

## STATE AID TO THE ROMANIAN STEEL AND COAL SECTORS: ISSUES RELATED TO ACCESSION\*

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**Abstract.** *This article aims to offer to the non-specialist reader a concise introduction to the main elements of the state aid acquis, and inform on what lies ahead of Romania in the accession process in relation to state aid control, based on the precedent of the 2004 enlargement. It also discusses the current state of affairs in Romania in the domain of state aid control, with a particular view to the situation of the steel and coal sectors. Section I covers the legal concept of state aid, the substantive rules applicable to state aid – the general ban and exemptions from it, the Commission’s control and monitoring powers, and the regime currently applicable to coal and steel aid. Section II relates the experience of the countries that joined the EU in May 2004 in the negotiation of state aid issued under the Competition Chapter, discusses the notion of “existing aid” (i.e. state aid given in the candidate countries previous to accession but which continues to produce effects after accession) in the context of enlargement, and overviews the agreed transitional arrangements. Section III turns to the legislative and institutional context for the control of state aid in Romania, and to topical issues related to state aid in the context of the negotiations on the Competition Chapter.*

### Introduction

At the time of writing this article, a Romanian team of negotiators is preparing to fly to Brussels for a new round on the Competition Chapter. This, together with Justice and Home Affairs, are the two remaining open negotiation chapters, which Romania hopes to conclude very soon so as to be able to sign the Accession Treaty in Spring 2005. The pending issues under the Competition Chapter are related to state aid. One is that Romania still cannot prove a “credible enforcement record” in the field of state aid - while this is one of the essential criteria for closing negotiations on competition, along with the adoption in full into national legislation of the state aid acquis and the establishment of an adequate administrative capacity for implementing it. The other is state aid for the restructuring of the Romanian steel industry.

State aid control is therefore one of the hot issues of the moment in Romanian political, institutional and business circles, as well as for the press. It remains, however, one of the areas of EC law that is least known and understood by the public. One of the purposes of this article is offer an accessible guidance to the non-specialist reader as to the main elements of the state aid acquis. The other is to inform those directly interested (academics, but also institutions involved in the granting of state aid and the business community) about what lies ahead in the accession process in terms of state aid regulation – based on the precedent of the countries that joined the EU in the 2004 enlargement – and on the current state of affairs in Romania in the domain of state aid control, with a particular view to the situation of the steel and coal sectors.

\* This article draws on a study carried out in the context of the Pre-Accession Impact Studies II program of the European Institute in Romania. See Gheorghe Oprescu, Isabela Atanasiu, Mariana Papatulica and Petre Prisecaru (2004): *State Aid Control in the Sensitive Sectors – Coal, Steel, Shipbuilding, Motor Vehicles* (English and Romanian versions available at <http://www.ier.ro>).

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The article is structured as follows: Section I is an introduction to the EC state aid control system, covering the following aspects: the elements defining the concept of state aid; the structure of the substantive law applicable to state aid – the general ban and exemptions from it; and the procedures according to which the Commission reviews and monitors state aid granted in the EU. In addition, this section overviews the regime currently applicable in the EU to steel and coal aid. Section II relates the experience of the countries that joined the EU in May 2004 in the negotiation of the Competition Chapter - state aid issues in particular, and explains the mechanism adopted for the review of “existing aid”, i.e. aid given in the candidate countries previous to accession but which continued to produce effects after accession. Section III briefly describes the legislative and institutional context for the control of state aid in Romania, and includes some comments on the remaining topical issues related to state aid in the context of the negotiations on the Competition Chapter. Section IV concludes by summarising the main findings.

## I. THE STATE AID ACQUIS

### General notions

#### 1.1. Definition of state aid

The EC notion of state aid goes beyond what is commonly referred to as “industrial subsidies”, to cover a variety of state measures and transactions that confer support to industrial or service firms in so far as having anticompetitive consequences. Aid measures are singled out according to their

effects, rather than objectives, form or content. This effects-based approach in the application of EC state aid rules allows the European Commission to exert control over a wide spectrum of anticompetitive measures undertaken in the Member States, ranging from economic regulation to transactions between the state and individual firms. This approach is at the same time somewhat challenging for those directly involved in the aid operation - aid donors and beneficiaries, for a good understanding of the EC notion of state aid is required in order to determine whether a support initiative falls under the scope of EC state aid rules, especially when support is indirect. In Romania, similar to the case of other transition economies that have recently joined the EU, indirect aid instruments are often preferred over the ‘classical’ direct subsidies, due to the existent budgetary restraints. Therefore, a good understanding of the conditions under which indirect support measures may be qualified as involving state aid is furthermore important.

What follows is not an exhaustive discussion of the legal definition of state aid,<sup>9</sup> but a concise introduction to the subject for the readers of this publication who are less familiar with EC competition law.

The Treaty itself does not offer a straightforward definition of state aid. Article 87(1) EC prohibits “any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods [...] in so far as affecting trade between the Member States [...]” (emphasis added) The European Commission and EC courts have interpreted this provision to indicate four cumulative conditions

<sup>9</sup> For a more detailed discussion on the legal definition of state aid, see e.g. Carl Baudenbacher (1999): *A Brief Guide to European State Aid Law*, London: Kluwer Law International; Malcolm Ross (2000): “State aids and national courts: definitions and other problems”, *Common Market Law Review* vol. 37, pp. 401-423; European Commission (2003): *Vademecum – Community Rules on State Aid* (available at [http://europa.eu.int/comm/competition/state\\_aid/others/Vademecum/Vademecumen2003\\_en.pdf](http://europa.eu.int/comm/competition/state_aid/others/Vademecum/Vademecumen2003_en.pdf)); for a discussion on the legal definition of state aid and the soft budget phenomena arising in transition economies, see Isabela Atanasiu (2001): “State Aid in Central and Eastern Europe”, *World Competition* vol. 24, no. 2, pp. 257-283.

under which a state measure or a transaction involving the state is qualified to involve state aid.

**These are as follows:**

- transfer of state resources;
- the conferring of an economic advantage to the beneficiary firm(s);
- selectivity of the measure; and
- cross-border distorting effects.

**Transfer of state resources.** Article 87(1) EC stipulates that state aid can be granted “by the state or through public resources”. This formulation was interpreted to have two implications. First, the notion of state aid covers both support measures directly implemented by public bodies (government, regional and local administrations) as well as those implemented by private bodies acting on behalf of the state (e.g., a commercial bank offering subsidised loans or loans based on state guarantees, or managing a state-funded SME aid scheme).<sup>2</sup> Second, the notion of state aid covers not only measures involving a direct expenditure from the state’s coffers (e.g., direct subsidies or subsidised loans), but also measures implying a loss of revenue for the state (e.g. waivers or postponed payment of public debts, the reduction or postponement of tax and social security contribution payments). For example, in *DTM*,<sup>3</sup> a case involving postponement for 8 years of the social security payments due by a firm in difficulty (DMT) to the Belgian institution responsible for collecting such payments (the ONSS), the European Court of Justice (ECJ) decided that, as long as social security contributions are imposed by law and administered by the ONSS on its basis, such contributions must be

qualified as state resources. In *PreussenElektra*,<sup>4</sup> instead, the ECJ established that the German law obliging electricity suppliers to purchase German-produced electricity from alternative resources at a pre-established minimum price did not involve state aid, because it did not imply any transfer of state resources.

