

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 2 on Competition and Regulation****Ensuring Competitive Neutrality through the State Aid Policy– Note by Romania****Tools for addressing Competitive Neutrality****3 June 2019**

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Romania

1. General remarks

1.1. National Procedural Framework on State Aid, the role of Competition Council

1. In Romania, the EU rules on State aid apply in the same extent to public enterprises (SOEs) and to private enterprises (POEs).
2. The Competition Council (CC), by law (GEO No. 77/2014), has the role of national authority in the field, which ensures the interface between the authorities, the beneficiaries of aid and the EC. The Competition Council assists the central and local public authorities in the drafting and implementation of the measures designated to support the enterprises from public funds, including in SOEs financing operations, where appropriate.
3. All authorities in Romania are required to request in advance the opinion of the CC on any measures of State aid nature which they intend to initiate. Moreover, the Government and the Parliament (often at the request of Ministry of Public Finances or Ministry of Justice) request the CC's opinion on draft normative acts that would have the potential to impact competition by directly or indirectly supporting certain categories of enterprises.

1.2. CC's recommendations in the context of SOEs funding

4. SOEs have a multiple role in Romania:
 - may carry out non-commercial/regulatory activities (for example in the field of ports, airports)
 - provide services of general economic interest (transport, energy, utilities, health etc.)
 - provide genuine economic activities and can be beneficiaries of State aid (under similar conditions to POEs) within the limits of European legislation
 - can be instruments through which the State exerts influence to support other entities and can therefore turn themselves into State aid providers (for example if they conclude contracts below the market price for their services/products, especially in the utilities sector, or if they do not execute receivables on other enterprises with the same diligence as a private creditor, etc.)
5. CC, through its views and recommendations, aims to ensure the equal and non-discriminatory treatment of POEs and SOEs.
6. In the case of SOEs financing, the methods of ensuring the competitive neutrality that the CC takes into account in its recommendations, in line with the European legislation in the field of State aid, are:
 - in the case of SOEs providing public services of general economic interest (for example transport, district heating, water, health, airports etc.), to finance them in a transparent manner strictly to cover the net costs induced by that public service obligation and a reasonable profit.

- the use of open, transparent, unconditional competitive procedures for the purchase of any goods and services by the State/SOE, concessions, sale of public goods, etc.

7. In the case of public utility services contracts directly entrusted to SOEs *in house operators*, the obligation for these to be analysed by the CC was introduced by law, precisely to limit the effects on competition. Although the direct entrustment of public utilities to in-house operators is allowed by national legislation, including the European Public Procurement Directive, in its evaluation the CC requires to the authorities to substantiate the need for the direct award of the delegation contract as opposite to the public tender (market failure, urgency measure, efficiency). The obligation to carry out a study of opportunity for justifying the award procedure and the limitation of the duration of these contracts, usually at 5 years, has been introduced into the national legislation on public utility services.

- transactions involving the transfer of public resources/waiving the right of collection between the state and the SOE are, in principle, in line with market terms (*pari passu* transactions, assessments on the basis on benchmarking etc.), such as:
- loans/guarantees granted to SOEs from public sources to be under market conditions;
- if the State, as a shareholder, intends to increase the share capital of an SOE/to invest in an SOE, to carry out a prior analysis of the measure's profitability from the perspective of a prudent private investor (internal rate of return consistent with the market where the SOEs are performing their activities) – *private investor test*;
- if a public authority is a creditor of an SOE under financial difficulty (it has a receivable to be collected from it - taxes, fees, royalties etc.), it should consider its available options, similar to any private creditor, for recovery of its receivable, according to national legislation in field of insolvency (forced execution/liquidation of the company versus its restructuring) - *private creditor test*.

8. An example of such a case, namely a State aid granted to a SOE in the process of the public debts restructuring, is Oltchim. An interesting case from this point of view, with a SOE as beneficiary and other SOEs as State aid providers, their behaviour in the insolvency procedure being determinant.

2. OLTCHIM CASE - COMPETITIVE NEUTRALITY IN THE CONTEXT OF APPLYING STATE AID AND INSOLVENCY LAW

2.1. Background

9. Oltchim is one of the largest petrochemical companies in Romania and South-East Europe. The Romanian State (currently via the Ministry of Economy) maintains a controlling stake of 54.8% in the company.

10. Oltchim is the main industrial employer in Valcea area (a Romanian less developed area). In 2015 Oltchim had 2,208 employees.

