

NEW APPROACHES TO EUROPEAN POLICY ON STATE AID VERSUS DE MINIMIS AID

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Abstract: As a member state of the European Union, Romania is making considerable efforts to comply with all the requirements and recommendations of the EU. One of its recommendations was to reduce as much as possible state aid granted for sectoral objectives, which were considered to be harmful to the Community's competitive environment. Instead, State aid agreed by the Commission is that which has horizontal objectives, such as those granted for environmental protection, research, development and innovation, support to small and medium-sized enterprises, vocational training and employment. State aid is an important instrument used to efficiently allocate state resources so as to ensure the improvement of the functioning of markets for the benefit of economic agents and consumers, which is a major objective of the competition policy. State aids are selective public financial support measures granted to enterprises, areas or activities to meet general interest objectives such as environmental protection, small and medium-sized enterprises development, deprivation of less-favored areas, state aid rescue or restructuring strategic economic agents, etc. As a Community concept, de minimis aid, emerged in 1992 and was created exclusively for SMEs. Subsequently, coverage has been extended to larger businesses, and is not considered to distort competition to a great extent.

Keywords: competition, public authority, budget, cohesion policy, support mechanisms, investments

1.1. State aid

The Treaty on the Functioning of the European Union (TFEU) regulates the conditions that Member States have to meet in order for State aid to be compatible with the Internal Market:

- to foster the economic development of regions where the standard of living is abnormally low or where there is a very low employment rate, as well as of less developed regions, given their structural, economic situation and social issues; to promote the realization of an important project of common European interest or to remedy serious disturbances in the economy of a Member State;

- to facilitate the development of certain economic activities or of certain economic areas, where they do not change the conditions of trade to an extent contrary to the common interest;

promote culture and heritage preservation if they do not change the conditions of trade and competition in the community to an extent contrary to the common interest;

Through the Competition Council, Romania aims to find solutions to make collaboration between Member States and the European Commission more effective in applying these new regulations in the field, assessing state aid, ensuring transparency of the state aid process, good practices in compliance with the provisions of the Regulation exempting notification of certain categories of State aid. Public funding and state aid are not one and the same, meaning public funding does not necessarily represent state aid. The fact that public funds are involved is not a sufficient condition for a measure to be State aid.

The Beneficiary may be a public or private legal entity, or a Public Private Partnership (PPP). In order to talk about state aid, a state-funded benefit must be involved in an economic entity operating in a field of activity within the EU. The entity does not necessarily need to be

involved in trade with Member States. The problem is whether the activity is also carried out in trade between Member States, such as insurance, construction, banking. At present, there are very few activities that are not carried out between Member States and do not affect competition. If the entity does not carry out an economic activity, it is not state aid in the light of these rules.

Unauthorized State Aid is considered illegal. The consequences of granting such aid are as follows:

- The payment of aid may be suspended;
- Companies will have to reimburse the respective aid with the related interest;
- It may be necessary to change the economic policies of the state;
- It may be necessary to amend legislation;
- Beneficiary economic agents may be sued by competitors for damages.

1.2. Objectives of State aid

Depending on their destination, State aid objectives are classified into horizontal, sectoral and regional objectives. The state aid granted to the beneficiaries, irrespective of their field of activity, is considered to have a horizontal objective to achieve in good conditions actions such as: research and development and innovation, environmental protection (including energy saving), support and promoting small and medium enterprises, promoting culture and cultural heritage, employment, training of employees, rescue and restructuring of firms in difficulty.

The sectoral objective of a State aid scheme is to be found where the facilities are for a particular sector of activity, their classification by groups showing the competitive sectors, namely those with overcapacity: the manufacturing industry (steel, shipbuilding, motor vehicles, yarns and synthetic fibers), transport, tourism, financial services, media and culture.

Regional objectives address state aids aimed at closing the economic development gaps between regions by supporting investment and job creation by promoting the development, modernization and diversification of the activity of economic agents located in those regions by encouraging the setting up of new firms in region.

