

REGULATIONS on state aid as compensations granted to undertakings entrusted with services of general economic interest

Under art. 28 align. 1. in the Competition Law 21/1996, with subsequent modifications and completions, and under art. 22 align.1 of Law 143/1999 on State Aid, with subsequent modifications and completions,

The Competition Council adopts this Regulation,

Introduction

Elaborating a legal framework to regulate the State aid matter stands for the continuous harmonization of the Romanian legislation with the European legislation, which is part of Romania's process of accession to the EU.

The scope of the notification and the authorization of the state aids granted by public authorities or bodies which administer state resources is to seek the extent in which a state aid is compatible with a normal competition environment, in a market economy where prices and tariffs for services are regulated by supply and demand.

Any intention to grant a new state aid or to modify an existent state aid should be notified to the Competition Council. No state aid may be granted without the authorization of the Competition Council. Without bringing prejudice to the provisions of Art. 2 in Law 143/1999 on state aid, with subsequent modifications and completions, and recognizing the importance that the services of general economic interest have in the range of EU shared values, promoting their role in the framework of the social and territorial cohesion, services of general economic interest must benefit from the observance of the principles and conditions for which they were established.

In order to operate under the conditions for which they were established, certain services of general economic interest must be financially supported by the state in order to totally or partially cover the costs incurred by the operation of the public service. It is of no importance whether these services of general economic interest are operated by a public or a private undertaking.

The Competition Council may authorize state aid under the form of compensations, as aid compatible with Law 143/1999 on State Aid, with subsequent modifications and completions, if the supplier and the initiator of the state aid demonstrates the necessity to grant the aid for the operation of the service of general economic interest, the meeting of the conditions provided for in this Regulation, and the fact that the award of such an aid does not unduly affect the trade between Romania and the EU Member States.

CHAPTER I

General Provisions

Application field

Art. 1 – 1 This Regulation shall apply to state aids in the form of compensations granted to undertakings entrusted with the performance of the services of general economic interest for the purposes of Art. 3⁸ in the Law 143/1999 on State Aid, with subsequent modifications and completions , to the extent in which the application of the Regulation does not obstruct the operation, by facts or by law, of meeting the obligations with which, these undertakings were entrusted.

Exemptions

Art. 2 - The provisions of the present Regulation doesn't apply to the state aids for agriculture and fishery.

Performing the service of general economic interest

Art.3. – (1) For applying the provisions of the present Regulation, the obligations resulting from the performing of the service of general economic interest must be stipulated in a normative or administrative act (law, Government decision, ordinance, etc.).

(2) These normative or administrative acts must enclose in particular the following elements:

- a)** the nature and the extent of the obligations of performing the public service;
- b)** the undertaking and the involved region;
- c)** the nature of the special or exclusive rights granted to that undertaking;
- d)** the parameters for calculating any compensation, as well as a reasonable profit;
- e)** the repayment modalities for overcompensations as well as the State's intervention modalities in the case of overcompensations.

Conditions when the compensation of the services of general economic interest doesn't constitute state aid

Art. 4.- Compensations granted for performing the service of general economic interest don't constitute state aid, according to the provisions of art. 2 in the Law no.143/1999 on state aid, with subsequent modifications and completions, if the following conditions are cumulatively met:

- a)** the performance of the service of general economic interest is entrusted to the beneficiary of the financial support by a normative or administrative act, by the State (central, local, regional authorities). The obligations the undertaking benefiting by the financial support must fulfill in order to perform the service of general economic interest must be clearly defined (by normative, administrative acts);
- b)** the parameters on the basis of which the compensation is calculated are established *ex ante* (in advance), in an objective and transparent manner, to avoid it conferring an economic advantage which may favor the beneficiary. Payment by the supplier of compensation for the loss incurred by an undertaking without the parameters of such compensation having

been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which is considered state aid;

c) the compensation does not exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations taking into account the relevant receipts and a reasonable profit;

d) where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tendered capable of providing those services at the least cost to the community, the level of compensation needed is determined on the basis of an analysis of the costs which a typical undertaking, well run so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations of the service of general economic interest.

Compatible state aid

Art. 5 – (1) In case the four conditions under Art. 4 are not met cumulatively, the compensation granted in view of performing the services of general economic interest may constitute a state aid, compatible with the normal competitive environment, being subject of the notification obligation towards the Competition Council, with the demonstration of the following aspects:

a) The state aid is necessary in view of performing the service of general economic interest.

b) The state aid does not unduly affect trade between Romania and the EU Member States.

(2) – The elements provisioned at **Art. 3** in this Regulation have to be respected and the amount of the compensation is to be calculated in accordance with Art. 6 of this Regulation.

The quantum of the compensation

Art. 6 – (1) The amount of compensation shall not exceed the necessary sum to cover, totally, or partially, the costs incurred with the operation of the public service, taking into consideration both the relevant incomes and a reasonable profit for fulfilling the public service obligation.

(2) The amount of compensation includes all the advantages granted by the state from state resources, of the administrative- territorial units, or of other bodies administering state sources or the local collectivity's sources or from public authority's resources

(3) The parameters of the calculation and of the grant of the compensation must be transparent. At the same time, they must be identical for all undertakings which perform the same obligations of public services.

(4) The costs taken into consideration should include all costs incurred in providing the service of general economic interest.

