

ASSESSMENTS ON STATE AID IN THE CONTEXT OF ROMANIA'S EUROPEAN UNION INTEGRATION

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Abstract

Reflecting on the process of European integration requires prior clarification of its content. The term of integration is used in the sociological sense to define a close interdependency between the parts of a living being or between members of a society, a union consisting of multiple entities or more groups of individuals.

Keywords: the process of European integration, clarification, close interdependency

1. Preliminary issues

Reflecting on the process of European integration requires prior clarification of its content. The term of integration is used in the sociological sense to define a close interdependency between the parts of a living being or between members of a society, a union consisting of multiple entities or more groups of individuals¹. Thus it should be understood that the economic integration is not a purpose in itself but a means, a way to achieve some goals. One of the goals in mind is to achieve a perfect competition, the ideal situation, if this goal is not achieved then the reduction by any means of the factors which lead to unfair competition is tried. The competition environment may be adversely affected by anticompetitive actions which have as a purpose the effect of agreements or concentrated practices between powerful economic operators, by the abuse of the dominant position some operators have, furthermore, competition may be distorted by subsidies awarded by the state to some economic operators, means through which they gain an upper hand over the other competitors on that market. Competition is seen as "a reference situation in which there is a complete and free confrontation between all operators across the supply area as well as in the demand area of goods and services, production goods and capitals"².

Community law³ seeks to ensure that through the European regulations the common market is protected and competition in the economic area is stimulated. The goal of controlling the state aids given by public authorities or organisms which administrate

¹ Technical literature gives the notion of international economic integration many meanings: the transition from microspaces to macrospace, the creation of more extensive economic ensembles, the absence of discrimination or progressive elimination from economic relations between different states, the stability and economic efficiency of relations between states.

² O. Căpățînă, *Dreptul concurenței comerciale. Partea generală*, ed. a II-a Ed. Lumina Lex, Bucharest, 1998, p. 273; Laura Maierean, Vasile Cătălin, *Instituții de dreptul concurenței*, ed. Cernaprint, Bucharest, 2009, 144-160.

³ Article 107 of the Treaty (ex. article 87 TEC) states the incompatibility of aids granted by the states or through state resources with the domestic market in any form whatsoever, fact which distorts or threatens to distort competition by favoring certain enterprises or the production of certain goods, in such a way that it affects the trade between member states. Rules of community law, the Treaty establishing the European Community (TEC) states that the essential work of the European Community is to create a system which ensures an undistorted competitive environment in the domestic market.

state sources is of supervising the level in which a state aid is compatible with a normal competition environment, in a market economy in which the prices of goods and fees of services are regulated by supply and demand. According to The law of state aid, the Competition Council may adopt and enforce regulations in the prospect of defining the key criteria which need to be fulfilled in order to authorise the state aid, especially in regards to certain areas of the economy or specific goals of the state aid. Romania adhered to the European Union after traveling a long road which culminated with the harmonization of its legislation to the European one, in order to be compatible with European regulations. However, in some areas the harmonization of the internal legislation with the European one was more difficult, the state aid area being a proper example.

In this respect G.E.O. nr.117/2006 regarding national procedures in the state aid area was adopted⁴. This emergency ordinance has the purpose of regulating national procedures in relation to the state aid, in order to apply articles 87-89 (107 in present) from the Treaty of the European Community and the subsidiary legislation adopted on their basis. The regulations of this emergency ordinance do not apply to state aid for agriculture and pisciculture, given in accordance to article 32 from the Treaty of the European Community⁵. Taking into consideration the evolution of our national legislation on this matter, as well as its adaptation to European regulations, this paper seeks to offer an overview of Emergency ordinance nr. 117/2006 regarding national procedures in the state aid area, in accordance with European legislation, directives and the European institutions: Competition Council and European Court of Justice.

