

D E C I S I O N O F T H E C O M P E T I T I O N C O U N C I L
No. 71 of 29.03.2006
regarding the state aid scheme
for the restructuring of the small and medium enterprises stipulated by the
Procedure on the implementation of the state aid scheme regarding the facilities granted at
privatization of small and medium undertakings in the Authority for State Assets Recovery's
portfolio

THE COMPETITION COUNCIL,

Taking into consideration 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 Law no. 20/1993, published in the Romanian Official Gazette no. 73, Part I, of 12.04.1993,

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

Taking into consideration the provisions of State Aid Law no. 143/1999, republished in the Official Gazette, Part I, no. 744 of 16.08.2005,

Taking into consideration the provisions of the Regulation on state aid for small and medium enterprises, published in the Official Gazette, Part I, no. 340 of 19.04.2004, issued in the enforcement of Law no. 143/1999 on state aid, republished,

Taking into consideration the provisions of the Regulation on state aid for rescue and restructuring firms in difficulty, published in the Official Monitor of Romania, Part I, no. 1215 of 17 December 2004,

Taking into consideration the provisions of Decree no. 57/2004 on the appointment of the Competition Council's members,

Based on the following reasons,

1. THE PROCEDURE

(1) By address no. VP4/1454/28.02.2006, registered at the Competition Council with no. RS-AS 38/01.03.2006, the Authority for State Assets Recovery notified based on art. 15 of the State Aid Law no. 143/1999, republished, the state aid scheme for small and medium enterprises regarding the fiscal facilities within the *Procedure on the implementation of the state aid scheme on the facilities granted at privatization of the small and medium undertakings in the portfolio of the*

Authority for State Assets Recovery. The notification became effective at the date of its registration.

DESCRIPTION OF THE STATE AID SCHEME

Objective

(2) The restructuring state aid scheme aims to support the SMEs in difficulty in the process of re-organizing their activity based on a restructuring plan which should ensure the return to long term viability.

Legal base

(3) According to par. 2 of the *Procedure on the implementation of the state aid scheme on the facilities granted at the privatization of the small and medium undertakings in the portfolio of the Authority for State Assets Recovery* (herein after named the *Procedure*), the state's support shall be granted under the form of fiscal facilities provisioned by legal acts regulating facilities granted at privatization and their consolidation according to EGO no. 26/2005 on the abrogation of legal provisions on the granting of facilities for the payment of overdue budgetary obligations modified and completed by Law no. 244/2005, namely:

- Law no.137/2002 on certain measures for accelerating privatization, with further modifications and completions, consolidated with the provisions of:
- EGO no. 26/2004 on certain measures for finalizing privatization of undertakings in the portfolio of APAPS and consolidation of certain privatizations modified and completed by Law no. 442/2004 for approval of EGO no. 26/2004;
- GO no. 37/2004 on certain measures on adjusting the arrears in the economy;
- EGO no. 51/1998 on the recovery of certain state assets, republished, with further modifications and completions;
- EGO no. 26/2005 on the abrogation of the legal provisions on the granting of facilities for the payment of overdue budgetary obligations, modified and completed by Law no. 244/2005 for approval of EGO no. 26/2005;
- Local Council Decisions of the localities of residence for the undertakings included in the scheme;
- EGO no. 95/2003 on the takeover by AVAS of certain budgetary claims in view of cashing and transferring them to the National Fund for Health Insurance, approved with modifications and completions by Law no. 557/2003;
- GD no. 577/2002 on the approval of Methodological Norms for implementation of EGO no. 88/1997 on the privatization of undertakings, with further modifications and completions;
- Government decisions on the extension of terms for granting facilities for the payment of overdue obligations;
- Privatization contracts (shares sale-purchase) undertaken by AVAS.

Geographic coverage

(4) The scheme applies to the SMEs in difficulty, on Romanian territory.

Sectorial coverage

(5) According to par. 6.2 of the *Procedure*, the state aid scheme applies in all activity sectors, except for the steel and coal sector, agriculture, fishery, aquaculture, without any prejudice to the application of the specific field rules regarding firms in difficulty for the sectors in which such rules are established.

