

CONTROL ON PUBLIC INTERVENTIONS THAT CAN AFFECT THE ECONOMIC COMPETITION

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Abstract: “State aid policy” represents the legal approach regarding state aids, meant to ensure the predictability and an increased transparency for the initiators and suppliers of state aid, for the business environment, as well as for the internal and international financing institutions, regarding the orientation of investments and of incentives they can benefit from, the definition of the conditions to access those financial incentives, as well as the obligations thereof.

Key words: State aid policy, low taxation, NUTS

Introduction

Article 87 of the Treaty stipulates that “any aid awarded by a Member State or from state resources, in any way, affecting or menacing to affect the competition by favouring some enterprises or the production of certain goods, shall be considered, whether affecting the commercial relationship among the Member States, as incompatible with the common market”, so it has a detrimental potential when: it grants an economic advantage to the beneficiary, it is offered selectively to certain companies or for manufacturing certain goods, it can affect the competition or the commercial relationship among the Member States.

But not all state aids are forbidden. The main situation where the state aid is allowed is when it has a social character, being offered to the individual consumer, provided that these aids be compatible with the domestic market, such as:

- aid of promoting the development of certain activities or areas;
- aid for promoting the execution of a project of European interest or for repairing some serious disturbance in the economy of a Member State;
- fiscal subsidies admitted within the development programmes.

Regimes of preferential taxation

OCDE issued in 1998 a report “Competition affected by excessive taxation – a global problem”. The key factors in identifying and assessing the regimes of preferential taxation:

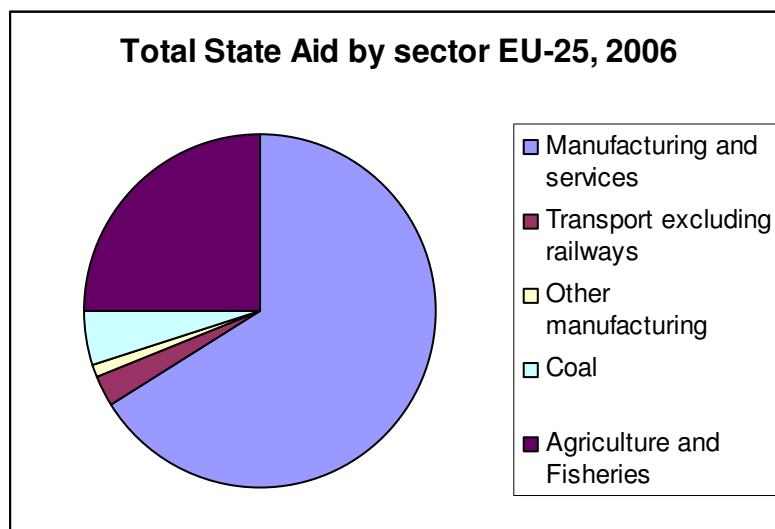
- a) Zero tax or the effective low taxation quota or an effective low taxation quota applied to relevant incomes is the starting point necessary to determine whether a preferential taxation regime is harmful. The zero tax or the effective low taxation quota can occur when the taxation rate is low or from the way a country defines its taxation basis.
- b) The “restriction” regime: the restriction represents a clue that, through the preferential tax regime applied by the respective country, it has the potential to create harmful chain reactions. Thus, the restriction can be:
 - c) a regime that can exclude the resident tax payers explicitly or implicitly from benefiting from it;
 - d) the enterprises benefiting from this regime can be forbidden to function on the domestic market, explicitly or implicitly.
- e) Lack of transparency: non-transparency is a wide concept including the favourable application of laws and regulations, negotiable tax provisions and inability to apply the available tax practices on a large scale.

