarded by contracting entities regarding the activities laid down in Section 8(3)-(9) of the Public Procurement Act[28]. Details regarding public procurement notifications are regulated by the Decree of the Public Procurement Office No. 35/2006 Coll. on Notifications Used in Public Procurement. The Act No. 583/2004 Coll. on Budget Rules of Territorial Self-Governing Units and the Act. No. 523/2004 Coll. on Budget Rules of Public Administration are also relevant.

[27] Public Procurement Act, Section 1(1)(b).

[28] Gas, heat, electricity, water, transport services, postal services, exploration for, or extraction of, oil, gas, coal or other solid fuels, as well as ports and airports. See Public Procurement Act, Section 1(2)(n),(o).

Furthermore, several policy documents have been adopted in form of government resolutions, such as the Report on Creating Conditions for Implementation of Public-Private Partnership Projects,[29] the Policy for Implementation of Public-Private Partnership (PPP) Projects,[30] Innovative Financial Instruments for the National Strategic Frame of Reference 2007 – 2013 (Phase II)[31], Implementation of Technical Aid Scheme for Public-Private Partnerships (PPP)[32] and the Basic Methodology and Implementation Documents Related to the Management of the Technical Aid Scheme for Public-Private Partnerships (PPP).[33]

Besides the government resolutions, various policy documents have been adopted by the Ministry of Finance of the Slovak Republic. These include the Syllabus of PPP Project Objectives and Selection Criteria, the Code of PPP Project Preparation Management, the Approach to Risk Management in PPP Projects, the Contents and Requirements Concerning a Feasibility Study and a Public Sector Comparator and the PPP Project Preparation, Implementation and Control Procedure.[34]

Q 35. For the new member states, it would be interesting to describe how the reform process of the economy whereby large sectors of the economy were privatized has taken place. Even if it is decided that certain activities are to be carried out by undertakings, governments may still want a specific regime for them.

The transition to the market economy in Slovakia included restitution of property to previous owners (private persons), transfer of certain state property to municipalities, dissolution of inefficient state enterprises as well as the small privatization and the great privatization, which were the most significant in this process.

Small privatization was based on the Act No. 427/1990 Coll. on the Transfer of State Property to Certain Things to Other Natural Persons and Legal Entities. It was the first stage of privatization taking place between 1991 and 1993. State property was transferred to private parties on the basis of auctions. Business units were sold to private persons for market prices offered at the auctions. Small privatization significantly changed the business structure in the field of trade and services.

Great privatization, consisting of two stages, was based on the Act No. 92/1991 Coll. on the Conditions of Transfer of State Property to Others Parties. The first stage of great privatization took place between 1991 and 1993 and the second stage started in 1994. During the first stage, the so-called coupon privatization method was used, which was replaced in the second stage by the bond method. By means of "coupon books", shares of state enterprises

[29] Resolution of the Government of the Slovak Republic No. 245/2005. In this document, the main advantages and disadvantages of public-private partnership projects were analyzed.
[30] Resolution of the Government of the Slovak Republic No. 914/2005. In this document, the principles of PPP projects and rules to limit the risks for the public administration budget were defined.
[31] Resolution of the Government of the Slovak Republic No. 836/2006. In this document, the granting of financial aid to support public infrastructure construction by means of PPP projects as one of the innovative financial instruments was defined.
[32] Resolution of the Government of the Slovak Republic No. 786/2007. In this document, the role of technical aid schemes for public-private partnerships was defined and the individual stages of the process of preparation and implementation of PPP projects and the institutional framework as well as the roles of the individual entities involved were specified.
[33] Resolution of the Government of the Slovak Republic No. 80/2008. This was the first "package" of methodology documents for entities awarding concessions under the PPP projects.
[34] See www.finance.gov.sk.

could be acquired by citizens. The transformation of state property involved transformation of state enterprises into limited liability companies with all or certain shares held by the state.

The Act No. 192/1995 Coll. on Securing State Interests in Privatization of Strategic State Enterprises and Limited Liability Companies defined certain state enterprises operating in the field of gas and heat industry, post services, telecommunications, armament and machinery industry, pharmaceutical industry and agriculture, wood and water management and other entities that cannot be privatized due to their strategic importance. This act also defined strategic state enterprises and state-owned limited liability companies, the privatization of which was subject to specific conditions. However, this act was repealed in 1999, and therefore, the enterprises and companies previously defined as strategic could be privatized.

See also answer to question 29.

Q 36. Has there been any discussion of the question whether certain services should be guaranteed by identifying them as services of general economic interest? What are the questions that were discussed?

Such a discussion concerns mainly the question of providing certain services (services of general economic interest) at a price regulated by the state. The Act No. 276/2001 Coll. on Regulation in Network Sectors is the legal basis of regulated prices of certain products and services provided in network sectors, which include gas, heat, electricity and water sectors (e.g. access and connection to networks, production and supply of heat and drinkable water, supply of electricity and gas to households). The prices of services defined by statute provided in these sectors are regulated by decisions of the Network Sector Regulation Office. Prices of postal services and medicines are also regulated by state authorities. Quite naturally, price regulation is criticized by undertakings operating in the relevant sectors.

Q 37. Has the implementation of the Services Directive 2006/123 led to a debate about services of general economic interest?