The undertakings' eligibility

(6) *The procedure* provides that specific state aid allocations within the scheme are granted when companies are privatized. As such, companies benefiting of state aid and the majority shareholders (companies which acquired from AVAS majority stakes within the privatization process) are tied enterprises within the meaning of art. 2 of Regulation on state aid for small and medium enterprises, with subsequent modifications and completions. At point 6.1 of the *Procedure* it is mentioned that in order to receive specific state aid allocations for restructuring within the scheme, companies must be “firms in difficulty” and to fulfil cumulatively criteria related on financial values and number of employees given the fact that they are enterprises tied to the majority shareholders. Thus, to be considered small and medium-sized enterprises, companies should:

- have less than 250 employees;
- have an annual turnover not exceeding the equivalent, in RON, of Euro 50 mill., or an annual result of the balance sheet not exceeding the equivalent in RON of EURO 43 mill.

(7) Moreover, the undertakings considered SMEs, which meet the criteria to be considered small enterprises, namely they have less than 50 employees and they have an annual turnover or an annual result of the balance sheet not exceeding the equivalent in RON of EURO 10 mill. Euro can benefit from specific state aid allocations.

(8) Par. 6.2. of the *Procedure* stipulates that undertakings benefiting from state aid within the scheme are considered “firms in difficulty” if at least one of the following conditions is fulfilled:

- a) For a limited liability company, when the loss of more than half of the registered capital is noticed and, in addition, when more than a quarter of the capital has been lost in the last 12 months;
- b) For a company where at least part of the associates are unlimitedly held responsible for the company's debts, when the loss of more than half of the registered capital, as shown in the accounting books of the undertaking is noticed, and more than a quarter of the company's capital has been lost in the last 12 months; or
- c) Regardless of the legal form of that specific company, when it fulfils the conditions for being subject to a procedure provisioned by the legislation on the judicial reorganization and bankruptcy procedure.

(9) The granting of state aid to an enterprise operating on a market where structural long term over-capacity exists, regardless of the size of the beneficiary, 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.

(10) According par. 6.2. of the *Procedure*, 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 by art.28 in the Regulation on state aid for rescuing and restructuring firms in difficulty, namely:

- Return to viability: criteria stipulated by art. 13 are applying;
- Preventing any excessive distort of the competition: the state aid granted to small enterprises is less likely to distort competition so the principle provisioned by art. 14 doesn't apply, except for the cases when the rules on state aid for specific sectors stipulate otherwise; state aid granted to medium-sized enterprises is, to a higher extent, likely to distort competition, in such a way that the principle provided by 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 provide that the beneficiaries do not extend their capacity during the restructuring period;
- Limitation of state aid to minimum necessary: principles stipulated by art. 15 are applied;
- 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 by art. 24, which is fully applicable.

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

(12) Granting state aid to an undertaking which took over the assets of another undertaking, which, at its turn, received rescuing or restructuring state aid, shall be individually notified to the Competition Council, in accordance with art. 29 align. 3 of the Regulation regarding state aid for rescue and restructuring firms in difficulty.

(13) Any state aid granted to an undertaking not fulfilling the eligibility criteria shall be subject to an individual notification, according to art. 15 of Law no. 143/1999 on the state aid, republished.

Aim of the state aid measure

(14) Fiscal facilities granted within the state aid scheme are related to historical debts, their aim being to ensure the solution to fiscal problems, decreasing the pressure of certain forced executions and to create incentives for the implementation of certain investment programmes assumed by the buyers within the privatisation contracts.

The state aid forms and the granting criteria

(15) Restructuring state aid allocations within the scheme shall be granted to the SMEs under the form of exemption from the payment of debts, penalties, of conversion in shares or other fiscal measures provisioned by legal acts mentioned at par.3 of current decision, at their privatisation.

(16) In accordance with the provisions of the legal acts stipulated by the Procedure, the SMEs in difficulty which were privatized, benefit of certain facilities for the payment of the delayed and unpaid obligations, as follows:

- a) Total or partial exemption from the payment of the unpaid obligations to the state or local budgets representing taxes, duties, contributions and other budgetary incomes stipulated by the above mentioned legal acts, as well as incomes, penalties, calculated according to legal provisions in force;

- b) Rescheduling of overdue obligations to the state or local budgets, which were not exempted from payment;
- c) Conversion in shares of the claims of AVAS, utilities suppliers or budgetary creditors.

(17) Granting restructuring state aid allocations within the scheme shall be conditioned by the beneficiary's integral application of the assumed restructuring plan approved by A.V.A.S. This condition is stipulated by par. 6.2 of the *Procedure*.

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

(19) According to par. 6.4 of the *Procedure*, the amount and the intensity of the state aid must be limited to minimum necessary in order to allow the restructuring according to the existing financial resources of each company benefiting of 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, from sales of the unessential assets for the undertaking's survival or from external funding obtained under market conditions inclusively. 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, effective, excluding any potential future profits, as well as the profits from cash flow and must be as substantial as possible. The scheme provides that granting the State aid is conditioned by ensuring of the contributions of at least 25% for small enterprises and of at least 40% for medium size enterprises;

(20) For avoiding the distortion of competition, the state aid shall not be granted in an amount or under a form leading to additional liquidities that could be used in aggressive distorting activities and not related to the restructuring process.