2. The concept of state aid

The present normative act does not contain a definition of the state aid as did Law no. 142/1999, now repealed, in article 2 paragraph 2, thus the state aid was any measure of support granted by the state or the administrative-territorial units, regardless of form, which distorts or threatens to distort competition by favoring certain enterprises, the production of certain goods, the provision of certain services, or affects trade between Romania and member states of the European Union. Such aid is any form of transfer of state resources by favoring certain businesses, thus constituting a potential effect on competition and trade between member states of the European Union. The same article implies that state aid is usually incompatible with the common market.

According to the European Commission and the European Court of Justice, the state aid has been interpreted broadly as being any public aid granted by central authorities as well as the aid given to local or regional authorities. However, state aid can also come from private organizations or other organizations over which the state, a public institution, a local or regional authority exercise a strong influence, directly or indirectly⁶. Article 87 paragraph 1 only applies to measures that have a specific, selective

⁴ Published in the Monitorul Oficial al României, Part I, nr.1042/2006, approved, amended by Law 137/2007. The present normative act repealed on 31 December 2006 Law 143/1999 on state aid because the latter contravened the Treaty establishing the European Communities.

⁵ Article 1, paragraph 1 and paragraph. 2 of O.U.G. No. 117/2006.

⁶ The form under which state aid is provided is of not interest – tax cuts, loan guarantees, supplies of goods or services on preferential terms, capital injections in discriminatory terms in relation to private investment, as is the reason why it is provided. Of particular interest are the effects of state aid over competition on the market.

nature, for example only those who favor certain activities or the production of certain goods. Application of the selective criterion involves drawing a distinction between measures of general application which apply without distinction to all companies and sectors, and measures that generate benefits for certain enterprises or the production of certain goods. Nevertheless it is difficult to draw a clear line between general and selective support measures, and especially unclear remains the distinction between them, both in law and in the community law on state aid, the European Commission and the community's courts tend to attribute the selective nature to a measure whenever it can not be proved that it is general or justified by the nature of the system⁷. In regards to the meaning of the term public resources, we can say that it covers all financial means by which public authorities support enterprises, with no regard to the fact that those means are permanent assets of the public sector⁸.

3. Types of state aid

State aid may result either in the transfer of public funds to an enterprise or giving up some future, certain or uncertain income, and provide an economic or financial benefit to an enterprise, which could not have been obtained in the absence of such measures. Furthermore, it may take the following forms: state aid schemes (a system through which individual allocations of aids to enterprises which are defined in a general and abstract manner, or any system through which an aid which is not tied to a specific project may be awarded to one or more enterprises for an indefinite period of time or in an indefinite amount); individual aid (any type of aid that is not awarded on the basis of a scheme).

In terms of nature, the aids can be: direct state aid for budgetary expenses or income that the state gives up, aid which includes: grants, allowances, bonuses, fundings by the state or the central or local authorities or other bodies administering the resources of the state or the local communities, the sale of land or other assets below market price, discounts for goods supplied or services provided, cancellation or reduction of debt, granting loans with preferential interest etc; indirect state aids granted through the tax system and the social security system, which include: exemptions, customs duties reductions, reductions or exemptions from payment of the budget necessities or the delay penalties, delays, spacing out the payment of the budget and the delay penalties.

4. The importance and the role of state aids

By applying the new regulations the rules on competition and state aid will be respected. Thus, public support measures will be better targeted and state's intervention in the market will be predictable and transparent in areas such as: environmental

⁷ If the body granting financial assistance has a degree of freedom which gives it the possibility to choose the beneficiaries or the conditions under which it provides assistance, the assistance can not be considered general in nature.