**Economic advantage.** ECJ jurisprudence has established from the early years of application of the Treaty of Rome that the notion of state aid comprises “any support measure, whatever its form, that has as an effect the reduction of the expenses normally borne by undertakings, even if it is not a subsidy, but it has the same nature and effects” (emphasis added).<sup>5</sup> This condition is more problematic to verify in the case of indirect support measures, where it is more difficult to identify and measure the effect of reducing the expenses normally borne by a firm. The European Commission has developed an analytical tool for this purpose, known as “the market economy investor principle” (MEIP), which consists of comparing the behaviour of the body implementing the support measure with that of a private investor acting in similar circumstances.<sup>6</sup> Although the MEIP instrument appears to be quite straightforward, in practice it is often difficult to identify the appropriate comparison benchmark. In *Alfa-Romeo and ENI-Lanerossi*,<sup>7</sup> the ECJ established that, whenever a public institution implements a support measure in the context of a wider economic policy strategy, this behaviour must be measured against that of a holding company seeking to increase its profits in the medium to long-term, rather than that of a company seeking short-term profit. In *DMT*,<sup>8</sup> the

<sup>2</sup> See in this sense *Joint Cases C-72/91 and 73/91 Sloman Neptun -1993- ECR I\_887, Joined Cases C-52/97 and C-54/97 Viscido -1998-, Case C-379/98 PreussenElektra -2000- ECR I-2099.*

<sup>3</sup> *Case C-256/97 Déménagements Manutention Transport SA (DMT) -1999- ECR I-3913.*

<sup>4</sup> See *supra* note no. 3.

<sup>5</sup> See *Case 30/59 De Gezamenlijke Steenkolenmijnen in Limburg v. High Authority* §1961† ECR 19.

<sup>6</sup> For a detailed analysis of the MEIP, see e.g. Giuseppe Abbamonte (1996): “Market Economy Investor Principle: A Legal Analysis of an Economic Problem”, *European Competition Law Review* no. 4, pp. 259-268; for recent developments of the jurisprudence in this area, see Marc Hansen, Anne van Ysendyck, Susanne Zühlke (2004): “The Coming of Age of EC State Aid Law: A Review of the Principal Developments in 2002 and 2003”, *European Competition Law Review* no. 4, pp. 202-233, discussing *inter alia* the recent *Altmark* judgment – *Case C-280/00 Altmark Trans GmbH et al. v. Nahverkehrsgesellschaft Altmark GmbH*, judgment of 24 July 2003 (not yet reported) – on whether the compensation paid for performing public service obligations contains state aid.

<sup>7</sup> *Case C-305/89 Italy v. Commission (Alfa Romeo) -1991- ECR I-1603; Case C-303/88 Italy v. Commission (ENI-Lanerossi) -1991- ECR I-1433.*

<sup>8</sup> See *supra* note no. 3.

Court established that the tolerance shown by the Belgian ONSS towards DMT should be compared to that of a private creditor, who may also decide to postpone payments from debtors in financial difficulty for the purpose of allowing them to recover, and thus eventually pay their debts. In *Seleco*,<sup>9</sup> the ECJ addressed the question of whether the acquirer of assets is liable for the recovery of illegal aid that was granted to the seller prior to the acquisition (a question of high relevance in privatisation contexts). The *Seleco* judgment establishes that, if the acquirer has paid a market price for its acquisition, it has not received through the transaction any economic advantage that could be considered as state aid, and thus it cannot be considered liable for the repayment of the illegal aid previously granted to the seller.

Selectivity. Article 87(1) EC is applicable to support measures that “favour certain undertakings or the production of certain goods”, or in other words, are selective. The selectivity criterion entails a distinction between support measures of a general character, which are available on the same conditions to all firms, irrespective of the economic sector in which they operate or their location within the same jurisdiction, and those that confer an advantage only to certain firms or sectors of activity, and whose distorting potential is presumably higher.<sup>10</sup> Examples of support measures found to be selective are *Maribel bis/ter*<sup>11</sup> – a Belgian law reducing the rate of social security contributions for manual workers, which favoured manual labour-intensive sectors with respect to others –

and *CETM*<sup>12</sup> – a Spanish law whereby the state subsidised loans for the purchase industrial vehicles by physical persons, SMEs, public institutions and public transportation companies. Admittedly to this date the selectivity condition is not defined very precisely in EC law and jurisprudence. The Commission and the EC courts seem to apply a presumption of selectivity to all measures that do not have a straightforward general character, thus passing the burden of proving the contrary to the Member State where the measure was initiated.<sup>13</sup> Moreover, support measures that apparently have a general character will nevertheless be qualified as selective if the institutions/bodies empowered to implement them enjoy a certain degree of discretion in their application. In *Ecotrader*<sup>14</sup> and *Piaggio*<sup>15</sup> an Italian law establishing a procedure for passing large firms in difficulty under the administration of the Ministry of Industry in view of their restructuring was found to be selective because: *i*) the criteria for selecting the firms to benefit from this procedure were discretionary; *ii*) the Ministry of Industry was given discretion to decide which of the selected firms could continue their activity. In *DMT*,<sup>16</sup> the Belgian ONSS was in the position to decide in a discretionary way whether and for how long the payment of social security contributions could be postponed for its debtors.

Some specific issues arise in the application of the selectivity test to taxation measures. In a Notice on fiscal aid<sup>17</sup> the Commission indicated that some tax measures normally qualifying as

<sup>9</sup> *Joined Cases C-328/99 and C-399/00 Italian Republic and SIM 2 Multimedia SpA v. Commission (Seleco)* -2003- ECR I-4035.

<sup>10</sup> See e.g. *Case C-241/94 France v. Commission* -1996- ECR I-4551; *Case C-200/97 Ecotrader* -1998- ECR I-7907; *Case C-75/97 Belgium v. Commission* -1999- EC I-3671.

<sup>11</sup> *Case C-75/97 Maribel bis/ter* -1999- ECR I-3671.

<sup>12</sup> *Case T-55/99 CETM* -2000- ECR II-3207.

<sup>13</sup> See *Malcolm Ross (2000)*, as cited in *supra* note no. 1, at p. 406.

<sup>14</sup> See *supra* note no. 10.

<sup>15</sup> *Case C-295/97 Piaggio* -1999- ECR I-3735.

<sup>16</sup> See *supra* note no. 3.

<sup>17</sup> *Commission Notice on the application of state aid rules to measures relating to direct business taxation*, OJ C 348 of 10.12.1998.

selective might nevertheless be considered not to involve state aid if the selectivity element is “justified by the nature of the [general taxation] system”. The distinction between selective tax schemes and those where selectivity is justified in the general context of the taxation system applicable in a given jurisdiction is not very clear. More straightforward is, however, that taxation facilities which are available to all firms, irrespective of sector or location, and on the same terms, and where the fiscal authorities do not enjoy discretion in implementation, qualify as having a general character and therefore fall outside the scope of EC state aid rules.

Cross-border distortion of competition. Article 87(1) EC applies only to support measures that distort competition on a cross-border dimension. The Commission presumes that this condition is met whenever the aided firm operates on a market where there is intra-community trade.<sup>198</sup> Moreover, even if the aided firm is not engaged in exporting, aid is assumed to help maintain or increase domestic production, with the consequence of limiting the possibilities of producers from other Member States to export on that market.<sup>199</sup> In other words, there appears to be an almost automatic assumption that aid to firms operating on a market where there is intra-community trade will harm competition, with the exception of *de minimis* aid (i.e. cases where total aid received over a period of three years by one beneficiary, irrespective of form and objective, does not exceed 100,000 euro<sup>200</sup>).