(21) According to *Procedure's* provisions (par.6.2), 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 extend its production capacity.

(22) Par. 6.2 of the *Procedure* stipulates that one of the granting conditions is that the beneficiaries should not have received rescue or/and restructuring state aid in the previous 10 years. Moreover, in order not to allow the undertakings' assistance in an improper proportion, the rescue or/and restructuring aid shall only be granted once. The scheme provisions, as an exception, the possibility to receive State aid allocation only if the restructuring State aid follows a rescue State aid within the same restructuring operation.

The maximum amount of state aid

(23) According to par. 6.2 of the *Procedure*, 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. Any aid exceeding this amount shall be individually notified to the Competition Council.

The state aid scheme budget

(24) According to par.3 of the *Procedure*, the scheme's maximum budget is that of RON 203 mill., divided by years as follows:

- year 2006: RON 153 mill;
- year 2007: RON 35 mill;
- year 2008: RON 15 mill.

State aid scheme implementation period

(25) Par.22 of the *Procedure* stipulates that the state aid scheme implementation period is 2006-2008. Any prolonging of the state aid scheme's duration must be notified to the Competition Council prior to its implementation.

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

(26) A.V.A.S. estimates that within the notified state aid scheme approx. 31 SMEs shall benefit from the state aid specific allocations.

THE ASSESSMENT OF THE STATE AID SCHEME

Procedure

(27) The state aid scheme for SMEs consisting of facilities provided by the *Procedure* was notified to the Competition Council by the AVAS.

The state aid character of the notified scheme

(28) The criteria, which allow to be established whether a measure is State aid, are provided by art. 2 (1) of Law no. 143/1999 on State aid, republished. Thus, the State aid represents any support measure granted by the State or local administration authorities or by the State or local administration authorities resources, regardless the form, that distort or threaten to distort competition by conferring an economic advantage to certain undertakings, goods production or services supply or that affect the trade between Romania and the Member States of the European Union, being considered incompatible with a normal competitive environment.

(29) Within the notified scheme, the financial support is granted under the form of facilities for the payment of budgetary obligations and of debts of AVAS, utilities' suppliers and State creditors. These facilities are detailed in the normative acts included in the *Procedure*. The conditions in which these facilities are granted are better than those contracted on the competitive market. Thus, the financial support measures provided by the scheme confer an economic advantage to the beneficiaries.

(30) The financial support measures granted to the undertakings within the scheme consist of giving up by the State to certain revenues, consequently State resources are involved.

(31) The financial support measures granted according to the normative acts included in the *Procedure* address only to the undertakings to be privatize. Thus, the financial support has a selective nature.

(32) Granting the financial support to certain undertakings within the notified scheme creates the premises for a possible distortion of competition on the relevant markets since it enables the undertakings to remain on these markets. In addition, there is no doubt that these financial measures could unduly affect the trade with the Member States of the European Union since the goods manufactured can compete with those similar in the European Union.

(33) In conclusion, the provisions of the Procedure institute a State aid scheme that fall under the Law no. 143/1999 on State aid, republished.

Granting conditions

(34) The state aids' allocations shall be granted only to the SMEs in difficulty in view of their restructuring. Therefore, the Competition Council assesses the restructuring state aid scheme according to art. 21(2) of the Law no. 143/1999 on State aid, republished, and to the provisions of Regulation on State aid for SMEs with subsequent amendments and completions.

Sectorial covering

(35) The Competition Council underlines that the state aid scheme applies to all activity sectors, except for the steel and coal sector, agriculture, fishery and aquaculture, thus being observed the provisions of art. 4 of the Regulation on State aid for rescuing and restructuring firms in difficulty. In addition, AVAS insures itself that the state aid rules in specific sectors shall be observed.

Eligibility of the undertakings

(36) The *Procedure* provides that the State aid specific allocations within the scheme shall be granted only to the SMEs in difficulty. In this context, the Competition Council notes that these undertakings fulfill the following conditions:

- a) the undertakings are SMEs according to the provisions of art.2 of the Regulation on State aid for SMEs with subsequent amendments and completions;
- b) the undertakings are considered "firms in difficulty" according to the provisions of art. 2(2) of the Regulation on State aid for rescuing and restructuring firms in difficulty.

