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WORKING LANGUAGE

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Subject: State Aid NN 59/2007 – Romania
Privatisation of Automobile Craiova (former Daewoo)

Sir,

The Commission wishes to inform Romania that, having examined the information supplied by your authorities on the case referred to above and information otherwise available, it has decided to initiate the procedure laid down in Article 88(2) of the EC Treaty and to enjoin Romania pursuant to Article 11(1) of Council Regulation No 659/99 to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market.

I. PROCEDURE

- (1) On 17 January 2007, the Commission requested general information on several undertakings, including SC Automobile Craiova SA (hereinafter Automobile Craiova), former Daewoo Craiova, in the context of the national privatisation process. 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 letter of 5 July 2007, the Commission urged the Romanian authorities to abolish the specific conditions attached to the privatisation contract of Automobile Craiova, 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).

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- (3) By letter of 18 July 2007, the Romanian authorities informed the Commission that the privatisation of Automobile Craiova would be notified to the Commission. By letter of 20 August 2007, the Commission reminded Romania that the privatisation of Automobile Craiova would have to be notified before any act binding the public authorities is implemented.
- (4) In September 2007, the Commission learnt from the press that Romania had apparently signed a sale-purchase contract with Ford and that a "special law" had been passed by the Romanian government concerning the writing off of the debts of Automobile Craiova.

II. DESCRIPTION

2.1. The undertaking concerned

- (5) Automobile Craiova is a 100% State owned company situated in Craiova, an area eligible for regional aid under Article 87(3)(a) EC Treaty. Automobile Craiova used to be a subsidiary of the Daewoo group, Daewoo Craiova. Daewoo went bankrupt in 2000. Daewoo Craiova has high debts towards the Romanian State and other creditors such as other Daewoo subsidiaries. Whereas most Daewoo subsidiaries were acquired by General Motors in 2002, no purchaser could be found for Daewoo Craiova due to the potential high debt liability. Therefore, the Authority for State Assets Recovery (hereinafter AVAS), purchased it in 2006 to resell it to a new investor.
- (6) The amount of debts of Automobile Craiova towards the public budget is unknown. The amount of debts towards other former Daewoo subsidiaries is estimated by the press to amount to about EUR 220 million.
- (7) According to the information available to the Commission, Automobile Craiova is currently not producing any vehicles but is active only in the trade with spare parts.

2.2. The privatisation

- (8) The tender documents for Automobile Craiova included a number of conditions which had led the Commission to raise doubts. AVAS had attached to the privatisation contract specific conditions concerning a minimum level of investments and production (minimum 200 000 cars in the 4th year). If the conditions are not fulfilled, AVAS has reserved the right to annul the privatisation contract and/or to claim penalty payments and damages. Ford Motors Company (hereinafter Ford), General Motors Corporation and Russian Machines submitted non-binding offers to buy the public owned shares of Automobile Craiova. However, Ford was the sole undertaking to submit also a binding offer, winning thus the tender. The technical and financial negotiations with Ford started in July 2007.
- (9) According to press information, Romania and Ford signed a sale-purchase contract on 12 September 2007, whereby Ford would acquire the majority stake of Automobile Craiova for the price of EUR 57 million. From information submitted by Romania, the Commission understands that the share of Ford will amount to about 72%, which corresponds to the shares held by AVAS.
- (10) According to further press information, Ford will produce 48 000 units in the first year, of production, 245 000 units in 2011 and 300 000 units in 2013. Ford further undertook

to make direct investments worth 675 million EUR in upgrading the works and to increase the personnel number from 3500 to 7000. Ford also committed to buy components and services worth 1 billion EUR from the Romanian market.

- (11) Furthermore, the press reported that the Romanian government passed a special law for the privatisation of Automobile Craiova. Allegedly, the law provides for a write off of the debts of the car producer and a guarantee concerning the payment of the debts towards the other former Daewoo subsidiaries. Such debt write off had not been offered to all potential bidders in the tender procedure.