### **1.2. Substantive rules: exemptions from the ban**

Article 87 EC establishes a general ban on support measures that qualify as involving state aid according to the above-mentioned criteria, but

also lays down exemptions from it. The exemptions from this ban mentioned in Article 87(2) EC – including social aid, aid granted directly to consumers, aid granted to compensate damages resulting from natural disasters and other exceptional occurrences – are automatic, whereas those listed in Article 87(3) EC are applied by the Commission, following an evaluation of the objectives and effects of aid. In particular, the Commission is empowered to approve:

- “aid to promote the economic development of certain areas where the standards of living are very low or unemployment is very high” (Article 87(3)(a) EC); and
- “aid to facilitate the development of certain economic activities or certain economic areas, where such aid does not adversely affect trading conditions contrary to the common interest” (Article 87(3)(c) EC).

The Commission has the discretion to assess whether the conditions for granting the above-mentioned exemptions are met. In order to render the enforcement policy more transparent and provide legal certainty, the Commission issues policy-guidance documents (regulations, communications, notices, frameworks, guidelines and letters addressed to the Member States) explaining the criteria according to which different categories of aid may be approved. What follows is a brief description of how the above-mentioned exemptions are applied to different categories of aid.

Taking into account the policy objectives pursued and the economic situation of the beneficiary firms, we can distinguish two broad categories of aid measures: those aiming at the recovery of inefficient firms, and those aiming to stimulate some sort of investment by profitable

<sup>198</sup> See the Commission's *Vademecum* (2003), as cited in *supra* note no. 1, at. Pp. 3-4.

<sup>199</sup> See e.g. *Joined Cases C-278/92 and C-280/92 Spain v. Commission -1994 - ECR I-1403*, para. 40.

<sup>200</sup> See *Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid*, OJ L 10 of 13.1.2001.

firms – for example, to attract initial investment into a certain region, or stimulate firms to undertake investment projects that are desirable from a social point of view (R&D, environmental protection, employment, training, etc.). In short, the above-mentioned exemptions apply to the various categories of aid as follows.

Article 87(3)(a) EC is mainly the ground for approving regional aid, namely aid measures aimed to attract/stimulate initial investment in the poorest regions of the Community, where GDP per capita (PPS) is below 75% of the EU average. The methodology for selecting the regions enjoying “assisted area” status under this paragraph, as well as the conditions for approval of investment aid in such regions, are laid down in the so-called Regional Aid Guidelines.<sup>21)</sup> In addition, the Commission takes a more lenient approach towards aid for the recovery of inefficient firms that operate in the regions enjoying “assisted area” status under this paragraph. For example, aid aiming at the rescue or restructuring of firms operating in such regions is approved under less strict conditions regarding the reduction of excess production capacities. Moreover, operating aid (or aid reducing the current expenses of firms without

being related to the carrying out of a restructuring programme) is exceptionally allowed in such regions, although otherwise forbidden throughout the EU, on condition that it be granted on a temporary basis and gradually reduced.<sup>22)</sup> Finally, aid for other types of investment (e.g. R&D, environmental protection, SMEs, employment, training, etc.)<sup>23)</sup> in such regions is subject to less strict limitations in terms of total amount allowed.

Article 87(3)(c) EC is the ground for approving: aid for initial investment granted in regions enjoying “assisted area” status under this paragraph – as a general rule, regions affected by industrial decline, and those where the standards of living are lower by comparison to other regions within the same Member State;<sup>24)</sup> rescue and restructuring aid granted to firms in difficulty, irrespective of their location;<sup>25)</sup> and aid to other types of investment (R&D, environmental protection, employment, training, etc.).<sup>26)</sup>

### 1.3. Control and monitoring procedures

Article 88 EC establishes a system of ex ante control and ex post monitoring by the Commission of aid measures initiated by the Member States. In

<sup>21)</sup> See Commission Guidelines on National Regional Aid, OJ C 74 of 10.3.1998. The current Guidelines are up for revision towards the end of 2005.

<sup>22)</sup> See Point 4.15 of the 1998 Regional Aid Guidelines, as cited at supra note no. 21. See also cases T-459/93 Siemens v. Commission -1995- ECR II-1675, T-214/95 Vlaams Gewest v. Commission -1998- ECR II-717, and T-55/99 CETM -2000- ECR II-3207, establishing that aid covering modernization costs which must be undertaken periodically by a firm because of the very nature of its activity qualifies as operating aid.

<sup>23)</sup> For the rules applicable to R&D aid, see Community Framework for state aid for research and development, OJ C 45, 17.02.1996, and Commission Communication amending the Community Framework for state aid for research and development, OJ C 48, 13.2.1998. For environmental aid, see Community Guidelines on state aid for environmental protection, OJ C 37, 3.2.2001. For employment aid, see Commission Regulation (EC) No 2204/2002 of 5 December 2002 on the application of Articles 87 and 88 of the EC Treaty to state aid for employment, OJ L 337, 13.12.2002, and successive amendments. For training aid, see Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid, OJ L 10, 13.1.2001 and successive amendments. For aid to SMEs, see Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to state aid to small and medium-sized enterprises, OJ L 10, 13.1.2001 and successive amendments.

<sup>24)</sup> See Regional Aid Guidelines, as cited at supra note no. 21. For a detailed discussion on the methodology for selecting the “assisted areas” currently covered by this paragraph, see also Fiona Wishlade (1998): “Competition Policy or Cohesion Policy by the Back Door? The Commission Guidelines on National Regional Aid”, *European Competition Law Review* no. 6, pp. 346 et seq..

<sup>25)</sup> See Community Guidelines on state aid for rescuing and restructuring firms in difficulty, OJ C 244 of 1.10.2004. For a discussion of the elements of novelty in this recent version of the Guidelines on aid to firms in difficulty, see Hansen, van Ysendyck and Zühlke (2004), as cited in supra note no. 6.

<sup>26)</sup> See supra note no. 23.

particular, paragraph (3) of this Article obliges the Member States to:

- notify to the Commission, for control and approval, any plan to introduce aid measures or modify aid measures that were already approved (the notification obligation); and
- not to implement such measure until the Commission pronounces a decision on their compatibility with the Treaty (the stand-still clause).

The detailed procedures according to which the Commission exercises its control and monitoring attributions with respect to state aid were codified within a Council Regulation, adopted in March 1999.<sup>27)</sup> The Regulation lays down distinct procedures applicable to four categories of aid measures: “new (notified) aid”, “unlawful aid”, “misuse of aid” and “existing aid”.<sup>28)</sup> In what follows we summarise the procedures applicable to each.

**New aid.** Articles 2 and 3 of the Procedural Regulation confirm the notification obligation and the stand-still clause applicable to “plans to grant new aid” as resulting from Article 88 EC. The notification obligation applies in principle only to support measures that clearly involve an element of state aid according to the four criteria commented above. However, in case of uncertainty as to whether a given support measure involves state aid, the Member States are well advised to notify it to the Commission for assessment. This will spare them the consequences of a possible future qualification of the measure in question as involving “unlawful aid” – which, as we will show below, has important practical consequences, since the Commission has the

authority to order the retroactive full recovery of unlawful aid.<sup>29)</sup> Following notification of plans to grant new aid, the Commission opens a preliminary examination procedure (Article 4 of the Procedural Regulation), to be concluded within two months from the receipt of the complete notification form. At this stage the Commission may decide either to declare the notified measure as compatible with the Treaty (under one of the exemption provisions commented above) or open a formal investigation procedure (Article 6) if there are doubts as to the compatibility of aid with the Treaty. The formal investigation procedure shall be concluded whenever possible in maximum 18 months (Article 7(6)), and may result in a “positive decision” (declaring aid compatible with the Treaty), or a “conditional decision” (approving aid subject to certain conditions, implying that for the future the Commission would monitor compliance with these conditions), or a “negative decision” (prohibiting the measure in question).

