

ROMANIA: STATE AID LAW IN ROMANIA



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Abstract

This chapter examines the state aid law in Romania, focusing on its legal framework, key provisions, and recent developments. It provides an overview of the regulatory framework governing state aid in Romania, including the relevant legislation, regulations, and guidelines. Apart from analysing the criteria and procedures for granting state aid, it also discusses the role of the Romanian competition authority in enforcing state aid rules. Examining recent case laws and decisions related to state aid in Romania, it highlights the legal realities of state aid. Overall, it offers insights into the state aid regime in Romania and its implications for businesses, government entities, and the broader economy.

Keywords: *State Aid Law, Romania, Legal Framework, Competition Authority, Government Entities*

1. Introductory aspects

State aid constitutes a set of policies regulated by European Union (EU) law, with Member States having only a limited margin of manoeuvre as determined by the EU law. The underlying aim of these policies is to preserve competition as the basis of the market economy. According to the Constitution of Romania, Art. 135:

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Romania's economy is a free market economy, based on free enterprise and competition. The state must secure: a) a free trade, protection of fair competition, provision of a favourable framework in order to stimulate and capitalize every factor of production; b) protection of national interests in economic, financial and currency activity; c) stimulation of national scientific and technological research, arts, and protection of copyright; d) exploitation of natural resources, in conformity with national interests; e) environmental protection and recovery, as well as preservation of the ecological balance; f) creation of all necessary conditions so as to increase the quality of life; g) implementation of regional development policies in compliance with the objectives of the European Union.

For an effective competitive environment, economic operators must enjoy equal treatment and opportunities. Following this principle, the state must treat profit-making entities with no bias, without directly or indirectly favouring any of them.¹ Of course, in many cases, state intervention in the economy becomes an imperative necessity, justified on substantial objective grounds. Hence, a total ban on state aid would produce negative effects, absolutizing the concept of free competition, to the detriment of economic imperatives and of national interest. This is precisely why state aid law exists: to balance the conflict between the principle of free competition and equal treatment, on the one hand, and the need for state intervention in cases where other imperatives require it, on the other. A distinction must be made between *measures of a general nature*, which are aimed at certain state economic strategies in certain sectors, and *measures of an individual nature*, which are aimed at a particular company and pose a much greater risk of discrimination. Thus, state aid policy and state aid law are both based on a simultaneously prohibitive and permissive set of rules. European and national state aid laws are interlinked, with the former dominating the latter.² The importance of state aid is revealed by its intensity: companies in Romania received state aid totalling around RON 29.5 billion in 2023, about 2% of its Gross Domestic Product (GDP).

2. Sources of law

In addition to the mandatory application of European state aid law, the Romanian government (the Cabinet) has adopted an important piece of national legislation in the form of an emergency ordinance to reflect the rapid changes at the European

¹ Almășan, 2021.

² For an economic analysis of state aid in Romania, see: Pop, Iootty De Paiva Dias, Bruhn and Ruiz Ortega, 2021.

level in this area, namely, the Government Emergency Ordinance No. 77/2014, on national state aid procedures.³

An emergency ordinance is an act of legislation adopted by the Cabinet (called *Guvern* in Romanian, hence the name ‘government emergency ordinance’, which is a slight misnomer) during extraordinary situations when the regulation cannot be delayed. It has a legal force equivalent to that of an organic law (which requires a qualified majority) adopted by Parliament. The Parliament retains a *post facto* right of control and approval over such ordinances. These ordinances constitute only ‘provisional’ law, coming into effect from when they are published in the *Monitorul Oficial*, the official journal of Romania. Parliament may then approve, reject, or amend them after adoption. Bearing in mind the fact that such ordinances may be overused in the Romanian legal order, the adoption of such a source of law in the field of state aid has been justified by arguments such as: (i) the need to bring national state aid legislation in line with the EU law; (ii) the need to create a legislative framework that guarantees the fulfilment of the *ex-ante* conditions imposed by the European Commission on Romania for accessing European funds in the 2014–2020 programme period; (iii) the need to better control how public funds (national and European) intended for the business environment are utilised; (iv) to ensure that the vast majority of state aid facilities are verified mainly at the national level as intended by the European reform in the field of state aid since the European Commission conducts only an *ex post* control of compliance with the conditions laid down in the relevant EU rules; (v) the need to establish a control mechanism at the national level, establishing the powers and obligations of providers, beneficiaries, and the Romanian Competition Council in the implementation of state aid and *de minimis* measures to facilitate the absorption of European funds and avoid their recovery; (vi) urgent measures taken to create a legislative framework at the national level that meets the European Commission’s requirements in the field of both state aid and European funds.

Since all these issues are in public interest and deemed to constitute urgent and extraordinary situations, when implementing measures cannot be postponed, adopting an emergency ordinance is justified. Parliament subsequently approved this emergency ordinance with amendments by means of Act No. 20/2015.

Romanian national state aid law aims to regulate national state aid procedures for the application of Arts. 106 to 109 of the Treaty on the Functioning of the European Union (TFEU), and the secondary legislation adopted on the basis thereof. Thus, national regulation is (only) an implementing act for European legislation, facilitating the application of European rules at the Member State’s level.

³ Regarding the constitutionality of some provisions of this emergency ordinance, see: Toader and Safta, 2016. For a general overview on the evolution of the Romanian state aid law, see: von Borries, 2006; Schütterle, 2007.

3. Concepts and definitions

Under national law, state aid is defined as an economic advantage granted through state resources or resources managed by the state in any form whatsoever that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, insofar as it affects trade between Member States.⁴

Economic advantage is any type of quantifiable pecuniary advantage, whatever its form: subsidies, cancellation of debts or the taking over of losses, tax exemptions, reductions or deferrals of taxes, the foregoing of normal revenue from public funds, including granting of loans at preferential rates of interest, guarantees granted on preferential terms, equity participation by the state, central, or local government or other bodies administering state or local authority funds, if the rate of return on these investments is lower than the normal rate of return expected by a prudent private investor, discounts on goods and services provided by central or local government or other bodies administering state or local authority funds, including the sale of land belonging to the private domain of the state or local government below market price, the creation of a market or the strengthening of the beneficiary's position in a market, etc.

The concept of enterprise is broad, covering any entity, irrespective of its legal status and method of financing, including non-profit entities, which carries out an economic activity. State sources and resources are public funds or funds of public authorities, institutions, or undertakings.

Exempt aid is a state aid measure that fulfils the criteria specified in the European Commission regulations, with direct applicability, allowing a state aid measure to be established without prior authorisation by the European Commission. Unlawful aid is aid granted without complying with national and the EU state aid procedures. Misused aid is aid used by the beneficiary without respecting the conditions under which it was granted. *De minimis* aid is aid limited under EU rules to a level that does not distort competition and/or trade with Member States.

4. National procedures

Unless otherwise provided for in the EU regulations adopted pursuant to Art. 108 of the TFEU or other relevant provisions thereof, any intention to grant new state aid must be notified to the European Commission in time. The notification must be in the specific form accompanied by the relevant documentation to be submitted to the European Commission to establish the character of state aid and analyse the

⁴ For further details, see: Niță, 2018. See also: Art. 2 para. (1) point (d) of Emergency Ordinance No. 77/2014.

compatibility of the draft support measures with EU law. The documentation is the draft legislative or administrative act establishing the support measure, as well as any other act relevant for the analysis of the compatibility of the measure with the EU rules on state aid.

New state aid, subject to the notification requirement, may be granted only after it has been authorised by the European Commission or after it is deemed to have been authorised in accordance with Art. 4 para. (6) of Regulation (EU) 2015/1589.⁵ State aid that is not subject to the notification requirement may be granted only on compliance with the provisions of EU and national state aid law.

State aid or *de minimis* measures are introduced following an analysis on its appropriateness; introducing these measures requires the initiator or provider, where applicable, to draw up, under the law, regulatory or administrative acts, as necessary, establishing state aid or *de minimis* schemes or individual state aid or *de minimis* aid. It must mention at least the objective, method of granting state aid or *de minimis* aid, beneficiaries, period of application, amount of funds allocated for this purpose from the supplier's budget, and the applicable provision of the EU law under which the state aid or *de minimis* aid measure has been established in accordance with the relevant legislation.

