

## **GUIDELINES REGARDING STATE AID IN AIR TRANSPORT SECTOR**

Pursuant to Article 27 (1) of the Competition Law no. 21/1996 and to Article 30 (1) of the State Aid Law no. 143/1999 with the subsequent completions and modifies,

The Competition Council adopts the present Regulation.

### **1. Introduction**

- 1.1. Drafting a legal framework regulating the state aid discipline stands for the continuation of the harmonization process of the Romanian legislation with the European legislation, which is part of Romania's accession process to the European Union.
- 1.2. The purpose of the state aid control exerted by the public authorities or any other bodies administering resources on behalf of the state aims at assessing the compatibility of a state aid with a normal competitive environment within a market economy where the supply and demand determine the prices of the goods and services.
- 1.3. The present Guidelines have the objective to increase the transparency of the assessment of the notifications to the Competition Council as well as the establishing of the applied criteria and procedures.

### **2. Scope of These Guidelines**

- 2.1. These guidelines apply for State aid scheme and individual aid granted in the aviation sector.
- 2.2. The State aid may be granted for activities accessory to air transport, direct or indirect subsidization of which could benefit airlines such as flight schools, duty free shops, airport facilities, franchises, airport charges, within the limits which will be defined in the following chapters.
- 2.3. These Guidelines do not apply to State aid for aircraft production.
- 2.4. Aids granted to airlines in order to promote acquisition or operations of certain aircraft are included in the scope of these guidelines.
- 2.5. The construction or enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy which cannot be controlled by the Competition Council under the Law no. 143/1999 on State aid with the subsequent completions and modifies. Infrastructure development decisions fall outside the scope of application of these Guidelines in so far as they are aimed at meeting planning needs or implementing national environmental and transport policies.
- 2.6. This general principle is only valid for the construction of infrastructures by Member States, and is without prejudice to evaluation of possible aid elements resulting from preferential treatment of specific companies when using the infrastructure. The Competition Council, therefore, may evaluate activities carried out inside airports which could directly or indirectly benefit airlines.
- 2.7. The reduction or the deferral of fiscal or social contributions does not constitute State aid, but a general measure, unless it confers a competitive advantage to specific undertakings to avoid having to bear costs which would normally have had to be met out of the undertakings' own financial resources and thereby prevent market forces from having their normal effect.

2.8. The Competition Council has a positive approach towards social aid, for it brings economic benefits above and beyond the interest of the firm concerned, facilitating structural changes, reducing hardship and evening out differences in the obligations placed on companies by national legislations.

### **3. Operating Aids**

3.1. Direct aids aimed at covering operating losses are, in general, not compatible with the common market and may not benefit from an exemption.

3.2. In exceptional cases, such aids may be granted fulfilling all the conditions:

a) the aid is justified through their contribution at the rectification, renewal and development of the Romanian commercial fleet;

b) the level of the aid is proportional with the handicaps it seeks to alleviate.

3.3. Operating aid must be both limited in time and progressively reduced.

3.4 The State aid granted as direct operational subsidization of air routes can, in principle, only be accepted in the following two cases:

a) public service obligations;

b) aid of a social character.

#### **3.5. *Public Service Obligations***

3.5.1. Public service obligation means any obligation imposed upon an air carrier to take, in respect of any route which it is licensed to operate by a Member State, all necessary measures to ensure the provision of a service satisfying fixed standards of continuity, regularity, capacity and pricing, which standards the air carrier would not assume if it were solely considering its economic interest.

3.5.2. Such public service obligations may be imposed:

a) on scheduled air services to an airport serving peripheral or development regions in its territory;

b) on a thin route to any regional airport in its territory;

c) on a route that is considered vital for the economic development of the region in which the airport is located.

3.5.3. If no air carrier has commenced or is about to commence scheduled air services on a route in accordance with the public service obligations which have been imposed on that route, there may limit access to that route to only one carrier for a period of up to three years after which the situation must be reviewed.

3.5.4. The right to operate shall be offered to any Romanian air carrier entitled to operate such air services by the public tender procedure.

3.5.5. The air carrier selected for carrying out the imposed public service obligation may be reimbursed. Such reimbursement shall take into account the costs and revenue (that is the deficit) generated by the service. The reimbursement cannot involve any overcompensation of the air carrier. The development and the implementation of these schemes must be transparent. In this respect, the selected company should have an analytical accounting system sophisticated enough to apportion the relevant costs (including fixed costs) and revenues.

3.5.6. The acceptability of the reimbursement shall be considered in the light of the State aid principles. In this context it is important that the airline which has access to a route on which a public service obligation has been imposed, may be compensated only after being selected by public tender. This bidding procedure enables the supplier to value the offer for that route,

and make its choice by taking into consideration both the users' interest and cost of the compensation.

