

DECISION OF THE COMPETITION COUNCIL

no. 163 of 13.07.2006

**concerning the state aid granted to
S.C. ICMRS S.A. Galati**

The Competition Council,

Taking into consideration the provisions of the European Agreement establishing an association between Romania and the European Communities and their Member States, ratified by Law no.20/1993, published in the Official Gazette, Part I , no. 73 of 12.04.1993;

Taking into consideration the provisions of Competition Law no. 21/1996, republished in Romania's Official Gazette no 742, I Part of 16.08.2005;

Taking into consideration the provision of Law no 143/1999 on State aid, republished in the Official Gazette no. 744/16.08.2005, Part I;

Taking into consideration the provisions of the Regulation regarding the Regulation on the form, content and other details provided in the complaint regarding the State aid notification, adopted by Order no. 528/31.12.2004, published in the Official Gazette of Romania no.82/25.01.2005;

Taking into consideration the provisions of the Regulation regarding the State aid for the rescuing and restructuring of the firms in difficulty, published in the Official Gazette Part I, no. 1215 of 17.12.2004;

Taking into consideration Decree no. 57/2004 on the appointment of the Competition Council;

The Report drafted by the reporting person and the investigation team subsequent to findings during the investigation open by the Order of the President of the Competition Council no. 134/15.06.2005,

Having before us,

I. PROCEDURE

- (1) After the control carried out by the Galati Competition Inspectorate in February 2005, to S.C. ICMRS S.A., certain support measures, likely to include State aid elements, were identified. These measures were granted to the company at privatization, based on the provisions of G.E.O. no. 26/2004 regarding certain measures for completing the privatization of companies in the AVAS' portfolio and consolidating certain privatizations amended and completed by Law no. 442/2004, with subsequent amendments.
- (2) The Competition Council requested the Authority for the State Assets Recovery (hereinafter named AVAS), by the addresses no. 1148/03.06.2005 and no.1178/09.06.2005, to notify the support measures granted to S.C. ICMRS S.A. within privatization, in order to assess the support measures according to the state aid legislation.
- (3) Because AVAS did not answer the request to notify within the time limit established by the Competition Council, based on the Note elaborated by the Territorial Monitoring Department and registered with no. 1207/15.06.2005, an ex officio investigation was proposed.
- (4) Based on Article 34 (a) corroborated with Article 26 (j) of the Competition Law no. 21/1996, republished and Article 14, Article 20 and Article 40 of the State aid Law no. 143/1999, republished, by the Order of the Competition Council's President no.130/15.06.2005 an investigation was opened regarding the support measures suspected to be State aid granted to S.C. ICMRS S.A. within privatization. The investigation also focused on the compatibility of the measures with the conditions imposed by the State aid Law no. 143/1999 and the relevant secondary legislation.
- (5) Order no. 134/15.06.2005 regarding the investigation open procedure and the investigation's opening note were published on the Competition Council's website, according to the provisions of the State aid Law no. 143/1999, in order to allow the interested parties to submit their points of view.
- (6) During the investigation, AVAS notified the State aid measures granted at the privatization of S.C. ICMRS S.A., as individual restructuring State aid.
- (7) The report elaborated by the investigation team was submitted to the beneficiary and to AVAS, for possible comments¹.

¹ AVAS had no comments on the submitted Investigation Report.

II. DESCRIPTION OF THE FACTS

1. Legal basis for granting the financial support

- (8) The notified financial support measures are set up by the following acts:
- GEO no. 26/2004 regarding certain measures for completing the privatization of companies in the AVAS' portfolio and consolidating certain privatizations, amended and completed by Law no. 442/2004, with subsequent amendments;
 - Law no. 244/2005 for the approval of GEO no. 26/2005 regarding the abrogation of legal provisions on granting facilities at the payment of overdue budgetary obligations.