Specific allocations under an aid scheme authorised by the European Commission, following the notification process in accordance with Art. 108 para. (3) of the TFEU,⁶ or covered by the Block Exemption Regulations,⁷ may be granted only if the conditions laid down in that aid scheme are fulfilled. Individual state aid, whether authorised by the European Commission following an individual notification or initiated under the provisions for block exemptions, may be granted only if it fulfils the conditions laid down in the act approving the granting of the aid.

Regional state aid may be granted in accordance with the relevant regulations drawn up by the European Commission and the Regional Aid Map approved by the Government. The regional aid map is to be notified to the European Commission for approval, in accordance with the procedure laid down in Art. 108 para. (3) of the TFEU, and approved by government decision.

More importantly, in the context of public procurement,⁸ where the contracting authority finds that a tender has an unusually low price because the tenderer benefits from state aid, that tender may be rejected on that ground alone only if, following

⁵ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, 9–29.

⁶ Art. 108 para. (3) of the TFEU requires Member States to notify the Commission of any plans to grant or alter aid – the notification obligation – and to refrain from placing the proposed aid into effect until the Commission has taken a final decision on its compatibility with the internal market (the standstill clause).

⁷ *Competition Policy – Block Exemption Regulations* [Online]. Available at: https://competition-policy.ec.europa.eu/antitrust-and-cartels/legislation/block-exemption-regulations_en (Accessed: 15 January 2024).

⁸ For a general analysis on state aid and public procurement in Romania, see: Almășan and Bogrea, 2019.

the clarifications requested, the tenderer has not been able to demonstrate, within an appropriate time limit set by the contracting authority, that the state aid was granted legally.⁹ In such a case, when the contracting authority rejects a tender on these grounds, it must inform the European Commission after consulting with the Competition Council. This rule has been subject to criticism. In order to avoid exclusion, the economic operator is given an adequate period of time to prove the legality of the state aid. On the one hand, it is not clear what the legislator means by an appropriate time limit. On the other hand, it is rather strange that the economic operator must overturn an implicit presumption of illegality of state aid, instead of the contracting authority being obliged to prove its illegal nature (acts of the public administration are as a rule presumed legal under Romanian law and court case law until proven otherwise). The law also creates an obligation for the contracting authority to refer the matter directly to the European Commission but not through the Competition Council.¹⁰

5. The Competition Council as the National State Aid Authority

5.1. Generalities

In terms of power to authorise and recover state aid, for the period from 1 January 2000 to 31 December 2006, under the provisions of Act No 143/1999, the Competition Council and the courts, and not of the tax authorities, were responsible for examining the lawfulness or otherwise of state aid and the procedures for recovering and repaying state aid. After 1 January 2007, the date of Romania's accession to the EU, according to the provisions of Government Emergency Ordinance 117/2006 (later replaced by Government Emergency Ordinance No 77/2014, in force at this moment), the competence to declare unlawful state aid and the procedures for recovery and reimbursement of unlawful aid were transferred to the European Commission, with the Competition Council acting as the contact authority between the European Commission and the state aid providers.¹¹

⁹ Art. 210 para. (5) of Act 98/2016 on public procurement.

¹⁰ For details on the role of the Competition Council as the national contact authority in relations with the European Commission, see section 5.

¹¹ High Court of Cassation and Justice, chamber for administrative and fiscal litigation, decision no. 5731/2009; Suceava Court of Appeals, chamber for administrative and fiscal litigation, decision no. 2132/2011; High Court of Cassation and Justice, chamber for administrative and fiscal litigation, decision no. 4061/2014.

The Competition Council acts as the national contact authority in relations between the European Commission and public authorities and institutions, other state aid providers, and state aid beneficiaries involved in state aid procedures.

Providers, beneficiaries, and initiators of state aid and any other undertakings are required to submit to the Competition Council, within the time limits set by the Council, all information necessary for the proceedings before the European Commission. The deadlines set by the Competition Council may not be less than 10 working days, unless the data, information, and documents relating to state aid are required by the European Commission or EU regulations within shorter deadlines. Central and local public authorities, suppliers, and initiators are obliged to consult with the Competition Council when drafting replies, explanations, position papers, or other documents, with a view to forwarding them to the European Commission via the Competition Council and the Permanent Representation of Romania to the EU. The Competition Council together with the supplier or administrator involved will, if necessary, argue the cases before the European Commission.

The Competition Council, upon timely request by the originator or supplier, can withdraw a notification before a decision is issued by the European Commission. A request for withdrawal will be communicated to the European Commission by the Competition Council through the Permanent Representation of Romania to the EU.

The Competition Council informs, within five working days of receipt, the initiators or suppliers about the decisions adopted by the European Commission, received through the Permanent Representation of Romania to the EU, in addition to sending a copy of the decision in question.

The Competition Council publishes on its website, which constitutes the national information point, public information on the adoption of decisions by the European Commission in the field of state aid. The Competition Council informs authorities, other state aid providers, or administrators, beneficiaries, and the public about the EU's state aid rules by publishing guides, monthly newsletters, legislative and case law summaries, and other information material, and by organising seminars, workshops conferences, and the like.

The Competition Council provides expert assistance in the field of state aid to the authorities, other state aid providers, and beneficiaries to ensure that Romania fulfils its obligations as a Member State of the EU, including in the process of drafting regulatory or administrative acts establishing state aid or *de minimis* measures. The Competition Council cooperates with public institutions, other providers, administrators, and beneficiaries of state aid and supports them in the proper application of the EU state aid rules. The Competition Council collaborates with the competent authority to represent Romania before the competent courts at EU level in state aid cases.

The Competition Council, at the request of the supplier, or initiator, may start consultations with the European Commission and issue pre-notifications concerning draft support measures that may constitute state aid.

The Competition Council reports to the government every six months on its activity in the field of state aid.

Any draft measure likely to constitute state aid or *de minimis* aid – initiated by ministries or other specialised bodies of the central public administration, by public authorities or institutions subordinated, coordinated, or under their authority, respectively, as well as by other entities assimilated to them, with attributions in the implementation of the government’s policy – must be accompanied by a memorandum approved by the government on the appropriateness of the promotion of the measure and its compliance with the government’s economic, budgetary, and financial policies. The memorandum is submitted to the government for approval after obtaining the opinion of the Competition Council.

The institutions initiating state aid or *de minimis* aid measures jointly draft the memorandum referred to above, as a rule, every six months after completing the following stages: (i) obtaining the views of the ministry coordinating policy in the field of European funds regarding ensuring the complementarity of the state aid or *de minimis* aid measure in question with programmes financed by European funds; (ii) consulting with the suppliers within the interministerial council called the Council for the Application of State Aid Policy; (iii) obtaining the opinions of the Ministry of Public Finance on whether the memorandum is in line with the government’s economic, budgetary, and financial policies.

However, measures of a *de minimis* or state aid nature are exempted from notification to the European Commission, established by acts adopted, or initiated by the government; further, all measures financed by European funds and those initiated by local public administration authorities do not require drafting of the memorandum. In this case it must be expressly stated that the measures in question fall within the category of exempted state aid or *de minimis* aid.

The mandatory consultations for the application of state aid policy are usually conducted twice a year, during periods set by the Council.

In draft measures likely to represent state aid or *de minimis* aid initiated by local public administration authorities, to ensure coherence with the economic, budgetary, and financial policies of the Romanian state, they must be accompanied by proof that the prefect’s institution of the given jurisdiction (county) and the county council have been informed of the intention to establish the respective support measure. The law does not make the submission of an application to the Competition Council conditional on prior approval or endorsement by the prefect or the county council; only a mandatory information procedure needs to be followed. However, this gives rise to a question: When the county council, as a local government authority, initiates such a measure, how can it inform itself?¹²

12 For details on state aid at local level, see Section 5.4.

5.2. Endorsement procedure

Any draft measure likely to constitute state aid or *de minimis* aid, initiated by the supplier, or initiator, must be forwarded to the Competition Council for its endorsement, accompanied by an analysis of its appropriateness. The application for endorsement of measures likely to constitute state aid or *de minimis* aid, drawn up by the supplier, or initiator, must be submitted at the draft stage to the Competition Council, after finalising the consultation procedure. The Competition Council issues an endorsement on the compliance, correctness, and fulfilment of the obligations laid down in European state aid law. The endorsement is published on its website immediately after its adoption. Specific allocations to be notified to the European Commission, granted on the basis of a state aid scheme, are subject to the endorsement of the Competition Council and are exempt from the obligation to prepare the memorandum, appropriateness analysis, and submission to the State Aid Policy Council.