1.3. State aid scheme

State aid scheme means a normative / administrative act which determines the conditions in which the State intervenes to support economic agents, generally and abstractly. An aid scheme may target an entire sector or be aimed at developing a region by determining economic agents to establish themselves in a given area. There is no distinction between the modes of granting aid (exemptions, grants), while the four conditions are cumulatively fulfilled, we are in the presence of a state aid scheme.

It is very important that it is irrelevant from the point of view of state aid if the normative / administrative act applies also to entities that do not carry out economic activities.

When drafting a state aid scheme, the public authority should take into consideration that at least the following elements should be included in the normative / administrative act:

- Legal basis - reference will be made to the Community regulation under which the State aid scheme is established¹;
- Scope - in this section will be introduced elements regarding the potential beneficiaries of the state aid scheme, the fields of activity in which they operate, the specific criteria they have to meet;
- The objective of the scheme - the state aid scheme must have a well-defined objective based on market studies, impact assessments, public consultations to ensure the

¹<http://www.anfp.gov.ro/R/Doc/2014/Proiecte/Proiect%20ajutoare%20stat/Suport%20de%20curs%20ajutor%20de%20stat%20-%20Modul%202.pdf>

effectiveness of the scheme in relation to the priorities of the authority that initiated the measure or market problems;

Usually, state aid schemes are pursuing several objectives, which are equally useful. For State aid schemes to have the intended effects, a choice based on strategic interests as a whole should be made. Each scheme must have a priority objective, objective on which the compatibility of the scheme with State aid rules will be analyzed.

➤ Budget - Each state aid scheme must have the budget allocated for the respective support measure. It should be mentioned both as a global amount and broken down for each year of scheme implementation. Where the aid is granted in the form of tax incentives, the revenue forecasted (annually and for the entire duration of the scheme) to which the State renounces by granting those measures must be indicated;

➤ Form of state aid: it is necessary to state whether the aid will be granted in the form of grants, exemptions, phasing out, subsidized loans, etc. ;

➤ Duration - the state aid scheme must contain provisions regarding the period of implementation of the support measures. Thus, the date on which the scheme enters into force and the last date until which State aid will be granted must be mentioned. The date of the granting of the state aid is the date on which the financing contract was signed.

➤ Maximum number of beneficiaries - it is necessary to estimate the maximum number of economic agents that will be eligible for funding under the respective state aid scheme. When determining the number of beneficiaries, account must be taken of the budget of the scheme, the implementation period and any other conditions imposed under the State aid scheme;
For example, a de minimis scheme with a budget of € 20 million can not be estimated as 500 beneficiaries, as it would result that each beneficiary could receive € 400,000, which is not allowed in the case of aid minimis.

➤ Monitoring and reporting - all state aid schemes, irrespective of the objective pursued, should include a chapter setting out rules and obligations for reporting, monitoring or recovering State aid. These rules relate, for example, to the obligation to maintain the investment, to the need to maintain specific records or data reporting to suppliers or to the Competition Council.

1.4. Types of State aid measures and the State aid procedure specific to them

The European Commission is the only authority empowered to rule on the compatibility of a support measure with the State aid rules, the Community Forum experts have developed a series of communications and regulations setting out the main conditions under which the compatibility of a measure is judged support and it has been established that only certain measures will be analyzed at Community level.

Thus, depending on the Community legal basis envisaged, support measures are classified into: aid for which notification is required, aid exempted from the notification requirement and so-called de minimis aid.

1.4.1. Notifiable aid

Aid which has the potential to distort competition and trade between Member States must be notified to the European Commission for authorization. Thus, prior to the implementation of a state aid measure, authorization by the European Commission is required.

At national level, the procedure for notification of a State aid measure is laid down in GEO no. 117/20064. Thus, the supplier / initiator of a state aid measure must be sent to the Competition Council documentation to be notified regarding the conformity, the correctness

and the fulfillment of the obligations stipulated by the Community legislation regarding the drawing up of state aid schemes or individual aids.

