

D E C I S I O N N O 43
FROM 14.03.2005

**referring to the state aid scheme for small and medium sized enterprises
provisioned by art. 26 in the EGO no. 26/2004 regarding certain
measures for ending the privatization of undertakings within the
A.V.A.S. portfolio and the confirmation of certain privatizations, as it
was approved by the Law no. 442/2004**

THE COMPETITION COUNCIL,

Having regard the Decree no. 57/2004 regarding the appointment of the members of the Competition Council's Plenum,

Having regard the provisions of the Competition Law no. 21/1996, published in the Official Monitor no. 88/30.04.1996, Part I, with the subsequent amendments and completions,

Having regard the provisions of the Law no. 143/1999 regarding the state aid, published in the Official Monitor no. 370/3.08.1999. Part I, with the subsequent amendments and completions,

Having regard the provisions of the European Agreement establishing an association between Romania, on one hand, and the European Communities and their Member States, on the other hand, ratified by the Law no. 20/1993, published in the Official Monitor no 73/12.04.1993, Part I,

Having regard to the Regulation regarding the state aid for rescuing and restructuring firms in difficulty,

Based on the following considerations,

PROCEDURE

1. By the address no. P/3600/14.02.2005 registered at the Competition Council with the no. RS-AS 4/21.02.2005, the Authority for State Assets Valorification (A.V.A.S.), based on the art. 5 align. (2) in the Law no. 143/1999 of the state aid, with the subsequent amendments and completions, notified the state aid scheme for SME, under the form of the facilities provisioned by art. 26 in the EGO no. 26/2004 regarding certain measures for ending the privatization of undertakings within the A.V.A.S. portfolio and the consolidation of certain privatizations, as it was approved by the Law no. 442/2004.

2. The notification became effective at the date of its registration.

DESCRIPTION OF THE STATE AID SCHEME

Objective

3. The restructuring state aid scheme aims the support of the SMEs in difficulty for re-organizing the main activity based on a restructuring plan which should ensure the return to long term viability.

Legal Base

4. The legal base for granting the facilities in accordance with the state aid scheme is represented by the provisions of art. 26 in the EGO no. 26/2004 regarding certain measures for ending the privatization of undertakings within the A.V.A.S. portfolio and the confirmation of certain privatizations, as it was approved by the Law no. 442/2004.

Geographic coverage

5. The scheme applies to the SMEs in difficulty, on Romanian territory.

Sectorial coverage

6. The state aid scheme applies in all activity sectors, except for the steel and coal sector, agriculture, fishery, aquaculture, without bringing any prejudice

the application of the specific field rules regarding firms in difficulty for the sectors in which such rules are established.

The undertakings' eligibility

7. Specific restructuring state aid allocations within the scheme can be granted only to the companies in difficulty cumulatively fulfilling the criteria for being considered SMEs, namely:

- a) they have less than 250 employees;
- b) they have an annual turnover not exceeding the equivalent, in ROL, of Euro 8 mill., or an annual result of the balance sheet not exceeding the equivalent in ROL of EURO 5 mill.;
- c) they fulfill the criteria of independency.

8. In the same time, can benefit of specific state aid allocations the undertakings cumulatively meeting the criteria to be considered small enterprises, namely:

- a) they have less than 50 employees;
- b) they have an annual turnover not exceeding the equivalent, in ROL, of Euro 7 mill. or an annual result of the balance sheet not exceeding the equivalent in ROL of EURO 5 mill.;
- c) they fulfill the criteria of independency.

9. The companies benefiting of state aid within the scheme are considered “firms in difficulty” if it is met at least one of the following conditions:

- a) For a limited company, when it is noticed the loss of more than a half of the registered capital and, in addition, when more than a quarter of the capital was lost in the last 12 months;
- b) For a company, where at least a part from the associates are unlimitedly held responsible for the company's debts, when it is noticed the loss of more than a half of the registered capital, as it is in the accounting books of the undertaking, and, when more than a quarter of the capital was lost in the last 12 months; or
- c) No matter the legal form of that specific company, when it fulfils the conditions for being subject to a procedure provisioned by the legislation regarding the judicial reorganization procedure and that of the bankruptcy.

10. The state aid granted to certain undertakings not fulfilling any of the three criteria must be individually notified to the Competition Council, so that it can be evaluated if these specific undertakings can be considered firms in difficulty.