The Competition Council works with the originator or the provider to complete and improve the notifications, information, and documentation relating to the *de minimis* measures to comply with EU rules. Where notifications, information, or documentation relating to *de minimis* measures are amended after the endorsement of the Competition Council has been issued but before transmission to the European Commission or adoption, the amendments should be submitted to the Competition Council for a new endorsement.

For endorsement, the Competition Council may request additional data and information from the originator, or provider. If the requested information is not submitted within the time limit set by the Competition Council, it must issue the endorsement on the basis of the data made available to it and indicate this in the endorsement.

The Competition Council must deliver its endorsement within 10 to 60 days of receipt of the request for an endorsement. Where additional information is required, the time limit is from the date on which the information requested by the Competition Council has been provided. Where pre-consultations have been completed and the pre-notification procedure before the European Commission has been finalised, the Competition Council delivers its endorsement within a maximum of 15 days after receipt of the request for an endorsement, unless the originator, or provider, requests in writing an extension of the time limit for completing the notification or information. If the endorsement issued by the Competition Council does not propose any changes or make any recommendations, the Competition Council, at the request of the initiator or supplier, sends the notification to the European Commission, in the form approved, after the government has approved the memorandum on the appropriateness of promoting the measure in question and its compatibility with the government's economic, budgetary, and financial policies. If the notification does not propose any changes to the information or documentation relating to the *de minimis* measures, the supplier or the initiator may adopt the state aid or *de minimis* measure, subject to the legal provisions in force.

For state aid measures that require the European Commission's authorisation, if the Competition Council's endorsement has proposed changes, and the initiator or the provider agrees with them, it has to submit to the Competition Council the notification amended in accordance with the endorsement for transmission to the European Commission, following the government's approval of the memorandum referred to above. If the Competition Council's endorsement proposes changes to the information or documentation relating to the *de minimis* measures, and the initiator or the supplier agrees with them, it may adopt the state aid or *de minimis* measure, subject to the legal provisions in force.

If the initiator or the provider does not agree with the changes proposed by the Competition Council, based on EU rules and national legislation, it submits to the Competition Council a reasoning for the non-acceptance of the proposed changes, within 20 days of receiving the endorsement.

The Competition Council will examine the documents submitted by the originator or supplier and will issue a new endorsement within a maximum of 30 days of receipt of the reasoning from the originator or supplier.

5.3. Amendment of regulatory or administrative acts

Amendments to the legal or administrative acts implementing state aid or *de minimis* aid, which may affect the assessment of the compatibility of the aid measure, with reference to duration, granting instrument, eligibility, and granting conditions, or increase the budget of the measure or the number of beneficiaries by more than 20%, can be made with the endorsement of the Competition Council.

Amendments to the regulatory or administrative acts implementing state or *de minimis* aid are exempted from drafting a memorandum and submitting it to the Interministerial Council for the Implementation of State Aid Policy.

5.4. State aid at the local level

When examining the legality of administrative acts establishing support measures by local authorities, the prefect¹³ is obliged to verify the existence of the endorsement issued by the Competition Council. In the case of *de minimis* aid measures, when

13 The prefect is the representative of the government in each county and in the Municipality of Bucharest. At the county level, the prefect directs the decentralised structures subordinate to the various ministries and other bodies of the central public administration. Between the prefects, on the one hand, and the local councils and the mayors, as well as the county councils and their presidents, on the other, no relationships of formal subordination exist. However, the prefect exercises vast influence over councils, mayors, and presidents of county councils, as the Romanian concept of public administration is based on the cvasi-centralised model in which the prefect represents the national interest, which, in practice, limits the idea of local self-government. One of the main tasks of the prefect is to exercise control of legality over the acts of local governments. In this sense, the prefect may challenge, before the administrative court, an act of the county council, a local council, or a mayor, in case it is deemed unlawful. The act thus challenged shall be suspended *ope legis*.

examining the existence of the endorsement of the Competition Council, the prefect will also verify compliance with the legal provisions on state aid. In the case of measures adopted by local public authorities for granting an economic advantage to an enterprise, the prefect requests the Competition Council for endorsement, if it does not have one, based on national and EU rules on state aid.¹⁴

5.5. Optional consultations

In addition to mandatory consultations, optional consultations also exist. Central and local public authorities and institutions, as well as other entities controlled by the state or administering state resources, may initiate prior consultations with the Competition Council to establish the classification of the measures to be introduced by those acts as state aid or *de minimis* aid and the conditions under which the measures may be implemented. The initiators of such draft acts must submit to the Competition Council, in good time, the documentation on the projects establishing measures that may constitute state aid or *de minimis* aid. The Competition Council will decide on the documentation received and invite the providers, or initiators, if any, to submit applications for the endorsement of projects concerning measures likely to constitute state aid or *de minimis* aid within 10 to 20 working days from the time of completion of documentation. During prior consultations with the Competition Council, the Romanian authorities may also initiate consultations with the European Commission through the pre-notification procedure.

5.6. Notification and information procedure

The final form of the notification or information is to be submitted to the Competition Council by the originator or supplier for transmission to the European Commission. In the case of measures for which a memorandum has to be drawn up, the notification or information is to be submitted to the European Commission after the memorandum approved by the government has been communicated to the Competition Council.

The notifications must be sent to the European Commission, via the Competition Council and the Permanent Representation of Romania to the EU, in the format prescribed in the relevant European legislation, within a maximum of 20 working days from the adoption of the legislative or administrative act establishing the state aid measure.

If the initiator or the supplier does not request the submission of the notification within 30 days from the service of the endorsement of the Competition Council or the approval of the memorandum, it will be deemed to have waived it. If, after the expiry of this period, the originator or the supplier wishes to submit the notification or the information to the European Commission, the procedure must be resumed from the start.

¹⁴ For further details, see: Alexe, 2017.

5.7. Procedure for granting *de minimis* aid

The final form of the regulatory or administrative acts implementing *de minimis* aid should be submitted to the Competition Council for information within 15 days of the date of adoption and then published on the website of the supplier and the Competition Council.

The provider or the administrator of *de minimis* aid measures informs the beneficiaries, at the time the aid is granted, of the *de minimis* character of the aid and verifies compliance with the *de minimis* ceiling imposed by the EU law.

5.8. Procedure when aid is compensation for provision of a service of general economic interest

Draft legislative or administrative acts establishing schemes or individual aid in the form of compensation for the provision of a service of general economic interest or a public service obligation, for which notification to the European Commission is not required, should be forwarded to the Competition Council for its endorsement.

Draft laws, regulations, or administrative provisions establishing schemes or individual aid in the form of compensation for the provision of a service of general economic interest or a public service obligation, for which notification to the European Commission is required, should be forwarded to the Competition Council for its endorsement.

5.9. Monitoring of state aid and *de minimis* aid

State aid or *de minimis* aid granted is monitored for each individual measure by the provider or the administrator of the measure. On-the-spot checks in accordance with the legal provisions in force may be conducted to verify compliance with the conditions for granting the aid and appropriate measures may be taken if these conditions have not been met. The supplier or the administrator may issue decisions ordering the suspension or recovery of state aid or *de minimis* aid granted. Such decisions are enforceable.

Providers and beneficiaries of state aid are responsible, according to the law, for the accuracy and completeness of the data and information submitted to the Competition Council.