(5) The costs allocated for the operation of the service of general economic interest may cover all variable costs involved in the supply of the service of general economic interest, an appropriate contribution to fixed costs and a reasonable profit.

(6) The costs allocated to any other activity which is not related to the operation of the service of general economic interest must cover all the variable costs, an appropriate

contribution to establish the fixed costs and an adequate profit. These costs may not be imputed to the operation of the service of general economic interest, and the calculation of these costs must be based on generally accepted accounting principles.

(7) For taking into account the revenue, it must include at least the entire revenue earned from the service of general economic interest. If the undertaking in question enjoys any special or exclusive rights, as defined under Art. 3⁹ in Law 143/1999 on state aid, with subsequent modifications and completions, closely linked to another service of general economic interest that generates profit in excess or benefits from other advantages granted by the state, these must be taken into consideration, analyzed under the state aid law and added to its revenue calculation.

(8) The supplier and the initiator of the state aid shall decide if the profits accruing from other activities outside the scope of the service of general economic interest must be allocated in whole or in part to the financing of the carrying out of the obligations for performing the service of general public interest.

(9) “*Reasonable profit*” shall mean a profit which must also envisage a possible risk or the absence of the risk taken by the undertaking in the light of state intervention, in particular if the state grants exclusive or special rights for the purposes of Art. 3⁹ in the Law no.143/1999 on State Aid, with subsequent modifications and completions. This profit rate must not exceed, under normal circumstances, the rate set in the preceding years, for that sector.

(10) In sectors where there is no undertaking comparable to the undertaking entrusted with the operation of the service of general public interest, a comparison may be made with undertakings situated in other EU member states or in other sectors. In order to determine a reasonable profit, the supplier and the initiator of the state aid may introduce incentive criteria strictly relating to the quality of service provided.

(11) Where an undertaking is entrusted with the operation of several services of general economic interest, the undertaking must demonstrate, through its internal accounts, that there is no over-compensation at the level of each service of general economic interest in question.

Incompatible state aid

Art. 7 – (1) The amount of compensation shall include all the advantages granted by the State or through state resources. The latter must be effectively used by the undertaking for the operation of the service of general economic interest for which they have been granted.

(2) Financial support granted for the financing of the service of general economic interest but which is used to intervene on other markets, outside the scope of the service of general economic interest, constitutes incompatible state aid.

Over-compensation

Art. 8 – (1) The state aid in the form of compensation which exceeds the costs necessary to meet the service of general economic interest represent over-compensation and is incompatible with normal competitive environment.

(2) In cases of over-compensation, the aid has to be recovered in accordance with the general provisions.

(3) If the over-compensation does not exceed 10% of the amount of the annual compensation received by the undertaking at issue, the compensation shall be yielded for next year;

(4) Where service of general economic interest have costs that vary significantly each year, over-compensation in excess with 10% during a period of 3 years may prove necessary for the operation of the service of general economic interest.

(5) The over-compensation of an undertaking may be used by this to finance another service of general economic interest it was entrusted with, if such a transfer is demonstrated in the undertaking's accounts.

(6) In cases when a public undertaking benefits by compensation, any over-compensation may be used by the State in its capacity as shareholder to inject finance into that undertaking provided that the private investor criterion is met. Such transfers must be determined by the normal commercial procedure, must comply with the relevant national rules, specific to the commercial and fiscal field, they must be clearly identified in the accounting and must be the result of a formal decision by the public authorities; this decision must identify the exact use for which the financial transfer is granted.

Transparency

Art. 9 – For undertakings which receive state aid under the form of compensation to perform the service of general public interest and which also perform other activities besides this service of general public interest must elaborate separate book records which should include both the costs and incomes related to the operation of the service of general public interest, and to the costs and incomes related to the operation other activities.

Necessity of information

Art. 10 – (1) The aid supplier and the aid initiator must submit to the Competition Council all the necessary elements in order to determine whether the state aid granted under the form of compensations is compatible with the provisions of this Regulation.

(2) The aid supplier and the aid initiator must submit to the Competition Council, upon the latter's written request, within 20 working days from receive, or within other time limits as provided in the request, all the information that the Competition Council considers necessary in order to assess whether or not the conditions provisioned in this Regulation are met.

Final provisions

Art. 11 – (1) The provisions of this Regulation shall apply according to the *Regulation on the form, content and other details of the notification of state aids* and under the *Regulation on the de minimis threshold of aids which are not subject to the notification obligation*, enacted by Order of the President of the Competition Council 27/2000 published in the Official Monitor of Romania, Ist Part, no. 125 on March the 24th, 2000, with the subsequent modifications and completions, as well as the *Regulation regarding the transparency of the financial relations between the public authorities and the public undertakings as well as the financial transparency within certain undertakings*, published in the Official Monitor, Ist Part, no.120 on March the 21st, 2004.

(2) This Regulation applies to state aids under the form of compensations granted for the performing of the services of general economic interest notified after the Regulation entered

into force, as well as for the state aids notified before the regulation's entering into force, but for which the CC issued a decision after this date.

(3) This Regulation is based on the *EC Decision on application of Art. 86 of the EU Treaty in the field of state aids in the form of compensations, granted to undertakings entrusted with the operation of services of general economic interest and the Community framework for state aid in the form of public service compensation.*