**Unlawful aid.** Article 1(f) of the Procedural Regulation defines “unlawful aid” as aid that has been put to effect in breach of the notification obligation and stand-still clause. The procedures applicable to unlawful aid are similar to those applicable to new aid, but include some additional instruments, some having provisional effects lasting for the duration of the investigation procedure, others concerning the recovery of unlawful aid from the beneficiary. Thus, during the investigation procedure the Commission may adopt suspension injunctions, ordering the provisional suspension of the measure under inquiry (Article 11(1)), as well as

<sup>27)</sup> Council Regulation (EC No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83 of 27.3.1999.

<sup>28)</sup> For a detailed discussion of the Procedural Regulation, see Adinda Sinnaeve (1999): “State aid procedures: the reform project”, in Bilal Sanoussi and Phedon Nicolaides, eds., *Understanding State Aid Policy in the European Community: Perspectives on Rules and Practice*, Maastricht: European Institute of Public Administration, pp. 209-230.

<sup>29)</sup> See Adinda Sinnaeve (1999), as cited at supra note no. 28, in particular pp. 216-217.

provisional recovery injunctions (Article 11(2)), ordering the provisional recovery of aid already paid on the basis of the investigated measure. Provisional recovery injunctions may be adopted only if three cumulative conditions are met: there are no doubts about the aid character of the measure concerned, there is an urgency to act, and there is a serious risk of substantial and irreparable damage to a competitor of the aid beneficiary. Non-compliance by the Member States with such interim injunctions constitutes an infringement of the obligations assumed under the Treaty. Finally, when the investigation procedure concludes with a negative decision by the Commission (establishing that the measure involves aid incompatible with the Treaty) the Commission can order the retroactive recovery of aid already granted on its basis, including interests on the aid at an appropriate rate fixed by the Commission (Article 14). The Member States are obliged to put to effect the recovery decision without delay, according to procedures available under national law, provided they allow the immediate and effective recovery (Article 14(3)). In practice, however, the recovery of unlawful aid is often delayed by the beneficiaries through initiating proceedings under national law against the Member State that have the effect of suspending the carrying out of the Commission's recovery order. Last but not least, it is worth mentioning that the Commission cannot ask recovery after more than 10 years since the award of unlawful aid (article 15). Aid with regard to which the limitation period of 10 years has expired shall be qualified as "existing aid", with the practical consequences explained below.

**Misuse of aid.** Article 1(g) of the Procedural Regulation defines this category as aid used by the

beneficiary in contravention of the approval conditions established in the Commission's decision. The main practical differences between "misuse of aid" and "unlawful aid" is that, in the case of the former category, during the examination of the aid measure the Commission cannot order the provisional recovery of aid, and the stand-still clause does not apply.

**Existing aid.** Article 1(b) of the Procedural Regulation defines this concept as covering, inter alia, aid that was put to effect before, and is still applicable after, the accession of Austria, Finland and Sweden to the EU,<sup>30)</sup> and aid that at the time when the measure was put into effect did not qualify as involving aid according to the EC legislation in place at the time, but which subsequently became state aid according to the evolution of the common market and EC state aid regulation (an example in this sense is that of fiscal aid measures implemented in certain Member States before the adoption of a tighter discipline on this aid category in 1998). The essential difference between "existing aid" and "new aid" is that the Commission can alter the former category only for the future, meaning that aid amounts disbursed in the past under existing aid measures are protected from retroactive recovery.<sup>31)</sup>

## 2. The *acquis* for the "sensitive sectors": the case of steel and coal

Due to the strategic importance of the steel and coal sectors in the European economy, state aid granted to (parts of) these sectors were subject to specific, tighter rules than those applicable to other economic sectors under the EC Treaty. Article 4 of the ECSC Treaty prohibited state aid to

<sup>30)</sup> This provision (Article 1(b)(i) of the Procedural Regulation) was amended following the May 2004 enlargement to include, by the same token, aid put to effect before, and still applicable after, the entry into force of the Accession Treaty in the 10 new Member States, without prejudice to Annex IV, point 3 and the Appendix to the said Annex to the Accession Treaty.

<sup>31)</sup> See Georg Roebbling (2003): "Existing Aid and Enlargement", *Competition Policy Newsletter* no. 1, pp. 33-37.



steel and coal in any form whatsoever, yet Article 95 of the same Treaty was often used by the Commission and Council to exempt aid granted in the context of restructuring. As a matter of principle, following the expiry of the ECSC Treaty on 23 July 2002, the steel and coal sectors became subject to the general state aid regime (Articles 87-89 EC and the secondary legislation developed in their application). Nevertheless, at present these sectors continue to be subject to more restrictive aid regimes, whose main elements are summarised in what follows.

**Steel.** The European steel industry traditionally concentrated in few regions, with the local population predominantly employed in activities related to steel production. The structural crisis that affected the sector during the 1970s and 1980s brought about a real subsidy war between the Member States, who sought to support the restructuring of their own steel industry while mitigating the ample social and economic consequences of restructuring at regional level. To keep under control subsidy levels and coordinate restructuring efforts, the Commission implemented a series of successive State Aid Codes, whose common defining element was conditioning the approval of aid on the reduction of excessive production capacities.<sup>32)</sup> The last Steel Aid Code,<sup>33)</sup> covering the period from 1996 to the expiry of the ECSC Treaty, further narrowed the range of support measures allowed in this sector to R&D, environmental and closure aid. After evaluating the condition of the European steel

sector in the late 1990s, the Commission concluded that it was necessary to maintain a stricter state aid discipline even after the expiry of the ECSC Treaty, so as to safeguard the outcome of previous restructuring efforts.<sup>34)</sup> In March 2002 the Commission published a Communication on aid to steel firms in difficulty (applicable until the end of 2009),<sup>35)</sup> which prohibits rescue and restructuring aid in whatever form to this sector. The same Communication confirms the prohibition of aid for large initial investment projects undertaken in this sector (i.e. projects whose total cost exceeds 50 million euro, or where the amount of aid proposed exceeds 5 million euro) as already established in the context of the regime for regional aid to large investment projects.<sup>36)</sup> This prohibition also applies to aid for large initial investment projects undertaken by SMEs, as defined by Article 6 of the Commission Regulation on aid to SMEs (i.e., cases where the total cost of the investment project exceeds 25 million euro or the total amount of aid awarded exceeds 15 million euro).<sup>37)</sup>

Turning to the aid categories that are allowed for the steel sector, the 2002 Communication lists types of closure aid that may be granted and the conditions for their approval. These include: compensations for early retirement and for workers losing their jobs (if granted for the first time to each beneficiary, and up to 50% of the total compensation awarded), and aid to compensate the costs of closing production plants (for companies registered and regularly producing

<sup>32)</sup> For a historic overview of the EC Steel Aid Codes and their application, see e.g. Alexander Schaub (1997): "State Aid in the ECSC Steel Sector", *Competition Policy Newsletter* no. 2.

<sup>33)</sup> Decision No. 2496/96/ECSC of 18 December 1996 establishing Community rules for state aid to the steel industry, OJ L 338 of 18.12.1996.

<sup>34)</sup> Communication from the Commission to the Council, the European Parliament and the ESCS Consultative Committee (1999): *The State of Competitiveness of the Steel Industry in the EU*, COM(1999) 453 final.

<sup>35)</sup> European Commission (2002): *Communication on Rescue and Restructuring Aid and Closure Aid for the Steel Sector*, OJ C 70 of 19.3.2002.