State aid awarded in the EU Member States, 2006

	Total State aid less railways in billion €	Total State aid for industry and services in billion €	Total State aid less railways as % of GDP	Total State aid for industry and services as % of GDP
EU-25	66.7	47.9	0.58	0.42
EU-15	61.1	44.7	0.56	0.41
EU-10	5.6	3.2	0.91	0.52
Belgium	1.2	0.9	0.39	0.28
Czech Republic	0.8	0.6	0.66	0.51
Denmark	1.3	1.0	0.59	0.46
Germany	20.2	16.0	0.87	0.69
Estonia	0.1	0.0	0.41	0.08
Ireland	1.0	0.5	0.57	0.28
Greece	0.6	0.3	0.26	0.15
Spain	4.9	3.9	0.50	0.39
France	10.4	7.4	0.58	0.41
Italy	5.5	3.8	0.37	0.26
Cyprus	0.1	0.1	0.76	0.48
Latvia	0.3	0.0	1.80	0.15
Lithuania	0.1	0.1	0.54	0.23
Luxemburg	0.1	0.0	0.32	0.13
Hungary	1.4	0.8	1.57	0.93
Malta	0.1	0.1	2.29	1.77
Netherlands	1.9	1.3	0.35	0.24
Austria	2.3	1.6	0.90	0.60
Poland	2.3	1.2	0.85	0.45
Portugal	1.5	1.4	0.93	0.91
Slovenia	0.3	0.1	0.83	0.48
Slovakia	0.2	0.2	0.51	0.45
Finland	2.6	0.6	1.53	0.35
Sweedden	3.5	2.9	1.15	0.94
United Kingdom	4.2	3.1	0.22	0.16

Source: European Commission, Economic forecast Autumn 2007, State Aid Scoreboard

In relative terms²⁰², State aid amounted to below 0.6% of EU Gross Domestic Product (GDP) in 2006. This average hides significant disparities between Member States: the share of total aid to GDP ranges from 0.4% or less in Belgium, Greece, Italy, Luxembourg, the Netherlands and the United Kingdom to 1% or more in Latvia, Hungary, Malta, Finland and Sweden. The high proportion in some of the EU-10 Member States is due largely to pre-accession measures which are being phased out under transitional arrangements or limited in time. In Sweden, it can be attributed to the very high amounts of aid for environment and energy saving which represents 86% of total aid. In Finland and Latvia, the explanation can be found in the relatively large amount of aid to agriculture which represents almost 75% for Finland and around 67% in Latvia. The EU average of State aid for industry and services expressed as percentage of GDP hides differences between Member States. The sharpest falls can be observed in Czech Republic, Cyprus and Malta, largely due to the phasing out of pre-accession measures, and in Poland due to the declining aid to the coal industry. Ireland, Denmark, Spain and Germany experienced also a significant decrease. In 2006, around 65% of State aid in the Member States was earmarked for the manufacturing and services sectors. A further 24% was directed towards agriculture and fisheries, 5% for coal and 3% to the transport (excluding railways) sector and the remaining 1% went to other non manufacturing sectors. The sectoral distribution is relatively stable over time with the exception of the coal sector which is clearly decreasing.



The state aid policy

“The state aid policy” creates the premises for a better orientation of state aids available to satisfy the economic development priorities of Romania in compliance with the adopted national and sectorial strategies. The document deals with the issue of state aids in compliance with the development objectives contained in the Lisabona Strategy, reviewed, and with the nationally adopted programmatic documents:

- The governing programme for 2005-2008;
- The National Development Plan 2007-2013;
- The Sustainable Development National Strategy of Romania “Orizont 2025”;
- The sectorial strategies adopted by the Romanian government.

“The state aid policy” contains the general objectives, the priorities that shall benefit from the respective support and also the community legislation applicable for state aid. The necessity of establishing a balance between necessities and available resources imposed the necessity of prioritizing the domains benefiting from support by granting state aids, thus establishing three categories of priorities:

- priorities identified by the National Development Plan (PND);

²⁰² For the purposes of the scoreboard, aid to the manufacturing includes aid for steel, shipbuilding, other manufacturing sectors, aid for general economic development and aid for horizontal objectives including research and development, SME's, environment, energy saving, employment and training for which the sector is not always known.

- priorities relying on financial instruments such as state aid granted only from state resources;
- priorities related to the privatization process.

