

## **DECISION no. 169 / 02.06.2004**

**regarding State Aids  
stipulated in art. 38 (3) and (4) of the Fiscal Code,  
which are granted according to the state aid scheme  
stipulated by art. 14 of the Draft Law for amending and completing  
the Law no. 84/1992 regarding the regime of the free zones**

**THE PRESIDENT OF THE COMPETITION COUNCIL,**

**On the basis of:**

1. Presidential Decree no. 57/2004 for appointing the Competition Council's members;
2. The provisions of the Competition Law no. 21/1996, published in the Official Journal of Romania, Part I, no. 88/30.04.1996, with subsequent amendments and completions;
3. The provisions of the Law no. 143/1999 on State Aid, published in the Official Journal of Romania, Part I, no. 370/03.08.1999, with subsequent amendments and completions;
4. The Regulation regarding the organization, functioning and procedure of the Competition Council, published in the Official Journal of Romania, Part I, no. 288/01.04.2004;
5. The Regulation regarding the form, content and other details of a state aid notification, published in the Official Journal of Romania, Part I, no. 125/24.03.2000;
6. The Regulation on Regional State Aid, published in the Official Journal of Romania, Part I, no. 340/19.04.2004;
7. The notification submitted by the common letter of the Ministry of Transport, Building and Tourism (no. 1853/SS/31.03.2004) and of the Ministry of Public Finance (no. 107767/31.03.2004), registered at the Competition Council with no. RS – AS 36/07.04.2004, referring to the state aid scheme regulated by the Draft of Law aiming to amend and complete the Law no. 84/1992 regarding the regime of the free zones;
8. The notice of the Directorate for State Aid Authorization regarding the notified state aid.

**On the basis of the following grounds:**

1. The working out of the Draft of Law aiming to amend and complete the Law no. 84/1992 regarding the regime of the free zones (hereinafter, called „Draft”) has been caused by the necessity to make the existing state aid scheme, contained by the Law no. 84/1992, amended by the Fiscal Code, compatible with the rules in the field of state aid regarding the regional development.
2. Until present, 6 free zones have been set up, as follows: Free Zone of Sulina (based on the Governmental Decision - „GD” - no. 156/1993), Free Zone of Constanta-Sud and Basarabi (based on the GD no. 410/1993), Free Zone of Braila (based on the GD no. 330/1994), Free Zone of Galati (based on the GD no. 190/1994), Free Zone of Giurgiu (based on the GD no. 788/1996), Free Zone of Curtici-Arad (based on the GD 449/1999).
3. The main facility of which have benefited the undertakings that are carrying on the activity within / into the free zone, based on a licence (herein after, called „operators”) was the total or partial exemption from the payment of the profit tax, calculated on the basis of the accounted profit, under the provisions of the Law no. 84/1992, completed by the provisions of Law no. 414/2002 on the profit tax, with subsequent amendments and completions.
4. At present, under art. 38 (3) of the Fiscal Code, the operators which have achieved, until the date of July 1st, 2002, investments into the free zone, in tangible repayable assets used in the manufacturing industry, in value of at least 1,000,000 USD, will benefit of exemption from the profit tax, until the date of June 30, 2007.

The art. 38 (4) of the Fiscal Code provides that, excepting the provisions of art. 38 (3), the tax payers which are obtaining incomes from activities developed on a licence basis within a free zone have the duty to pay profit tax in a 5% quota for the taxable profit corresponding to these incomes, until the date of December 31, 2004.

According to the provisions of art. 1 (5) of the Fiscal Code, any fiscal measure set up by the Code, that represents state aid, is granted under provisions of Law no. 143/1999 on state aid, with subsequent amendments and completions.

By corroborating the art. 1 (5) with art. 38 (3) and (4) of the Fiscal Code, it results that granting of fiscal measures in the free zones is conditioned by the fulfilling of the criteria regulated on state aid field, depending on the foreseen objective for the state aid granting.

5. The art. 14 of the Draft regulates the general framework of the state aids which can be granted within the free zones.

So, in the paragraph (1), is provided that undertakings which are achieving investments into the free zone, according to the concluded commercial contracts, may receive state aid under condition to fulfil the criteria regarding the regional state aid and the state aid for SMEs.