Aid providers are obliged to submit to the Competition Council, in the format requested by the Council, all data and information necessary for the monitoring of state aid or *de minimis* aid at the national level, including for the preparation of the state aid and *de minimis* aid inventory and the reports and information necessary to fulfil Romania's obligations as a Member State of the EU. Beneficiaries of state aid or *de minimis* aid are obliged to submit to the provider, or administrator, periodic reports and other information on the aid granted, as requested by the provider, or administrator, under the sanctions provided for in Emergency Ordinance No. 77/2014.

The Competition Council monitors state aid and *de minimis* aid at the national level on the basis of reports, information, and data submitted by suppliers. The Competition Council may request data and information from the supplier when, on the basis of the information provided, the conditions for granting state aid or *de minimis* aid may not have been met. After analysing the data and information submitted by the supplier, the Competition Council may require the supplier to take the necessary measures to ensure compliance with state aid and *de minimis* legislation. The supplier may, within 20 working days of receipt of the request, raise objections, which will be forwarded to the Competition Council for its consideration and endorsement. If the data and information submitted by the supplier do not clarify the issues raised, the Competition Council may order an inspection of the undertaking benefiting from the support measure in compliance with the legal provisions in force. The Competition Council's inspection team will be accompanied by representatives of the supplier. The conclusions of the Competition Council's analysis or verification action are recorded in a report, which, if appropriate, will require the supplier to take the necessary measures to ensure compliance with the state aid legislation. The supplier may, within 20 working days of receipt of the request, raise objections, which will be forwarded to the Competition Council for analysis and endorsement.

The supplier is obliged to inform the Competition Council, within 30 working days from when the endorsement was sent, about the state of implementation of the measures ordered by the Competition Council; in case of non-implementation of the measures, within 20 working days from the receipt of the request, the supplier must send the reasons for non-implementation to the Competition Council.

If necessary, the Competition Council issues decisions to stop or recover *de minimis* aid. Decisions issued by the Competition Council are enforceable. These decisions must be forwarded, together with proof of receipt, by the beneficiaries, within 20 working days of the date of issue of the decision, with a view to recovery of the *de minimis* aid, including interest thereon, to the competent tax authorities, and the amounts thus realised will be paid to the state budget.¹⁵ Competition Council decisions can be challenged before the Bucharest Court of Appeal.

5.10. State aid inventory: State aid and de minimis aid register

The Competition Council drafts and updates the inventory of state aid and *de minimis* aid based on reports, data, and information received from suppliers, in accordance with the provisions of the applicable emergency ordinance. The Competition Council draws up the reports and provides the information necessary for the

¹⁵ Regarding the problem of interests see section 6 from the present chapter. The Competition Council will calculate the amount of interest for the period from the date of payment of the *de minimis* aid up to and including the date of issue of the recovery decision, and the tax authorities will calculate the amount of interest for the period from the date of issue of the recovery decision up to and including the date of recovery or full repayment.

fulfilment of Romania's obligations as a Member State of the EU and any other reports and studies in the field of state aid or *de minimis* aid, based on the state aid inventory, data, and information submitted by the suppliers, respectively, information provided on the request of the Competition Council by suppliers and beneficiaries. The data and information necessary for drafting and updating the inventory and for preparing reports and studies must be submitted by the state aid or *de minimis* aid providers in accordance with the procedures laid down in the Competition Council Regulations.

The Competition Council organises and maintains a register of state aid and *de minimis* aid granted in Romania. The register is maintained by the supplier, or administrator, where applicable, who is responsible for the accuracy and completeness of the data entered.

With a view to transposing the Commission Directive 2006/111/EC of 16 November 2006 on the Transparency of Financial Relations between Member States and Public Undertakings as well as on the Transparency of Financial Relations within Certain Undertakings, the Competition Council supervises the financial relations between the entities to which the scope of the Directive extends, including those entrusted with the provision of services of general economic interest on the basis of reports, information, and data submitted by public authorities. Public authorities are required to keep records of the financial relations between themselves and the public undertakings referred to above and provide the Competition Council, at its request, information in connection with these relations. Public undertakings, undertakings providing a service of general economic interest and undertakings benefiting from special or exclusive rights, which receive compensation in any form for these services and which also carry out other activities, are obliged to keep specific records by activity to ensure financial transparency, to transmit, at the request of the Competition Council, the information requested in relation to these relationships, and to communicate annually to the Competition Council whether the conditions for classification of these services as a public undertaking are fulfilled.

5.11. Procedural rules

The deadlines set by the Competition Council for the receipt of reports, information, and data in the monitoring process may not be less than 30 days, unless the data, information, and documents on state aid are requested by the European Commission or required by EU regulations within shorter deadlines.

While the European Commission carries out an on-the-spot check in accordance with the provisions of Art. 27 of Regulation (EU) 2015/1589, the Competition Council together with the supplier may raise duly substantiated objections to the appointment of experts chosen and authorised by the European Commission to assist with the check. The Competition Council, together with the state aid providers, appoints representatives authorised to assist the European Commission in the on-the-spot verification. The Competition Council, the authorities, other providers, and beneficiaries

of state aid cooperate with the staff mandated by the European Commission to carry out the on-the-spot verification in accordance with the legal procedures in force.

European Commission decisions ordering the recovery of unlawful or misused state aid, which have not been suspended in accordance with applicable EU law, are enforceable titles for the recovery of amounts by the supplier from the beneficiaries of unlawful state aid.

6. Repayment, recovery, suspension, or provisional recovery of state aid or *de minimis* aid ordered by the European Commission

The beneficiary of a state aid or *de minimis* aid is obliged to repay the amount of state aid or *de minimis* aid whose recovery has been ordered by the European Commission unless the implementation of the European Commission's decision has been suspended in accordance with EU rules. Specific problems were raised in the context of insolvent beneficiaries of state aid. The fact that the Commission's decision constitutes a special enforceable title does not entitle the Romanian court to hold that the claim thus recognised enjoys special priority, nor that the decision will apply absolutely independently of the national rules, which, in the present case, considering the recovery rates in both proposed scenarios, cannot be regarded as affecting the immediate and effective recovery of the aid. Romanian courts did not find in the case-law of the Court of Justice of the European Union (CJEU) any recognition of a special priority for creditors providing state aid if the debtor is in insolvency, but rather constant references to national rules that must be applied to ensure immediate and effective recovery of state aid.¹⁶

State aid or *de minimis* aid to be repaid or recovered must include interest thereon from the date of its payment until the date of its recovery or full repayment.¹⁷ The procedure for calculating the interest is laid down in instructions issued by the Competition Council. The provider or administrator of state aid or *de minimis* aid calculates the interest amount. The Romanian courts state that the particular situation of a debtor becoming insolvent cannot be ignored. State aid law cannot be considered to have a special norm in relation to the provisions of insolvency law; on the contrary, it is a rule of general character for the recovery of unlawfully granted state aid, which is applicable insofar as no other special rules apply. However, the debtor is in insolvency; hence, recovery of state aid can be affected not in accordance with

¹⁶ Pitești Court of Appeals, second civil, administrative and fiscal chamber, decisions no. 529 and 530 of 25 June 2020.

¹⁷ The applicable interest rate is that set in accordance with Regulation (EU) 2015/1589.

the provisions of the general law on the subject, but only in the light of the special rules applicable to insolvency.¹⁸

To tackle this problem, Act No 20/2015 and Emergency Ordinance No 6/2020 created a special regime for insolvent companies, generating a framework of priority for state aid recovery. In cases where recovery of state aid, or *de minimis* aid, has been ordered and the beneficiary of the aid is under insolvency proceedings, the national court handling the insolvency proceedings must ensure the immediate and effective implementation of the recovery decision. The court will agree to enter the claim for repayment of the aid in question in the list of claims, together with the interest accrued thereon, up to the time limits laid down by national insolvency law applicable to all creditors. The ranking of the claim is to be determined in accordance with the insolvency legislation and will not be lower than that of ordinary unsecured claims. By way of derogation from the provisions of insolvency legislation, the entry of the claim arising from a decision to recover aid must be followed by the recovery of the full amount of the aid or, if this is not possible, by the liquidation of the undertaking and the definitive cessation of its activity. It should also be added that this is mandatory if the undertaking is under a preventative restructuring or it functions under a reorganisation plan. In the case of recovery decisions issued by the European Commission, recovery must be affected within the time limit set by the Commission.