3.5.7. The essence of an aid lies in the benefit for the recipient. A reimbursement limited solely to losses sustained because of the operation of a specific route does not bring about any special benefit for the company, which has been selected on the basis of the objective criteria.

3.5.8. The Competition Council considers that compensation for public service obligations does not involve aid provided that:

- a) the carrier has been correctly selected through a call for tender;
- b) on the basis of the limitation of access to the route to one single carrier;
- c) the maximum level of compensation does not exceed the amount of deficit as laid down in the bid.

3.5.9. The Competition Council considers that the level of compensation is the main selection criterion. Other criteria such as adequacy, prices and standards required are generally already included in the public service obligations themselves. Consequently, it is only in exceptional cases, duly justified, that the selected carrier could be other than the one which requires the lowest financial compensation.

3.5.10. If the Competition Council concludes that it has not been selected the best offer it would promptly request information from the bidding organizers in order to allow the Competition Council to examine whether they include State aid elements.

3.5.11. In case that the best bid has not been selected, the Competition Council may consider that State aid was granted to the air carriers. Should the supplier not have notified the aid, the Competition Council would consider the aid, in the case that compensation has already been paid, as illegally granted and would open the investigation procedure.

3.5.12. Possible reimbursement given to the carriers benefiting from these exclusive concessions may well involve aid elements, particularly as the carriers have not been selected by an open tender. The Competition Council stresses that such reimbursements must be notified in order to allow the Competition Council to examine whether they include State aid elements.

3.5.13. In its assessment of these compensations, the Competition Council will verify whether or not the aid diverts significant volumes of traffic or allows carriers to cross subsidize routes - whether intercommunity, regional or domestic routes - on which they compete with other Community air carriers. This will not be considered to be the case if the reimbursement is based on the costs and the revenues (i.e. the deficit) generated by the service. Such compensation must be notified.

### *3.6. Aid of a Social Character*

3.6.1. Aid of a social character, granted to individual consumers is allowed provided that such aid is granted without discrimination related to the origin of the air carriers.

3.6.2. The aid must have a social character, i.e. it must, in principle, only cover specific categories of passengers travelling on a route (e.g. children, handicapped people, low income people). However, in case the route concerned links an underprivileged region, mainly islands, the aid could cover the entire population of this region.

## **4. Application of the Market Economy Investor Principle**

4.1. In the assessment, the Competition Council takes in consideration the market economy investor principle. The Competition Council cannot replace the judgement of the investor,

but must establish with reasonable certainty that the programme financed by the State would be acceptable to the market economy investor. If there are characteristics of the operation indicating that an owner would not risk his own capital in similar circumstances, such operations shall be considered as State aid.

#### *4.2. Capital Injections*

4.2.1. Capital injections do not involve State aid when the public holding in a company is to be increased, provided the capital injected is proportionate to the number of shares held by the authorities and goes together with the injection of capital by a private shareholder; the private investor's holding must have real economic significance.

4.2.2. The market economy investor principle will normally be satisfied where the structure and future prospects for the company are such that a normal return, by way of dividend payments or capital appreciation by reference to a comparable private enterprise, can be expected within a reasonable period.

4.2.3. The Competition Council will accordingly analyse the past, present and future commercial and financial situation of the company.

4.2.4. In examining if the financial projections are realistic, the Competition Council may assess the airline's situation in the following areas:

a) Financial performance. Different indicators may be taken into account, for example:

- gearing ratios (debt/equity) and cash flow are important indicators for the standing of an individual company, as they permit an assessment of the company's ability to finance investments and ongoing operations, from its own resources;
- operating and net results may be analysed over a period of several years. Profitability ratios may be determined and the trends originated therein may be assessed,
- future capital values and future dividend payments.

(b) Economic and technical efficiency. The indicators which may be considered are, for example:

- operating costs and labour productivity,
- fleet age could be an important element of the assessment. An airline whose fleet age is higher than the European average will certainly be handicapped due to the substantial investment required for fleet renewal.

(c) Commercial strategy for different markets.

The trends of the different markets on which the company competes (the past, present and future situation), the market share held by the company over a sufficient period and the company's market potential may be evaluated and the projections carefully assessed.

In the case of loss making undertakings, necessary improvements and restructuring measures are fundamental in the Competition Council's assessment. These measures must form a coherent restructuring programme. The Competition Council particularly appreciates situations where restructuring plans are established by external and independent financial advisers after a study.

#### *4.3. Loan Financing*

4.3.1. The Competition Council will apply the market economy investor principle to assess whether the loan is made on normal commercial terms and whether such loans would have been available from a commercial bank.