At the time this report was drafted, the Services Directive had not been fully transposed into Slovak legislation yet. However, the Draft Act on Services in the Internal Market (2009) uses, for the purposes of derogation from the freedom to provide services, the definition of services of general economic interest stipulated in Article 17(1) of the Services Directive. Thus the Slovak draft act defines the services of general economic interest as services provided in the postal sector, in the power sector (including electricity sector and gas sector), water distribution and supply services and waste water services and treatment of waste,[35] but, unlike the wording of the Article 17(1) of the Services Directive, which contains an exemplary enumeration of services of general economic interest, the Slovak draft act opts for an exhaustive enumeration of these services.

Q 38. Has the introduction of Article 16 EC with the Treaty of Amsterdam given rise to a debate about the function of services of general economic interest and/or services of general interest?

Given the fact that the Slovak Republic acceded to the European Union in 2004, such debate did not take place at the time the Treaty of Amsterdam was signed and came into force.

[35] Draft Act on Services in the Internal Market (2009), Section 8(2).

Q 39. Has the equivalent of Article 81 (3) EC in your national competition law been interpreted so as to allow exceptions for the protection of public interest? And has this led to a situation whereby public enterprises have been favoured over private enterprises?

The national equivalent of Article 81(3) EC is Section 6(3) of the Slovak Act No. 136/2001 Coll. on Competition Protection, which is formulated in the same way as the said EC Treaty provision. Thus, the considerations regarding the possible interpretation of this provision in the context of Community law as stated in this question also apply to Slovak legislation. However, no case of such interpretation is known to the national rapporteur.

Q 40. Do the merger control rules in your member state provide for special authorization of mergers when public interests are deemed to be at stake?

No, Slovak merger control rules do not provide for any special authorization of mergers when public interests are deemed to be at stake.

Q 41. Have such powers been used? Give a brief overview of the cases.

This question is not applicable to Slovak legislation (see answer to question 40).

Q 42. Have these decisions been appealed to courts? What was the outcome of these appeals?

This question is not applicable to Slovak legislation (see answers to questions 40 and 41).

State aid

43. Does your Member State have national rules on the granting of state aid? Are there any procedural rules on the granting of state aid?

The granting of state aid is governed by the Slovak Act no. 231/1999 Coll. on State Aid (hereinafter referred to as the „State Aid Act"). Prior to the accession of the Slovak Republic to the European Union, the State Aid Act contained a comprehensive set of rules governing state aid. Upon accession of the Slovak Republic to the European Union, many of its provisions were repealed and only those of mostly technical character are in force.

The State Aid Act applies to undertakings and associations of undertakings, state authorities, self-governing regions, municipalities and other legal entities granting state aid pursuant to special laws (hereinafter referred to as „providers").[36]

State aid is defined as any aid in any form provided by providers directly or indirectly from state budget funds, from their own budgets or their own funds to undertakings for business or business-related purposes. State aid may be granted pursuant to the State Aid Act, special laws and Community rules governing state aid.[37]

[36] State Aid Act, Section 1(1).
[37] State Aid Act, Section 1(2).

No state aid distorting or threatening to distort competition by favouring certain undertakings or the production of certain goods or provision of services, in so far as it affects trade between Member States, may be granted. However, state aid is not prohibited, if it is to be provided to make good the damage caused by natural disasters or other exceptional circumstances, or if it has a social character and is granted to individual consumers, without discrimination related to the origin of the products or services concerned. The prohibition of granting state aid does not apply to *de minimis* aid and to state aid granted pursuant to Community rules on block exemptions.[38]

State aid may be granted if it falls within the categories laid down in Article 87(3) EC, the wording of which is integrated Section 4 of the State Aid Act. The State Aid Act distinguishes between direct and indirect forms of state aid as well as between state aid schemes and individual state aids.[39]

As far as procedural rules are concerned, the State Aid Act provides that applications for state aid from state budget funds are to be filed with the competent ministry or legal entity through which these funds are provided. Applications for state aid from the funds of a municipality or other legal entity granting state aid are to be filed with the municipality or the legal entity. A calculation of costs to be covered by state aid as well as documents corroborating financial coverage of other costs, such as a bank promise, and the applicant's bank account statement with a bank confirmation of allocation of the applicant's funds for the specific purpose, have to be enclosed with applications for individual state aid.[40]

There is no legal entitlement to state aid. State aid is granted on contractual basis, except for state aid granted indirectly. If state aid has been granted from state budget funds, from a municipality budget or from a state purpose fund budget, the non-compliance with the conditions of granting state aid is deemed to be an infraction of budget discipline. If state aid has been granted from the budget of a legal entity other than a state purpose fund, the state aid recipient having failed to comply with the conditions of granting state aid has to:

a) return the state aid granted, or the part thereof illegitimately used, to the provider, to the budget from which it had been granted,
b) pay an interest of a double basic interest rate of the European Central Bank for each day of illegitimate use of the state aid granted, to the budget from which it had been granted.[41]

State aid recipients have to:

a) prove the use of state aid funds and the legitimacy of the costs incurred to the provider,
b) enable the provider to carry out a verification, and if the provider is the Ministry of Finance, a government audit regarding the use of state aid funds, legitimacy of costs incurred as well as the compliance with the conditions of granting state aid.[42]

State aid granting with respect to the state aid providers in the Slovak Republic and the European Union is coordinated by the Ministry of Finance of the Slovak Republic.[43]