11. The granting of a state aid to an enterprise acting on a market where there is structural long term over-capacity, regardless the size of the beneficiary, it must be individually notified to the Competition Council, so that it can be evaluated based on art. 14 align. 5 in the Regulation on state aid for rescuing and restructuring firms in difficulty.

12. The restructuring state aid allocations within the scheme can be granted only to the SMEs fulfilling the eligibility criteria, presenting a restructuring plan and fulfilling the conditions provisioned at art.28 in the Regulation on state aid for rescuing and restructuring firms in difficulty, namely:

- Return to viability: are applying the criteria stipulated at art. 13 ;
- Preventing any excessive distort of the competition: the state aid granted to small enterprises is not unlikely to distort the competition, the principle provisioned at art. 14 doesn't apply, excepting from the cases when it is stipulated otherwise in the rules on state aid for specific sectors; state aid granted to medium-sized enterprises is, to a higher extent, likely to distort competition, in such a way that the principle provided in art. 14 must be applied; both for medium-sized and small enterprises, in order to minimise as much as possible the negative effects on competition, the schemes shall provide that the beneficiary undertakings do not extend their capacity during the restructuring period;
- The limitation to the minimum necessary state aid: are applied the principles stipulated at art. 15;
- Modifying the restructuring plan: any modifications brought to the restructuring plan must be in accordance with the rules mentioned at art. 19;
- The „first time – last time” principle provisioned at art. 24 which is fully applicable.

13. According to art. 2 align.(4) in the Regulation regarding the state aid for rescuing and restructuring firms in difficulty, a newly established undertaking is not eligible for granting the restructuring state within the scheme, even though its initial financial position is uncertain.

14. Granting a state aid to an undertaking which took over the assets of another undertaking, which, at its turn, received state aid for rescuing or restructuring, shall be individually notified to the Competition Council, in accordance with art. 29 align. 3.

15. Any state aid granted to an undertaking not fulfilling the eligibility criteria shall be object of an individual notification, according to the art. 6 in the Law no. 143/1999 of the state aid, with the subsequent amendments and completions.

The state aid forms and the granting criteria

16. Allocating restructuring state aids within the scheme shall be granted to the SMEs under the form of payment facilities for the budgetary obligations and for other obligations towards budgetary creditors, A.V.A.S. and local budget. At points 17, 18, 19, 20 from the present decision are précised the facilities the SME will benefit of, within the notified scheme.

17. In accordance with the provisions of art. 26 in EGO no. 26/2004 regarding certain measures for ending the privatization of undertakings within the A.V.A.S. portfolio and the confirmation of certain privatizations, as it was approved by the Law no. 442/2004, the SMEs in difficulty which were privatized, benefit of certain facilities for the payment of the delayed and unpaid obligations, as it follows:

- a) Total or partial exemption from the payment of the unpaid obligations on 31.12.2003, representing taxes, duties, contributions and other budgetary incomes as well as credits, loans and guarantees granted by the budgetary creditors;
- b) Total or partial exemption from payment of the obligations representing debts and budgetary credits managed by A.V.A.S.;
- c) Total or partial exemption from payment of the unpaid obligations on 31.12.2003 towards the local budgets, representing taxes, duties, contributions and other incomes, as well as other obligations representing

debts and budgetary credits managed by the authority of the local public administration;

d) When partly exemptions, the difference left from the payment incumbent to the undertaking will be paid rescheduled for a up to five years period, with 6 months grace period, enclosed in the reschedule period, in accordance with the chart made by the budgetary creditor, the authority of the local public administration or A.V.A.S., as the case may be;

e) exemption from the payment of interests and any kind of penalties related to the budgetary obligations owed and unpaid at 31.12.2003, enclosed in the budgetary obligations certificates, calculated until the date when the ownership right on the shares was transferred;

f) Total exemption from the payment of interests and penalties of any kind related to the debts provisioned for at letter b), enclosed in the notifications issued by A.V.A.S., calculated until the date when the ownership right on the shares was transferred.

18. They are not exempted from payment the budgetary unpaid obligations of the undertakings, representing the contribution to the supplementary pension, the individual contribution of social insurance, the individual contribution for the unemployment insurance, the VAT suspended at the customs, the taxes on salary benefits, the taxes for dividends and the garnishments at the source taxes, for which the following benefits are granted by the budgetary creditors:

a) rescheduling these the unpaid budgetary obligations for a period up to 5 years, with 6 months grace period, comprised in the rescheduling period, according to the graphic of the budgetary creditor and which administrates that income;

b) the exemption from payment of interests and penalties of any kind, related to the budgetary obligations according to letter a), calculated until the date of property right transfer of shares;

c) the VAT suspended at the customs shall be included in the first VAT payment after the privatization, both as a collected tax and deductible tax, without effectively paying it. There are exempted from payment the interests and penalties related to the VAT delay payment suspended at the customs, calculated until the date of property right transfer of shares. These operations are being operated in the accountancy according to the accountancy applicable regulations.