⁸ Therefore, even if the amounts corresponding to the state aid measures are financial resources of public enterprises and not held permanently by the treasury, the fact that they remain constantly under public scrutiny and are therefore available to the competent national authorities, is enough to enter into the category of public resources. In such a situation, the state has the right to direct the use of its resources, especially by exercising its dominant influence over public enterprises, with the purpose of financing specific advantages for other enterprises, when they require it.

protection; development of small and medium enterprises; development of lagging areas and the elimination of differences between regions; development of research and innovation. The government has the power and responsibility to establish budget priorities and initiate state aid schemes in Romania in order to ensure an economic growth, creation of work places, social cohesion. Starting with the social-economic imbalances, the state aid policy aims to address these issues in an order which takes into account the priority of the impact on economic and social life⁹.

The state aid policy aims to link the economic development goals contained in the national plans and sectoral strategies and the effective targeting of public money in order to stimulate the economy and increase human capital performance. Furthermore, this policy will help to ensure greater transparency for the business environment, domestic and international financier institutions, consumers in terms of targeting investments and incentives that they can benefit from and to define the conditions of access to these incentives as well as the obligations that are implied in this perspective¹⁰.

Accession to the European Union will lead to the need to reduce the percentage of the state aid from the GDP over time, for the gradual integration, within the range considered normal at a community level. This will require better targeting of the state aid available to meet Romania's needs of economic development, with priority, in accordance with the global and sectoral strategies adopted by Romanian authorities. One of the goals is to increase the competitiveness of economic agents. Support measures like the state aid are designed to develop enterprise performance through horizontal policies such as: research and development, environmental protection, the improvement of human capital performance. An important area to which state aid is targeted is the SME's area¹¹. In this context, the SME sector will make a substantial contribution to raising the GDP, especially in terms of creating new jobs and stimulating the participation in international trade. Likewise, a significant role in increasing competitiveness will be played by the measures regarding the efficient consumption of energetical resources and energy, as well as the reduction of economic and social differences between regions; effective targeting of resources by concentrating them towards achieving national development goals; the foundation of the state aids policy upon a refined economic analysis of their impact; effective implementation of the community acquis in the field of state aid. The protection and improvement of the environment's quality is taken into consideration. These measures are aimed at improving living standards by providing public utility services at the quality and in the quantity required, as well as the improvement of the environment. Another priority is the development of human resources and the promotion of employment, social inclusion and the strengthening of the administrative capacity. In the context of sustainable development one of the priorities is to invest in human resources to determine both increasing employment and combating social exclusion by providing equal opportunities for learning and professional development and by

⁹ <http://www.avocatnet.ro/content/articles>.

¹⁰ Stein E, Hay P, Waelbroeck M, *European Community Law and institutions in Perspective: Text Cases and Readings*, Indianapolis, 1988, p. 54.

¹¹ Another objective is reducing differences between the levels of development of the romanian and community economy. One of these actions is to increase economic competitiveness and the development of the knowledge economy.

supporting the creation of new jobs¹². Rural economy development and increased productivity in the agricultural sector is also a priority.

General support measures, which may include a general reduction of taxation on labor and social costs, boosting investment in general education and training, measures of providing guidance and advice, general assistance and training for the unemployed and improvements in labor law does not constitute state aid and thus can be implemented immediately by the member states. Some measures, such as reducing payment terms to improve cash flows of SMEs or the Commission's proposal to exempt small businesses from burdensome tasks in terms of accounting regulations and likewise, the statistical reporting which does not involve state aids.

Support measures for SMEs involving state aid under Article 107 (ex Article 87) paragraph (1) of the Treaty must comply with the state aid procedure. Some of these measures:

- will not be considered as state aid under certain conditions;
- will constitute state aid but may be granted directly by the member states without any notification of the Commission¹³;
- will be generally considered as state aid compatible if they meet the conditions laid down in the relevant Commission guidelines and frameworks¹⁴. These measures must be notified to the Commission and may be implemented only after receiving authorization from the Commission¹⁵.