11. The company had a long history of economic difficulties, starting with 1995. It contracted state-guaranteed loans, which could not be reimbursed, banks having executed government guarantees. Due to this fact, Oltchim became a debtor to the Romanian State (AAAS), a debt which could not be paid, accruing penalties and interests.

12. Romania made several attempts to privatise Oltchim 2001-2008 but all failed.

13. In order to increase the attractiveness of privatisation, in 2012 the Romanian State (the owner and the main creditor of the company) decided to swap Oltchim' debts into shares, worth about 231 million euros, after analysing the options at its disposal, respectively the option consisting in the liquidation of the company.

14. The European Commission (EC) decided that the operation does not constitute State aid, as the Romanian State has firmly committed itself to privatise the company as soon as possible, considering the public creditor (AAAS) would have recovered more of its claims from the privatisation of the company than from the liquidation - *the private creditor test under normal market conditions*.

15. Privatisation has failed because of the minority shareholder opposition and the conversion has not been achieved. At the beginning of 2013, the company entered into insolvency, being administered by a consortium of official receivers.

2.2. Ensuring competitive neutrality for an enterprise under insolvency

16. In March 2015, the Creditors' Assembly approved the Reorganization Plan, and later it was confirmed by the syndic judge. The reorganization plan implied the transfer of viable assets and the business to a newly established company, a Romanian legal entity called Oltchim SPV, whose unique associate will be Oltchim. Oltchim SPV would then have been sold to an investor.

17. The reorganization plan also involved the restructuring of debts, namely hair-cut on the receivables of private and public creditors (cancellation of a percentage of debts).

18. The main creditors of the company were: public creditors - AAAS and state companies (suppliers of utilities and raw materials) and private (for example banks having secured receivables).

19. In the case of the Oltchim's reorganisation, under insolvency procedure, the private creditors with guaranteed (secured) receivables would have recovered 73-80% of the debts and the public ones (state budgetary, utilities suppliers, and other SOEs unsecured creditors) between 0% and 30% of the debts.

20. The question was whether the public creditors (both authorities and state-owned enterprises, suppliers of utilities and raw materials) acted in accordance with the principle of competitive neutrality in voting on Oltchim's reorganization plan and accepting the cancellation of such a large proportion of debts; if they aimed at maximizing the debt recovery degree (as any private creditor) or if their decision was influenced by the fact that Oltchim was a SOE that should have been saved for social reasons, etc.

21. The instrument used to determine how the principle of competitive neutrality was respected in this case was *the private creditor test* applied to the specific national framework of insolvency proceedings.

22. EC investigated the case and concluded that some of the public creditors would have obtained a higher degree of recovery from the liquidation of the company than from

the reorganization, so it would have been economically rational to vote against the reorganization program. They were therefore considered to have offered incompatible State aid to Oltchim, which must be recovered (approximately EUR 335 million), plus the interests. Even the lack of state reaction/the non-execution of debts up to the moment of entry into insolvency and the fact that one of the state-owned electricity suppliers did not interrupt the supply although they did not collect their receivables on time was also considered a State aid measure.

2.3. The issue of economic continuity in selling Oltchim

23. However, in the meantime, the reorganization program was adjusted for the sale on functional assets (and not as a business as originally provided), in order to avoid economic continuity and the risk that the potential incompatible state aid would be transferred to the buyer (the successor of Oltchim).

24. Thus, the assets were sold through an open, transparent and unconditional tender procedure, at the best price, in accordance with the principle of economic discontinuity, under the application of both the national insolvency law and European State aid rules and those on economic concentration. The buyer opted for the re-employment of many of Oltchim's employees.

25. The EC Decision confirmed that the sale of viable assets complied with the principle of economic discontinuity, so that the illegal and incompatible aid would not be recovered from the buyer. These must be recovered from the "old" Oltchim, a company that still holds only non-functional assets and has entered a liquidation procedure anyway.

26. Oltchim is in our opinion a successful case in restructuring a state-owned company with losses, having successfully saved the viable part and the majority of jobs, while at the same time ensuring a balance in terms of competition distortion. The Oltchim case is an example of how the application of the national insolvency law and the European law in the field of State aid and even in the field of economic concentrations has been combined for a good purpose. At the same time, it is an example of a good collaboration between all the actors involved in this case (public authorities, the European Commission, the Competition Council, the judicial administrators, the consultants employed by Oltchim).