2. Financial support measures for S.C. ICMRS S.A.

- (9) The financial support measures consist of exemption from payment of taxes, in amount of RON 165,348,974 and rescheduling of debts, in amount of RON 2,057,894, as follows:

Table no. 1 – The facilities

	Measure	Amount -RON-
1.	Exemption from payment up to 80% of overdue budgetary obligations at 31.12.2003	35,982,027
2.	Exemption from payment of interest and penalties of any kind related to overdue budgetary obligations at 31.12.2003, calculated until the date of the share ownership transfer	124,843,509
3.	Exemption from payment of overdue budgetary obligations at 31.12.2003 related to income tax from concessions	951,260
	SUB-TOTAL FACILITIES MPF²	161,776,796
1.	Rescheduling of the company's debts to the National Fund for Social Health Insurance, taken over by AVAS for recovery	2,057,894
2.	Exemption from payment of interest and delay penalties related to rescheduled debts, calculated until the date of the share ownership transfer	3,572,178
	SUB-TOTAL FACILITIES AVAS	5,630,072
	TOTAL FACILITIES	167,406,868

Source: The notification form

3. The Beneficiary – S.C. ICMRS S.A. Galati

- (10) S.C. ICMRS S.A. Galati is a joint stock company with the headquarter in Galati, Smardan, 1 street, Galati county, having the registration number at the Trade Register J 17/12/1991 and CUI R1633620. The beneficiary is located in the South East Development Region, which is considered an assisted area, in accordance with the provisions of Article 87 (3) (a) of the EC Treaty.

² Ministry of Public Finances.

- (11) The company was established in 1960 as the general contractor for the construction of SIDEX Steelworks. Subsequently, the company extended its activity to cover a complete range of services in the field of industrial, civil and infrastructure engineering works.
- (12) [...] ³
- (13) [...] ⁴
- (14) The company had, at the end of 2004, 1,534 employees and a turnover of RON 50,000 thousand, being, therefore, a large company.

4. *Relevant markets*

- (15) S.C. ICMRS S.A. is active on the following markets: fitting of electrical and technological equipment, civil engineering works, infrastructure and water engineering works, and manufacturing of metal structures. S.C. ICMRS S.A. provides services on the local market of the city of Galati.
- (16) According to the market survey attached to S.C. ICMRS S.A. Restructuring Plan, the company's market shares on the relevant markets are as follows:[...] ⁵
- (17) S.C. ICMRS S.A. renders services to [...] ⁶
- (18) On the local relevant markets, the competitors of S.C. ICMRS S.A. are: [...] ⁷
- (19) According to the market survey, the relevant markets on which S.C. ICMRS S.A. is active have significant growth potential inasmuch as they are some of the most dynamic markets in Romania. This trend is based on the development of construction industry, on the increasing demand for new and modern buildings, and on the increasing number of complex infrastructure upgrading and development projects. Furthermore, the city of Galati is also an important port on the Danube, and the area has an excess of qualified work force, which creates the premises of foreign investment growth in the area.

5. *Company's financial situation prior to privatization*

- (20) The evolution of the main economic and financial indicators registered by S.C. ICMRS S.A., during 2002-2003, was the following: [...] ⁸

³ Confidential data

⁴ Confidential data

⁵ Confidential data

⁶ Confidential data

⁷ Confidential data

- (21) The analysis of data included into the table shows that the company has faced, prior to privatization, a difficult economic and financial situation, highlighted by increasing losses and debts, growing stock inventories. The debts accumulating, especially debts to State, led to negative equity, besides cumulated debts. Also, analyzing the acid test ratio, it results that the company was not able to generate the necessary cash-flows for its current payments.

