



COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMISSION DECISION

of 02.IV.2008

ON THE STATE AID

n° C 41/2007 (ex NN 49/2007)

which Romania has implemented

for Tractorul

(Only the Romanian version is authentic)

(Text with EEA relevance)

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those provisions¹, and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) On 17 January 2007, the Commission requested general information on several Romanian public undertakings, including SC Tractorul U.T.B. SA Braşov (hereinafter Tractorul), in the context of the voluntary liquidation procedure. Romania submitted information by letter dated 15 February 2007. The Commission requested further information on 8 March 2007 and 22 May 2007, which Romania submitted by letters dated 21 March 2007, 25 May 2007 and 31 May 2007. A meeting with the Romanian authorities was held on 3 May 2007.
- (2) By letters of 5 July 2007 and 30 July 2007, the Commission urged the Romanian authorities to abolish specific conditions attached to the privatisation contract of Tractorul, indicating at the same time that the failure to suspend any unlawful aid might lead the Commission to adopt a decision on the basis of Article 88(2) EC Treaty and of Article 11(1) of Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (suspension injunction).

¹ OJ C 249, 24.10.2007, p. 21.

- (3) By letters of 8 and 10 August 2007, the Romanian authorities submitted additional information.
- (4) By letter dated 25 September 2007, the Commission informed Romania that it had decided to initiate the procedure laid down in Article 88(2) EC in respect of unlawful aid and to issue a suspension injunction. The Commission decision to initiate the procedure with the suspension injunction was published in the *Official Journal of the European Union*². The Commission invited interested parties to submit their comments on the aid.
- (5) By letter of 27 November 2007, Romania submitted its comments. By letter of 28 November 2007, Flăvius Investiții SRL (hereinafter Flăvius) submitted its comments, which were forwarded to Romania on 5 December 2007. Romania submitted its observations on Flăvius' comments by letter dated 4 January 2008.
- (6) By letter of 12 December 2007, the Commission required further information, which was submitted by letters of 14 and 15 January 2008.
- (7) On 19 December 2007, the Commission services met with the Romanian authorities accompanied by representatives of Flăvius.

2. DESCRIPTION

2.1 The undertaking concerned

- (8) Tractorul is a state owned company. The Romanian public privatisation agency, AVAS, holds 80.17 % of the stake, 17.15 % being held by a private investment fund, SIF Transilvania, and the remaining 2.67 % by private natural and legal persons. Until the end of 2006, Tractorul was a large producer of tractors and agricultural devices, located in an industrial area close to the city centre of Braşov. It employed around 2 300 people.
- (9) In 2006, Tractorul made losses of EUR 46 million and accumulated debts of around EUR 250 million, out of which EUR 200 million to the State budget. Due to this high level of losses and debts, on 23 February 2007 Tractorul ceased its activity and entered into voluntary liquidation under Government Emergency Ordinance 3/2007.
- (10) AVAS had previously tried several times to privatise the company, however, without any success.
- (11) Tractorul is situated in Braşov, an area eligible for regional aid under Article 87(3)(a) EC Treaty.

² Cf. footnote 1.

2.2 Description of the measures

- (12) At the beginning of 2007, Tractorul had accumulated significant debts, which it could not repay. The Romanian government however postponed the insolvency proceeding for 6 months, by adopting GEO 3/2007, time in which AVAS as shareholder had to decide to either privatise or to voluntarily liquidate the company.
- (13) On 23 February 2007, AVAS decided to voluntarily liquidate the company. To this end, in May 2007, AVAS organised a public tender for the appointment of a liquidator, determining at the same time in the tender documents the object of the liquidation: two "functional modules"³, i.e. the production of tractors and the production of iron forged components. The liquidator Casa de Insolvență Transilvania (hereinafter CIT) won the tender and was assigned with conducting the sale of Tractorul.
- (14) After identifying the assets which were the object of the liquidation, on 5 July 2007, CIT organised the tender in the form of an open bid for all the company's assets, comprising real estate (126 ha of land) plus factory buildings, offices and apartments, machinery, intellectual property rights and trademarks. The starting price for the block sale was EUR 77 035 000.
- (15) Several undertakings announced their participation, however only two accepted the starting price of EUR 77 million. Since Flavus was the first undertaking to submit its offer and the other competitor did not offer a higher price, Flavus won the tender. The sales framework contract and the sales purchase agreement were signed shortly after.
- (16) The tender documents stipulated various obligations for the buyer: maintaining the object of activity, i.e. production of tractors, for the next 10 years; rehiring with priority former employees of Tractorul; ensuring spare parts and service for the next 2 years (warranty) and 10 years (post-warranty); supplying cast iron components for the next 5 years.