Where suppliers or administrators do not have their own enforcement bodies or when more than one public authority supplier exists, they may forward recovery decisions together with proof of receipt by the beneficiaries within 20 working days of the date of issue of the decision at the latest, with a view to recovering state aid or *de minimis* aid, including interest thereon, to the competent tax authorities. Providers or administrators shall calculate the amount of interest for the period between the date of payment of the state aid or *de minimis* aid and the date of issue of the recovery decision included and inform the competent tax authorities of it. The competent tax authorities will then calculate the amount of interest for the period between the date of issue of the recovery decision and the date of recovery or reimbursement in full. The sums thus realised will be paid to the state budget, unless otherwise provided by law.

The beneficiary may not receive any further state aid or *de minimis* aid until the repayment obligation has been fulfilled.

The Competition Council must forward to the state aid provider a copy of the European Commission's decision ordering the recovery of unlawful state aid or misused aid, received via the Permanent Representation of Romania to the EU. The state aid provider must forward a copy of the European Commission's decision to the beneficiary within five working days of receipt. State aid providers or administrators, where applicable, are obliged to take the necessary legal measures to implement the European Commission's decision. The state aid provider must inform the beneficiary

¹⁸ Pitești Court of Appeals, second civil, administrative and fiscal chamber, Decision No 504/R-COM of 18 June 2020.

of the state aid, within a maximum of five working days of receipt of the decision, of the obligation to repay or recover the unlawful or misused state aid resulting from the European Commission's decision.

The Competition Council acts as the national contact authority between the European Commission and state aid providers in the procedure for adopting decisions to suspend or provisionally recover state aid, in accordance with the provisions of Art. 13 of Regulation (EU) 2015/1589.

The Competition Council must, within five working days of receipt, send a copy of the decision ordering the suspension or provisional recovery of state aid to the supplier. State aid providers or administrators are obliged to take the necessary measures to implement the European Commission's decision. Pursuant to Art. 13 para. (1) of Regulation (EU) 2015/1589, the state aid provider will suspend the granting of state aid from the date of receipt of the European Commission's decision via the Competition Council. The act by which the state aid provider orders the suspension of state aid will have the effect of immediately terminating the grants of state aid until the compatibility of the financial support measure with EU rules has been established.

Providers of state aid or *de minimis* aid must submit information to the Competition Council information and documentation on the status of recovery, provisional recovery, or suspension of state aid on a monthly basis.

7. European Commission decisions ordering the initiation of the investigation procedure

Where the European Commission orders the opening of an investigation into the existence of unlawful state aid, the Competition Council must forward to the state aid provider a copy of the decision, received via the Permanent Representation of Romania to the EU, and the state aid provider must forward a copy of such a decision to the beneficiary, within a maximum of five working days from receipt. State aid providers or administrators are obliged to take the necessary legal measures to implement the European Commission's decision. The state aid provider notifies the beneficiary of the state aid of the investigation within a maximum of five working days of receipt of the decision.

If the investigation procedure is initiated by the European Commission concerning the granting of allegedly unlawful aid, the provider must request the imposition of safeguard measures, under the terms of the Tax Procedure Code, on the assets of the beneficiary of state aid, for an amount equivalent to the amount of unlawful state aid considered by the European Commission, as estimated by the provider.

Where the European Commission has decided to start an investigation procedure in respect of state aid measures ordered by an enforceable title consisting of

a judgement or arbitration award (issued in favour of the beneficiary), from the date of communication of the European Commission's decision to open the investigation procedure to the supplier, any enforcement of this title may not start or will be suspended *ope legis*.¹⁹

To implement the enforceable title, the state aid provider must (within one working day from the date of service regarding the investigation to the beneficiary) apply to the State Treasury with which it has opened accounts for the opening of a special interest-bearing account in the name of the creditors and, where applicable, at the disposal of the bailiff. The interest applicable to the funds in the special-purpose account shall be the sight interest charged by the State Treasury, and the source of payment of such interest shall be the State Treasury budget. The application for opening the account shall contain the names of the creditors and, where applicable, of the bailiff for whom the account is opened. Within a maximum of 30 days from the date on which the account is opened in the name of the creditors and, where applicable, at the disposal of the bailiff, the state aid provider must enter in the account opened with the State Treasury the amount required to discharge the obligation covered by the enforceable title and the costs of enforcement incurred till the date of the automatic suspension, less the obligations discharged up to the date of the automatic suspension. In calculating the amounts credited, the supplier must consider the method of calculating interest used in determining the amounts in enforceable titles, including those issued by the bailiff. Once the sums have been credited to the account opened with the State Treasury, the supplier must immediately inform the creditors and the bailiff.

19 For the reasons of these rules see for example: Matei, 2016; Momic, 2019; Bernabeu, 2020; Northmore-Ball, Harvey and Courtier, 2021; Struckmann and De Catelle, 2021; Finckenberg-Broman, 2022; Hestermeyer, 2022; Pérez-Bernabeu, 2023. The Micula case involved a dispute over state aid granted to the Micula brothers (originally from Romania but bearing Swedish nationality). In the late 1990s, the Micula brothers invested in various sectors in Romania, and the Romanian government granted them incentives to encourage economic development in disadvantaged regions. However, in 2007, Romania joined the EU and committed to aligning its policies with EU rules, including those on state aid. Subsequently, Romania withdrew the incentives and demanded the Micula brothers to repay the aid received. The Micula brothers initiated arbitration proceedings against Romania, claiming that the withdrawal of incentives violated their rights and the bilateral investment treaty between Romania and Sweden. The arbitration tribunal ruled in favour of the Micula brothers, ordering Romania to compensate them for the withdrawal of state aid. Romania challenged the decision, arguing that it violated the EU state aid rules. The European Commission also opposed the enforcement of the award, contending that it would undermine the EU state aid framework. The case led to complex legal disputes involving issues of international investment law, EU law, and the interaction between the two. The legal battle raised questions about the relationship between investor-state arbitration and EU law, as well as the balance between protecting investors' rights and preserving the EU's ability to enforce its competition rules. The General Court stated that the European Commission had retroactively applied its competences to facts pre-dating the accession of Romania to the European Union on 1 January 2007, but the European Court of Justice (ECJ) treated the arbitral award as state aid, which was granted after Romania's accession to the European Union. See: CJEU, 25 January 2022, C-638/19 P, *Commission v. European Food SA and Others*, ECLI:EU:C:2022:50.

On the date on which the sums are entered, the enforcement measures by which attachments have been made and those by which distraints have been imposed on the assets of the state aid provider up to the date of suspension automatically lapse. The other acts of enforcement remain subject to the time limits and conditions for appeal laid down in the Code of Civil Procedure.

Proof of the deposit of the sums, by which the enforceable title has been enforced, shall be communicated by the provider to all persons against whom attachments and seizures have been established, who shall also be notified of the automatic termination of these measures.

Creditors who are dissatisfied with the amount of the sums recorded and the bailiff who is dissatisfied with the amount of the enforcement costs recorded may request the supplier to increase the amount. Within 15 days of receipt of the request for an increase, the state aid provider is obliged to settle the request. The person claiming to have suffered damage may lodge an action before the administrative court against the decision or the refusal to decide on the request within the time limit referred to above.

The state aid provider is obliged to amend the amount of the aid in the light of court rulings in any legal proceedings, by increasing or decreasing the amount of the aid within 30 days of the date on which those rulings become final.

Failure to pay the sums in time or to alter the amount within the legal time limit would result in the suspension of enforcement being lifted. If it is impossible to secure these funds, the sums required for deposit with the State Treasury may be allocated, by government decision, to the chief authorising officers from the budgetary reserve fund available to the government.

If the sums are deposited in the name of creditors, at the request of the state aid provider, accompanied by a copy of the decision of the European Commission on the initiation of the investigation procedure, the State Treasury shall freeze the amount deposited until the European Commission's decision on the compatibility of the state aid with the internal market is served to the provider.