6. Description of the privatization process

- (22) In 2004, AVAS has offered for sale, through the method of negotiating on the basis of firm and final offers, the majority shares package held at S.C. ICMRS S.A., representing 82.74649% of the company's registered capital, respectively 42,569,251 shares.
- (23) The privatization process started on 29.03.2004, through publication of the sale offer in the "Adevarul" and "Monitorul de Galati", daily newspaper, on the Internet, at the company's and at AVAS' headquarters.
- (24) Through the shares sale offer, the potential bidders have been notified that they may make a written request, according to the legislation in force, for direct access to technical, economic, financial and legal data and information concerning the company. At the same time, within the presentation file, it was specified that the company will benefit from facilities such as those for payment of debts towards budgetary creditors, according to legal provisions.
- (25) [...]⁹
- (26) [...]¹⁰

7. The restructuring plan

- (27) The restructuring plan, that covers the period 2005-2009, was drawn up by the company and the buyer and approved by AVAS, in order to restore the viability of the company, by organizational, technological, environmental and financial measures.
- (28) The organizational restructuring measures aim mainly to change the organizational chart, to train work force and to sell assets no longer required which can be sold in order to attract financial resources. The restructuring process also involves technological and environmental investments, assumed by the Buyer through the share purchase agreement, and the financial restructuring of the company by

⁸ Confidential data

⁹ Confidential data

¹⁰ Confidential data

granting facilities for the payment of overdue debts and by obtaining the required liquidity to carry out the current activity and to make investments.

Table no.5 – Synthesis of S.C. ICMRS S.A.’s restructuring plan [...] ¹¹

(30) The total restructuring cost of S.C. ICMRS S.A. is of [...] ¹²

III. ASSESSMENT OF THE FINANCIAL SUPPORT MEASURES

Existence of aid

- (31) The criteria which allow establishing if a measure constitutes State aid, are presented in Article 2 (1) of Law no.143/1999 on State aid, republished. Thus, any support measure granted by the State or from State resources or resources of the local administration, no matter the form, that distort or threaten to distort competition, by favouring certain enterprises, the production of certain goods or the provision of certain services, or that affect the trade with the Member States represents State aid and is considered incompatible with a normal competitive environment.
- (32) The financial support granted to S.C. ICMRS S.A. in the privatization context consists in the fact that the State renounces to collect certain revenues; therefore, resources of the State are involved. The financial support is granted to a certain undertaking, namely S.C. ICMRS S.A. having therefore a selective character.
- (33) By the financial support measures which are granted ¹³ under the form of postponements and exemptions from the payment of overdue debts, an economic advantage is given to S.C. ICMRS S.A. Granting these facilities will have a favourable effect on the company’s economic and financial indicators, particularly on cash-flow. Therefore the company has an advantage, being favoured in comparison with its competitors.
- (34) The assumption that the facilities indicated above represent an advantage is valid in a non privatisation context. Where such facilities are part of a privatization package, they should be analysed in terms of whether or not they constitute state aid, by applying the prudent private investor test ¹⁴. The State is acting like a prudent private investor/seller in the privatization context if it obtains the best price for the selling of its shares. The price paid by the buyer for the acquisition of the main

¹¹ Confidential data

¹² Confidential data

¹³ See paragraph (8) from the present decision.

¹⁴ It should be mentioned that generally the existence of conditions stipulated in the privatization contract leads to the non appliance of the prudent private investor test (see par. (25) of the draft decision).

share package of [...] ¹⁵. However, a prudent investor/creditor may be willing to accept a negative price if the cost of the privatization is less than the costs of liquidation. AVAS informed Competition Council that they did not undertake any comparative analysis of S.C. ICMRS S.A.'s liquidation and privatization costs prior to the privatization decision.

- (35) Taking into account all the above, including any social costs assumed by the buyer, the Competition Council concludes that in this case the prudent private investor principle cannot be applied to the privatization of S.C. ICMRS S.A. Therefore, granting of these facilities constitutes an advantage to the company as indicated at paragraph (33).
- (36) There is no doubt that the financial measures affect the trade with the Member States of the European Union, because S.C. ICMRS S.A.'s products compete with other similar products manufactured by firms from the Member States.
- (37) Therefore, the financial support measures that are granted to S.C. ICMRS S.A. are considered as State aid and fall under the provisions of the *Law no.143/1999 on State aid*, republished.