3. DECISION TO OPEN THE FORMAL INVESTIGATION AND TO ISSUE A SUSPENSION INJUNCTION

- (17) The formal investigation procedure was opened due to doubts that the liquidation process was in fact a privatisation with conditions attached requiring the continuation of the production activity of the company, which lowered the sales price and, thus, might have conferred an advantage on the sold entity or the buyer.
- (18) First, according to the information available at that moment, which was mostly based on press articles, the Commission had grounds to assume that AVAS envisaged attaching to the sale of Tractorul certain conditions which would ensure the maintenance of the production and the current employment level. The Commission suspected that these conditions were liable of lowering the sales

³ The Commission used in its opening decision the expression "viable activity". However, this wording was contested by Romania, with the argument that the assets of Tractorul are not in a state which would allow the performance of an activity which is economically self-sustainable. Romania proposed the term "functional asset".

price and might have deterred other potentially interested parties from even submitting a bid.

- (19) Second, the Romanian authorities failed in providing any information concluding that the voluntary liquidation involving the sale of the functional modules would be the most advantageous outcome for the State as shareholder and the creditors as opposed to judicial liquidation. The Commission had doubts whether a market economy operator would have bundled valuable land close to the Brasov city centre with obsolete factory buildings and machinery instead of dividing the land which is not necessary for the production activity and selling it off separately and thus possibly obtain a higher price.
- (20) Since the Romanian authorities carried out the public tender for the viable modules and concluded the sales contract with the winner of the tender shortly after despite the Commission's repeated warnings, the Commission issued at the same time a suspension injunction.

4. COMMENTS SUBMITTED BY ROMANIA

- (21) Romania argues that AVAS, when selling the viable modules of Tractorul, acted like market economy operator, obtaining the highest possible price. Thus, no State aid was involved.
- (22) First, Romania argues that Tractorul was not privatised but it went through a voluntary liquidation procedure. While privatisation involves the sale of the company's shares from the State to third parties and the company continues to exist, voluntary liquidation involves the sale of the company's assets, the payment of its debts to the creditors according to the order established by law and the distribution of any surplus amount to shareholders. At the end of the operation the company ceases to exist and it is deleted from the company register.
- (23) Further, Romania explains that the voluntary liquidation of the company was organised within an open, transparent, non-discriminatory and unconditional tender. This tender was widely publicised in the local and national press.
- (24) The tender of the viable modules was unconditional, so that the sales price was not lowered. The sale purchase agreement between Tractorul and Flavus does not stipulate any obligation for the buyer to maintain the activity for a period of 10 years and to employ a particular number of employees from the former company. Thus, the sales price represents the market value of Tractorul.
- (25) Second, Romania argues that, although AVAS intended to sell the two functional modules separately, the independent liquidator, CIT, recommended after an initial assessment the sale of the entire industrial platform as a whole, as it would be more advantageous than a piece by piece sale, in particular since the industrial platform contains also some un-attractive assets (i.e. plots of land which do not have access to any local infrastructure and/or are located near the city waste dump, the buildings are outdated etc.), which could probably not be sold individually.

- (26) According to this evaluation report, the sum of the total assets included in Tractorul amounted to around EUR 100 million. In order to avoid additional liquidation and maintenance costs if selling the assets individually, the liquidator offered the assets as a whole (functional module) and calculated a discount of 23%. Thus, the starting price was of EUR 77 million and represented the market value. Moreover, no competitor offered a higher price.
- (27) Finally, Romania explained that the voluntary liquidation was allowed under the national company law (Law 31/1990) and under the special law for speeding-up privatisations (Law 137/2002). Romania ensured that the voluntary liquidation was a more swift procedure implying less costs for the undertaking, whereas, at the same time, the creditors have identical control tools at their disposal in order to ensure that their rights are not being breached.