The documentation is contained in the draft normative act establishing the State aid measure, the forms expressly required by Community legislation, and any other document deemed necessary to demonstrate compliance with the State aid rules. The Competition Council collaborates with the applicant to complete and improve the notifications in order to comply with the Community rules. If the notifications are modified after the Competition Council's opinion has been issued, but before submitting the notification to the European Commission, the amendments must be submitted to the Competition Council for approval. The Competition Council may request additional data and information for the applicant. 4 on national procedures in the field of state aid, modified and completed by Law no. 137/2007; If the requested information is not submitted within the deadline established by the Competition Council, it shall issue the opinion on the basis of the data provided to it.

The Competition Council shall issue its opinion no later than 30 days after receipt of the request for approval, unless the applicant requests in writing the extension of the deadlines for completion of the notification or information.

In the event no modifications were proposed by the notice, the Competition Council shall immediately send the notification to the European Commission in the approved form after the notification of the opinion to the applicant.

If the Competition Council's opinion has been proposed, if the applicant agrees with it, it will submit to the Competition Council the amended notification according to the opinion, within 10 days of its receipt, for the purpose of sending the notification to the European Commission.

If the applicant does not agree with the amendments proposed by the Competition Council on the basis of the Community regulations, he may request the transmission of the notification in the form he / she wishes, within 10 days of receiving the opinion.

The notification is sent to the European Commission through the Permanent Representation of Romania to the European Union using a special application designed to send notifications and information: SANI.

State aid for which notification to the European Commission is required can not be granted without an authorization decision by the Community forum.

1.4.2. Aid exempted from notification

Such aids are considered to be compatible with the competitive environment, subject to compliance with all the conditions laid down in specific Community regulations, and there is no need to request authorization from the European Commission, and simple information is sufficient.

The procedure for exempted aid is similar to that for notified aid, except for the fact that the information is sent within 20 days of the national approval of the State aid measure. In general, these types of aid are aimed at fostering job creation and increasing competitiveness and promoting the development of small and medium-sized enterprises. Initially, there were only 10 types of state aid exempted from the notification obligation, then their number increased to 26, and an increase is currently planned to increase the number of State aid measures that are exempted from the notification requirement

1.4.3. Minimis aid

Minimis aid is State aid which does not exceed the ceiling provided by the Community regulations in force within a specified period of time. This type of aid is not subject to the notification procedure.

The Commission is of the opinion that small aid (minimis aid) has no potential effect on competition and trade between Member States. The Commission therefore considers that such aid does not fall under Article 107 (1) TFEU.

Minimis aid is a measure of support to an enterprise, irrespective of its size, which does not exceed € 200,000 over a three-year fiscal period (€ 100,000 for any enterprise operating in the transport sector). For the purpose of cumulation, only the aid granted under the minimis regulation in the last two fiscal years and in the current fiscal year is taken into account when calculating the threshold.

Minimis aid can not be granted to undertakings performing road freight transport for the purchase of goods road transport vehicles, or to agricultural firms (except for the processing and marketing of agricultural products) or for activities directly related to export.

Minimis aid can be granted by any public institution. The aid provider must require the potential beneficiary to declare any form of minimis aid received from any source in the last three years. It is necessary to ensure compliance with the threshold and other conditions, as well as keeping the documents for a period of ten years.

Before granting minimis aid, the provider must comply with all administrative requirements in the regulation, including ensuring that summing rule is respected and have a monitoring system in place.

1.5. General considerations on de minimis aid

Minimis aid is a threshold value, that is a total value, rather than a percentage threshold of project costs. It may be granted by any public institution. Therefore, for the purposes of administrative organization, it is essential that the aid provider requires the potential beneficiary to declare any form of de minimis aid received from any source over the past three years. The compliance with the threshold and other conditions, as well as the retention of documents for ten years, must be ensured, but the information sheet necessary for block exemptions should not be provided. The legal basis is EC Regulation no. 1998/2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid ".

