SUMMARIES OF STATE AID JUDGMENTS AT NATIONAL LEVEL

JUDGMENTS SELECTED FROM THE 2009 STUDY ON THE ENFORCEMENT OF STATE AID LAW AT NATIONAL LEVEL

I- Information on the judgment

The Regional Court Košice ("Krajský súd Košice"), 21.04.2008, 2Cob/155/2007 and related judgment 34Cb/338/2006 dated 11.06.2007, Tax Office v. FRUCONA Košice, a.s.

II- Brief description of the facts and legal issues

Parties:

- The applicant: Košice IV Tax Office ("the Tax Office");
- The defendant: FRUCONA Košice, a.s.

Factual background:

Frucona Košice a.s. is an undertaking active in the production of spirit and spirit-based beverages, non-alcoholic beverages, canned fruit and vegetables, and vinegar.

In 2004, the defendant became an indebted company within the meaning of the Act on Bankruptcy (Act No. 328/1991 Coll. on Bankruptcy and Arrangement with Creditors) and applied for the arrangement procedure ("*arrangement with creditors*").

Arrangement with creditors ("*arrangement*" or "*arrangement procedure*") is a court supervised procedure which, like the bankruptcy procedure, aims to settle 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. 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.

During this procedure creditors agreed that 35 % of their receivables would be repaid by the defendant and the rest of the debt would be written off by creditors. The Tax Office, as well as other creditors voted for a conclusion of the arrangement. The "*arrangement with creditors*" (dated 09.07.2004) was subsequently approved by the supervising court becoming effective on 23.07.2004. The date on which it became effective was defined by the Commission as the day of the breach of Article 88(3) of the EC Treaty by the Slovak Republic (Decision of the European Commission (No. C 25/2005 (ex NN 21/2005) of 07.04.2006).

In 2005, the applicant filed a complaint to the District Court Košice II and asked for recovery of the unlawful aid in line with the Section 26 of the Act No. 231/1999 Coll. on State Aid which stipulated that the grantor of State aid is obliged to enforce a recovery of unlawfully granted State aid.

The District Court rejected the complaint stating that the request for recovery was inadmissible. The applicant lodged an appeal against the District Court's decision to the Regional Court Košice which upheld the contested decision.

Legal issues:

The main issue in this case was whether the debt written-off as a part of the "*arrangement with creditors*", concluded based on the Bankruptcy Act, could be qualified as a State aid within the meaning of State Aid Act and Article 87(1) EC.

The District Court rejected the complaint of the applicant with the substantiation that the written-off debt did not constitute State aid and therefore the applicant had no right to claim for recovery. This conclusion was based on the fact that the defendant was unaware that by applying for the "*arrangement with creditors*", it would receive State aid. Such "*knowledge*" is a precondition for the grant of State aid.

The Regional Court confirmed the District Court's decision and agreed with its reasoning. In addition to applying the conclusions of the District Court, it also based its decision on the fact that, according to the Bankruptcy Act and Act No. 511/2002 Coll. on Administration of Taxes and Duties, the tax debt had ceased to exist. (According to the Section 65a/ of the respective act, the tax office shall write-off the debt or part of it, if the debtor properly fulfils any obligations arising from a court's decision to approve of the "*arrangement with creditors*". The tax debt shall cease to exist from the date of its write-off.) The fact that the defendant's tax debt then ceases to exist was also confirmed by the applicant in its letter dated 3 February 2005.This was also confirmed by the applicant in a letter dated 3 February 2005. Moreover, the Regional Court stated that the written-off debt could not qualify as the State aid due to the fact that the defendant had not asked to be granted State aid. Furthermore, the Regional Court concluded that the defendant had sufficient justification for finding that the "*arrangement with creditors*" was the best mean for debtors to recover at least part of their receivables. The Regional Court held that the defendant had not shown sufficient evidence to support its claim that bankruptcy or tax execution would have been a better solution for debtors.

The Regional Court came to the conclusion that it was not possible to adopt a recovery order according to which the defendant would be obliged to recover unlawfully granted State aid.

III- Summary of the Court's findings

Both Slovak courts came to the conclusion that the "*arrangement with creditors*" agreed by the Tax Office and subsequent debt write-off could not be seen as a grant of State aid (page 4 of the District Court decision).

The courts came to this conclusion because the Tax Office had complied fully with legal regulations and acted in accordance with the Bankruptcy Act. Moreover, there is no legal basis for defining the behaviour of the Tax Office as constituting the grant of State aid.