<sup>36)</sup> See European Commission (2002): *Multisectoral framework on regional aid to large investment projects*, OJ C 70 of 19.3.2002 (amended version of the 1998 text).

<sup>37)</sup> See *supra* note no. 23.

before January 2002, and if this type of aid is granted for the first time; when the firm to be closed is owned or controlled by another steel firm remaining in business, the beneficiary must be legally separated from the owned at least 6 months before the award of aid, and its financial situation will be checked by independent experts appointed by the Commission). In addition to closure aid, steel firms are also allowed to receive regional aid for reduced investment projects undertaken by SMEs (only when the beneficiary SMEs are located in a region enjoying “assisted area” status under Article 87(3)(a) or (c) EC; aid must not exceed 15%, respectively 7.5% of the overall cost of investment),<sup>38)</sup> and aid for other types of investment (R&D, environmental protection, employment, training).<sup>39)</sup>

**Coal.** Starting with the 1960, coal extracted in the EC Member States ceased to be competitive with coal imports from third countries. Similar to what occurred in the steel sector, for the past four decades the European coal industry has undergone a long and painful restructuring process. The Member States subsidised the re-dimensioning of production and implemented programs (often co-financed by the EC) offering financial compensations, re-training, re-location schemes for the redundant miners. At present, after four decades of restructuring, only four of the EU-15 countries are still producing hard coal - the UK, Germany, France and Spain – and only the UK extraction units are relatively efficient, while extraction in the other locations continues to be subsidised.<sup>40)</sup> Following the expiry of the ECSC Treaty the Council adopted a Regulation on state

aid for the coal industry.<sup>41)</sup> The Regulation takes into account that, on the one hand, the restructuring and re-dimensioning of the hard coal production in the EU needs to continue (and be supported by the state) beyond the expiry of the ECSC Treaty, and on the other hand, the EU is becoming ever more dependent on imports from third countries of primary energy resources, thus it being necessary to maintain a minimum level of domestic coal production as part of the strategy to ensure security of energy resources. Thus, the Regulation allows the granting of certain categories of aid for hard coal extraction that aim at one of the following two broad objectives: maintaining a minimum strategic level of domestic hard coal production, and alleviating the social and economic consequences of closing the surplus extraction units. In particular, the Regulation allows the following categories of aid:

- **Operating aid** covering the losses of extraction units about to be completely closed by the end of 2007 (Article 4). This provision covers extraction units that were notified to the Commission by end of December 2002, and for which the Member States presented a plan for total closing of production by the end of 2007. Aid should not lead to a decrease of prices for hard coal extracted in the EU under the price levels of equivalent imports from third countries.

- **Aid** for maintaining a minimum level of domestic hard coal extraction (Article 5). We underline that this provision envisages the granting of either investment aid or operating aid to each specific beneficiary. Investment aid may be granted up to the end of the year 2010, to firms that have

<sup>38)</sup> See Regulation 70/2002 on state aid for SMEs, as cited at supra note no. 23. It is important to note that aid for initial investment satisfying the criteria in this Regulation does not need to be notified for approval.

<sup>39)</sup> For the exact conditions for the approval of each of these types of aid, see the policy documents cited in supra note no. 23.

<sup>40)</sup> Report from the Commission on the application of Community rules for state aid to the coal industry, COM (2002) 176 final.

<sup>41)</sup> Council Regulation No. 1407/2002 of 23 July 2002 on state aid to the coal industry, OJ L 205 of 2.8.2002.

not received similar aid in the past, and in support of an investment plan of demonstrable viability. The maximum amount of aid in this category granted to each beneficiary cannot exceed 30% of the total cost of the supported investment plan. Operating aid, instead, may be approved for firms included in the national strategic plan for maintaining a minimum level of domestic coal extraction (presented to the Commission before the end of 2002). Aid should not lower the prices of the domestic coal under the level of equivalent imports from third countries.

- **Aid covering debts** stemming from the implementation of a restructuring/ rationalization plan, such as the expenses related to the ecological rehabilitation of former extraction fields.

- **R&D, environmental protection and training aid**, under the conditions laid down in the corresponding EC regulation.<sup>42)</sup>

## II. THE PRECEDENT OF THE 2004 ENLARGEMENT

### Accession negotiations

The European Council held in 1993 in Copenhagen established a series of political and economic criteria for the accession of the Central and Eastern European countries to the EU. The economic criteria implied that the candidate countries demonstrate the existence of a functional market economy and the capacity to withstand competitive pressures within the internal market. In the context of accession negotiations on the so-called Competition Chapter, these economic criteria were translated into three conditions to be fulfilled by the candidate countries: adopting the competition *acquis* in full into their national legislation prior to accession; establishing national

authorities empowered to implement this legislation and endowing them with the adequate administrative resources necessary for this task; and establishing a credible enforcement record with respect to state aid. While all 10 countries invited to join the EU in May 2004 succeeded relatively early to comply with the first two conditions, the development of a credible enforcement record in the field of state aid was slower.<sup>43)</sup> Some of the 10 candidate countries started a proper enforcement activity with respect to state aid after the year 2001. By the end of the year 2002, however, it was concluded that all three conditions were satisfactorily complied with.

In the context of negotiations on the Competition Chapter, two categories of aid measures used in the candidate countries revealed to be more problematic: fiscal aid (in particular tax incentives to attract FDI and the establishment of so-called “free zones”, tax waivers and deferrals for companies in difficulty) and aid to firms in difficulty from the sensitive sectors, steel and coal in particular.

With respect to fiscal aid, the Commission agreed with the candidate countries some arrangements meant to bring such measures in line with the *acquis* within a reasonable time period. For example: Hungary agreed to phase out incompatible fiscal aid to SMEs by end 2011, for off-shore companies by end 2005, and incompatible aid granted by local authorities by end 2007; Poland accepted to phase out incompatible fiscal aid for small firms by end 2011 and for medium-sized firms by end 2010, and to modify incompatible fiscal incentives for large investment projects according to the criteria for approval of regional aid in the EU; Slovakia undertook to discontinue fiscal aid to a beneficiary in the motor vehicles sector by end 2008 and to another

<sup>42)</sup> See *supra* note no. 23.

<sup>43)</sup> See Janne Känkänen (2003): “Accession Negotiations Brought to Successful End”, *Competition Policy Newsletter* no. 1, pp. 24-28.

beneficiary in the steel sector by end 2009 (or when aid reached a pre-determined total amount).

As to aid for the sensitive sectors, steel in particular, the EU agreed in exceptional circumstances to authorise, in the context of special transitional arrangements, the granting of restructuring aid as a “last opportunity” for restoring the viability of these firms (thereby as an exception from the “one time, last time” rule otherwise applicable to restructuring aid in the EU), conditional upon the achievement of a certain level of productivity at the end of the restructuring process and the carrying out of a pre-determined reduction of excess production capacities. Transitional arrangements for the restructuring of the steel industry were concluded with three candidate countries: the Czech Republic and Poland (in both cases, restructuring to be completed by end 2006), and Slovakia (where fiscal aid to one particular beneficiary shall be discontinued by end 2009). In the cases of Poland and the Czech Republic, the transitional arrangements regarding aid to the steel sector establish a maximum amount of aid to be granted to each beneficiary, the aid being approved conditional upon the fulfilment of certain obligations regarding levels of productivity to be attained following restructuring and the reduction of excess production capacities. Compliance with these conditions is monitored by the Commission on a regular basis. In the case of the Czech Republic, for example, the maximum amount of aid approved for the steel sector was of 413 million euro, to be paid over the period 1997-2003, while a productivity comparable to that of steel firms in the EU should be achieved by 2006.<sup>44)</sup>

<sup>44)</sup> See *infra* note no. 46.