In the paragraph (2) is established the objective of the state aid granting, the regional development, as well as the maximum allowable intensity of the state aid, respectively 50% of the eligible costs of the investments achieved by the large companies and 65% of the eligible costs of the investments fulfilled by the SMEs, intensity in accordance with the one regulated by the Regulation on regional state aid. As a result, even if provisions of art. 38 of the Fiscal Code do not condition the granting of the exemption from profit tax, or of the reduction of profit tax, the state aid intensity cannot exceed the maximum ceiling stipulated in art. 14 (2) of the Draft.

Art. 14 (2) stipulates that, for the existing state aids related to the on-going contracts under concession, in order to make them compatible, the state aid grantors will work out schemes for making these state aids compatible, which will be approved by Government Decision (GD).

Art. 14 (5) of the Draft stipulates that the modalities / ways of granting state aid are those stipulated in the enforced legislation on state aid. The state aid grantor works out the schemes of granting state aids for the operators into the free zones. In case where schemes do not stipulate fiscal state aids – which are regulated by the Fiscal Code – these will be set up by law or by GD (Government Decision).

The beneficiaries of the regional state aid set up by the Draft are:

- the operators – natural persons or legal entities, Romanian or foreign ones, that are carrying on activities into free zones, on the basis of working licences issued by the free zones' administrations;
- the administrations of the free zones.

6. After analysing the Draft and the information submitted into the notification, it resulted that the objective of the state aid which is granted into free zones consists of regional development. Consequently, the criteria of granting state aids included in the Regulation on regional state aid (hereinafter, called „Regulation”) must be taken into consideration.

7. The state aid granted into free zones is compatible with a normal competitive environment if the criteria stipulated into Regulation are observed, respectively: the concept of initial investment, the eligible costs for investments in tangible and intangible assets, the contribution of the regional state aid beneficiary, the intensity of the regional state aid, the maintaining of the investment.

a. Initial investment

Undertakings are achieving investments which consist of acquisition of fixed assets for production or other activities specific to free zones (buildings construction, grades, platforms, storing rooms, acquisition of loading – unloading equipments) or of improving the existing ones, state aid being, thus, dedicated to the achievement of initial investments, as they are defined by art. 5 of the Regulation.

b. Eligible costs

According to art. 6 (2) of the Regulation, the eligible costs for investments in tangible assets are settled on the basis of a homogeneous ensemble of expenses related to the investment' elements, respectively lands, buildings and equipments, which make up the standard basis. Also, eligible costs may include certain categories of investments in intangible assets, provided that these costs do not exceed 25% from the standard basis, in case of large companies.

c. Contribution of the regional state aid beneficiary

The contribution of the state aid beneficiary to the financing of the investments must be of at least 25%, in order to guarantee a viable and efficient level for them, accordingly to provisions of art. 8 (1). This contribution cannot be object of any other state aid.

d. Intensity of the regional state aid

Art. 14 of the Draft stipulates that the state aid intensity is of at most 50% from the eligible costs of the investment achieved by the large companies, respectively 65% out of the eligible costs of the investments for SMEs, intensity in accordance with the one regulated by the Regulation.

e. Maintaining of the investments

The state aid beneficiaries must maintain the respective investments for a minimum period of 5 years, according to art. 11 of the Regulation.

8. The state aid for the initial investment may be cumulated with the state aid for jobs creation, within the limit of the ceiling stipulated in art. 14 (2) of the Draft. In this case, the amount of the state aid for the initial investment, expressed as percentage of the value of the eligible costs of the investment, and the amount of the state aid for jobs creation, expressed as a percentage from the wages costs, must not exceed the intensities stipulated in art. 14 (2) of the Draft.

A job is related to the fulfilling of an investment from the moment where it refers to the activity to which the investment is reported and if it was created within a 3 years period after the investment completing. The state aid for jobs creation cannot exceed 50% from the wages costs for the employees, during a 2 years period, in case of large companies, in the

case of SMEs the maximum intensity being of 65%. Any job lost during the referred period must be deducted from the number of jobs created during the same period.