State aid may only be granted if it has been approved by the Commission, except for cases governed by a special law. Providers of *de minimis* aid have to notify the Ministry of Finance of granting such aid on a quarterly basis. Recipients of *de minimis* aid also have to

[38] State Aid Act, Section 2 (1)(2) and Section 3.
[39] State Aid Act, Section 5.
[40] State Aid Act, Section 17.
[41] State Aid Act, Section 18.
[42] State Aid Act, Section 19.
[43] State Aid Act, Section 21.

notify the Ministry of Finance of receiving such aid. The details of state aid granting and receiving notifications are laid down by statute.[44]

Before granting state aid, providers have to apply to the Commission for state aid approval, except for cases governed by special Community rules.[45] Applications for state aid approval are to be filed by providers with the Ministry of Finance, unless the procedure is governed by the Act No. 561/2007 Coll. on Investment Aid (hereinafter referred to as the „Investment Aid Act"). The content and form of the applications have to be in compliance with the applicable Community rules governing state aid. An official English translation of the state aid approval application has to be enclosed. The compliance of the application with the applicable Community rules governing state aid is assessed by the Ministry of Finance. If the application contains all information necessary for a Commission decision, the Ministry of Finance will forthwith ask the Commission to decide. This does not apply to the procedure governed by the Investment Aid Act. The Ministry of Finance is entitled to require any information from the state authorities, municipalities, undertakings and other legal entities concerned that may be necessary for the assessment of compliance of the state aid with the applicable Community rules governing state aid and for state aid approval by the Commission; these persons have to provide such information immediately. Upon request by the Ministry of Finance, such information has to be provided by these persons in special forms. Upon request by the Ministry of Finance, providers have to present interim reports and final reports concerning state aid granted by them within the deadlines and within the scope required by the Ministry of Finance. Investment stimuli providers under the Investment Stimuli Act have to notify the Ministry of Finance of Commission decisions issued upon their request. If, pursuant to the Community rules on block exemptions,[46] information about granting state aid is to be provided to the Commission, providers have to provide such necessary information for this purpose so that the Ministry of Finance can comply with the notification duties pursuant to the applicable Community rules governing state aid within 10 days of granting state aid. If, pursuant to the applicable Community rules governing state aid, reports concerning state aid are to be provided to the Commission, providers have to provide for this purpose necessary information and reports within the scope and within the deadlines allowing the Ministry of Finance to comply with the reporting duties pursuant to the applicable Community rules governing state aid, within 45 days after the period for which the report concerned is presented.[47]

The Ministry of Finance is entitled to carry out a government audit of any provider granting state aid under Section 3 of the State Aid Act (*de minimis* aid and state aid based on block exemptions). For this purpose, it is entitled to verify the relevant fact also with the state aid recipient. The government audit is carried out in compliance with the Act. No. 502/2001 Coll. on Financial Verification and Internal Audit. If the Ministry of Finance, while carrying out a government audit, finds out that a state aid under Section 3 of the State Aid Act is being

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[44] State Aid Act, Section 22.

[45] E.g. Commission Regulation (EC) No. 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid (OJ L 10, 13.1.2001, p. 30–32), Commission Regulation (EC) No. 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33–42), Commission Regulation (EC) No. 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid (OJ L 10, 13.1.2001, p. 20–29).

[46] E.g. Article 3 of the Commission Regulation (EC) No. 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33–42), Article 3 of the Commission Regulation (EC) No. 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid (OJ L 10, 13.1.2001, p. 20–29), Article 3 of the Commission Regulation (EC) No. 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment (OJ L 337, 13.12.2002, p. 3–14).

[47] State Aid Act, Section 23.

provided in breach of Community rules on *de minimis* aid[48] or of the State Aid Act, it shall notify thereof the provider and the provider has to stop providing the aid immediately.[49]

If the Commission has decided that a state aid is illegitimate, the provider has to enforce from the recipient the amount corresponding to illegitimate aid including interest pursuant to the interest rate laid down by the Commission. The recipient having received a state aid declared by the Commission to be illegitimate has to pay into the budget from which it had been granted an amount corresponding to the illegitimate aid including interest pursuant to the interest rate laid down by the Commission.[50]

The Ministry of Finance may impose upon entities having breached the duties under Sections 22, 23 and 24 of the State Aid Act fines of up to € 3,319 (in case of natural persons) and up to € 33,194 (in case of legal entities). The fine imposition procedure is governed by general administrative procedure rules.[51] The Ministry of Finance may impose such fines within one year of having discovered a breach of duty imposed by the State Aid Act, however, no later than five years of the date of such breach. The fines are an income of the state budget and they are enforced by the Ministry of Finance.[52]

The Ministry of Finance keeps records of

a) state aid approval applications,
b) approved state aids,
c) disapproved state aids,
d) *de minimis* aid granting notifications,
e) *de minimis* aid receiving notifications.