Two possibilities exist: the European Commission may find the state aid compatible with the internal market, or it may find it incompatible.

In the first situation, upon completion of the investigation, the state aid provider must, within a maximum of five working days of receipt, communicate a copy of the European Commission's decision on the compatibility of the state aid with the internal market to the creditors and, where appropriate, to the bailiff. Upon receipt of the European Commission's decision finding the state aid to be compatible with the internal market, based on that decision, the freezing of the amount of aid or, where appropriate, the suspension of enforcement ceases. The state aid provider shall forward to the State Treasury the European Commission's decision and the list of individualised amounts that may be used by each creditor or bailiff as well as the identification data and specimen signatures of the persons who may order transactions from the account. Amounts credited in excess of the amounts due to creditors

or bailiffs shall be transferred by the State Treasury to a separate budget revenue account at the request of the state aid provider.

In the second case, within a maximum of five working days of receipt of the European Commission's decision finding the state aid incompatible with the internal market, the state aid provider shall serve this decision, which is enforceable, to the State Treasury and shall request enforcement by transferring the sums credited to a separate budget revenue account. From the date of service, the suspension of enforcement ceases, and enforcement may continue for any amounts still to be enforced as the difference between the enforceable title materialised by the European Commission's decision and the enforceable title invoked by the beneficiary in its favour.

Continuation of enforcement after the *ope legis* suspension and until its termination constitutes disciplinary misconduct and may, depending on the seriousness of the offence, be punishable by disqualification from the profession, if the acts do not constitute an act sanctioned under criminal law. The enforcement acts followed during the suspension become null and void. The disciplinary offence shall be established and sanctioned in accordance with Act No 188/2000 on bailiffs, republished, with subsequent amendments and additions.

8. Repayment, recovery, suspension, or provisional recovery of unlawful aid and misused state aid ordered by suppliers

Providers or administrators must order the recovery of state aid or *de minimis* aid where the conditions for granting the aid have not been respected, and where unlawful aid has been granted without fulfilling the compatibility conditions laid down in the applicable European legislation. The legal provisions on interest and recovery by the competent tax authorities are also applicable in this situation if the provider or administrator does not have its own enforcement bodies.

Pending the decision ordering the recovery of the state aid granted, the provider or the administrator may request the competent tax authorities to take preventative measures against the assets of the beneficiaries of state aid in an amount equivalent to the amount of unlawful or misused state aid estimated by the provider or the administrator.

Providers are obliged to inform the Competition Council within five working days after the final decision of the national courts on the recovery of state aid or *de minimis* aid. Suppliers are also required to submit to the Competition Council, for information, within five working days of adoption, their own decisions ordering the recovery of state aid or *de minimis* aid.

9. Role of national courts in the field of state aid

National courts will ensure the direct applicability of Art. 108 para. (3) of the TFEU by adopting any necessary measures in accordance with the applicable national procedural rules. The court's judgement may order, *inter alia*: suspension of payment of unlawful aid, recovery of unlawful aid, recovery of appropriate interest, and compensation for affected competitors. Courts will consider, in applying national legal provisions, the European Commission's decisions ordering the recovery of aid. National courts are obliged to verify whether the contested measure has been declared state aid by the European Commission or by the supplier. If the measure has been declared as state aid by the European Commission, the national court cannot alter the state aid character of the support measure. The Competition Council and/or the European Commission may intervene in the case as *amicus curiae*.

If the provider grants the aid in breach of the notification obligation or the cease-and-desist clause, national courts may take the necessary measures to protect the parties concerned, including by way of interim measures if appropriate. The beneficiary of unlawful state aid may not receive any further aid until all the measures ordered by the national court decision ordering recovery of the aid have been complied with, except aid to make good the damage caused by certain natural disasters.

Undertakings affected by the granting of unlawful aid may lodge an action against this measure before the Bucharest Court of Appeal.

In cases where recovery of state aid or *de minimis* aid has been ordered and the aid beneficiary is subject to insolvency proceedings, the national court conducting the insolvency proceedings will ensure immediate and effective enforcement of the recovery decision. The court will agree to enter the claim for repayment of the aid in question in the schedule of claims, together with the interest accrued thereon, up to the time limit laid down by national insolvency law applicable to all creditors. The ranking of the claim will be determined in accordance with Act No. 85/2014 on insolvency prevention and insolvency proceedings, as subsequently amended and supplemented, and will not be lower than that of ordinary unsecured claims. By way of derogation from the provisions of Act No 85/2014, the entry of the claim arising from a decision to recover aid must be followed by the recovery of the full amount of the aid or, if this is not possible, by the liquidation of the undertaking and the definitive cessation of its activity. In the case of recovery decisions issued by the European Commission, recovery must be affected within the time limit set by the Commission.

In a particular case, as the applicant pointed out, the granting of state guarantees to a company for taking a loan for the acquisition of another company constitutes individual state aid. As a result, the implementation of this individual state aid without notification to the European Commission constitutes illegal state aid. In this respect, it is for the national courts to prevent the implementation of unlawful state aid. National courts are often called upon to intervene in cases where a Member State authority has granted aid without respecting the obligation not to implement

the intended measures. This situation arises either because the aid was not notified or because the authority implemented the aid before obtaining the Commission's approval. The role of national courts in such cases is to protect the rights of persons affected by the unlawful implementation of aid. In the present case, it is important to note that, when the applicability of a state aid scheme is challenged with regard to a particular state aid measure, the national court can only assess the fulfilment of all the conditions of that scheme. The national court cannot and should not assess the compatibility of an aid measure where these conditions are not fulfilled, as this assessment remains the sole responsibility of the Commission. Further, for the national court to verify whether a measure is state aid or not, the state aid must actually be granted; hence, the application for annulment is premature. The Court held also that any interested party may also inform the Commission of any alleged unlawful aid and of any alleged misuse of aid.²⁰

10. Obligations of the provider or administrator and beneficiary of state aid or *de minimis* aid: Transparency

The provider or the administrator of a state aid or *de minimis* aid measure is obliged to inform the Competition Council of the entry into force of the support measure, as well as of any changes to the support measure, no later than 5 days after this event has taken place. These entities are also obliged to keep a record of the information regarding the aid granted for a period of at least 10 years from the date on which the last specific allocation was granted. This record must contain the information necessary to demonstrate compliance with all the conditions laid down in the granting act, such as, but without being limited to identification of the beneficiary, duration, eligible expenditure, amount, timing and method of granting the aid, origin of the aid, duration, method of calculation of the aid granted.

The beneficiary of a state aid or *de minimis* aid measure is required to maintain a record of the information regarding the aid received for at least 10 years from the date on which the last specific allocation was granted. This record must contain the information necessary to demonstrate compliance with all the conditions laid down in the granting act, such as: identification of the beneficiary, duration, eligible expenditure, amount, timing and method of granting the aid, origin of the aid, duration, and the method of calculating the aid granted.

The beneficiary is obliged to reply, within the deadline set by the Competition Council, to any request for information on the state aid or *de minimis* aid received. The deadline set by the Competition Council may not be less than five working days.

²⁰ Bucharest Courts of Appeals, chamber VIII for administrative and fiscal litigation, decision no. 676/2010.

The Competition Council's state aid website²¹ is the only national state aid website within the meaning of the EU rules for ensuring transparency of state aid measures. The Competition Council will publish on the state aid website all information related to state aid and *de minimis* aid measures implemented in Romania, in accordance with the EU rules on state aid.

Providers or administrators, where applicable, are also obliged to publish on their own websites the state aid and *de minimis* aid measures.

11. Contraventions and sanctions

National state aid rules are protected by a system of administrative liability. Thus, certain acts of state aid beneficiaries – such as providing incomplete information and documents, as well as failure to provide the requested information and documents within the deadlines set by the Competition Council or public authority suppliers; refusal to submit to control; failure to keep specific records on the state aid received – constitute contraventions and are punishable by a fine of between RON 5,000 and RON 40,000. The finding of contraventions and the application of sanctions shall be made by the persons empowered by the Competition Council or the suppliers. Complaints may be lodged with the District Court of Sector 1 Bucharest within 15 days of notification against the official reports of the finding and sanctioning of the contraventions provided for in the above.