III. ASSESSMENT

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

- (12) Article 87(1) of the 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.
- (13) According to the information at its disposal, the Commission currently considers that the conditions attached to the sales contract and the debt related measures result in the granting of State aid within the meaning of Article 87(1) of the EC Treaty which has not been notified by the Romanian authorities and thus, would constitute unlawful aid.

3.1.1 Conferral of an advantage

- (14) An undertaking benefits from an advantage if it obtains something from the State which it would not have obtained under normal market conditions. To this end, it is first to be assessed whether the State acted in its role as market economy company owner or in its role as State who sold a company at conditions not corresponding to normal market conditions.
- (15) In this respect, the Commission has serious doubts both with respect to the conditions attached to the privatisation contract and with respect to the debt related measures. According to the market economy vendor principle and in conformity with the Commission's privatisation principles¹, the State can be considered acting as market economy owner of the company only if he sells the company or shares, respectively, at the highest possible price within an open, transparent and non-discriminating tender, to the highest bidder.
- (16) The highest possible price can normally only be achieved if no conditions are attached which would potentially reduce the sales price and which would not be acceptable for a market economy operator. In the case at stake, the Commission does not know precisely which of the undertakings by Ford as announced in the press form part of the sales-purchase contract. Given that the tender already included a minimum production level,

¹ XXIIIrd Report on Competition Policy, 1993, p. 255.

the Commission assumes that the sale was made conditional upon at least the achievement of such minimum production and possibly other conditions. Since a market economy vendor would normally not request the acquirer to achieve a minimum production and such requirement is likely to have a negative impact on the sales price, the Commission considers that the privatisation of Automobile Craiova most likely does not meet the market economy vendor test.

- (17) In addition, it is possible that further commitments were made part of the sale such as the increasing of the employment level (from 3500 to about 7000), a minimum investment in upgrading the plant (EUR 675 million) and a minimum purchase of components and services from the Romanian market (valued at EUR 1 billion). Such commitments are likely to have further influenced the purchase price.
- (18) The Commission also strongly doubts that the alleged writing off of the debts of the company and the alleged guarantee with respect to the debts towards other former Daewoo subsidiaries would meet the market economy vendor/creditor test. A market economy vendor would carefully calculate the outcome of the different possibilities (including liquidation) and would choose the solution which allows for the highest possible revenue (or the lowest possible losses). The Commission doubts that Romania had previously assessed whether writing off the public debts and guaranteeing part of the debts towards private creditors was the most advantageous solution. Further, the market economy creditor test is probably not met either since the at least part of the other (private) creditors did not write off their debts but benefit from a State guarantee.
- (19) The Commission thus comes to the provisional conclusion that the Romanian state, when privatising Automobile Craiova, acted in its role as state and not as normal market player.²
- (20) The terms of the privatisation contract may have conferred an advantage to possibly both Automobile Craiova and Ford.
- (21) An advantage to Automobile Craiova may result from the minimum production condition and any other condition potentially attached to the sale, such as an employment increasing obligation, an obligation to buy components and services worth EUR 1 billion on the Romanian market, investment obligations or export obligations. Automobile Craiova did not produce any cars anymore. The privatisation measures may guarantee that the former loss-making activities are resumed, that a minimum market activity is maintained and that the competitive pressure is reduced. These advantages would be financed by the state through a lower sales price, i.e. through foregone revenues. The whole operation seems to constitute a state-supported restructuring of the company.
- (22) Writing off the public debts of Automobile Craiova and guaranteeing the payment of part of the debts towards private creditors provides an advantage to Automobile Craiova. This measure immediately frees it from part of its debt and reduces the debt serving pressure for another part.

² See for example Case C-344/99 Germany v. Commission (*Gröditzer Stahlwerke*), Judgement of the Court of 28 January 2003; Joined cases C-278/92, C-279/92 and C-280/92 Spain v. Commission (*Hytasa*), Judgement of the Court of 14 September 1994.