The Ministry of Finance has to provide, upon request of the Commission information within the required deadlines and scope. It also has to cooperate with the Commission pursuant to the applicable Community rules governing state aid. The Ministry of Finance has to present to the Commission information and reports within the scope and deadlines pursuant to the applicable Community rules governing state aid. Before the end of February of each calendar year, Providers have to present to the Ministry of Finance a final report concerning the state aid provided in the previous calendar year. Before the end of May of each calendar year, the Ministry of Finance has to present to the government a report concerning state aid provided in the previous calendar year. The annual report concerning state aid provided is presented by the Ministry of Finance to the Commission once it has been approved by the government.[53]

Besides the State Aid Act, which is a general Slovak act governing state aid, there are also special national acts governing specific types of state aid. The above mentioned Investment Aid Act governs the granting of state aid for regional development by the Ministry of Finance, Ministry of Economy, Ministry of Labour, Social Affairs and Family and other entities. This act constitutes a state aid scheme based on the Commission Regulation (EC) No. 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation).[54]

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[48] Commission Regulation (EC) No. 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid (OJ L 10, 13.1.2001, p. 30–32).
[49] State Aid Act, Section 24.
[50] State Aid Act, Section 26.
[51] Act. No. 71/1967 Coll. on Administrative Procedure (Code of Administrative Procedure).
[52] State Aid Act, Section 27.
[53] State Aid Act, Section 28.
[54] OJ L 214, 9.8.2008, p. 3–47.

Other specific types of state aid include subventions for establishing industrial parks[55] and, most recently, stabilization aid governed by the Act No. 276/2009 Coll. on Measures to Mitigate the Impact of the Global Financial Crisis on the Banking Sector (hereafter referred to as the "Financial Crisis Act"). This act, constituting a state aid scheme,[56] governs the granting of stabilization aid, which is aid granted to banks in order to remedy serious disturbances in the economy[57] with a view to mitigating the transfer of impact of the global financial crisis from the banking sector to the economy of the Slovak Republic or reinforcing the prerequisites for maintaining stability of the financial system as a whole.[58]

Stabilization aid may be granted on a temporary basis to a bank the financial situation of which has been caused mainly by the global financial crisis in form of an asset investment from state financial assets managed by the Ministry of Finance into the bank's capital stock or of a particular guarantee for bonds issued by the bank or short-term credits granted to the bank under specific conditions.[59] Stabilization aid may only be granted only to support the economy by means of further credits granted by the bank to persons within the European Union or to stabilize the financial situation of a bank under specific conditions.[60] Stabilization aid is provided to banks by the Ministry of Finance.[61] There is no legal entitlement to stabilization aid.[62]

Stabilization aid applications have to be filed with the Ministry of Finance, which forwards the applications to the National Bank of Slovakia.[63] A stabilization plan, *inter alia*, must be enclosed with the application.[64] The opinion of the National Bank of Slovakia is essential to approving or disapproving the aid. If the National Bank of Slovakia suggests that the aid be granted, the Ministry of Finance presents a stabilization aid proposal to the government. However, if the National Bank of Slovakia does not suggest that the aid be granted, the Ministry of Finance rejects the application.[65] If the government approves the stabilization aid proposal, the Ministry of Finance concludes a stabilization aid agreement with the bank.[66] Such agreements may only be concluded until 31 December 2010.[67]

The Ministry of Finance verifies the compliance with the conditions of granting stabilization aid and, in case of non-compliance, it may impose sanctions.[68] The Ministry of Finance informs the Commission of any stabilization aid granted under the Financial Crisis Act and presents a justification assessment report regarding this state aid scheme to the Commission every six months.[69]

44. Has the application of the guidelines for state aid to the financial sector mentioned above been successful in addressing the distortions of competition resulting from the massive aid operations and the accompanying measures?

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[55] See Act No. 193/2001 Coll. on Subventions for Establishing Industrial Parks.
[56] Financial Crisis Act, Section 1(2).
[57] See Art. 87(3)(b) EC Treaty.
[58] Financial Crisis Act, Section 1(1)(a).
[59] Financial Crisis Act, Section 2(1).
[60] Financial Crisis Act, Section 2(2).
[61] Financial Crisis Act, Section 2(5).
[62] Financial Crisis Act, Section 2(7).
[63] Financial Crisis Act, Section 3(1).
[64] Financial Crisis Act, Section 3(3)(c).
[65] Financial Crisis Act, Section 4(1).
[66] Financial Crisis Act, Section 6(1).
[67] Financial Crisis Act, Section 10.
[68] Financial Crisis Act, Section 7(1).
[69] Financial Crisis Act, Section 8(6)(7).

The guidelines for state aid to the financial sector mentioned above were one of the incentives for the Slovak legislator to adopt the Financial Crisis Act analyzed above.[70] In the explanatory note to the Financial Crisis Act, the Slovak legislator specifically refers, *inter alia*, to the Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis[71] as well as to the more recent Communication from the Commission — The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition.[72]

However, since the Financial Crisis Act came into force in July 2010, the particular effect of the mentioned guidelines in Slovakia in conjunction with this legislation cannot be assessed yet.

45. Discuss the main Commission decisions concerning your member state so far. As these decisions all contain a revision clause that the effects of the aid have to be assessed after six months it is appropriate to describe/analyse the follow up measures. Such analysis should be focused on the main theme of this questionnaire, as set out above.

First of all, it must be noted that there are no objective criteria for identifying certain Commission decisions as the main decisions. Nonetheless, four selected significant Commission decisions concerning the Slovak Republic will be analyzed below. In three of them, the Commission declared the respective state aid schemes compatible with the common market. In these cases, no follow-up measures have been identified. However, by the last decision analyzed below, the Commission declared the state aid scheme incompatible with the common market. This decision led to a referral of the Slovak Republic to the European Court of Justice. The proceedings are still pending.