The following acts of the suppliers or administrators also constitute contraventions and are punishable by a fine of between RON 5,000 and RON 40,000: providing incomplete information and documents, as well as failure to provide the requested information and documents within the deadlines set by the Competition Council; failure to comply with the procedure for approving regulatory acts with an impact on state aid; failure to take recovery measures ordered by decision of the European Commission; failure to forward to the Competition Council their own decisions on the recovery of state aid; and failure to maintain specific records on state aid granted.

These infringements shall be established and sanctioned by decision of the Competition Council Commission comprising three members of the Plenary of the Competition Council appointed by order of the President of the Competition Council. As an exception, these infringements shall be established and sanctioned by the decision of the Plenary of the Competition Council, at the reasonable request of at least one member of the Commission, formulated in cases with a high degree of complexity. The Competition Council's decisions will be argued and served to the parties involved within a maximum of 120 days of the deliberation and will be published on

21 *Consiliul Concurenței România* [Online]. Available at: www.ajutordestat.ro (Accessed: 15 January 2024).

the Competition Council's website for the legitimate interest of any party involved. Sanctions shall be imposed by the same decision that establishes the infringement. Decisions of the Competition Council establishing and imposing sanctions may be challenged by way of administrative action, which must be lodged at the Bucharest Court of Appeal, Administrative Litigation Section, within 30 days of the service of the contested decision.

Enforcement of fines for all contraventions listed here is subject to prescription (arising from the statute of limitations) within 3 years from the date of the offence.

The law also allows the Competition Council, if there is opposition to any control measure, to request the police to accompany and provide the necessary support to the control teams in the exercise of their powers.

12. Transitory state aid measures in crises

A recent testing of the state aid system was the context of the economic crisis created by the COVID-19 pandemic. Romania, like many other countries, implemented various measures to provide financial support and aid during the pandemic. The total cost of support measures related to COVID-19 amounted to 4.85% of the GDP in 2020.²² The main legal norm regulating these transitory tools of state economic intervention was Emergency Ordinance No 29/2020 on some economic and fiscal-budgetary measures, and its later modifications (Emergency Ordinances 90/2020, 99/2020 and 181/2020). The measures taken included economic stimulus packages and state aid for businesses. The Romanian government launched several economic stimulus packages to support businesses and individuals affected by the pandemic. These packages included financial assistance, tax breaks, and subsidies for various sectors. In March 2020, Romania announced an initial economic stimulus package to address the immediate impacts of the pandemic. This package included measures such as postponing tax payments, providing liquidity support to businesses through state-guaranteed loans, interest subsidies and subsidies for furloughed employees (75% of the employee's gross monthly salary, without exceeding 75% of the gross average wage). In July 2020, the Romanian government unveiled a second economic stimulus package aimed at supporting businesses and stimulating economic recovery. This package included measures such as reducing VAT rates for certain sectors, extending payment deadlines for taxes and utility bills, and providing financial aid to small- and medium-sized enterprises (SMEs). Throughout the pandemic, Romania continued to introduce additional economic stimulus measures to address evolving challenges and support businesses. These measures included targeted support for industries severely affected by the pandemic, such as tourism,

²² Fegyveresi and Szentpáli-Gavallér, 2022, p. 238.

hospitality, and transportation. Romania also provided state aid to businesses affected by the pandemic to help them stay afloat and retain employees and to cover expenses such as rent, utilities, and employee wages. These grants were often targeted toward SMEs and sectors facing significant financial hardships. The aid often was in the form of grants, loans, and subsidies. Businesses in Romania were granted tax relief measures, including deferrals of tax payments and reductions in tax rates for certain sectors. These measures aimed to alleviate financial burdens on businesses and improve cash flow during the challenging period. The government facilitated access to financing for businesses by offering state-guaranteed loans with favourable terms and conditions. These loans were provided through financial institutions and aimed to support businesses in maintaining operations and retaining employees. Certain industries, such as tourism, hospitality, and entertainment, received targeted state aid to help them deal the adverse effects of the pandemic. This support included financial assistance, tax incentives, and promotional campaigns to stimulate demand (sector-specific support). These economic stimulus packages and state aid measures were part of Romania's broader efforts to mitigate the socio-economic impact of the COVID-19 pandemic and support businesses through unprecedented challenges.²³

13. Indirect aid

Tax relief in Romania is a form of indirect state aid aimed at promoting specific economic activities, regions, or sectors while providing financial incentives to eligible taxpayers. Tax relief measures are governed by national legislation and the EU state aid rules. Tax relief measures in Romania are primarily regulated by Law No. 227/2015 of the Tax Code. This law establishes the general framework for taxation in Romania and includes provisions related to tax incentives, exemptions, deductions, and credits. As a principle, the Tax Code states in Art. 4 that any measure of a fiscal nature that constitutes state aid shall be granted in accordance with the legal provisions in force on state aid. The detailed fiscal measures are regulated by Law No. 207/2015 regarding the Tax Procedure Code. Romania offers various tax incentives to stimulate economic growth, investment, and innovation. These incentives may include reduced corporate income tax rates for certain activities or regions, tax deductions for research and development expenditures, and tax credits for investments in specific sectors. Tax relief measures may also be used to support regional development objectives in line with the EU state aid rules. Romania has implemented regional aid schemes to promote investment and job creation in less developed regions, including tax incentives for companies operating in designated areas. Tax relief measures must comply with the EU state aid rules to prevent distortions of

23 For further details, see: Fegyveresi and Szentpáli-Gavallér, 2022, pp. 238–243.

competition in the internal market. The European Commission's guidelines on regional aid and other forms of state aid provide criteria and conditions for assessing the compatibility of tax relief measures with EU regulations.

Tax relief measures in Romania serve as important tools to support economic development, stimulate investment, and encourage innovation while ensuring compliance with the EU state aid rules. Eligible taxpayers may benefit from various tax incentives designed to promote specific activities or regions and contribute to the country's overall growth and competitiveness.

14. Decisions regarding illegal state aid and general conclusions

The reality of state aid is a highly complex and interesting phenomenon in the economy of every state. It is worth looking at how it works through a few examples. The European Commission launched a total of 22 formal investigations regarding state aid in Romania between 2007 and 2024 and issued eight negative decisions with recovery, as shown in Table 1:

Table 1: European Commission decisions regarding illegal state aid in Romanian cases

Case number	Illegal aid	Last decision date	Type of illegal state aid (aid instrument)
SA.62829	Restructuring aid to Blue Air	16.02.2024	Guarantee
SA.36086	Aid to Oltechim	30.06.2022	Debt write-off
SA.48394	Restructuring of National Uranium Company (Companiei Nationale a Uranului CNU)	24.02.2020	Debt write-off Direct grant Equity intervention
SA.43549	Aid to CFR Marfa	24.02.2020	Equity intervention
SA.38517	Micula v Romania (ICSID arbitration award)	07.12.2018	Tax advantage or tax exemption
SA.43785	Aid to CE Hunedoara	08.11.2018	Loan/repayable advances
SA.33475	Incompatible aid through preferential tariffs in contracts between Hidroelectrica S.A. and thermoelectricity sellers	20.04.2015	Preferential tariffs

Case number	Illegal aid	Last decision date	Type of illegal state aid (aid instrument)
SA.24127	Privatisation of Automobile Craiova, Romania	27.02.2008	Debt write-off Guarantee