<sup>45)</sup> See Georg Goebbling (2003), as cited in *supra* note no. 31.

### Pre-accession aid continuing beyond accession

Equally important during the negotiations on the Competition Chapter was to agree on procedures for the screening of aid granted during the pre-accession period which would continue to be implemented and produce effects following accession.<sup>45)</sup> In the case of the 1994 enlargement (involving Austria, Finland and Sweden), the Accession Treaty stipulated that all aid measures approved by the EFTA Surveillance Authority (ESA) before accession would be treated as “existing aid” following accession. As we mentioned above, this qualification has important practical consequences, because aid disbursed in the past under an existent aid measure is protected from recovery – the Commission can alter it only for the future. The model of the 1994 enlargement could not be transposed *ad litteram* to the case of the 2004 enlargement: ESA, as a supra-national authority modelled on the Commission implementing Community substantive law, represented a guarantee in so far as the “objectivity” of its decisions on aid, whereas the control of state aid granted in the candidate countries during the pre-accession period was exercised by a national authority operating under certain domestic political and legislative constraints. To keep under control the process of approving during the pre-accession period aid measures continuing to be implemented after accession, or having effects after the same date, the Commission proposed a two-tier review system. This system recognised the authority of the national authorities responsible for state aid as a first instance of review, but added a second (lighter) layer of review by the Commission itself,

aiming essentially at identifying unlawful pre-accession aid that had escaped review by the national authorities (and therefore not implying a fully-fledged assessment of each aid measure).

According to this system, aid measures put into effect during the pre-accession period and continued after accession would qualify as “existing aid” only if having passed the two-tier review. It is important to note that the two-tier review system was applied also to aid measures that, if awarded within the EU itself, would not have needed to be notified for approval, as being covered by block exemption regulations (applicable under specific conditions to aid for SMEs, employment and training aid).<sup>46</sup> If, by contrast, a new Member State wished to continue an aid measure that was approved by its national authority before accession, but in relation to which the Commission had expressed doubts on the compatibility with the *acquis*, upon accession it had to notify the measure to the Commission for review as “new aid”. In practical terms, this meant that, following notification, the new Member State would have to discontinue the application of the aid measure in question until the Commission pronounced a decision. Breach of this standstill obligation would result in the qualification of the measure as “unlawful aid”, with the consequences thereof deriving regarding the retroactive recovery of payments already made.

The two-tier review system did not apply to the following categories of aid measures:

- aid covered by transitional arrangements (including steel aid);
- aid put into effect in the candidate countries before 10 December 1994 – which upon accession was to be treated as “existing aid”

per se; and

- aid to the agriculture and transport sectors, which are subject to separate regimes.

Pre-accession aid measures that passed the two-tier test mentioned above were included in a list attached to the Accession Treaty. Since aid measures proposed to be implemented in the candidate countries during the period between the finalisation of the Accession Treaty and the actual date of accession could no longer be included on such a list, a distinct interim procedure was set up for this period.

Under the interim procedure, the candidate countries were requested to notify to the Commission for review any plans to introduce new aid measures. Such notifications were to be supplemented with a list of all existing aid measures already approved by the national state aid authority. If the Commission did not raise any objections with regard to a notified measure within 3 months from the receipt of a complete notification (i.e. a notification containing all the information necessary for the assessment of the case), the aid in question was to be considered as approved. If, instead, the Commission decided to raise objections, this triggered a formal investigation under the Procedural Regulation, investigation that would be suspended until accession.

In 2002 the Commission approved some 222 aid measures under the two-tier review system, which are listed as existing aid in an Annex to the Accession Treaty.<sup>47</sup> Other 278 existing aid measures were approved by the Commission under the interim procedure until September 2004. By the same date, 106 other aid measures were still under assessment – the majority of which were proposed by the Czech Republic and Poland. A significant number of aid measures were

<sup>46</sup> See European Commission (2004): *State Aid Scoreboard – autumn 2004 update, COM(2004) 750 final*. For the block exemption regulations, see *supra* note no. 23.

<sup>47</sup> See European Commission (2004): *State Aid Scoreboard – autumn 2004 update, COM(2004) 750 final*.

submitted for review under the interim procedure, right to the date of accession. Around 78% of the overall aid expenditure in the new Member States during the period 2002-2003 was earmarked for particular sectors – for example, 56% of the aid expenditure in Poland was directed towards the restructuring of the coal industry, and 35% of the aid expenditure in Slovakia was related to the restructuring of the steel industry.

### III. THE SITUATION IN ROMANIA

#### Legal and institutional framework

Likewise to the countries that joined the EU in May 2004, Romania had previously concluded an Association Agreement with the EU, in the context of which it undertook to apply the *acquis communautaire* on state aid in full.<sup>48)</sup> The Association Agreement foresaw two exceptions in this respect. One was that, for the first five years of implementation of the Agreement, Romania's entire territory would be treated for the purposes of state aid control in the same (more lenient) way as the European regions enjoying "assisted area" status under Article 87(3)(a) EC - with the practical consequences mentioned in Section I above. This status was eventually prolonged until the end of 2005.<sup>49)</sup> The second concerned aid to the steel industry. Article 9(4) of Protocol 2 annexed to the Association Agreement made possible the approval of rescue and restructuring aid for the steel sector for a period of 5 years from the entry into force of the Agreement, as long as the following conditions were observed:

- aid should be given in relation to a feasible

restructuring plan, restoring the economic viability of the beneficiary;

- the amount of aid given should be limited to what is strictly necessary in order to restore the beneficiary's viability;
- the support to any given beneficiary should be progressively reduced; and
- the aided restructuring plan should include measures of rationalization and reduction of excessive production capacities.

The above-mentioned five-year period was prolonged until the end of 2005 through the signing of an additional Protocol to the Association Agreement (as Protocol 2 did not contain a clause envisaging the possibility of prolongation). This new Protocol takes over the already-mentioned criteria for the approval of aid for the restructuring of Romanian steel firms, and introduces a two-tier review system: aid measures would have to be approved by the Romanian Competition Council and the Commission, and both institutions will also monitor the implementation of the aided restructuring plan. We need to underline that the expiry of this Protocol at the end of 2005 places Romania in a different situation from that of other steel-producing countries which joined the EU in May 2004 (i.e. Poland, the Czech Republic, Slovakia) in the sense that the latter were covered by a similar Protocol on steel aid up to the date of their accession. At the time of writing it is difficult to speculate upon the regime that will eventually be agreed for the period comprised between the end of 2005 and the date of accession. However, in the absence of another prolongation running up to the

<sup>48)</sup> *Agreement establishing an association between the European Economic Communities and their member States, of the one part, and Romania, of the other part, OJ L 357 of 31.12.1994. For state aid control, see in particular Article 64 of the Agreement.*

<sup>49)</sup> *See Decision No 2/2000 of the Association Council of 17 July 2000 extending by five years the period within which any public aid granted by Romania will be assessed taking into account the fact that Romania is to be treated as an area identical to those areas of the Community described in Article 87(3)(a) of the Treaty establishing the European Community, OJ L 230 of 12.9.2000.*

date of accession, Romania will not be allowed to grant rescue and restructuring aid to steel firms after the end of 2005. Moreover, even if the Protocol were to be prolonged until the date of accession, Romania would still probably not be allowed to continue payments of aid in this category after the date of accession, unless negotiations on this subject resulted in a transitional arrangement of the kind that was concluded with Slovakia (see above).