Legal basis for the assessment

- (38) Article 2 of the Law nr.143/1999 on State aid, republished, stipulates that state aid granted by the state or from state resources, distorting or threatening to distort competition and affect trade between Member States, is incompatible with a normal competition environment. Still, certain aid measures may be deemed compatible and authorised by the Competition Council, on the condition that these measures are granted observing certain criteria provisioned by the Regulations and Instructions of the Competition Council.
- (39) Since S.C. ICMRS S.A. is in financial difficulties, the notified aid can only be considered compatible if the conditions laid down in the Regulation on state aid for rescue and restructuring firms in difficulty, applied through Order of the Competition Council's President no. 501/23.11.2004, published in the Official Gazette no.1215/17.12.2004 (hereinafter called the Regulation) are respected.
- (40) The Competition Council assesses the compatibility of the State aid granted to S.C. ICMRS S.A. in accordance with the criteria stipulated by the Regulation, respectively:
 - firm's eligibility - firm in difficulty and group affiliation;
 - restoration of long-term viability;
 - avoidance of undue distortions of competition;
 - aid limited to the minimum: real contribution, free of aid;
 - „one time, last time” principle;
 - full implementation of the restructuring plan and monitoring.

¹⁵ Confidential data

Eligibility - firm in difficulty

- (41) In order to benefit of state aid according to the Regulation, the firm has to be in difficulty. It is considered that “a firm is in difficulty if it is it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term.
- (42) According to Article 2 (3) of the Regulation “a company is considered as being in difficulty where the usual signs of a firm being in difficulty are present, such as: increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, increasing debts, rising interest charges and failing or nil net asset value”.
- (43) From the data presented in paragraphs (19) and (20) of the present decision, it results that S.C. ICMRS S.A. has the characteristics of a firm in difficulty, as they were defined in Article 2 (3) of the Regulation.

Group affiliation

- (44) According to the provisions of Article 2 (5) of the Regulation, a firm belonging to or being taken over by a larger business group is not normally eligible for rescue or restructuring aid, except where it can be demonstrated that the firm's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself.
- (45) [...] ¹⁶

Restoration of long-term viability

- (46) According to Article 13 of the Regulation, the grant of the restructuring aid must be conditional on implementation of the restructuring plan which must be endorsed by the Competition Council. The restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. The improvement in viability must derive mainly from internal measures contained in the restructuring plan; it may be based on external factors such as variations in prices and demand over which the company has no great influence, but only if the market assumptions made are generally acknowledged. Restructuring must involve the abandonment of activities which would remain structurally loss-making even after restructuring. The plan must provide for a turnaround that will enable the company, after completing its restructuring, to cover all its costs including depreciation and financial charges.

¹⁶ Confidential data

- (47) Given the difficult situation of S.C. ICMRS S.A. at privatization, the restructuring of the company was decided and a restructuring plan was drafted for the period 2005-2009. The summary of the restructuring measures of S.C. ICMRS S.A. was presented in chapter II 7. This plan was conceived starting from the causes that led to the company's difficulties and from the diagnosis analysis that highlights the strong and weak points.
- (48) Given that one of the main cause which led the company in difficulty was represented by the high reliance to its main client, i.e. Mittal Steel Galati, to whom S.C. ICMRS S.A. discharges construction works and repairs (included in fitting of electrical and technological equipment), the notified restructuring program aims to diminish the weight of this activity in the total turnover of the company and to consolidate its activity of civil constructions and infrastructure. In this respect, S.C. ICMRS S.A. will purchase new equipment, will train the work force and will obtain required certifications, will implement the quality management system in the field of civil constructions and infrastructure. [...]¹⁷
- (49) Other issue considered in the restoration of the company's viability is its re-orientation to large, complex works where S.C. ICMRS S.A. is to be general contractor, involving turn-key projects.
- (50) The company was confronted prior to privatization with high production costs and low ratio of production capacity utilization, due to lack of orders and liquidity required for a timely supply of raw materials. [...]¹⁸ Also, in order to reduce costs and increase operating efficiency, investments will be made to upgrade and renew the equipment and installations.
- (51) In order to obtain the required liquidity for current activity and investments required for making the company viable, S.C. ICMRS S.A. will proceed to sale/lease assets, issue shares or take loans for working capital.
- (52) The restructuring strategy aims to preserve the company's strong points, respectively: experience as a general contractor, capacity to deliver complex "turn-key" projects. In the same time weak points such as excess capacity, high reliance on Mittal Steel, lack of equipments and installations required by modern constructions technologies and lack of liquidity are to be limited and counterbalanced.
- (53) By applying the restructuring measures the economic and financial indicators are estimated to improve as follows: [...]¹⁹