- (23) Further, it cannot be excluded that the advantages granted by the State will not also benefit the buyer as new owner of the sold undertaking. Therefore, the Commission cannot exclude State aid to the buyer, Ford. It seems that the debt write-off was introduced after the tender had been launched. Out of the three originally interested parties, Ford was the only one to submit a binding offer. The Commission currently assumes or at least cannot exclude that other interested parties may also have submitted binding offers if they had been aware of the possibility to benefit from a debt write-off. Reports in the press give strong indications in this direction. It cannot therefore be excluded at the current stage that a higher bid than the one offered by Ford might have been submitted. The price paid by Ford would then not represent the market price.

3.2. Other conditions of Article 87 (1) EC Treaty

- (24) Second, the measure is selective as it favours only Automobile Craiova and the new buyer, Ford.
- (25) Third, the conditions to the privatisation contract have been attached by the Romanian privatisation agency, AVAS. The resuming and maintenance of a high level of economic activity and the financed lower sales price are paid for by the foregone revenue of the State. Therefore, the aid stems from State resources and is imputable to the State.
- (26) Fourth, Automobile is a car and spare parts producer, all these products being widely traded across the European Union. In addition, according to the press, most of the production is aimed at exportation. Thus, the measure threatens to distort competition and affects trade between Member States.
- (27) At this stage, the Commission thus comes to the conclusion that the conditions attached to the privatisation of Automobile Craiova seem to constitute aid and that the compatibility of the measures has to be assessed accordingly.

3.3. Unlawful State aid

- (28) Since the sales contract, including the conditions attached, has already been signed, the Commission considers that the aid has already been granted. In as far as measures are included in the special law, the Commission assumes that the law has to be passed by the Romanian parliament before becoming binding. However, on the basis of the information available, the Commission has to assume that the Romanian State can already now not step back from the privatisation contract on its own motion. The Commission therefore considers the measures covered by the privatisation and the special law as quasi granted and that any notification submitted after the passing of the special law by the Romanian government could not be considered as *ex ante* notification anymore.
- (29) Since the Romanian authorities have not notified the privatisation contract and have not suspended the conclusion of this contract, it seems that the aid measure was put into effect in breach of Article 88(3) of the EC Treaty. Consequently, the measure seems to constitute unlawful aid.

3.4. Derogations under Article 87(2) and 87(3) EC Treaty

- (30) Having established that the scheme involves State aid within the meaning of Article 87(1) of the EC Treaty, it is necessary to consider whether the measure could be found compatible with the common market.
- (31) The exemptions in Article 87(2) EC Treaty do not apply to the present case. As to the exemptions under Article 87(3) EC Treaty, only the exemption of Article 87(3)(c) EC Treaty, which allows State aid granted to promote the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest, can be applied. As regards the aid granted to Automobile Craiova as beneficiary, it seems that the measure could aim at the restoration of the long-term viability of an undertaking in difficulty. As regards potential aid to Ford, at this stage the Commission does not see any grounds which would justify the aid as compatible with the common market.
- (32) Therefore, the aid to Automobile Craiova could only be considered compatible on the basis of Article 87(3)(c) EC Treaty if the conditions laid down in the Community Guidelines on State aid for rescuing and restructuring firms in difficulty³ (hereinafter "the Guidelines") are respected.
- (33) First, according to the Guidelines, a firm is in difficulties if it is unable to recover through its own resources or by raising the funds it needs from shareholders or borrowing and without the intervention of public authorities will almost certainly go out of business. Automobile Craiova has in the past years accumulated a high amount of debts which it could obviously not serve. The exact amount is currently unknown to the Commission. In any event, it seems that Automobile Craiova qualifies as firm in difficulties.
- (34) However, the Romanian authorities have not provided a restructuring plan which would aim at restoring the long term viability of the economic activity.
- (35) Further, pursuant to the Guidelines, the aid must be limited to the minimum necessary and the beneficiary is expected to make a significant contribution to the restructuring from its own resources or from external commercial financing. The Guidelines clearly indicate that a significant part of the financing of the restructuring must come from own resources, including the sale of assets not essential to the firm's survival and from external financing at market terms. At this stage, the Commission does not have any evidence that the aid is limited to the minimum necessary. Further, the Commission has no information about an own contribution of the beneficiary.
- (36) Third, the aid shall not unduly distort competition. This usually implies a limitation of the presence which the company can enjoy on its markets at the end of the restructuring period. The compulsory limitation or reduction of the company's presence on the relevant market represents a compensatory factor in favour of its competitors. It should be in proportion to the distortive effects of the aid and to the relative importance of the firm on its market or markets. The Romanian authorities did not propose any compensatory measures; on the contrary, by imposing the buyer the obligation to significantly increase the production over the next four years, the State ensures that Automobile Craiova will increase its position on the market.