N 659/2006 - Regional aid scheme for large enterprises

The scheme, notified on 5 October 2006, aimed at supporting initial investment and job creation linked to initial investment in Slovakia in the regions: *Bratislavký kraj, Západné Slovensko, Stredné Slovensko, Východné Slovensko*. Its objective was to contribute to the regional development of the assisted areas pursuant to Article 87(3) (a) and (c) of the EC Treaty, in conformity with Commission decision of 28 April 2004 on the Slovak regional aid map.

The beneficiaries of the scheme were the large enterprises that invest in the assisted regions. The foreseen number of beneficiaries was in the range of 51 to 100. The beneficiaries seeking aid under the scheme had to carry out a project subject to the minimum amount of eligible expenditure and subject to the minimum share of employees in the staff structure by level of education.

Aid was to be granted in all sectors with the exception of the production, processing and marketing of all products listed in Annex I to the EC Treaty, transport, coal industry, steel, shipbuilding, and synthetic fibres.

The aid could be awarded in indirect form – relief from the corporate income tax form and transfer of title to real property owned by the state or municipality at a price below the market price as well as in direct form - financial subsidies for covering investment costs and grant for newly created jobs.

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[70] See answer to question 43.
[71] OJ C 270, 25.10.2008, p. 8.
[72] OJ C 10, 15.1.2009, p. 2.

The tangible eligible costs for initial investment included cost of land, buildings, equipments and machineries. Aid for creation of jobs linked to initial investment were to be granted for jobs created within 3 years of the investment's completion. The aid was conditioned by the obligation of the maintenance of the employment created during a minimum period of 5 years. The eligible expenditure could also include intangible investment (patents, operating or patented know-how licences) of maximum 25% of the eligible costs in tangible investments concerned by the aid. The aided investment had to be maintained during a minimum period of 5 years.

The notified scheme applied until 31 December 2006.

The total budget of the scheme was 12, 62 billion SKK (332 million EUR).

In all cases, the recipient's contribution to the financing of the aided investment had to be at least 25%.

The Commission examined the proposed aid measure in the light of Article 87(3) (a) and (c) of the EC Treaty, of the Community Guidelines on National regional aid (hereinafter referred to as the "Regional Aid guidelines"). This assessment led to the following observations:

- The intensity of the aid was in conformity with the Slovak regional aid map.
- No aid would be granted to firms involved in the production, processing and marketing of products listed in Annex I to the EC Treaty, coal industry, steel, shipbuilding, synthetic fibres and transport.
- Aid would be limited to initial investment and job creation linked to initial investment as defined in the Regional Aid Guidelines.
- The eligible costs fell within the scope of the Regional Aid Guidelines.
- The aided investment would be maintained during a minimum period of 5 years from the completion of the investment. The job created will be maintained during a minimum period of 5 years.
- The necessity of aid principle was respected; in fact the application of aid had to be presented before work is started on the projects.
- The rules on cumulation of aid as defined in point 4.18 *et subs*. of the Regional Aid Guidelines were respected.
- The project met the condition that at least 25% of the aided investment is financed with own funds.
- The requirements of the Multisectoral framework on regional aid for large investment projects were respected.
- No aid would be granted to firms in difficulty.
- The duration of the scheme was in line with the duration of the regional map. The notified scheme would expire on 31 December 2006 (the last date for granting the aid was 31 December 2006).

In view of the above, the Commission considered that the notified aid scheme was compatible with the common market in accordance with Article 87(3) (a) and (c) of the EC Treaty. The Commission decision was adopted on 8 November 2006 and published in the Official Journal of the European Union on 13 April 2007.[73]

N 857/2006 - Kia Motors Slovakia

[73] OJ C 80, 13.4.2004, p. 4.

The aid was notified by the Slovak authorities on 20 December 2006. The aid project aimed at promoting regional development. The investment was to take place in the district of Žilina, in the municipalities of Nededza, Teplička nad Váhom and Mojš, situated in the region of Central Slovakia, an assisted area pursuant to Article 87(3)(a) of the EC Treaty, with an aid intensity ceiling of 50% NGE, according to the regional aid map established for the Republic of Slovakia and in force till the end of 2006. It was expected to create 663 new direct jobs by end 2008.

The Slovak authorities intended to provide *ad hoc* regional investment aid to Kia Motors Slovakia, s.r.o. (hereafter: KMS) in the nominal amount of EUR 32.454 million (SKK 1 153 100 000), for the expansion of an existing automotive manufacturing plant in the Slovak Republic. The total cost of the investment would amount to EUR 242.667 million (nominal value), of which EUR 216.363 million were eligible for regional investment aid.

The beneficiary was KMS, a limited liability company established in 2004, with its registered office in Žilina, in Slovakia, is a 100% affiliated company of Kia Motors Corporation, Seoul, Republic of Korea, a global automotive manufacturer.

The investment concerned the expansion of an existing facility, for which state aid had been approved by the Slovak State Aid Office before the accession of Slovakia to the EU.[74] The state aid for the original project consisted of a cash grant for investment costs, a cash grant for job creation, and training aid. The existing facility was designed to produce 200 000 passenger cars annually. The construction of the plant started in October 2004, and the actual production of passenger cars started in December 2006. Full production was expected to be reached by end 2008.

The original plant was to produce passenger cars in the B and C segments. However, because of the dynamic development on the market, in order to respond to the relatively new and increasing demand for cars in the SUV segment, KMS decided to penetrate this fast-developing and profitable market segment and to amend its original production plan. Under this modified plan, passenger cars in the C segment (KIA C'EED) and the SUV segment (KIA Sportage) would be produced in the years 2006 to 2008.

