ROMANIA'S POSITION

regarding the European Commission's proposal of revising the Commission Notice on the recovery of unlawful and incompatible state aid of 2007

The Romanian authorities support the European Commission's initiative of revising the Notice on the recovery of state aid, which has as its purpose explaining the norms and procedures regulating the recovery of state aid and the way in which the Commission collaborates with Member States.

The Romanian authorities submit a series of suggestions and observations regarding the modification of the Notice:

1. **At point 52 of the Draft Notice**, the "existence of exceptional circumstances which make it absolutely impossible for a Member State to implement the recovery decision is the only situation recognized by the Court of Justice as justifying the Member State's failure to implement that decision".

We find necessary a definition of the phrase "exceptional circumstances", for the purpose of a better understanding of the norms and procedures regulating the recovery of state aid.

2. **According to point 110 of the Draft Notice**, the Commission makes available an instrument to aid in the calculation of interest to be recovered, for the issued decision, which the Member State must recover.

   In Romania, national procedure requires, unequivocally, that state aid providers have the obligation to recover state aid if they find that the conditions under which state aid was granted were not respected. The sums to be repaid are accompanied by interest calculated according to the procedure under Commission Regulation 794/2004, using the interest rates set by the European Commission.

   The European Commission has made available to the Member States, for the purpose of calculating state aid and the related interest rate, which must be recovered following a decision of the Commission, a software application (*Recovery interest calculator*), which is helpful to state aid providers when the obligation falls upon them to calculate their quantum.

   Romanian providers consider that this application has the utility of assuring the transparency of the procedures towards the beneficiaries. This is why we ask you to analyze the possibility of allowing the access for the beneficiaries, in a controlled way (on the basis of a user name and password), to this software application.

3. Usually, within the insolvency procedure, the debt to be recovered is assigned to the creditors and reorganization plans are drawn up. These reorganization plans comprise sometimes reductions of debts.

According to **point 131 of the Draft Notice**, the acceptance of this plan is prohibited, if the recovery of the entirety of the sum is not guaranteed, within the term of recovery.

On one hand, the term is impossible to abide by within the insolvency procedure, which is a specific procedure, with specific terms, which is why we support modifying the recovery term in this (specific) case. On the other hand, the public creditor which must recover the full sum is not granted the possibility of reducing the debt within insolvency. Under these conditions, the only possible situation is the liquidation of the company. Or, in the situation in which the undertaking does not survive on the market only due to the aid received, where there are real chances of rehabilitation through reorganization, we propose introducing some provisions which regulate the possibility of conducting the private creditor test.

4. Bearing in mind the provisions of Article 3 – *Standstill clause*, under the Council Regulation 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, named "The procedural regulation", according to which "*Where the Commission has not taken a decision in accordance with paragraphs 2, 3 or 4 within the period laid down in paragraph 5, the aid shall be deemed to have been authorised by the Commission. The Member State concerned may thereupon implement the measures in question after giving the Commission prior notice thereof, unless the Commission takes a decision pursuant to this Article within a period of 15 working days following receipt of the notice*", **arises, unequivocally, the following conclusion. In the situation where the Commission does not adopt a decision within two months** following the receipt of the complete notification and after the term of 15 working days since receiving the notice, **the aid is considered authorised by the Commission, and the Member State concerned can give effect to the measures at hand.**

This way, the principles of legitimate security and the protection of legitimate expectations are respected, two fundamental principles of European law. The Court of Justice of the European Union has stated that the principle of judicial security is part of Community judicial order and must be respected both by Community institutions, but also by Member States, when these are exercising the prerogatives conferred to them by Community Directives (in this sense, Case C-381/97, Belgocodex).

Or, within the *Communication Project of the European Commission regarding the recovery of unlawful and incompatible state aid*, at **point 39 of the Draft Notice**, the Commission indicates that:

"In particular, legitimate expectations cannot be based, among other things, on:

- *The silence of the Commission on an aid measure notified to it […]*
- *Absence of action by the Commission for a relatively long period […]"*

We find there is a contradiction in approaches: on one hand, the provisions of Council Regulation 2015/1589, mentioned earlier, offer the right to the Member State to put into effect the state aid measures, considering the aid as authorized by the Commission, if there has been no response within the time interval referred to in the Regulation, but, on the other hand, the *Draft Notice* establishes the opposite: "*legitimate expectations cannot be based, among other things, the silence of the Commission on an aid measure notified to it […]*".

Therefore, we find that, although the principle of judicial security and protection of legitimate expectations were put forward in the contents of the Draft Notice, these are not respected, the contradiction generating confusion, even if the provisions of EU Regulations are the ones which apply.

As such, we find necessary the elimination of the provisions found in the Draft Notice which allow the European Commission a relatively long/unlimited response time to notifications by Member States, as these violate the two fundamental principles laid out, which are contrary to the provisions under Council Regulation 2015/1589, and, last but not least, have a negative effect, from an economic point of view, on the sector concerned by the respective state aid measure.

5. **Points 128 and 129 of the Draft Notice** targets the assignment of the debt related to the recovery of the aid (including the related interest) in the creditor's table, without clarifying the issues which contradict applicable national law, which forbid the modification of the definitive table of debt by the judicial administrator within the judicial reorganization procedure. Moreover, there are no clarifications regarding whether this debt represents a distinct category from the five categories of debt included in the applicable legislation and how the debt (including the related interest) is prioritized, by reference to the other categories of debt set out by insolvency law.

6. To the aim of obtaining clearer norms, we consider that the roles of instances and judicial administrators/liquidator need to be clarified significantly within the procedure of recovering illegal state aid from undertakings in insolvency.

7. At **point 2.4.2 of the Draft Notice** regarding the limitation period, it is necessary to clarify the date from which the limitation period begins (the date on which the aid is granted or the effective payment of the aid), considering that:

a. **Paragraph 45** states: "*In the case of an aid scheme, the limitation period does not run from the date of adoption of its legal basis but from the moment the individual aid is granted under that scheme*" (in this situation we interpret the time of granting as the date when the judicial act for the granting of aid is issued);
b. **Paragraph 46** states: "*For a multiannual scheme entailing payments or other financial advantages granted on a periodic basis, the date of adoption of the legal basis of the aid scheme and the date on which the undertakings concerned will actually be granted the aid may be a considerable period of time apart. In this case, for the purpose of calculating the limitation period the aid must be regarded as not having been awarded to the beneficiary until the date on which it was actually paid out to the beneficiary*" (in this case it could be understood that the moment of effective granting is the moment at which the aid is paid);
c. **Paragraph 47** states: "*The principle referred to in paragraph 46 also applies to an aid scheme entailing fiscal measures granted on a periodic basis [...]for which the limitation period starts running for each fiscal exercise on the date on which the tax is due.*" (in this case the date on which the tax is due is the date of relief).

Also, if the aid is paid in several tranches, it should be clarified whether the limitation period begins to run from the date of the first tranche / payment of each tranche / from the date of payment of the last tranche.