¹⁷ Confidential data

¹⁸ Confidential data

¹⁹ Confidential data

- (54) As a result of accomplishing the measures provisioned by the restructuring plan, the company forecasts to reach in 2009, the following target indicators:

Table no. 7 - Target economic -financial indicators [...] ²⁰

Taking into account the above data, the Competition Council considers that the restoration of company's viability mainly results from the internal measures included in the restructuring plan, namely the reorganization and retechnologization of activity. At the same time, in order to assess whether the company will become viable at the end of the restructuring period, it was also taken into account the favorable evolution of the metallic structures market. Given the above, the Competition Council considers that the proposed restructuring plan will lead to the restoring of S.C. ICMRS S.A.'s long term viability.

Avoidance of undue distortions of competition (compensatory measures)

- (55) According to the provisions of the Regulation, in order to ensure that the adverse effects on trading conditions are minimized as much as possible, so that the positive effects pursued outweigh the adverse ones, compensatory measures must be taken. The measures must be in proportion to the distortive effects of the aid and, in particular, to the size and the relative importance of the firm on the relevant markets. Reducing the firm's market presence is established on the basis of the market survey attached to the restructuring plan and, where appropriate, on the basis of any other relevant information. The reduction must be an integral part of the restructuring as laid down in the restructuring plan.
- (56) In order to reach viability at the end of the restructuring period, the company reduces its loss making capacities, dismantles and sells equipments no longer used. These dismantlings of capacities are not considered compensatory measures according to the Regulation.
- (57) [...] ²¹
- (58) Taking into account the small market shares held by the company on the relevant markets, the Competition Council considers that reductions of viable capacities and limitations of the company's market presence are sufficient. Given the above mentioned, the Competition Council appreciates that the state aid will be used only to restore the company's viability, without allowing the Beneficiary to extend its production capacity during the implementation of the restructuring plan.

Aid limited to the minimum: real contribution, free of aid

- (59) According to the provisions of Article 15 of the Regulation, the amount and intensity of the aid must be limited to the strict minimum of the restructuring costs

²⁰ Confidential data

²¹ Confidential data

necessary to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs. Aid beneficiaries will be expected to make a significant contribution to the restructuring plan from their own resources, including the sale of assets that are not essential to the firm's survival, or from external financing at market conditions. In accordance with the provisions of Article 15 (2) of the Regulation, for large undertakings, a contribution of at least 50% is considered to be appropriate.

