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10.2 STATE AID

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The relevant **competition laws and regulations** regarding the state aid are:

Domestic Regulations

- ✓ Government Emergency Ordinance no. 77 of 2014 regarding the National Procedures regarding the State Aid, as well as the amendment and the supplementation of the Competition Law no. 21 of 1996 as subsequently amended („**Emergency Government Ordinance no. 77**”)
- ✓ Government Decision no. 437 of 2015 regarding the Approval Procedure and the Content of the Memorandum provided by Art. 7 of the Emergency Government Ordinance no. 77
- ✓ Regulation of the Competition Council of June 20, 2007 regarding the State Aid Monitoring Procedures
- ✓ Regulation of the Competition Council of June 13, 2005 regarding the State Aid Register
- ✓ Government Decision no. 651 of 2006 regarding the Approval of the State Aid Policy for the period 2007 - 2013
- ✓ Government Decision no. 98 of 2010 regarding the Establishing of the Interministry Council the "Council for the Application of the State Aid Policy"

European Union Regulations

- ✓ Treaty for the Functioning of the European Union („**EC Treaty**”)
- ✓ Council Regulation (EC) no. 659 of 1999 laying down detailed rules for the application of Article 93 of the EC Treaty
- ✓ Council Regulation (EC) no. 794 of 2004 implementing Council Regulation (EC) no 659 of 1999 laying down detailed rules for the application of Art. 93 of the EC Treaty
- ✓ Council Regulation (EC) no. 994 of 1998 on the application of Articles 92 and 93 of the EC Treaty to certain categories of horizontal State aid
- ✓ Commission Notice of May 22, 2005 on the determination of the applicable rules for the assessment of unlawful State Aid
- ✓ Commission Notice of November 15, 2007 towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State Aid
- ✓ Commission Notice of April 9, 2009 on the enforcement of State aid law by national courts

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- ✓ Regulation (EEC, Euratom) no. 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits

Measures considered as state aid

According to the EC Treaty, the regulations regarding state aid only apply to the measures which fulfill cumulatively all the criteria mentioned below:

a. State resources transfer

The regulations regarding state aid concern the aid granted by the State or the transfer of state resources (including from national, regional and local authorities, banks and public foundations, public or private intermediary body assigned by the state).

The financial transfers representing state aid can be under, but not limited to the following form:

- (i) subsidies, or reduction of the interest;
- (ii) loans guarantees;
- (iii) provisions related to the accelerated depreciation method;
- (iv) capital injections;
- (v) tax exemptions.

b. Economic Advantage

The state aid must materialize in a certain economic advantage otherwise unavailable to the beneficiary in the normal course of business.

c. Selectivity

The state aid must be selective, favoring certain companies or the production of certain goods, thus affecting the balance between companies and their competitors. The "selectivity" is the criterion that differentiates the state aid from the "general measures", namely the measures which apply to all companies from all economic sectors of a Member State (for instance, the tax measures of general applicability).

A scheme is considered "selective" if the authorities managing it enjoy a certain discretionary power. The selectivity criterion is also fulfilled if the scheme applies only to a part of the territory of a Member State.

d. Effect on the competition and trade

The state aid must distort or threaten to distort the competition and the trade between the Member States.

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State aid notification procedure

Given that state aid can distort competition by favoring certain companies over others, EU regulations provide strict control of state aid measures.

EU legislation regarding the state aid is directly applicable in Romania and the competences to authorize state aid were transferred from the Competition Council to the European Commission.

The state aid subject to the notification obligation cannot be granted unless approved by the European Commission or after it is considered to have been authorized.

The notifications of state aid measures shall be submitted by the applicant to the Competition Council. This authority will issue an opinion on compliance, accurateness and fulfillment of the obligations under the EU legislation regarding a state aid scheme within at most 30 days as of the receipt of the notice, unless the applicant requests in writing an extension of the deadline for filling additional information.

In the event that the Competition Council's opinion does not propose any changes, after sending the opinion to the applicant, the Competition Council must forward the notice or the relevant information to the European Commission.

The Competition Council assists in the preparation of notices or reports submitted to the European Commission, working with state aid providers to develop regulations establishing schemes or individual state aid. It also ensures the dissemination of the EU legislation and of the experience of the inspectors of the Competition Council regarding state aid, constantly monitoring both the legal framework for state aid and the compliance with its own decisions or the decisions issued by the European Commission in this area.

Investigation of the state aid by the European Commission

The main role of the European Commission is to examine and decide what measures may be considered as state aid. Therefore, the Commission, i.e. DG Competition, has extensive powers to monitor, control and restrict the methods and levels of the aid granted by the Member States.

The European Commission must make decisions on the Notices under review within two months as of the date when the notice is deemed complete. The Commission may extend the deadline if additional information is required (the two-months period begins to run only when the documentation is complete). At the end of the two-month period, the Commission may decide to approve the aid or to open a formal investigation. The formal investigation may take up to few years.

If the European Commission has doubts as to the compatibility of an aid scheme/individual aid that was notified or brought to its knowledge through a complaint, an investigation is required to be started. This is a fairly long procedure that can last up to 18 months in the cases regarding the notified aid and, even more, for those which are not notified.

In the first phase, the Commission will send a letter to the Member State mentioning its concerns related to the alleged state aid case. The Member State has at most 30 working days to respond. The third parties (including competitors and other Member States) may send comments, usually within a period of one month. The Member State has one month to

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respond to the comments of the third parties. Further on, the European Commission shall review the information and may decide to organize bilateral meetings with the parties involved. At the end of the procedure, the European Commission may decide that state aid measures are not involved, and that the aid is compatible (possibly conditioned) or that the aid is incompatible. If the incompatible aid has already been granted, its recovery may be requested. At this point, the procedure before the European Commission will be closed.

Recovery of the unlawful state aid

Unauthorized state aid is considered unlawful. Consequences of granting such aid are:

- (i) payment of the aid may be suspended;
- (ii) companies receiving unlawful state aid will have to reimburse such aid with the related interest due as of the date of payment until the date of recovery or reimbursement;
- (iii) change of the state's economic policies and legislation; or
- (iv) the beneficiaries and the granting authority can be sued by competitors for damages.

The state aid beneficiary is obliged to refund the amount equivalent to state aid if the recovery was ordered by the Commission, unless the implementation of the European Commission's decision was suspended, in accordance with the EU rules.

The Competition Council shall forthwith send to the state aid provider a copy of the European Commission decision whereby the recovery of the unlawful state aid or the abusively used aid was ordered. Further on, the state aid provider must immediately send a copy of the decision of the European Commission to the beneficiary.

If the beneficiary does not reimburse the state aid to the provider, the latter may file an application with the Bucharest Court of Appeals requesting the recovery of the respective state aid and the payment of related interest.

The decision of the Court of Appeals is subject to appeal. The appeal is heard before the High Court of Cassation and Justice.

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