An ongoing complex case is of the national air operator Tarom, recipient of important state aid packages and practically in a permanent status of crisis (17 general directors in 7 years; approximate state aid of EUR 120 million in the last three years; 18 years of economic losses). The continuous restructuring of the company is expected to resume in 2024, anticipating the approval of the European Commission for new state aid. Questions are raised on (i) whether the proposed restructuring plans are adequate to resolve Tarom's difficulties and to restore its long-term viability within a reasonable timescale without further state aid; (ii) whether Tarom or market operators would sufficiently contribute to the restructuring costs, thereby ensuring that the restructuring plan does not rely excessively on public funding and that the aid is proportionate; and (iii) whether the restructuring plan would be accompanied by appropriate measures to limit the distortions of competition created by the aid.²⁴ The company's restructuring plans are mainly aimed at fleet renewal, restructuring measures, and commercial optimisation (re-optimisation of routes, renegotiation of contracts with suppliers, closure of unprofitable agencies, etc.), organisational efficiency measures, measures to cost optimisation measures (e.g. aimed at reducing fuel consumption and handling costs), as well as covering cash shortfalls. The total cost of the restructuring is estimated at EUR 408.4 million. To make it functional, the restructuring needs to be financed by state aid of EUR 190.7 million (rescue aid, grants, and capital increase to cover advance payments for acquisition of new aircrafts). Recently (January 2024), in the case *Wizz Air Hungary v Commission*²⁵ the Court of Justice of the EU considered that one of the important aids granted to Tarom is compatible with European Union law. The Court emphasised that the size of the market in question does not diminish the significance of a service provided within it, such that its disruption could lead to severe social hardship or constitute market failure. This is evident in the case of Tarom's potential cessation of operations, which would adversely affect connectivity in regions exclusively served by the airline and the economic conditions of those areas. Consequently, the Commission was not obligated to consider the size of Tarom's operating market or its market share when assessing the risk of disrupting a service crucial to Romanian society. Additionally, the Court rejected Wizz Air's arguments regarding the potential replacement of Tarom by its competitors on domestic routes exclusively serviced by the former, as well as the recurrent provision of state subsidies to Tarom and other legal arguments presented by Wizz Air.

²⁴ See: case SA.59344.

²⁵ CJEU, 11 January 2024, C-440/22, *Wizz Air Hungary v Commission*, ECLI:EU:C:2024:26.

The latest (February 2024) case is related to the air operator Blue Air. The Commission ordered recovery of EUR 33.84 million (RON 163.8 million) state aid. The European Commission concluded that Blue Air's restructuring plan was not capable of restoring the airline's long-term viability and is therefore incompatible with the EU state aid rules, specifically with the guidelines on state aid for rescuing and restructuring non-financial firms in difficulty (the Rescue and Restructuring Guidelines').²⁶

Despite efforts to maintain and operate the state aid system in line with EU law, occasional investigations by the European Commission into the legality of state aid measures underscore the importance of ensuring compliance with established regulations. These investigations are vital because they serve as a mechanism for upholding fair competition, preventing market distortions, and safeguarding the integrity of the EU's single market.

When the European Commission opens investigations into state aid measures, it does so to evaluate whether these measures comply with EU regulations. This scrutiny is necessary because state aid, if misused or provided in a manner that distorts competition, can have adverse effects on the functioning of the internal market. It can lead to unfair advantages for certain companies, hinder cross-border trade and investment, and disrupt the level playing field essential for healthy competition. In cases where state aid measures are found to be illegal, the European Commission takes corrective actions to address the situation. This could include requiring the Member State to recover the aid from the beneficiary, imposing fines, or demanding changes to the aid measure to make it compliant with EU rules.

Despite occasional instances of state aid measures being found illegal, operating a state aid system in line with EU law remains essential for the economy as a market corrective. State aid, when used appropriately, can play a constructive role in addressing market failures, fostering innovation, and promoting regional development. It can support strategic industries, facilitate research and development, and contribute to job creation and economic growth. However, it is crucial that state aid is provided in a transparent, non-discriminatory, and market-oriented manner, consistent with EU rules. By ensuring compliance with these principles, state aid system can effectively contribute to a fair, competitive, and well-functioning internal market within the EU.

In summary, while investigations into state aid measures may occur, operating a state aid system in line with EU law remains indispensable for correcting market failures and promoting economic development. These efforts help maintain fair competition, prevent market distortions, and uphold the principles of the EU's single market, ultimately benefiting businesses, consumers, and the economy as a whole.

²⁶ Case SA.62829.

Bibliography

- Alexe, I. (2017) 'Considerations Regarding the Attributions of the Prefect in the Field of State Aid', *Law Review*, 7(2), pp. 120–132; <https://doi.org/10.2139/ssrn.3097316>.
- Almășan, A. (2021) *Dreptul concurenței*. București: Hamangiu.
- Almășan, A., Bogrea, S. (2019) 'State Aid and Public Procurement Procedures in Romania', *Romanian Public-Private Partnership Law Review*, 7(1), pp. 32–42.
- Bernabeu, B. P. (2020) 'Taxation, State Aid Rules and Arbitral Courts: a BIT of a Mess in the Micula saga', *European State Aid Law Quarterly*, 19(3), pp. 329–38; <https://doi.org/10.21552/estal/2020/3/9>.
- von Borries, R. (2006) 'State Aid Control in Romania', *European State Aid Law Quarterly*, 5(3), pp. 509–518; <https://doi.org/10.21552/ESTAL/2006/3/84>.
- Fegyveresi, Zs., Szentpáli-Gavallér, P. (2022) 'Where is the 'Special Legal Order' Heading in Romania?' in Nagy, Z., Horváth, A. (eds.) *Emergency Powers in Central and Eastern Europe: from Martial Law to COVID-19*. Budapest: Ferenc Mádl Institute of Comparative Law, Central European Academic Publishing, pp. 221–246; https://doi.org/10.47079/2022.znah.epicaee.1_9.
- Finckenberg-Broman, P. (2022) 'The Breaking Point: The Micula Award' in *Weaponizing EU State Aid Law to Impact the Future of EU Investment Policy in the Global Context*. Cham: Springer International Publishing, pp. 129–157; https://doi.org/10.1007/978-3-031-10108-3_4.
- Hestermeyer, H. (2022) 'When regimes collide: Micula—and the fragmentation of the international legal system', *EULaw Live*, 11 February. [Online]. Available at: <https://eulawlive.com/op-ed-when-regimes-collide-micula-and-the-fragmentation-of-the-international-legal-system-by-holger-hestermeyer/> (Accessed: 3 January 2024).
- Matei, E. (2016) SA.38517 – Commission Decision of 30 March 2015 on State Aid Granted by Romania to Micula', *European State Aid Law Quarterly*, 15(1), pp. 134–141.
- Momic, M. (2019) 'Can an ICSID Award be State Aid? – Cases T–624/15, T–694/15 and T–704/15 Micula – Annotation by Marija Momic', *European State Aid Law Quarterly*, 18(3), pp. 346–351; <https://doi.org/10.21552/estal/2019/3/12>.
- Niță, M. (2018) 'New Approaches to the Notion of State Aid from the Perspective of the Concept of Enterprise', *Valahia University Law Study*, 32(2), pp. 27–36.
- Northmore-Ball, L., Harvey, J., Courtier, A. (2021) 'Micula v Romania – A Saga of Lasting Significance', *European Investment Law and Arbitration Review Online*, 6(1), pp. 74–103; https://doi.org/10.1163/24689017_0601004.
- Pérez-Bernabeu, B. (2023) 'State Aid Through Arbitration Awards: EU Law as a Ground for Non-enforcement', *Intertax*, 51(3), pp. 219–231; <https://doi.org/10.54648/TAXI2023006>.
- Pop, G., Iooty De Paiva Dias, M., Bruhn, M., Ruiz Ortega, C., (2021) *Design for Impact: A State Aid Evaluation for Romania*. Washington D. C.: World Bank Group; <https://doi.org/10.1596/978-1-4648-1703-8>.
- Schütterle, P. (2007) 'New Romanian State Aid Procedure Legislation', *European State Aid Law Quarterly*, 6(2), pp. 145–150; <https://doi.org/10.21552/ESTAL/2007/2/98>.
- Struckmann, K., De Catelle, W. (2021) 'State aid and international investment arbitration: the Micula case – taking stock in an ongoing saga', *ERA Forum*, 22(1), pp. 101–117; <https://doi.org/10.1007/s12027-021-00655-9>.
- Toader, T., Safta, M. (2016) 'Relationships between National, International and European Law within the Constitutional Review in Romania', *Constitutional Law Review*, pp. 91–107; <https://doi.org/10.47743/rdc-2016-1-0006>.