By OUG no. 117 of 21st December 2006, the state aid national procedures were established in order to apply articles 87-89 from the Treaty of establishing the European Community and the secondary legislation adopted. Thus, the Competition Council shall be the contact authority in the relations between the European Commission and the public authorities, including the public institutions involved in the privatization process and other state aid suppliers and the state aid beneficiaries, involved in the state aid procedures. The phenomenon of distortion of the competitive relations among countries is favoured by their involvement in a process of concentration that can become dangerous and by the existence of state aids or by the persistence of some monopolies in favour of private companies benefiting from privileged advantages

The concept of state aid was construed by the Commission and by the Court of Justice very widely, so that it includes any public aid granted by central authorities, as well as the aids given by local or regional authorities. Moreover, the aid can come even from private bodies or other bodies on which the state, a public institution, a local or regional authority has, directly or indirectly, a powerful influence.

The range of state aids is larger than that of subsidies and contains all measures that, in a way or another, involves the state resources. The selective character is vital for a tax measure to be considered as state aid.

In most cases, state aid creates discrimination between competitors. The form of the aid (tax deductions, guarantees for loans) or the reason for granting it, are not relevant. It is the effects generated by state aids on the competition on the market that counts.

In the opinion of the Commission and of the community courts there are four cumulative conditions according to which an economic measure or transaction in which the state is involved can be considered as concerning a state aid. They are:

- measure to involve the use of state resources;
- measure to award an advantage to the beneficiary company/companies;
- measure to distort or to threaten with distortion the competition at the cross border level.

Therefore, we can conclude that a measure shall be considered as state aid under the following circumstances:

1. Involving the use of state resources

Pursuant to Article 87(1) EC, the state aid can be granted “by the state or from the state resources”. So, the form in which state aid is granted is irrelevant concerning the control of state aid: the effect of the measure is important. So, the distinction between “aid granted by state” and “aid granted from the state resources” is made to clarify that not only the aid granted by the central government, but also the aids granted by the local and regional state authorities and by the public or private bodies acting on behalf of the state are included in the exclusive control range of the Commission. As for the effective form in which the aid is granted, the state aid does not only refer to direct expenses made from the state resources (ie subsidies to the budget), but also to the indirect transfers of state resources (thus incurring revenue losses for the state), this concerning the generally accepted jurisprudence. Indeed, a revenue loss from taxation is equivalent to consumption of state resources, regardless of the level, regional or local, at which the loss is incurred.

2. Awarding an advantage to the beneficiary company/companies

The interpretation of the concept of “awarded advantage” proved to be vital in ensuring a large range of coverage for the community regulations concerning state aid. Starting from the first years of applications of the state aid community regulations, the European Court of Justice (ECJ) defined the notion of state aid as “including any measure, no matter its form, reducing the burden normally borne by a company, even if it is not a direct subvention *stricto sensum*, but it is equivalent to it in the virtue of its nature and effects”. Accordingly, in Fiscal Aid Notice, the Commission only reiterates a well-known concept: a tax measure forgiving the companies of burdens normally borne from their own resources, measure satisfying the second criteria from the state aid definition. The Commission also gives some examples of tax measures awarding such an advantage:

- Measures reducing the tax basis (as well as special deductions, special or accelerated depreciation arrangements, inclusion of contingencies in the company balance sheet);
- Measures involving a partial or total reduction of the amount owed as tax (eg. tax exemptions or fiscal credits);
- Deferrals, annulment, even exceptional rescheduling of the debts to the budget.

Moreover, even the tax measures which ultimately are not equivalent to a loss of revenue for the state, as well as tax deferrals and payment deferrals to the social security budget, are also included in the state aid category, as long as this kind of facilities offer the beneficiary companies an advantage – allowing them to use amounts of money that would not be at their disposal otherwise.