19. They are not exempted from payment the unpaid budgetary obligations of the undertakings, owned to the Social health security fund, and the employees contribution for the social health insurances, for which, the following benefits are granted, by case:

- a) rescheduling these unpaid budgetary obligations representing the contribution to the Social health security fund, for a 5 year period, with a grace period of 6 months, enclosed in the rescheduling period;
- b) Exemption from payment of the delay interests and penalties related to the obligations provided at letter a), calculated until the date of property right transfer of shares.

20. According to the provisions of art. 26 of the EGO no. 26/2004, the budgetary obligations owned and unpaid until the date of issuing of the common order, having the same nature as the above-mentioned and which are not subject to payment facilities, are rescheduled for a 5 year period, with a grace period of 6 months, enclosed in the rescheduling period, by issuing an additional act to the common order. The interests and penalties of any kind related to these unpaid budgetary obligations until the date of issuing of the common order are exempted from payment. For the above-mentioned budgetary obligations no interests and penalties of any kind are calculated and owned, between the date of property right transfer of shares and the date of issue of the common order.

21. The exemptions loose their validity if the undertaking doesn't pay its current budgetary obligations of each fiscal year with dead line the date of issuing the common order. The failure to fulfill the conditions and to observe the dead lines under which the approval was given in the common order and the additional act of thereof, leads to the following situations: their annulment, the start or the continuation, by case, of the forced execution for the whole unpaid sum and the obligation to pay delay interests and penalties calculated starting with the date when the dead line and/or conditions weren't met.

22. Granting restructuring state aid allocations within the scheme shall be conditioned by the beneficiary's integral application of the restructuring plan which was approved by A.V.A.S.

23. The restructuring plan must be as short as possible and must reinvigorate the undertaking on long term, in a reasonable time period, and based on realistic assessments regarding its functioning conditions.

24. The amount and the intensity of the state aid must be limited to the minimum necessary for allowing the restructuring according to the existing financial resources of each company benefiting of state aid within the scheme, of its shareholders or of the group it is part of. The state aid's beneficiary must have a significant contribution to the restructuring plan, from its own financial resources, inclusively from sales of the unessential assets for the undertaking's survival or from external funding obtained under market conditions. Such a contribution is a sign that the markets trust the actual value of the return to viability. This kind of contribution must be real, namely effective, excluding any potential future profits, as well as the profits from cash flow and must be as substantial as possible. Usually, it is considered that the following contributions to the restructuring are the right one: at least 25% for small enterprises and at least 40% for medium enterprises.

25. For avoiding the distort of the competition, the state aid shall not be granted in an amount or under a form leading to a liquidity exceeding in the firm, exceeding that could be used in market aggressive distorting activities and that have no relation with the restructuring process.

26. The state aid shall be used only with the purpose of the company's return to viability and shall not allow to the beneficiary, while applying the restructuring program, to extent its production capacity.

27. For not allowing the undertakings' assistance in an improper proportion, according to art. 18 in the Regulation regarding the state aid for rescuing and restructuring firms in difficulty, the state aid, the restructuring aid must be granted only once.

The maximum quantum of the state aid

28. The state aid specific allocations within the notified scheme cannot exceed Euro 10 mill, including any other state aid granted from other sources or within other schemes.

The state aid scheme budget

29. The scheme's maximum budget is in amount of ROL 4,900,000 mill. divided by years as follows:

- Year 2005: ROL 1,053,450 mill;
- Year 2006: ROL 1,000,425 mill;
- Year 2007: ROL 1,235,249 mill;
- Year 2008: ROL 1,200,876 mill;
- Year 2009: ROL 410,000 mill.

Period of the state aid scheme

30. The period for the state aid scheme's application is 2005-2009. Any prolonging of the state aid scheme's duration must be notified to the Competition Council before being implemented.

The estimated number of specific state aid allocations' beneficiaries within the scheme

31. A.V.A.S. estimates that within the notified state aid scheme will benefit from the state aid specific allocations approx. 31 SMEs.