5. Methodology for assessing state aid

Building on the experience and expertise gathered over time, the state aid reform program introduced a refined economic approach in the assessment of state aid cases. The purpose of defining a more precise methodology and economic criteria of assessing the positive and negative elements of state aid measures was to "grant a smaller, but better targeted volume of state aid"¹⁶. Assessing the compatibility of the aid is mainly analyzing its positive effects (in terms of contribution to the achievement of a well-defined goal of common interest) against its negative effects (mainly the distortion of competition and trade), which equals to "the compared test". For the aid to be declared compatible, it must be necessary and proportional in order to achieve a specific goal of common interest. However, a refined economic approach does not mean that every case of state aid is subject to specific in-depth assessment. Using the economic reasoning compared test, the Commission took into consideration the economic requirements when determining the general rules on state aid, while at the same time, the possibility of using

¹² Pascariu Gabriela, *Uniunea Europeană. Politici și piețe agricole*, Ed. Economică, Bucharest, 1999, p. 87.

¹³ http://ec.europa.eu/research/fp7/index_en.cfm?pg=understanding.

¹⁴ <http://ec.europa.eu>.

¹⁵ The Commission has modernized state aid rules to encourage member states to better correlate investments with the objectives of the Lisbon strategy for growth and jobs, as well as the competitiveness objectives. In this context, SMEs were given special attention and increased possibilities for receiving state aids. The idea that SMEs are eligible for all aid categories allowed under EU rules on state aid must be accepted, and for those categories of aid measures that can be granted to large enterprises, SMEs benefit from higher intensity aids. Given the fact that market failures are greater for small as opposed to medium-sized enterprises, basic aid intensities and bonuses are set differently.

¹⁶ <http://www.ajutordestat.ro>.

the most appropriate control system. Therefore, the cases with the lowest distortion effects are not considered state aid (*de minimis* aid).

Secondly, the cases for which *ex ante* it may be possible to develop a set of easily applicable compatibility criteria are exempt from the notification requirement (state aid included in the General block exemption aid).

The next level, standard evaluation, allows the Commission to assess most cases of state aid in relation to predefined conditions (including predefined aid intensities) to ensure proportionality and necessity of aid, as well as its effects which are limited by distortion, namely the precise economic evaluation is made as a whole in advance and is reflected in the legal presumptions of the regulations.

The last level of control – detailed assessment – applies to cases that can cause the most serious distorting effects, where the Commission verifies the economic foundation of the aid on a case by case basis. The core of the more precise economic approach is the compared test. This is mainly a cost-benefit analysis of the proposed measure.

The compared test includes the following base elements:

1. Well-defined goal of common interest

The aid should have a well-defined goal of common interest (such as economic growth, employment, cohesion, environmental protection etc.). This goal may include both efficiency and equity. The efficiency goal aims to correct a market failure (e.g. external effects, imprecise information and coordination issues). Equity objectives may include, for example, the employment of disabled workers or the encouragement of firms to establish factories in disadvantaged areas. In some cases, state aid may be authorized to also promote the transition to more efficient markets.

2. Well-designed tool

The basic idea is to determine whether the aid is suitable for achieving the goal of common interest identified above. To this end, the answers to the following three questions will be crucial:

- state aid is an appropriate policy instrument? Without affecting the choice of member states in terms of policy instruments, the state aid should be used where the advantages of using a selective instrument (such as the state aid) are established and proven.

- this measure has an incentive effect? State aid changes the behavior of the beneficiary? Following the receipt of the aid, the recipient should carry out activities (i) that they would not perform at all without the aid or (ii) that they would perform only in part or in another manner. The goal is to avoid the granting of state aid for an activity that the enterprise would carry out anyway, even without the aid, to the same extent (i.e. training that a enterprise should anyways provide to its employees in order to function).

- is the aid measure proportional to the problem at hand? This question is intended to determine whether the same change in behavior could be obtained with a smaller aid. The amount and intensity of the aid must be limited to the minimum which is necessary for the activity to take place. Usually, the aid is considered proportional if the maximum aid intensities laid down by law are respected¹⁷.