5. COMMENTS SUBMITTED BY THIRD PARTIES

- (28) By letter of 24 October 2007, Flavus intervened in the Commission proceedings as interested party.
- (29) First, Flavus argues that the tender of Tractorul was open, transparent and non-discriminatory. It was widely advertised in the local and national press.
- (30) Second, Flavus substantiate that there were no conditions attached to the sale of Tractorul's viable modules. The requirement to maintain the object of activity (i.e. production of tractors) for the next ten years could not qualify as a condition since it did not imply the obligation to effectively produce tractors. Moreover, Flavus explains that it has bought the viable modules because of the economic potential of the land in view of real estate development and has no intentions to restart tractor production on the site. Thus, the requirement was not onerous, but a mere administrative procedure of registering the object of activity with the Trade Registry.
- (31) Also, as regards the obligation to rehire with priority former employees of Tractorul, Flavus argues that this was not an onerous condition which could have been liable of lowering the sales price.
- (32) In conclusion, Flavus argues that the alleged conditions attached in the tender booklet did not lower the sales price. This is also reflected by the evaluation report drafted by an independent expert, assigned by the liquidator with the evaluation of Tractorul.

6. ASSESSMENT

6.1. Existence of State aid within the meaning of Article 87(1) EC Treaty

- (33) Article 87(1) EC Treaty states that, save as otherwise provided in the Treaty, any aid granted by a Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the common market, insofar as it affects trade between Member States.
- (34) Article 295 EC treaty provides that Community rules are neutral as regards public and private ownership. According to Article 86(1) EC Treaty, public undertakings are equally subject to State aid rules.

- (35) In accordance with a constant jurisprudence of the European Courts⁴ and Commission rules and practice on state aid in the context of privatisations⁵, when a Member State owns or sells undertakings, or otherwise purchases or sells shares of undertakings, no state aid is present if the Member State's behaviour is consistent with that of a private market economy investor.
- (36) Therefore, when the privatisation takes place by sale of shares on the stock exchange, it is generally assumed to be on market conditions and not to involve aid. When the privatisation is carried out through a trade sale, however, it can be assumed that no aid is involved if the following conditions are fulfilled: first, the company is sold by a competitive tender that is open to all comers, transparent and non-discriminatory; second, no conditions are attached which are not customary in comparable transactions between private parties and which are capable of potentially reducing the sales price; third, the company is sold to the highest bidder; and fourth, bidders must be given enough time and information to carry out a proper valuation of the assets at the basis of their bid.⁶ In other cases, trade sales must be examined for possible aid implications and must therefore be notified.
- (37) In such cases, assessing whether a transaction concerning State's assets involves an aid generally implies evaluating whether a market economy operator placed in a similar situation would have behaved in the same way, i.e. would have sold the company at the same price. In applying the market economy investor principle, non-economical considerations, such as for example industrial policy reasons, employment considerations or regional development objectives, which would not be acceptable to a market economy operator, cannot be taken into account as reasons for accepting a lower price and, on the contrary, point at the existence of aid. This principle has been repeatedly explained by the Commission⁷ and constantly been confirmed by the Court.⁸

⁴ See for example: Case T-296/97 Rec, *Alitalia*, Cases T-228/99 and T-233/99, *WestLB v Commission*; Case T-366/00, *Scott SA*, Cases C-328/99 and C-399/00, *Italy and SIM 2 Multimedia v Commission*; Case T-358/94, *Air France v Commission*.

⁵ XXIIIrd Report on Competition Policy, 1993, p. 255

⁶ Points 402 et seq. of XXIIIrd Report on Competition Policy (1993). See also point 248 of XXIst Report on Competition Policy (1991): "*No aid is involved where shareholdings are sold to the highest bidder as a result of an open and unconditional bidding procedure. If shareholdings are sold under other conditions, aid elements may be present*".

⁷ See for example Commission Decision of 3 May 2000, *TASQ*, OJ L227 of 23.8.2002, where the Commission found that "*The French authorities also showed that the invitation to tender was transparent and unconditional [...]. In particular, the documents submitted to the Commission showed that the sale of TASQ was not conditional on, for example, job maintenance, locations or continuation of activity.*" This allowed the Commission to conclude that no aid was present in the privatisation.

⁸ See for example Cases T-228/99 and T-233/99, *WestLB v Commission*; Case T-366/00, *Scott SA*, Cases C-328/99 and C-399/00, *Italy and SIM 2 Multimedia v Commission*; Case T-358/94, *Air France v Commission*; Case T-296/97 Rec, *Alitalia*.