The notified project constituted the expansion of the existing facility. The investment would be carried out on the site acquired for the original project of KMS. The expansion project referred to:

- an increase in the annual production capacity from 200 000 passenger cars and engines to 300 000 passenger cars and engines, which requires further investments in buildings, machinery and equipment;
- the production of […][75] passenger cars in the […]-segment […]. At that time the Kia Group was not producing such passenger cars.

Production under the expansion project would start in 2009 and full production was expected to be reached in 2013.

The regional aid to KMS in the amount of EUR 32.454 million (SKK 1 153 100 000) was granted in the form of a cash grant for the procurement of fixed assets. The grant was subject to corporate tax. Slovakia would provide the state aid in gross amounts, before deduction of the relevant taxes, so that the GGE of the aid was 15%.

The investment would be financed with equity (approx. EUR […] million), loans (approx. EUR […] million) and state aid (EUR 32.454 million). The Slovak authorities

[74] Decision of the Slovak State Aid Office No. 1180/2004, dated 29 April 2004.

[75] Covered by the obligation of professional secrecy (not disclosed in the public version of the Commission decision).

confirmed that at least 25% of the project would be funded by the beneficiary, in compliance with point 4.2 of the Guidelines on national regional aid.

The eligible expenditure for the regional investment aid to KMS amounted to EUR 216.363 million in nominal value. The value of the investment was established on the basis of material investment in buildings, machinery and equipment on the existing premises.

Since the aid concerned regional aid exceeding EUR 5 million GGE for an investment project in the motor vehicle sector, the Commission assessed its compatibility on the basis of the Guidelines on national regional Aid (hereinafter referred to as „RAG 1998“)[76] and the specific rules applicable to the motor vehicle sector laid down in the Multisectoral Framework on regional aid for large investment projects (as amended in 2003) (hereafter: MSF 2002).

Since the aid concerned regional aid for an investment project in the motor vehicle sector, the Commission did not need to decide on the qualification of the first Kia investment in Slovakia and the currently notified expansion investment as a single project in the meaning of point 49 of the MSF 2002.

The project constituted an initial investment (RAG 1998, point 4.4).

Its eligible expenditure was defined in line with point 4.5 of the RAG 1998 (material investment).

KMS had applied for the aid before starting work on the expansion project.

The investor provided an own contribution free from public support exceeding 25%.

The investment would be maintained for a minimum period of 5 years. The intensity of the *ad hoc* aid proposed of EUR 32.454 million corresponded to 15% GGE and did not exceed the specific regional aid ceiling applicable to the motor vehicle sector pursuant to the Slovak regional aid map in force until end 2006. This specific ceiling is 30% of the applicable standard ceiling of 50% NGE authorised for the region of Central Slovakia, i.e. 15% NGE.

The *ad hoc* aid would not be combined with other aid received from local, regional, national or Community sources to cover the same eligible costs, and the aid intensity did not exceed 15% GGE of the notified eligible expenditure.

By reducing the standard regional aid ceiling for the motor vehicle sector to 30% of the applicable standard ceiling, the Commission took already account of the specific sectoral situation existing in the car sector in the period 2003-2006 and the need to reduce the distortion of competition resulting from aid to the sector. Although as a general rule the Commission does not favour the award of *ad hoc* regional aid, in the present case the Commission was satisfied from the information given in the notification that the project would produce substantial positive spillovers which should provide a major contribution to the development of one of the poorest regions in the EU. The positive contribution of the overall investment project to regional development, in particular the creation of 663 direct and a not quantifiable number of indirect jobs, far outweighed the potential distortive effects of the aid.

The Commission concluded that the notified aid to KMS was in line with the RAG 1998 and respected the conditions of the MSF 2002. Consequently, the Commission declared the aid measure compatible with Article 87(3)(a) of the EC Treaty. The Commission decision was adopted on 18 July 2007 and published in the Official Journal of the European Union on 13 September 2007.[77]

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[76] OJ C 74, 10.3.1998, p. 9.
[77] OJ C 214, 13.9.2007, p. 4.

N 847/2006 Samsung Electronics Co., Ltd

On 18 December 2006, the Slovak authorities notified the Commission of their intention to grant regional *ad hoc* aid for a large investment project in favour of Samsung Electronics LCD Slovakia s.r.o. (hereinafter „Samsung LCD Slovakia“).

The notified aid measure supported an initial investment in setting-up of the liquid crystal display (hereinafter: LCD) TV module production plant in Voderady, in the Trnava district in Slovakia by Samsung LCD Slovakia.

Through supporting this investment the measure aimed at promoting regional development of the Western Slovakia (*Západné Slovensko*) region which is an assisted area pursuant to Article 87(3)(a) of the EC Treaty with a regional aid ceiling of 50% net grant equivalent (NGE) under the regional aid map for Slovakia applicable in the period of 1.5.2004 – 31.12.2006.

The recipient of the aid was Samsung LCD Slovakia, a company with a limited liability, established on 28 March 2007 in Slovakia. The beneficiary of the aid was a large enterprise, i.e. not a small or medium-sized 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.[78]

Samsung LCD Slovakia was a 100% subsidiary of Samsung Electronics Co. Ltd. (hereinafter Samsung Electronics); a joint-stock company with its seat in South Korea.