¹⁷ To perform the analysis, the Commission must identify a counterfactual scenario. This consists of comparing the project which is aided by the state to the hypothetical situation in which it would not benefit

3. Analysis of the positive and negative effects/positive overall balance

This matter concerns the possible negative effects of the aid and the extent that they are balanced by the positive effects. The negative effects are mainly distorting effects on competition and trade. Negative effects may include preventing the exclusion and keeping them afloat, excluding private investments, the effect on dynamic incentives, state aid costs related to tax expenditures etc. For the aid to be considered compatible, a large volume of negative effects should be sufficiently compensated by a proper high level of positive effects of the aid. In order to do this analysis, the two types of effects should be expressed both in qualitative and, if possible, in quantitative terms. The Commission will make an overall assessment of their impact on producers and consumers on the markets the aid measure aims at. The overall result will depend on a number of characteristics of the proposed aid measure and it will be assessed on a case by case basis for the measures which are subject to a detailed evaluation¹⁸.

6. The control procedure for granting state aid

The Commission has the duty to watch over the manner in which competition rules are respected. It can act on its own initiative, following a complaint made by a member state, following a notification of the agreements made by different companies or following the notification of the state aid. The Commission has significant powers of investigation; it can carry out the control of the companies without warning them in advance and it can ask for the required materials. Because the Commission must ensure that only aids which can be considered compatible with the single market are awarded, Article 108 (the former 88) sets the procedure and provides that member states must inform the Commission in a timely manner on projects which tend/intend to establish a new aid or alter an existing aid. In practice this translates to prior notification of the project.

The Commission may also authorize the aid, require its modification or rejection. If the Commission believes that a particular type of aid is not compatible with the common market nor with the accepted exceptions, it requires the member state to submit its comments on the measure within one month. If the reasons are not convincing, the Commission may decide to modify or exclude that state aid, in a given period of time (usually two months). If the member state fails to comply with the decision until the deadline, the Commission or any other affected member state may bring the case to the Court of Justice of the European Union. At the same time, the member state concerned may make use of the European Court of Justice and the Council of the EU (if it is not issued within three months, the drawing up of the decision rests with the Commission)¹⁹.

The Council may unanimously decide that an established aid or future aid is compatible with the common market where exceptional circumstances justify such a decision. In such a case, all proceedings conducted by that time will be suspended. The Council, by a qualified majority, on proposals from the Commission and after consulting

from that help. This is the only way in which certain objectives of common interest can be analyzed (e.g. a market failure) and the stimulating effect (was there a change in the behavior of the beneficiary?).

¹⁸ www.ajutordestat.ro.

¹⁹ European Institute of Romania in collaboration with Human Dynamics, *Politica în domeniul concurenței*, 2003, Series Micromonografii – Politici Europene, updated, paper developed under Phare project RO 0006.18.02, p. 28.

the European Parliament, may adopt regulations necessary to implement the above articles (Article 109 – former Article 89). Therefore, through Regulation no. 994/98/EC, the Commission may exempt certain horizontal types of aid, from the notification duty, namely: aids for SMEs, for research and development, the environment's protection, employment and training, regional aids in accordance with the regional aid map which is approved by the Commission, and through Regulation No. 659/1999/EC it has clarified and strengthened the procedural regulations on state aid²⁰.

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²⁰ Regulation 994/98/EC on the Art.107 and 108 of the EU Treaty on certain categories of horizontal state aids, establishes the right of the Commission to issue block exemption regulations on certain types of aid. These regulations will have to specify their purpose for each category, beneficiaries, thresholds, conditions for accumulation and control ways. Likewise, the Commission may decide that in the case of certain aids not exceeding a specific threshold, the notification to the Commission is not required (the "de minimis" rule). Furthermore, the regulation contains provisions on transparency and aid control, duration of validity and the way to change the regulations issued by the Commission.