- (38) Therefore, if any of the requirements mentioned further above are not fulfilled, the Commission considers that the public sale must be examined for possible aid implications and, thus, must be notified.⁹ Consequently, by respecting these requirements, it would be ensured that the State obtains the highest price, i.e. the market price, for its assets and, thus, no State aid is involved.
- (39) By imposing certain conditions on the buyer, the State potentially lowers the sales price and thus forgoes additional revenues. Also, conditions can deter potentially interested investors from submitting a bid in the first place, so that the competitive environment of the tender is disturbed and even the highest of the offers eventually submitted does not necessarily represent the actual market value.¹⁰
- (40) By imposing such conditions and thus accepting that it will not receive the best price for the owned shares or assets, the State does not act like a market economy operator, who would try to obtain the highest possible price. Instead the State chooses to sell the undertaking at a price below the market value. A market economy operator would not have an economic interest in attaching comparable conditions (in particular such as maintenance of the level of employment, conditions beneficial for the geographical region concerned or ensuring a certain investment level) but would sell the company to the highest bidder, who would then be free to determine the future of the acquired company or assets.¹¹
- (41) This does not mean that all conditions in a privatisation automatically lead to State aid elements being present. First, conditions which are common for such kind of transactions also between private parties (i.e. certain standard indemnities, the proof of the financial standing of the bidder, or the compliance with national labour market rules) are not problematic. Second, even conditions which appear to be unusual between private parties only lead to the presence of State aid if they are liable of reducing the sales price and provide an advantage. The fact that such conditions do not lead to aid needs to be demonstrated on a case by case basis.¹²

Conditions attached to the sale of Tractorul

- (42) When initiating the procedure under Article 88(2) of the Treaty, the Commission had doubts whether the sale of Tractorul was conducted within an open, transparent, non-discriminatory and unconditional tender. According to the information at that stage, which was based mostly on press articles, the Commission suspected that, according to the tender documents published by AVAS in order to appoint the liquidator, AVAS decided to liquidate Tractorul as functional modules and attached already at an early stage conditions to ensure the maintenance of the production activity for the next 10 years and the re-hiring of former employees. The Commission considered that these conditions were liable

⁹ See XXIIIrd Report on Competition Policy, 1993, p. 255.

¹⁰ In Commission decision of 15 February 2000, *Dessauer Geräteindustrie* (OJ L1 of 4.1.2001, p.10) the absence of conditions i.e. the unconditional nature of a tender led the Commission to conclude on the absence of aid in the privatisation procedure.

¹¹ See Commission Decision of 27 February 2008, *Privatisation of Automobile Craiova, Romania*, not yet published

¹² Such an analysis was, for example, carried out in Commission Decision of 20.6.2001, *Sell of business shares of the GSG by the Land Berlin*, OJ C67 of 16.3.2002, p.33, and allowed the Commission to conclude on the absence of aid even in the presence of unusual conditions, because it found that the conditions were not liable of reducing the sales price.

of lowering the sales price, and, thus, by attaching them, the State did not act like a market economy operator. In conclusion, the conditions might have resulted in State aid.

- (43) On the basis of the information provided by Romania, the Commission notes that the conditions attached to the sale of Tractorul were formulated in such a manner that they did not impose any onerous obligations on the potential buyers, but they were mere formal requirements. The condition to maintain the object of activity for the next ten years referred to the registration of the *object* of activity, i.e. production of tractors and other agricultural devices, in the Trade Registry, and does not oblige the buyer to continue the actual production of tractors. The acquirer, Flavus, explained that their legal advisor also confirmed that the clause would not imply the necessity to carry out any productive activity. In any event, they do not intend to re-start any production activity at the site.
- (44) Similarly, the obligation to give priority to former employees of Tractorul or to provide spare parts and components are not onerous obligations. They were included in the tender documents as best-effort clauses, and thus, are not mandatory and binding for the new owner.
- (45) The Romanian authorities explained that AVAS was motivated in attaching these symbolic requirements by the wish to maintain the well known reputation of the undertaking and its products, which can still be found to a large extent on the Romanian market.
- (46) In view of the above considerations, the Commission concludes that, since these conditions did not have an onerous character and this was obvious for all potential buyers from the formulation of the tender documents, they did not lower the sales price and did not have the potential to deter potential investors from submitting a bid and therefore did not involve the loss of State resources for the State. This conclusion is also supported by the fact that none of the four bidders participating in the tender had even a remote link to tractor manufacturing. Thus, the Commission considers that the conditions attached did not entail State aid.