Specific rules apply in agriculture, that is EC Regulation no. (EC) No 1535/2007 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid in the production of agricultural products (OJ L 337 / 21.12.2007, p.35).

The mimimis rule establishes a threshold for aid below which Article 107 (1) of the EU Treaty can be considered not to apply, so that the measure no longer needs to be notified to the Commission. The rule is based on the assumption that, in the vast majority of cases, small amounts of money have no effect on trade and competition between Member States.

The de minimis threshold is currently € 200,000, calculated over three consecutive fiscal years, namely EUR 100,000 in the field of road transport. The relevant three-year period should be assessed on a continuous basis so that for each new de minimis aid, the total amount of de minimis aid granted in the financial year in question and the last two financial years has to be determined. These ceilings apply irrespective of the form of the de minimis aid or the objective pursued and whether the aid granted by the Member State is financed wholly or partly by Community resources. Aid above the minimis ceiling should not be subdivided into smaller parts in order to fall within the scope of the minimis regulation. In the agricultural primary production sector, the minimis threshold is EUR 7,500 per enterprise in three consecutive fiscal years.

The aid to be paid in several installments shall be updated at the time of the grant. The interest rate used for the update is the reference rate applicable at the time the aid is granted, that is the base rate published on the EC site for each Member State, plus 1%.

In accordance with Community principles, the minimis aid is considered to be granted when the undertaking obtains the legal entitlement to receive the aid under the applicable national legal regime (for example, when the financing agreement between the beneficiary and the supplier is concluded).

1.5.1. Field of application

The general *de minimis* rule applies to all sectors and economic activities, with the following exceptions:

- fisheries and aquaculture;

- the primary production of the agricultural products listed in Annex I to the TFEU (where applicable Regulation no. 1535-2007).

- coal;

- processing and marketing of agricultural products where:

(1) the amount of aid is established on the basis of the price or quantity of exported products purchased from primary producers;

2) the aid is conditional upon its partial or full transfer to primary producers;

- activities related to export to third countries or to Member States, that is aid directly linked to the quantities exported, aid for the establishment and operation of a distribution network or for other current expenditure related to export activity;

- aids for the use of national goods instead of those imported;

- the purchase of road haulage vehicles to undertakings engaged in the carriage of goods by road on behalf of third parties.

European practice has shown that a company active in both the above-mentioned sectors and sectors covered by this Regulation can receive the *de minimis* aid for these last sectors or activities, provided young people have financial records - separate accounts so as to ensure that cross-subsidization is avoided.

Undertakings in difficulty can not receive the *de minimis* aid.

According to Community law, an enterprise is considered to be in difficulty in the following situations:

(a) a limited liability company if more than half of the share capital has disappeared, more than a quarter of that capital being lost in the last 12 months,

(b) a company in which at least some of the associates have unlimited liability for the company's claims when more than half of the equity as evidenced by the company's accounts has disappeared, more than a quarter of that capital being lost in the last 12 months ;

(c) irrespective of the type of trading company concerned, if it fulfills the criteria laid down by national law for being subject to collective insolvency proceedings.

Even when none of the above conditions are met, an enterprise may still be considered to be in difficulty, especially if it has symptoms such as increasing losses, lowering turnover, increasing inventory inventories , overcapacity, declining capital flow, increased indebtedness, increase in financial charges, and the decrease or disappearance of the net asset value. The *de minimis* rule only applies to transparent aid. Transparent aid is aid for which it is possible to precisely calculate the “*ex ante*” gross grant equivalent without the need for a risk assessment (eg grants, interest rate subsidies and capped tax exemptions).

Loan aid should be considered as *de minimis* aid when the gross grant equivalent was calculated on the basis of the market interest rates applicable on the date of their granting. Aid in the form of capital injections should not be considered as transparent *de minimis* aid unless the total amount of public sector capital contribution is lower than the minimum ceiling.