4.3.2. The Competition Council will take into account in particular both the interest rate charged and the security sought to cover the loan.

4.3.3. The Competition Council will examine whether the security given is sufficient to repay the loan in full in the event of default and the financial position of the company at the time the loan is made.

4.3.4. The aid element will amount to the difference between the rate that the airline would pay under normal market conditions and that actually paid.

4.3.5. In the extreme case where an unsecured loan is made to a company which under normal circumstances would be unable to obtain financing, the loan effectively equates to a grant and the Competition Council would evaluate it as such.

#### *4.4. Guarantees*

4.4.1. An assessment of the aid element of guarantees will involve an analysis of the borrower's financial situation. The aid element of this guarantee would be the difference between the rate which the borrower would pay in a free market and that actually obtained because of the guarantee net of any premium paid.

4.4.2. If no financial institution, taking into consideration the airline's poor financial situation, would lend money without a State guarantee, the entire amount of the borrowing will be considered aid.

### **5. Regional State Aid**

5.1. Regional State aid may be granted to the companies established in a disadvantaged region or to companies investing in certain disadvantaged areas.

5.2. For the assessment of the regional aid granted in the aviation sector the Competition Council will apply the provisions of the Regulation on regional aid and aid for small and medium-sized enterprises adopted through the Order by the President of the Competition Council no. 92/2002, published in the Official Gazette no. 470/2002.

### **6. State Aid for Rescue and Restructuring**

6.1. For the assessment of the State aid for rescue and restructuring granted in the aviation sector the Competition Council will apply the provisions of the Regulation on rescue and restructuring firms in difficulty adopted through the Order by the President of the Competition Council no. 92/2002, published in the Official Gazette no. 470/2002.

### **7. State Aid for Privatisation in the Aviation Sector**

7.1. When the State sells its shareholdings in public companies, aid is excluded and therefore notification is not required, if, upon privatization, the following conditions are fulfilled:

- a) the disposal is made by way of an unconditional public invitation to tender on the basis of transparent and non-discriminatory terms,
- b) the undertaking is sold to the highest bidder,
- c) the interested parties have a sufficient period in which to prepare their offer and receive all the necessary information to enable them to undertake a proper evaluation.

7.2. The following sales realized in the privatisation process are subject to the prior notification requirements because there is a presumption that they contain aid:

- a) all sales by way of restricted methods or where the sale takes the form of a direct trade sale;

- b) all sales which are preceded by a cancellation of debts by the State, public undertakings or any other public body;
- c) all sales preceded by a conversion of debt into capital or by a recapitalization;
- d) all sales that are realized in conditions that would not be acceptable for a transaction between market economy investors.

7.3. Companies that are sold on the basis of the conditions under subparagraph 7.2 above must be valued by an independent expert who must indicate, under normal circumstances, a going concern value for the company and, if the Competition Council believes it necessary, a liquidation value. A report specifying the sales value, or values, and the sales proceeds raised must be provided to the Competition Council to enable it to establish the actual amount of aid.

## **8. Concession of Exclusive Rights for Activities Accessory to Air Transport**

8.1 The grant of exclusive rights for activities which are accessory to air transport may involve considerable financial advantages for the exclusive grantee.

8.2. The State or the entity entrusted with the operation of an airport infrastructure may grant such an exclusive concession to an airline for a price lower than the actual market value of the concession. In the case the grantee pays no rent for the exclusivity or pays a rent which is lower than the price that the grantor would demand under normal commercial conditions aid element is involved.

8.3. The accessory activities for which the granting of exclusive rights may bring about aids in favour of air carriers are mainly those related to duty free shops.

8.4. The Competition Council considers that, in general terms, no aid is involved where the grantee is selected in circumstances that would be acceptable to a normal concession grantor operating under normal market economy condition. However, in certain circumstances, for example, where the highest bidder is unreliable or where its solvency is precarious, the Competition Council would understand the Member State's acceptance of a lower bid.

## **9. Final Provisions**

9.1. These Guidelines will apply without prejudice to any rules emitted by the Competition Council for the application of Law no. 143/1999.

9.2. These Guidelines applies to State Aids granted in the aviation sector, which will be notified after it enters into force. Also, the present Guidelines applies to state aids which were notified before its entering into force, but the Competition Council decision is subsequent to this date or the Competition Council has not issued a decision yet.

9.3. Pursuant to Article 29(1) of the Competition Law no. 21/1996 and to Article 22 (5) of the State Aid Law no. 143/1999 with the subsequent completions and modifies, these Guidelines are adopted through Order by the President of the Competition Council and enter into force at the publishing date in Official Gazette of Romania.