THE ASSESSMENT OF THE STATE AID SCHEME

Procedure

32. The state aid scheme provisioned by the art. 26 in the EGO no. 26/2004 regarding certain measures for ending the privatization of undertakings within the A.V.A.S. portfolio and the confirmation of certain privatizations, as it was approved by the Law no. 442/2004, was notified to the Competition Council by the A.V.A.S..

The state aid character of the notified scheme

33. Within the notified scheme, the financial support is granted under the form of payment facilities for the budgetary obligations and for public debts, these being detailed in points 17, 18, 19, 20 in the present decision. The conditions for granting these facilities are better than for those contracted on the competitive market. Under these circumstances, the state aid elements

enclosed by the financial support measures provisioned in the scheme give an economic advantage to the beneficiary undertakings.

34. After assessing the financial support measures, the Competition Council concluded that there isn't any doubt that these measures are financed from state resources and give an advantage to the undertakings benefiting from the state aid, within the scheme, and don't unduly affect the trade with the Member States of the European Union.

35. In conclusion, the financial support measures granted within the scheme are considered state aids and fall under the incidence of the Law no. 143/1999 of the state aid, with the subsequent amendments and completions.

Granting conditions

36. The state aids' allocations shall be granted only to the SMEs in difficulty for their restructuring. Therefore, the Competition Council examines the restructuring state aid scheme; according to the provisions of art.5 align. (2) from the Law no. 143/1999 on state aid, with the subsequent amendments and completions and of the provisions from the Regulation on state aid for rescuing and restructuring firms in difficulty.

Field covering

37. The Competition Council underlined that the state aid scheme applies to all activity sectors, except for the steel and coal sector, agriculture, fishery and aquaculture. Moreover, A.V.A.S. insures itself that the state aid rules in specific sectors shall be observed.

Eligibility of the undertakings

38. Within the scheme provisioned by the art. 26 in the EGO no. 26/2004 regarding certain measures for ending the privatization of undertakings within the A.V.A.S. portfolio and the confirmation of certain privatizations, as it was approved by the Law no. 442/2004, specific allocations shall be received by the SMEs in difficulty. In this context, the Competition Council concludes that these undertakings fulfill the following conditions:

a) the undertakings are SMEs according to the provisions of art.2 from the Regulation on state aid for SMEs;

b) the undertakings are considered “firms in difficulty” according to the provisions of art.2 align.2 from the Regulation on state aid for rescuing and restructuring firms in difficulty.

39. The Competition Council concludes that the newly established undertakings are excluded from the granting of specific state aid allocations within the notified scheme according to art.2 align.(4) from the Regulation regarding the state aid for rescuing and restructuring firms in difficulty.

Granting conditions for the state aid

40. The forms and the criteria for granting the state aid allocations within the scheme represented by art. 26 in the EGO no. 26/2004 regarding certain measures for ending the privatization of undertakings within the A.V.A.S. portfolio and the confirmation of certain privatizations, as it was approved by the Law no. 442/2004, are those mentioned in the Regulation on state aid for rescuing and restructuring firms in difficulty.

41. Granting specific allocations within the notified scheme is conditioned by the whole implementing of the restructuring plans approved by the A.V.A.S.

42. A.V.A.S. notes that the information enclosed by the scheme confirm that the restructuring plans shall include all the elements mentioned in art.13 in the Regulation regarding the state aid for rescuing and restructuring firms in difficulty. In the same time, A.V.A.S. confirms that the allocations of restructuring state aids within the scheme shall be granted only if the restructuring plans will lead to the company’s return to long term viability, and allow it to carry on its activity with its own resources.

43. The scheme provisions that the state aid allocations’ beneficiaries won’t increase their production capacities during the period of implementing the restructuring plan, as stipulated in art. 28 letter b) in the Regulation regarding the state aid for rescuing and restructuring firms in difficulty.

44. AVAS notes that the quantum and the intensity of the specific state aid allocations within the notified scheme are limited to the strictly necessary minimum, for allowing the restructuring, depending on the financial existing resources of that specific undertaking. In this context, the Competition Council concludes the following:

- a) the contribution of the undertakings benefiting from the state aid allocations will be real, namely effective, excluding possible future profits, as those from cash flow, and will be substantial. This way, the restructuring contributions will be of at least 25% for small enterprises and of at least 40% for medium size enterprises;
- b) the state aid allocations shall be granted within a quantum not leading to a liquidity excess for the undertaking, excess that could be used in aggressive activities distorting the market and without any relation to the restructuring process;
- c) granting state aid allocations shall not allow to the beneficiaries the financing of new investments not being essential for the return to the firm's viability.