Aid consisting of risk capital measures should not be considered as *de minimis* aid unless it is provided with the capital-specific risk capital system to each target enterprise only up to the *de minimis* ceiling.

1.5.2. Procedure for granting and monitoring the *de minimis* aid

A Member State is responsible for establishing the tools needed to ensure effective control over compliance with the cumulative *de minimis* threshold. This can be done in two ways:

- either the Member State creates a central register of minimis aid complete information on all minimis aid granted by any authority within the Member State (at present there is no such registry in Romania).

- either the supplier explicitly informs the undertaking of the minimis nature of the aid and obtains from that undertaking complete information on other minimis aid received during the previous two fiscal years and in the current fiscal year (own-account statements).

The supplier shall grant the new minimis aid only after verifying that it will not lead to an increase in the minimis aid received by the enterprise during the period covered by the tax year concerned and the last two tax years in that Member State above the minimis ceiling of minimis.

Suppliers are required to maintain records of minimis aid granted for 10 years after ad hoc aid or last individual allocation under a scheme. At the same time must report annually to the Competition Council, by March 31, the minimis aid granted. Beneficiaries are also required to keep a specific record of all minimis aid received and other State aid, showing the total amount they received, the breakdown by year, suppliers, objectives, form of aid, legal basis.

Minimis aid can not be granted to undertakings engaged in the carriage of goods by road for the purchase of goods road transport vehicles, or to agricultural firms (except for the processing and marketing of agricultural products) or to activities directly linked to export. Sometimes, national governments spend public money to support local industries or certain businesses, which gives them an unfair advantage over similar sectors in other Member States.

In other words, this practice distorts competition and trade.

The European Commission has the task of preventing this, authorizing the granting of State aid only if it is in the public interest - if it is to the benefit of society or the economy as a whole. Even if the support given to enterprises by the authorities supports a major public interest, it can distort the normal competitive environment.

Article 107 (1) of the EC Treaty sets out the criteria to be met cumulatively in the presence of a measure in the nature of State aid, namely: favoring certain undertakings or the production of certain goods, is granted by the State or by State resources , distorts or threatens to distort competition, affects trade between Member States.

Minimis aid is a measure of support to an enterprise, irrespective of its size, which does not exceed EUR 200,000 over three fiscal years (EUR 100,000 for any undertaking operating in the transport sector). For the purposes of summing, only the aid granted under the minimis regulation in the last two fiscal years and in the current fiscal year is taken into account when calculating the threshold.

1.6. Conclusions

Improving the functioning of markets for the benefit of economic operators and consumers is a major objective of competition policy. In this framework, the application of State aid rules is an important instrument used to efficiently allocate state resources so that competition is not distorted or restricted.

State aid is a selective measure of public financial support to enterprises, areas or activities to achieve general interest objectives such as environmental protection, small and medium-sized enterprises development, deprivation of disadvantaged areas, rescue or restructuring of strategic economic agents and so on Even if the support given to enterprises by the authorities supports a major public interest, it can distort the normal competitive environment.

Therefore, it is necessary to elaborate and strictly enforce the rules on how authorities can intervene in the market by granting State aid.

State aid may be compatible if it pursues clearly defined objectives of common interest with general beneficial effects on economic development and does not affect trade with Member States of the European Union. The European Commission encourages Member States to prioritize action to strengthen the competitiveness of their economies and to strengthen social and regional cohesion.

The Commission's recent reform of the competition policy in recent years is also aimed at state aid. Thus, redirection of aid towards the objectives set out in the Europe 2020 strategy, such as research, development and innovation, promotion of risk capital investments, training, renewable energies and environmental protection, is desirable. Community regulations require stakeholders to verify whether State aid is an appropriate policy instrument for achieving the objectives of common interest. State aid control thus contributes to avoiding the irrational use of public resources, for which citizens ultimately have to pay.

Minimis aid is cumulated with other types of State aid for the same eligible costs only to the extent that such summing does not result in the maximum intensity set by a European Commission regulation or decision².

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