- (60) According to the provisions of Article 20 of the Regulation, the circumstances for authorising the aid in the assisted areas can be less strict for compensatory measures and the beneficiary's contribution.
- (61) S.C. ICMRS S.A.'s total restructuring cost is of [...] ²²
- (62) In case of S.C. ICMRS S.A the State aid intensity, calculated as a ratio between the value of the State aid and the total restructuring cost, is of 53.47%.
- (63) The Competition Council notes that S.C. ICMRS S.A. is situated in South –East Development Region, considered assisted area according to the provisions of Article 87 (3) (a) of the EC Treaty. The maintenance in business of the state aid beneficiary provide jobs to approximately 1,200 employees and living means for their families (over 4,500 people). If employees of S.C. ICMRS S.A. would be laid-off, the unemployment rate in the city of Galati would go up from 8.7% currently to 9.3%.
- (64) In these conditions, the Competition Council considers adequate and certain the beneficiary's contribution (a large enterprise) of 46.53% to the implementation of the restructuring plan. This shows trust in the practical value of the restructuring, as well as the fact that the amount and intensity of State aid are strictly limited to allow restructuring according to the existing financial resources of the company and of the majority shareholder. As a consequence, the ability of the company to use any surplus liquidity for aggressive activities, with the possible distortion of the market, is prevented.

“One time, last time” principle

- (65) According to the information submitted by AVAS, S.C. ICMRS S.A. did not previously receive restructuring State aid. Therefore, the provisions of Article 24 of the Regulation, stipulating that the restructuring State aid must be granted only once, are observed.

²² Confidential data

Monitoring and annual report

- (66) In accordance with the provisions of Article 18 of the Regulation, the Competition Council permanently monitors the restructuring plan's implementation so that the established objectives are fulfilled.
- (67) The Competition Council shall monitor the restructuring plan's implementation until the end of the period, in order to ensure that there will be no increases in the production capacities, nor any serious deviation from the restructuring measures and that the State aid shall not lead to the creation of supplementary liquidities to be used for other activities than those enclosed in the restructuring program.

Conclusions

- (68) Having in view the above mentioned aspects, the Competition Council concludes that the individual State aid granted to S.C. ICMRS S.A. is compatible with the normal competitive environment and does not significantly affect trade with the Member States of the European Union.

DECIDES

Art. 1. The financial support measures granted to S.C. ICMRS S.A. represent State aid according to Article 2 (1) of the *Law no. 143/1999, republished*.

Art. 2. On the basis of Article 21 (2) (c) corroborated with Article 23 (1) (e) of *Law no. 143/1999, republished*, the restructuring State aid granted to S.C. ICMRS S.A. at its privatization is authorised, under the condition of fulfilling Article 3 and 4 of the present decision.

Art. 3. The company is compelled to fully implement the assumed restructuring plan. The modification of the restructuring plan shall be done only if the provisions of art. 19 of the Regulation on the State aid for rescue and restructuring firms in difficulty, applied by Order of Competition Council's President no. 501/23.11.2004, published in the Official Gazette no.1215/17.12.2004 are fulfilled.

Art. 4. The company shall reduce its production capacities by 2009, in accordance with the assumed Restructuring plan.

Art. 5. If the conditions imposed by the present decision are not fulfilled, the provisions of Article 22 and 25 (3) of Law no. 143/1999 on State aid, republished, and Article 194¹ and 192² from the Fiscal Procedure Code, completed by E.G.O. no 129/2005, shall be applied.

Art. 6. The value of the State aid granted is RON 167,406,868.

Art. 7. This decision is applicable as of its date of communication.

Art. 8. According to the provisions of Article 32 of *Law no.143/1999*, republished, the Authority for State Assets Recovery shall submit to the Competition Council information on the granted State aid, for its inventorying and monitoring. At the same time, the Authority for State Assets Recovery shall submit to the Competition Council annual reports on the implementation of the restructuring plan. The first report shall be submitted within 6 months from the date of issuance of the present decision. The following reports should prove that the company fulfilled the compensatory measures on production capacities' reduction enforced by the present decision.

Art. 9. According to Article 46 of *Law 143/1999 on State aid, republished*, this decision may be appealed by the interested persons at the Bucharest Court of Appeal, the Administrative litigation section, within 30 days from its communication.

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

- The Authority for State Assets Recovery, str. Cpt. Av. Alexandru Serbanescu, nr. 50, sector 1, Bucuresti;
- S.C. ICMRS S.A., strada Smardan nr.1, Galati, Judetul Galati, cod postal 800698.