3. It is selective

Article 87(1) EC is applied only to the selective measures, ie those which “favour certain activities or the production of some goods”. The application of the selection criteria implies the assignation of a distinction between general application measures, ie those measures applicable to all companies and sectors, and the measures generating advantages only for certain companies or sectors. Though, many times it is difficult to put a clear line between the general support measures and the selective ones. The tax measures are difficult to be assessed according to this criterion and to the fact that community law considers that the selectivity of certain tax measures can be justified by “the nature or general sketch of the system” (such measures not being covered by the state aid EU regulations).

4. Affecting the commercial relationships between the Member State

The interventions involving state aid lead to the modification of commercial relationships between the Member States and to the distortion of competition. The two conditions are organically dependent; if granting an aid leads to strengthening the position of an enterprise compared to others acting in the community area, those who did not benefit from an aid are discriminated and affected negatively.

The EC Treaty deals with this in three articles, from 87 to 89 (the former articles 92 – 94). Article 87 (former 92), first paragraph, stipulates that “except the derogations provided herein, there are incompatible with the Common Market all aids granted by the state or from the state resources, regardless of their form, as long as they affect the changes between the Member States, distort or threaten to distort the competition, by favouring certain enterprises or activities”.

As absolute forbiddance of aids would be impossible, the second paragraph of Article 87 mentions the situations where aids are compatible with the common market regulations, such as:

- social aids granted to individual consumers, subject to non discrimination related to the origin of such products;
- aids meant to remedy the damage caused by natural disasters or extraordinary events.

Also, the third paragraph mentions the situations where the aids can be considered compatible to the Common Market:

- aids meant to favour the economic development of the areas where life standard is very low or unemployment is very high;
- aids meant to promote the achievement of an important European project, or to remedy serious disturbances of the economy in a Member State;
- aids meant to make easier the development of certain activities or certain economic areas when not affecting the commercial and competitive conditions within the Community;
- aids meant to promote the culture and the preservation of the patrimony when not affecting the commercial and competitive conditions within the Community;
- “other categories of aids determined by the Council’s decisions” (issued with a qualified majority, based on the Commission’s proposal).

In Romania, the main aid plans involving financial aid are:

- the plan for disadvantaged areas (D areas) offering a series of tax facilities to companies which invest in the area;

- the plan for industrial parks offering a series of tax facilities to those companies specialized in rendering services to parks infrastructure;
- the plan for free areas offering tax facilities to companies which invest in the area.

Compatibility between the Romanian plans of regional aid and the *acquis communautaire*

The plan of D areas: the geographical coverage of this plan is more reduced than the eight “development areas” established at administrative level NUTS II (in fact, the 35 D areas covers territories corresponding to administrative areas NUTS IV, or even V), the concentration on smaller geographical levels can still be considered acceptable and pursuant to community regulations as long as they can be justified from the perspective of the regional development strategy;

NUTS is the acronym for Nomenclature of Territorial Units for Statistics, created by Eurostat in order to have a coherent and unitary territorial framework. It was used for the community legislation regarding Structural Funds starting with 1988 (at present, this nomenclature includes 15 EU countries, with 78 levels NUTS I, 210 levels NUTS II and 1093 levels NUTS III.

The plan for industrial parks: this plan does not identify particular issues concerning the compatibility with the community regulations. Industrial parks are confined area where they deploy economic activities, scientific research industrial production activities and services, activities of capitalizing the scientific research and/or technological development, with specific facilities, with a view to capitalize the material or human potential of the area. The industrial parks are based on the association in participation between public administration authorities, economic agents, research and development institutes and/or other interested partners. There are certain aspects regarding the future operation of the plan, as there can be problems regarding the compatibility with the community regulations in case the operating companies will offer services on preferential terms to different companies. These “preferential” services can affect the competition, especially if the companies in advantage belong to some “sensitive” sectors.

The plan for free areas: is incompatible with state aid EU regulations, as the income tax exemption for the entire period of existence of the area (of maximum 50 years) represents an operation aid (regarding the daily activity of the respective company and it is not related to supporting a new investment project). This facility is modified in practice so that it is strictly related to an investment project or to the creation of new jobs (modified so that it includes the conditions of approving the operating aids: temporary character, progressive reduction).

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