The eligible expenditure of the notified project covers the costs of fixed assets related to the setting-up of the plant and amounted to SKK 11 408 000 000 (EUR 321 072 000) in nominal value which corresponds to SKK 10 530 070 000 (EUR 296 363 000) in discounted value.

The works on the investment started in 2007 and will be carried out until the end of 2011. The project was expected to lead to the creation of […] production lines to be completed by the end of 2011. Production was to start in 2008 and the full production capacity of the project was estimated to be reached by the end of 2012.

The project would be financed by own resources of the beneficiary, bank loans and State aid in the form of grants and tax relief. The proposed aid constituted an *ad hoc* aid measure (i.e. was not granted under an existing scheme).The notified ad hoc aid package would be granted in the form of a grant and a corporate income tax relief. The grant would be aimed at financing the investment costs and the costs of job creation.

As the aid measure concerned was notified on 18 December 2006 and its objective was to support a regional development in a disadvantaged region (having the Article 87 (3) (a) status), the Commission assessed it on the basis of the Guidelines on National Regional Aid (hereinafter "RAG 1998") which set out the rules for regional aid in the period 2000-2006.

Moreover, as the proposed aid amount exceeded EUR 37.5 million, the aid measure was individually notifiable in accordance with point 24 of the MSF 2002 and thus subject to MSF 2002 rules.

In view of the measure's date of notification, its objective and the notified aid amount, RAG 1998 and MSF 2002 were the relevant rules for measure's compatibility assessment.

In its assessment, as a first step the Commission verified whether the standard compatibility criteria of the RAG 1998 were met, and in a second step, the conformity with MSF 2002 rules was considered.

[78] OJ L 10, 13.01.2001, p. 33-42.

As a general rule, the Commission does not favour the award of *ad hoc* aid within the framework of regional aid. However, in the present case the Commission took note that the project would produce substantial positive spillovers which should provide a major contribution to the development of a disadvantaged region of the European Union and outweigh the possible distortion of competition.

In the assessment of the respective criteria of the RAG 1998, the Commission came to the following conclusions:

(a) The Western Slovakia region was entirely eligible for regional aid under Article 87(3) (a) of the EC Treaty.
(b) The notified aid was aid for initial investment as defined in point 4.4 of the RAG 1998.
(c) The beneficiary's own contribution free of any aid to the eligible costs was above the required 25% threshold (cf. point 4.2 of the RAG 1998).
(d) The aid application was submitted before the work started on the project (cf. point 4.2 of the RAG).
(e) The aid measure covered the costs of fixed assets (land, buildings and equipment) which are eligible for aid under point 4.5 of the RAG 1998.
(f) In case any of the fixed assets are not new, the purchase transactions would take place under market conditions. In addition, assets for whose acquisition aid has already been granted prior to the purchase would be deducted from the eligible costs (cf. point 4.5. 2nd paragraph of the RAG 1998).
(g) Each production line envisaged by the investment would be maintained for at least 5 years after its completion (cf. point 4.10 of the RAG 1998).
(h) Any cumulation of the notified measure with aid in other forms or from different sources to the same eligible costs was excluded. The applicable adjusted aid intensity ceiling and cumulation rules would thus be respected (*cf.* 4.18 *et. subs.* of the RAG 1998).

As far as the compatibility with the MSF 2002 Provisions is concerned, the Commission noted that the aid intensity for the project (21.97% GGE) was below the adjusted maximum allowable ceiling (23.92% NGE), and thus the proposed aid intensity was in line with point 21 of the MSF 2002.

Furthermore, the Commission assessed compatibility with the rules under point 24 (a)(b) of the MSF 2002 by means of a market share test and a capacity test.

Under the four plausible relevant product markets and the two geographic markets segmentations considered by the Commission, Samsung's market share at group level remained below the 25% threshold of the sales of the product concerned (both in volume an value terms). Therefore the test in point 24 (a) of the MSF 2002 was complied with.

In accordance with point 24(b) of the MSF 2002, the Commission verified if the average annual growth rate of the apparent consumption of the products concerned over the last 5 years is above the average annual growth rate of the European Economic Areas' GDP (which would indicate that the market is not in structural decline). The growth rates of the relevant markets in the EEA were well above the compound annual growth rates (CAGR) of EEA GDP both in volume and value terms. The test under 24 (b) of the MSF 2002 was complied with and the investment project under scrutiny was compatible with point 24 (b) of the MSF 2002.

The Commission came to the conclusion that the notified regional aid was in line with the RAG 1998 and respected the conditions of the MSF 2002 and consequently, it was

compatible with Article 87(3)(a) of the EC Treaty. The Commission decision was adopted on 2 July 2008 and published in the Official Journal of the European Union on 19 August 2009.[79]

C 25/2005 (ex NN 21/2005) Frucona Košice, a.s.

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. 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.

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. The Commission decision to initiate the procedure was published in the *Official Journal of* the *European Union*.[80]

The recipient of the financial support was 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. The company was situated in a region eligible for regional aid under Article 87(3)(a) of the EC Treaty.

The disputed measure was 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”). 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. 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.

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.

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. In total, the deferred debt amounted to SKK 477 015 759 (EUR 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.

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.

[79] OJ C 195, 19.8.2009, p. 6.
[80] OJ C 233, 22.9.2005, p. 47.

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.

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 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. 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).

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.

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.

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.