³ OJ C 244, 1.10.2004, p.2

- (37) Fourth, the Commission has at this stage doubts that Automobile Craiova did not benefit in the course of the past ten years rescue and/or restructuring aid. In such case, a further restructuring aid would infringe the one-time-last-time principle.
- (38) In conclusion, since the aid measure does not appear to qualify for any of the exceptions provided for in the Treaty, the Commission has serious doubts about its compatibility with the common market.

IV. SUSPENSION INJUNCTION

- (39) Despite several letters urging the Romanian authorities to remove all conditions and to *ex ante* notify the privatisation contract, the Romanian authorities continued in the tender procedure and signed the sales contract with Ford. By letters of 5 July 2007 and 30 July 2007 the Commission had insisted on the Romanian authorities to provide such *ex ante* notification, otherwise the Commission would issue a suspension injunction decision following Article 11(1) of the Council Regulation (EC) No 659/1999⁴. So far no notification was submitted.
- (40) Should the Commission come to the conclusion that the unlawful aid granted by the Romanian authorities is not compatible with the common market, it would decide to issue a recovery order in a final negative decision. This would mean that the Romanian authorities would be obliged to recover the incompatible aid, potentially to annul the sales contract and to organise a second tender free of State aid elements. Since it seems that the sales contract has already been concluded and the special law passed by the government, any further steps in the sales procedure could lead to a situation which would be difficult to reverse or could cause further damage to the Romanian State, the new owner or any third party. The Commission therefore considers that it is crucial to now suspend any future action which would reinforce the current situation and might produce further legally binding effects (e.g. passing of the special law by the parliament, registration of ownership, starting of business activity, conclusion of employment contracts, etc.).
- (41) The Commission therefore decided that it is necessary to issue a suspension injunction in accordance with Article 11(1) of the Council Regulation (EC) No 659/1999.

V. DECISION

- (42) The Commission has serious doubts that the privatisation was carried out free of State aid and that the State aid measures would be compatible with the common market. Further, since the aid has not been notified to the Commission, it constitutes unlawful aid.

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 88(2) of the EC Treaty, requests Romania to submit its comments and to provide all such information as may help to assess the aid, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipients of the aid immediately.

⁴ OJ L 83, 27.3.1999, p.1

The Commission wishes to remind Romania that Article 88(3) of the EC Treaty has suspensory effect, and would draw your attention to Article 14 of the Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission enjoins Romania in accordance with Article 11(1) of the Council Regulation mentioned above to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market (suspension injunction). The Commission requires Romania to immediately cease any action which would further implement the privatisation contract, including any action with regards to the special law.

The Commission informs Romania that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter 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 this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

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Directorate-General Competition
State aid Greffe
B-1049 Brussels
Fax No: + 32-2-296.12.42

Yours faithfully,
For the Commission

Neelie Kroes
Member of the Commission