The general framework for the control of state aid in Romania is given by Law No. 143/1999, as modified by Law No. 603/2003. This normative act defines the legal concepts relevant in this area of competition law enforcement (the definition of state aid, categories of aid measures, the notions of aid grantor and aid beneficiary, etc.) and empowers the Romanian Competition Council to perform ex ante control and ex post monitoring functions modelled after those performed by the Commission on the EU side.

Article 14(1) entitles the Competition Council to issue regulations, instructions or specific guidelines transposing the state aid acquis. We do not intend to list in full in this context the regulations adopted by the Competition Council in this sense. Suffices it to mention here that a regulation transposing the special regime applicable to steel aid, as resulting from the Commission's Communication of March 2002,<sup>50)</sup> has not been adopted to the date of our writing. In the absence of such a specific framework, the legal regime applicable in Romania to steel aid remains somewhat unclear. For example, the Competition Council's Regulation on rescue and restructuring aid<sup>51)</sup> stipulates that, when such aid is

granted to steel firms, "specific rules will have to be observed with priority", but it does not make any reference where the relevant rules in question can be found. Moreover, the Competition Council could meet procedural difficulties in the attempt to enforce a negative decision in this area based exclusively on the provisions of the Protocol.

In so far as coal aid is concerned, the Competition Council adopted a framework for this sector in July 2004,<sup>52)</sup> transposing the principles and provisions of the EC Regulation of July 2002.<sup>53)</sup> According to this Regulation, closure aid cannot be extended beyond the end of 2007, while aid for initial investment and operating aid cannot be paid after the end of 2010. Any plans to grant aid for initial investment and operating aid must be notified to the Competition Council for approval by the end of 2004. The notification information must include an accompanying "plan for access to coal reserves" that is compatible with the governmental Strategy for the mining industry during 2004-2010, by the end of 2004.

### Critical issues in the negotiation of the Competition Chapter

We conclude this section with a few comments on two aspects relevant to the current debate in Romania on closing the negotiations on the Competition Chapter. It seems that the two remaining points to clarify before finalising negotiations on this chapter are the Competition Council's "lack of credible enforcement record" in the area of state aid (we remind that proof of a credible enforcement record is one of the three conditions to be satisfied for closing negotiations on the Competition Chapter) and state aid for the

<sup>50)</sup> See supra note no. 35.

<sup>51)</sup> Official Journal of Romania no. 470, part I, of 2.7.2002.

<sup>52)</sup> Regulation on state aid for coal mining, Official Journal of Romania no. 736, of 16.8.2004.

<sup>53)</sup> See supra note no. 41.

restructuring of the steel sector.<sup>54)</sup>

Lack of a credible enforcement record means in this context that probably the number of negative decisions (i.e. decisions prohibiting incompatible or unlawful aid) adopted so far by the Romanian Competition Council is more reduced than estimated in the case of a rigorous application of the state aid law according to the criteria resulting from the state aid acquis. Furthermore, the Competition Council has no enforcement record with respect to the prohibition and recovery of unlawful aid. Leaving aside possible considerations related to the Competition Council's institutional independence, this situation is, at least in part, due to the fact that the Competition Council's enforcement powers, as resulting from Law No. 143/1999 on state aid, are limited on several accounts.

First, the Competition Council does not have the ability to adopt itself interim measures in the course of investigations on unlawful aid (which, we remind, is defined as aid granted in breach of the notification obligation and stand-still clause), such as the information, provisional suspension and provisional recovery injunctions that may be ordered by the Commission on the EU side (see Section I above). According to Article 17(2) of Law No. 143/1999, interim suspension and recovery orders can only be issued by the Court of Appeals, on request from the Competition Council.

Second, in cases of unlawful aid granted on the basis of a normative act, the Competition Council cannot intervene directly for the annulment of the normative act in question and the recovery of unlawful aid already paid on its basis. According to Article 17(1) of Law No. 143/1999, the Competition Council has the possibility to request to the Court of Appeals in

whose jurisdiction the aid grantor or the aid beneficiary are located to "annul the administrative act granting the aid" and order the suspension of the measure and recovery of unlawful aid already paid on its basis. To be noted, however, that this provision refers to the annulment of administrative acts by means of which the unlawful aid was paid, and not to the normative act on the basis of which payments are made. Indeed, the normative acts on the basis of which unlawful aid is granted cannot be annulled or modified in the course of administrative contentious proceedings, and on grounds of their being in conflict with the state aid law, which is in its turn a normative act ranking equal with those on which aid is granted according to the Romanian legal hierarchy.

In order to circumvent this legal trap, Article 17 of Law 143/1999 establishes at paragraphs 3 to 6 an informal procedure whose legal effects and consequences are not very clear. According to this procedure, the Competition Council, when learning about unlawful aid, sends notice to the body that issued the normative act on the basis of which it is being granted (the government, in the case of Emergency Ordinances, or the Parliament, in the case of organic laws). The issuing body and the aid grantor are requested to suspend the application of this act within 10 days from receipt of the Competition Council's notice, and to notify the measure to the Competition Council for review within 30 days from receipt of the notice. Finally, the issuing body and the aid grantor are required to "take into account" the Competition Council's eventual decision on the measure if the later requests to amend the normative act in question and recover unlawful aid already paid on its basis. A similar procedure is established at Article 18(1)

<sup>54)</sup> See *Adevarul* of 3.12.2004.



with respect to aid that was prohibited by the Competition Council following notification, but which nevertheless is being granted on the basis of a normative act adopted in disregard of the Competition Council's prohibition decision.

In sum, both procedures seem to rely exclusively on the willingness of the body that issued the normative act in question to act according to the Competition Council's recommendations, as there are no provisions as to how the latter could enforce its decisions against the issuing body (be it the government or the Parliament). Admittedly it is not easy to find the legal and procedural solutions for this problem of conflict between the state aid law and normative acts ranking equal in the Romanian legal order. Possibly one way to circumvent it would have been to amend the Romanian Constitution by introducing an article establishing that freedom of competition is a constitutional principle – the Competition Council could have acted on its basis in order to request directly the annulment of the normative acts conflicting with the state aid law. At any rate, at an advanced stage of the preparations for accession, the problem could be partially

overcome through the two-tier review system involving the Competition Council and the Commission (see Section II above), which will probably render the initiators of aid measures more sensitive to competition law considerations.

As to state aid for the steel industry, we already mentioned in the sub-section above that until the end of the year 2005 Romania still enjoys the more lenient treatment resulting from Protocol 2 to the Association Agreement, which allows the granting of rescue and restructuring aid to this sector whereas such aid is currently banned in the EU. In spite of this permitting regime, aid expenditures for the Romanian steel industry were relatively low during the 2000-2003 period (see Table below). An all-time record was reached in 2001, on occasion of the privatisation of Sidex Galati, and remained relatively high over the following two years as the privatisation process was extended to other firms in the sector. The aid expenditure reported below for the period 1993-2002 are exclusively related to restructuring, and mainly took the form of debt write-offs and rescheduling, or debt-equity swaps. These commitments are also reflected in the