The Commission concluded 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 concluded that almost the entire yield obtained in the bankruptcy would accrue to the tax office.

The Commission also concluded that tax execution against the beneficiary's assets would have led to a higher return than the arrangement.

The Commission concluded 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. Therefore, it concluded that the disputed measure constitutes state aid within the meaning of Article 87(1) of the EC Treaty. The state aid

granted to the beneficiary was equal to the amount of debt written off by the tax office in the arrangement procedure, viz. SKK 416 515 990.

The Commission found that the Slovak Republic had 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.

The Commission came to the conclusion that the state aid which the Slovak Republic had implemented for Frucona Košice, a.s., amounting to SKK 416 515 990, was incompatible with the common market and ordered the Slovak Republic to take all necessary measures to recover from the beneficiary the unlawfully granted aid without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this decision including 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. The Commission decision was adopted on 7 June 2006 and published in the Official Journal of the European Union on 30 April 2007.[81]

On 12 January 2007, the beneficiary applied to the Court of First Instance for annulment of the Commission decision.[82] In support of its action, the applicant relies on the following ten pleas in law:

- by its first plea, the applicant claims that the Commission manifestly erred when determining the amount of the alleged state aid;
- by its second plea, the applicant submits that the contested decision violates an essential procedural requirement and fails to have regard to Article 33 EC. In fact, the applicant contends it is DG Agriculture and not DG Competition which was the competent directorate to carry out the investigation and take the procedural and formal steps that led to the contested decision;
- by its third plea, the applicant further submits that the contested decision violates Section 3, Annex IV of the Treaty of Accession, Article 253 EC, Article 88 EC and Regulation 659/1999 because the Commission lacked jurisdiction to issue the contested decision;
- by its fourth plea, the applicant contends that the Commission has erred in fact and in law in applying Article 87(1) EC when it found bankruptcy proceedings to be more favourable than the tax settlement;
- by its fifth plea, the applicant alleges that the Commission further erred by finding the tax execution procedure to be more beneficial than the tax settlement.
- by its sixth plea, the applicant submits that the Commission manifestly erred in law and in fact by failing to discharge the burden of proof thereby violating Article 87(1) EC and Article 253 EC. In addition, the applicant submits that the Commission disregarded the legal standards set forth by the Court on the application of the private creditor test;
- by its seventh plea, the applicant claims that the Commission erred in law and fact by failing to adequately assess and have regard to the evidence at its disposal;
- by its eighth plea, the applicant alleges that the Commission erred in law and in fact by taking into account irrelevant evidence such as internal differences within the tax administration;

[81] OJ L 112, 30.4.2007, p. 14.

[82] Action brought on 12 January 2007 — Frucona Košice v. Commission (Case T-11/07). OJ C 56, 10.3.2007, p. 36.

- by its ninth plea, the applicant further submits that the decision violates Article 253 EC by lacking sufficient reasoning to justify its conclusions.
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- lastly, by its tenth plea, the applicant alleges that the Commission erred by not exempting the tax settlement as restructuring aid and by retroactively applying the 2004 Restructuring Guidelines.

On 21 November 2008, the Commission applied to the Court of Justice for a decision declaring that the Slovak Republic, by failing to execute the Commission decision concerned, has failed to fulfil its obligations under the fourth paragraph of Article 249 of the EC Treaty and Article 2 of that decision.[83] The Commission stated that to date, the aid awarded to Frucona had not been recovered. The Slovak Republic had applied to recover the unlawfully granted aid in legal proceedings. The first instance court dismissed the action inter alia because Frucona's obligation to pay its debt to the tax authorities had arisen *ex lege*. The appeal court upheld the judgment of the first instance court inter alia because it was not possible to review the order concerning the arrangement, because, as *res judicata*, it must be respected by all bodies, including the appeal court and, also, because the Commission in the decision failed to respect the provisions of national law governing conflicts between bankruptcy and enforcement proceedings.

To support its action, the Commission stated that the judgments of both courts prevented the immediate and effective execution of the Commission decision. According to the Commission, it is not sufficient that the Slovak Republic made use of all means at its disposal. The application of those means must result in the immediate and effective enforcement of the decision, failing which the Slovak Republic must be considered as having failed to fulfil its obligations. A Member State fails to fulfil its obligation to recover if the steps taken by that Member State have no impact on the actual recovery of those amounts.

III.D. Miscellaneous

46. If you are of the opinion that financial regulation and supervision has an effect on the cleavage between public and private capital in your Member State please provide your views.

Financial regulation and supervision are, beyond doubt, vital elements of the functioning of the financial market. However, the national rapporteur does not deem these elements to have a direct effect on the cleavage between public and private capital in the Slovak market.

47. Is there a risk that the measures taken to address the financial crisis including the nationalization of some banks, will lead to less stringent financial supervision?

Such measures certainly imply the risk of a less stringent financial supervision. However, given the fact that no nationalization of banks has taken place in the Slovak Republic, these concerns, for the time being, do not apply to the Slovak financial market. Even though the recently adopted Financial Crisis Act allows stabilization aid to be granted to banks in the Slovak Republic (see answer to question 43), this act does not make the general system of financial supervision less stringent.

[83] Action brought on 21 November 2008 — Commission of the European Communities v. Slovak Republic (Case C-507/08). OJ C 102, 1.5.2009, p. 9.

48. Are there any other areas of the law that are designed to secure a level playing field between public and private capital?

There are no such areas of law.