(37) The State aid is granted only to SMEs for their privatization and, Competition Council concludes that the newly set up undertakings are excluded from granting the specific state aid allocations within the notified scheme according to art. 2(4) of the Regulation on State aid for rescuing and restructuring firms in difficulty.

Granting conditions for the state aid

(38) The forms and the criteria for granting the state aid allocations to SMEs within the scheme instituted by the *Procedure* are those provided by the Regulation on State aid for rescuing and restructuring firms in difficulty.

(39) The Competition Council notes, according to point 17 of present Decision, that the granting specific allocations within the notified scheme is conditioned by the assuming and whole implementing of the restructuring plans approved by AVAS.

(40) AVAS confirms that the restructuring plans shall include all the elements mentioned in art. 13 of the Regulation on State aid for rescuing and restructuring firms in difficulty. In addition, AVAS confirms that the allocations of restructuring state aids within the scheme shall be granted only if the restructuring plans lead to the company's return to long term viability, and enable it to carry on its activity with own resources.

(41) The scheme provides that the state aid allocations' beneficiaries won't increase their production capacities during the restructuring plan implementation, as stipulated in art. 28 letters b) of the Regulation on State aid for rescuing and restructuring firms in difficulty.

(42) The quantum and the intensity of the specific state aid allocations within the notified scheme are limited to the strictly minimum necessary to enable the restructuring depending on the existing financial resources of the specific undertaking. In this context, the Competition Council concludes the following:

- a) the contribution of the beneficiaries of the state aid allocations will be real, namely effective, excluding possible future profits, as those from cash flow, and must be substantial. Thus, the scheme provides that granting the State aid is conditioned by ensuring of the contributions 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) the granting State aid allocations shall not enable to the beneficiaries the financing of new investments not being essential for the return to the firm's viability.

Having in view the above-mentioned facts, the Competition Council finds that the conditions from art.15 of the Regulation on State aid for rescuing and restructuring firms in difficulty are observed.

(43) According with par. 22 of present Decision, Competition Council notes that the principal "first time last time", stipulated at art. 24 of the Regulation on State aid for rescuing and restructuring firms in difficulty are observed.

(44) The Authority for the Stat Assets Recovery confirms that 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.

(45) 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. AVAS shall individually notify to the Competition Council any aid over this amount. Therefore, the provisions of art. 29 of the Regulation on State aid for rescuing and restructuring firms in difficulty are observed.

(46) In accordance with art. 23 (1) of the Regulation on State aid for rescuing and restructuring firms in difficulty, the analysis of the Competition Council on 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

(47) According to the above-mentioned facts, the Competition Council concludes that the state aid scheme instituted by *the Procedure* is compatible with the normal competitive environment and does not unduly affect the trade with the Member States of the European Union.

REPORTING AND MONITORING

(48) AVAS shall submit to the Competition Council annual reports regarding the application of the state aid scheme provisioned by *the Procedure*, according to art. 30 of the Regulation on 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 provided by the *Procedure on the implementation of the state aid scheme regarding the facilities granted at privatization of small and medium undertakings in the Authority for State Assets Recovery's portfolio*, are considered State aid and fall under the Law no.143/1999 on State aid, republished.

Art. 2. Based on art. 21 (2) letter.c) corroborated with art. 23 (1) letter e) of the Law no.143/1999 on State aid, republished, the State aid scheme for small and medium size enterprises for their restructuring is authorized, under the conditions of meeting art. 3, art. 4 and art. 5 of the present Decision.

Art. 3. The undertakings benefiting from the state aid allocations within the scheme must not increase their production capacity over the level of the year 2006.

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

Art. 5. AVAS 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 RON 203 millions.

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

Art. 8. According to the provisions of art. 32 of the Law no. 143/1999 on State aid, republished, AVAS shall submit to the Competition Council information regarding the state aid scheme, for inventorying and monitoring. According to art. 30 of the Regulation on State aid for rescuing and restructuring firms in difficulty, AVAS shall submit to the Competition Council annual reports on the State aid scheme operation, containing information provided by the Regulation on the form, contain and other details necessary for the State aid notification with subsequent amendments and completions, as well as a list containing the beneficiaries, pointing out for each of these, information from art. 30 lett. a)-i) of the Regulation on State aid for rescuing and restructuring firms in difficulty.

Art. 9. According to the provisions of art. 46 of the Law no. 143/1999 on state aid, republished, 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 State Assets Recovery, 50, Cpt. Av. Alexandru Serbanescu street, sector 1, Bucharest.

PRESIDENT

MIHAI BERINDE