9. The amount of state aid granted to the operators in the free zones is given by the difference between the total granted facilities and the corresponding costs of the investments into infrastructure, achieved by these operators.
10. Since, at present, the operators in the free zones are benefiting of the facilities stipulated in art. 38 (3) and (4) of the Fiscal Code, which cannot be *ex ante* quantified, the state aid grantor and the Ministry of Transport, Building and Tourism, together with the administrations of free zones, will submit to the Competition Council half-yearly reports on the granted state aid. The Competition Council is monitoring the attainment of the maximum intensity of state aid for each operator.
11. Where it comes out that, in relation with the investments assumed by the terms of supply and with the above mentioned eligible costs, the maximum allowable level of the state aid intensity is attained, the state aid grantor will cease the granting of the facility.  
In case of ascertaining/finding the exceeding of the maximum allowable level of the intensity, the grantor should recover the state aid distributed over the authorized intensity. In the opposite, the Competition Council will require, accordingly to law, the recovering or reimbursement of the state aid allotted over the authorized intensity.
12. The ceilings of the state aid intensity stipulated in art. 14 (2) of Draft are applied at the total amount of the state aid, in case of the state aids granted simultaneously in the frame of several regional schemes, whether the funds are from local, regional, national or community sources.
13. The Ministry of Transport, Building and Tourism, together with the grantor have the responsibility to notify to the Competition Council the state aid schemes which will be set up under the art. 14 of the Draft.
14. The data presented in the notification submitted to the Competition Council lead to the conclusion that the facilities granted to the undertakings stipulated in art. 14 (2) of the Draft, with the observing of the criteria regarding the regional state aid and the state aid for SMEs, are not liable to significantly affect the normal competitive environment and also they do not infringe the adequate accomplishing of the international treaties wherein Romania is a Part.
15. Under art. 13 (1) of the Law no. 143/1999, with subsequent amendments and completions, the Competition Council shall permanently survey all the

existing state aids, and if it comes out that this state aid scheme or the specific allocations within this scheme are significantly affecting the normal competitive environment and the adequate application of the international treaties wherein Romania is a Part, it will require to the state aid grantor to take suitable measures in order to eliminate its incompatibility with Law no. 143/1999, with subsequent amendments and completions,

## **DECIDES:**

**Art. 1.** On the basis of art. 12 (2) c) corroborated with art. 14 (1) f) of the Law no. 143/1999 on state aid, with subsequent amendments and completions, authorizes with conditions the state aids stipulated in art. 38 (3) and (4) of the Fiscal Code, which are granted in accordance with the state aid scheme stipulated by art. 14 of the Draft Law aiming to amend and complete the Law no. 84/1992 regarding the regime of free zones, as being state aid for regional development.

**Art. 2.** The authorization is conditioned by the fulfilling of the following conditions and obligations:

- a. The state aids schemes which will be set up according to art. 4 (3) and (4) of the Draft will be *ex ante* notified to the Competition Council, by the grantor and the initiator of the state aid, in order to assess it for the authorization;
- b. The cumulated state aid granted, within the schemes, for the same objective, to the undertakings mentioned in art. 14 of the Draft, cannot have an intensity higher than 50%, respectively 65% from the eligible costs;
- c. The state aid grantor and the Ministry of Transport, Building and Tourism, together with the administrations of free zones, will transmit at the Competition Council half-quarterly reports on granted state aid;
- d. In case where it comes out that, related to the investments assumed by the terms of supply and the above mentioned eligible costs, the maximum allowable level of the state aid intensity is attained, the state aid grantor will cease the granting of the facility;
- e. The beneficiary of a regional state aid will maintain the investments for a minimum 5 years period, and in case of the state aid received

for jobs creation it will maintain the investments for a minimum 5 years period.

**Art. 3.** The present Decision becomes effective on its communication date.

**Art. 4.** In accordance with the provisions of art. 24 of the Law no. 143/1999, with subsequent amendments and completions, the state aid grantor shall submit to the Competition Council information regarding the granted state aids, for their inventorying and monitoring.

**Art. 5.** In accordance with the provisions of art. 29 of the Law no. 143/1999 on state aid, with subsequent amendments and completions, the present Decision may be appealed to the Bucharest Court of Appeal, in 30 days from its communication date.

**Art. 6.** The present Decision will be communicated by the General Secretariat of the Competition Council to the Ministry of Transport, Building and Tourism.

**Art. 7.** The General Secretariat and the Directorate for State Aid Authorization of the Competition Council shall pursue the fulfilment of this Decision.

**PRESIDENT**

**MIHAI BERINDE**