Block sale

- (47) When initiating the procedure under Article 88(2) EC Treaty, the Commission expressed doubts that the voluntary liquidation involving the sale of the viable modules would be the most advantageous outcome for the State as shareholder and the creditors as opposed to judicial liquidation or a piece by piece sale.
- (48) Romania argues that AVAS acted like a market economy operator and obtained the highest possible price for Tractorul. To this end, AVAS appointed an independent liquidator by an open, transparent, non-discriminatory and unconditional tender, who would carry out the voluntary liquidation.
- (49) Based on the information provided by Romania, the Commission notes that, initially, AVAS intended to sell separately the two viable modules – tractor factory and cast iron and forge foundry. However, CIT, the liquidator, based on its own evaluation of the 37 individual assets, recommended the sale of the industrial area as a whole in order to maximise the proceeds, and only in the event that no potential buyer would show interest for the area as a whole, he would proceed to a piece by piece sale of the company's assets.

- (50) The liquidator substantiated the advantages of such a comprehensive sale. First, the maps provided by the Romanian authorities show that several land plots are situated in the back of the area, near the city waste dump, and are not connected to any road, so that in fact they are not accessible on their own. Second, the value of the individual assets of the industrial area was significantly varying depending on their individual location, on the state of the buildings and machinery, on the existence of access to local infrastructure. Third, the majority of potential investors was interested in the area for real estate development reasons and out of 26 tender books acquired in total, 17 were bought for the entire Tractorul platform.
- (51) Consequently, the liquidator considered that disadvantaged assets could on an individual basis most probably not be sold to any potential investor. As a result, such assets would produce additional administration and maintenance costs to Tractorul and ultimately to AVAS as owner. Also, the parcelling of the land plots would produce substantial administrative costs, e.g. expenses for cadastral measurement and land registration.
- (52) The strategy of selling Tractorul as a whole was subsequently approved also by AVAS.
- (53) As regards the price obtained, the Commission notes that according to the evaluation report commissioned by the liquidator, the asset value of Tractorul (i.e. the sum of the value for the 37 individual assets) was of around EUR 100 million, on which the liquidator applied a 23 % discount for bundled assets, coming thus to a starting sales price of EUR 77 million. Such a discount is based on the liquidator's experience and on the fact that a block sale bears significant advantages as opposed to a piece by piece sale.
- (54) The procedure chosen by the liquidator for the sale of Tractorul was the competitive tender. According to the procedural rules set in Government Decision No. 577/2002, if there are at least two bidders at a certain step, but no one bids for the step higher (which was predetermined before the bid at 5%), the bidder with the lowest registration number wins the tender.¹³ Since Flavus and a second investor accepted the starting price, but none of them was willing to overbid, Tractorul was sold for EUR 77 million to the bidder with the lowest registration number, i.e. Flavus. Consequently, the liquidator obtained the market price for the company's assets and did not therefore forego State resources.
- (55) In view of the above, the Commission concludes that, given the particularities of this case, by selling the assets of Tractorul as a whole, AVAS obtained the market price for them, did not therefore forego State resources, and behaved like a market economy operator.

6.2. Classification as State aid: conclusion

- (56) Based on the above assessment, no conditions were attached to the sale of Tractorul which were liable of lowering the sales price or deterring potential investors from submitting a bid. By selling all the assets as a whole within the voluntary liquidation, AVAS obtained the highest price on the market, did not

¹³ The registration number corresponds to the order in which the tender documentation was submitted.

forego State resources and acted like a market economy operator. Consequently, the sale of Tractorul does not entail State aid.

7. CONCLUSION

(57) The Commission finds that the sale of Tractorul by the Romanian privatisation Agency, AVAS, on 6 July 2007 does not constitute aid.

HAS ADOPTED THIS DECISION:

Article 1

The sale by Romania to Flăvius Investiții SRL of the Tractorul industrial platform does not involve aid within the meaning of Article 87(1) of the Treaty.

Article 2

This Decision is addressed to Romania.

Done at Brussels, 02.IV.2008

For the Commission

Neelie Kroes

Member of the Commission

Notice

If the decision contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the decision. Your request specifying the relevant information should be sent by registered letter or fax to:

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