The applicant had no knowledge of the receipt of State aid (the page 18 of the Regional Court decision). Consequently, both courts stated that a claim for recovery pursuant to the State Aid Act (the Section 26 of the State Aid Act stipulated that the provider of the State aid is obliged to enforce recovery of unlawfully granted State aid) was inadmissible.

I- Information on the judgment

The Regional Court Trnava ("Krajský súd v Trnave"), 28.06.2007, 14S/14/2006 and related judgment of the Supreme Court 4Sžso 56/2007 dated 17.12.2008, Emil Krajčík s.r.o. v. Office on Employment

II- Brief description of the facts and legal issues

Parties:

- The applicant: Emil Krajčík s.r.o;
- The defendant: the Central Office on Employment, Social Affairs and Family ("the Office on Employment").

Factual background:

In 2005, the applicant applied for a compensation in relation to operating costs encountered as a result of providing protected workplaces (from January 2004 until December 2004). The applicant submitted several individual requests to regional employment offices. These requests were rejected on the basis that the criteria in the *de minimis* scheme No. DM-2/05 (scheme for support and sustainment of the working places for handicapped people) were not met.

The applicant disagreed with allegations made by the regional employment offices and introduced further demands for compensation. These demands were passed to the Office on Employment which adopted a common statement No. 10719/2005/OMAPT of 25 November 2005 ("*the Statement*") dismissing them *de facto*.

Consequently, the applicant filed a complaint against the Statement to the Regional Court in which it claimed the breach of the administrative proceedings rules, as well as State aid rules. The Regional Court revoked the decision of the defendant.

The defendant appealed the Regional Court's decision to the Supreme Court of the Slovak Republic which revoked the decision, thereby concluding the proceedings.

Legal issues:

The Regional Court divided the issues into two basic legal questions. The first question related to the breach of administrative rules defined by the Act No. 71/1967 Coll. on Administrative Proceedings. The second question related to the facts at issue, namely the assessment of the requests for compensation according to the *de minimis* scheme No. DM-2/05.

The applicant claimed that the defendant along with the regional employment offices had breached the rules on administrative proceedings because they did not issue formal decisions on the refusal to grant compensation.

The Regional Court concluded that requests for compensation submitted to regional employment offices constituted formal administrative proceedings pursuant to Section 1(1) of the Administrative Proceedings Act, and should be concluded by way of a formal, well founded decision containing prescribed terms and which could be challenged by an appeal. In line with this reasoning the

Regional Court stated that regional employment offices had breached the rules by failing to issue such formal decision.

In the meantime, the defendant had to deal with repeated requests by the applicant in the form of individual appeals and issued a formal decision. In the appeal against the Regional Court's decision, the defendant claimed that the Statement could not be subject to judicial review due to the fact that it did not create, change or recall the rights or obligation of natural or legal persons. The Supreme Court fully agreed with the defendant's reasoning. Therefore, in support of its findings, it stated that the legal regulations according to which the applicant applied for the compensation did not give the defendant the right to proceed according to the Administrative Proceedings Act and issue a formal decision.

According to scheme DM-2/05, *de minimis* aid requested by beneficiaries may not exceed the stipulated threshold (EUR 100.000) when cumulated with other *de minimis* State aid granted within a three years' period. The applicant claimed that the regional employment offices incorrectly applied this condition, as they also took into consideration State aid granted during years 2002 and 2003 and which would not have been included in the *de minimis* aid.

The Regional Court agreed with the applicant. It observed that scheme DM-2/05 was effective from March 2005 and was adopted on the basis of Commission's Regulation No. 69/2001 on the application of Articles 87 and 88 EC to *de minimis* aid which only came into force in the Slovak legal order from the day of the accession to the EU. In this context, the regional employment offices retroactively applied *de minimis* threshold to the aid granted during the years 2002 and 2003.

The Regional Court stated that it was not allowed to cumulate the *de minimis* aid with other forms of State aid for the calculation of the *de minimis* thresholds. The aid granted to the applicant in 2002 and 2003 could indeed be qualified as State aid but did not fall within the scope of *de minimis* aid.

III- Summary of the Court's findings

The Regional Court annulled a decision by the Office on Employment largely due to breach of administrative proceedings rules (mainly page 7 and 8 of the decision).

The Regional Court ordered the regional employment offices to adopt decisions in line with the legal opinion that State aid granted before the accession of Slovakia to the EU may not be taken into account when assessing *de mininis* criteria (page 8 and 9 of the Regional Court decision).

The Regional Court's decision was reversed by the Supreme Court on the ground that the Statement of the defendant could not be subject to judicial review (page 4). The Supreme Court concluded proceedings without any explanations in relation to the facts at issue.