Regarding the above-mentioned facts, the Competition Council finds that the conditions from art.15 in the Regulation regarding the state aid for rescuing and restructuring firms in difficulty are observed.

45. The scheme provisions that the restructuring state aid that the undertakings shall benefit from, within the notified scheme, is granted only one time, thus the principle “one time/ last time” stipulated at art.24 in the Regulation regarding the state aid for rescuing and restructuring firms in difficulty is observed.

46. The Authority for Capitalizing the State's Assets confirms that it shall not grant state aid allocations within the scheme to the undertakings which take over assets belonging to other enterprises which, at their turn, have received restructuring state aid.

47. The notified scheme stipulates that the maximum quantum of the state aid for each beneficiary should not exceed Euro 10 mill, including any other state aid granted from other sources or within other schemes. The Authority for Capitalizing the State's Assets will individually notify the Competition Council any aid over this amount. Therefore, the provisions from art.29 in the Regulation regarding the state aid for rescuing and restructuring firms in difficulty are observed.

48. In accordance with art. 23 para. (1) from the Regulation regarding the state aid for rescuing and restructuring firms in difficulty, the analysis of the Competition Council over the extension of the requested compensatory measures is influenced if the SMEs benefiting from the notified scheme are

granted any other aid during the restructuring period, even within a previously authorized scheme. Consequently, granting any state aid in the restructuring period is excluded.

CONCLUSIONS

49. According to the above-mentioned facts, the Competition Council concludes that the state aid scheme provisioned by art. 26 in the EGO no. 26/2004 regarding certain measures for ending the privatization of undertakings within the A.V.A.S. portfolio and the confirmation of certain privatizations, as it was approved by the Law no. 442/2004, is compatible with the normal competitive environment and doesn't unduly affect the trade with the Member States of the European Union.

REPORTING AND MONITORING

50. A.V.A.S. shall submit to the Competition Council annual reports regarding the application of the state aid scheme provisioned by art. 26 in the EGO no. 26/2004 regarding certain measures for ending the privatization of undertakings within the A.V.A.S. portfolio and the confirmation of certain privatizations cases, as it was approved by the Law no. 442/2004, in accordance with the art.30 in the Regulation regarding the state aid for rescuing and restructuring firms in difficulty.

DECIDES

Art. 1 The financial measures granted based on the state aid scheme for SMEs under the form of the facilities provisioned by art. 26 in the EGO no. 26/2004 regarding certain measures for ending the privatization of undertakings within the A.V.A.S. portfolio and the confirmation of certain privatizations, as it was approved by the Law no. 442/2004, are considered state aid and fall under the incidence of the Law no.143/1999 of the state aid, amended and completed by the Law no.603/2003.

Art. 2 Based on art.12 align.(2) letter.c) corroborated with art.14 align.(1) letter e) in the Law no.143/1999 of the state aid, with the subsequent amendments and completions is authorized the state aid scheme for small and

medium size enterprises for their restructuring, under the conditions of meeting art. 3, art. 4 and art. 5 in the present Decision.

Art. 3 The undertakings benefiting from the state aid allocations within the scheme mustn't increase their production capacity over the level of the year 2004.

Art. 4. The undertakings benefiting from the state aid allocations within the scheme have to completely implement the assumed restructuring plan.

Art. 5 A.V.A.S. must notify to the Competition Council any modification incurred in the restructuring plans of the beneficiaries of the restructuring state aid scheme for SMEs.

Art. 6 The total budget of the restructuring state aid scheme for SMEs is of ROL 4,900,000 millions.

Art.7 The present decision becomes applicable at the date of its communication.

Art. 8 According to the provisions of art.24 in the Law no.143/1999 of the state aid, with the subsequent amendments and completions, A.V.A.S. shall submit to the Competition Council information regarding the state aid scheme, for inventorying and monitoring.

Art. 9 According to 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 by concerned persons before the Bucharest Court of Appeal, the Administrative Section, in 30 days from its communication.

Art.10 The present Decision shall be communicated by the Secretariat-General of the Competition Council to:

- the Authority for Capitalizing the State's Assets, 50, Cpt. Av. Alexandru Serbanescu st., sector 1, Bucharest;

Art. 11. The Secretariat-General and the Directorate for State Aid Authorization of the Competition Council shall pursue the fulfillment of the present Decision.

PRESIDENT

MIHAI BERINDE