**Aid to Romanian steel plants during 1993-2002 and forecasts for 2003-2010 (million USD)**

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	Total	2003-2010
<b>Ispat-Sidex Galati</b>		34.8	11.5	27.1		19.7	26.2		911.6	14.8	<b>1045.7</b>	<b>233.0</b>
<b>Siderurgica Hunedoara</b>			8.7	6.0	5,8	13.4					<b>33.9</b>	<b>492.3</b>
<b>COS Targoviste</b>		1.8	5.5	13.7		8.4		28.2	2.1		<b>59.7</b>	<b>97.0</b>
<b>IS Câmpia Turzii</b>			16.2	3.2	0.1	4.5					<b>24.0</b>	<b>91.7</b>
<b>CS Resita</b>		33.5	2.4	1.3	6.3	2.3				102.6	<b>148.4</b>	<b>93.7</b>
<b>Gavazzi Steel Otelul Rosu</b>											<b>0.0</b>	<b>62.0</b>
<b>Siderurgica Calarasi</b>	5.2	6.6	6.0	5.2	1.3	1.0	1.2				<b>26.5</b>	
<b>Sidermet Calan</b>			0.4			23,8					<b>24.2</b>	
<b>TOTAL</b>	<b>5.2</b>	<b>76.7</b>	<b>50.7</b>	<b>56.5</b>	<b>13.5</b>	<b>73.1</b>	<b>27.4</b>	<b>28.2</b>	<b>913.7</b>	<b>117.4</b>	<b>1362.4</b>	<b>1069.7</b>

*Source: "The Restructuring Strategy of Romania's iron and steel industry for the 2004-2010 period"; Romanian Ministry of Economy and Commerce, April 2004.*

“Strategy for the restructuring of Romania’s steel industry during the period 2004-2010”, as issued by the Romanian government in Spring 2004, which, together with individual restructuring plans and the Competition Council’s decision regarding aid granted to each steel firm, will be analysed by the European Commission and eventually submitted for approval to the European Council. In this respect, a series of specific conditions will have to be met, in terms of the credibility and viability of the plans proposed, proportionality of aid with the costs of the restructuring operation, and proposals for capacity reduction.<sup>59</sup>

One of the questionable aspects related to the Spring 2004 version of the above-mentioned Strategy was that the payments proposed for the future were not structured by years. This could become problematic particularly considering uncertainty about whether the Steel Protocol to the Accession Agreement will be extended beyond the end of 2005. Another possibly problematic aspect could be the fact that the Romanian Competition Council did not appear to take into account restructuring aid measures that were initiated before the coming into force of Law No. 143/1999 on state aid, but which continued to be applied after that date, when approving restructuring aid measures proposed at the beginning of 2004. Finally, in 2002 the Competition Council approved restructuring aid given in the context of the privatization of Sidex Galati through a decision that was criticised by the Commission for not applying correctly the viability and proportionality criteria resulting from EU legislation.

<sup>59</sup> Eva Szymanska and Max Leinemeyer (2004): “Guidance for making a steel restructuring program”, European Commission, DG Competition, Brussels (mimeo).

#### IV. CONCLUDING REMARKS

Our concluding remarks relate to the following three main aspects: the regime currently applicable in the EU to steel and coal aid; lessons to be drawn from the experience of the countries that joined the EU in May 2004 in terms of what lies ahead for Romania in the area of state aid control; and topical issues for Romania in the negotiation of state aid aspects under the Competition Chapter.

Following the expiry of the ECSC Treaty, the EU implemented special regimes for steel and coal aid, maintaining a tighter discipline on aid with respect to that applicable to other economic sectors. The 2002 Communication on aid to steel firms in difficulty prohibits aid for the rescue and restructuring of steel firms, as well as aid for large initial investment projects undertaken in this sector. Steel firms in the EU may receive, instead, closure aid (if satisfying certain criteria), aid to reduced initial investment projects undertaken by SMEs, and aid for other types of investment (R&D, environmental protection, employment, training). The 2002 Council Regulation on state aid for the coal industry allows, broadly speaking, aid for this sector aiming at one of the following two broad objectives: maintaining a minimum strategic level of domestic hard coal production, or alleviating the social and economic consequences of closing the surplus extraction units. This includes: operating aid for extraction units about to be closed by the end of 2007; investment aid up to 30 % of the total investment cost if related to maintaining a minimum level of hard coal production (aid allowed up to 2010); operating aid for firms included in a national strategic plan for maintaining a minimum level of domestic coal

extraction; aid covering debt related to restructuring, such as the expenses related to the ecological rehabilitation of former extraction fields; R&D, environmental protection and training aid.

Likewise to the case of Romania, some of the countries that joined the EU in May 2004 faced severe problems related to the restructuring of their steel and coal industries. While no special allowances were made for the coal sector during the pre-accession period, these countries enjoyed, under the Steel Protocols to the Association Agreements, a more lenient treatment towards aid for the steel sectors, including in particular the possibility to grant rescue and restructuring aid. In the context of accession negotiation, the EU agreed to special transitional arrangements on aid for the restructuring of the steel industry in the Czech Republic and Poland (where restructuring should be completed by the end of 2006), and Slovakia (where fiscal aid to one particular beneficiary shall be discontinued by end 2009). With the exception of the case of Slovakia, the steel transitional arrangements concluded by Poland and the Czech Republic exclude the possibility of any aid payments after the date of accession – in practice, the period of time comprised between the date of accession and the expiry of the transitional arrangement covering only compliance with the conditions of viability, productivity and re-dimensioning of production on which restructuring aid was approved in the transitional arrangement. For the case of Romania, where most restructuring aid for the steel industry seems to be granted in the form of fiscal aid, one may envisage of a transitional arrangement of the type concluded with Slovakia. In the absence of such an arrangement, restructuring aid offered in other forms will have to be discontinued upon the date of accession.

Aid covered by transitional arrangements (therefore including steel aid) did not fall under the scope of the two-tier review mechanism, established in order to offer to the Commission the possibility to exert control over aid measures initiated during the pre-accession period but which continued to produce effects after accession. According to this system, aid measures put into effect during the pre-accession period and continued after accession would qualify as “existing aid” only if having passed the two-tier review of the national state aid authority and Commission. By contrast, measures approved by the national authority only before accession would have to be notified after accession to the Commission as “new aid”. Pre-accession aid measures that passed the two-tier test mentioned above were included in a list attached to the Accession Treaty. For aid measures proposed during the period between the finalisation of the Accession Treaty and the actual date of accession, the Commission established an interim procedure, this time involving the full notification of aid plans to the Commission. If the Commission raised objections, a formal investigation was considered to be triggered, investigation that would be suspended until accession.

In Romania, the Protocol to the Association Agreement allowing the granting of restructuring aid to the steel sector is applicable until the end of 2005. The Competition Council has not yet adopted a regulation transposing the special regime applicable to steel aid as resulting from the Commission’s Communication of March 2002. In the absence of such a specific framework, the legal regime applicable in Romania to steel aid remains somewhat unclear. The Competition Council could meet procedural difficulties in the attempt to enforce a negative decision in this area

based exclusively on the provisions of the Protocol. For the coal sector, instead, the Competition Council recently adopted a framework the principles and provisions of the EC Regulation of July 2002. Closure aid cannot be extended beyond the end of 2007. Aid for initial investment and operating aid cannot be paid after the end of 2010. Any notification of a plan to grant aid for initial investment or operating aid must be submitted by end 2004 and include an accompanying "plan for access to coal reserves" compatible with the Strategy for the mining industry during 2004-2010.

On a more general note, the Romanian Competition Council's limited powers to deal with unlawful or prohibited aid granted on the basis of

a normative act may in part explain the poor enforcement record so far in this area of competition law. The problem may partly be overcome with the application of the two-tier review system, performed jointly with the Commission, on aid measures to be continued beyond accession. As to the negotiation of a transitional arrangement for restructuring aid to the Romanian steel sector, it is important that the conditions required by the Commission for the approval of restructuring aid under a transitional arrangement in terms of the credibility and viability of the individual restructuring plans proposed, proportionality of aid with the costs of the restructuring operation, and proposals for capacity reduction, be met.

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