

# RELATIONSHIPS BETWEEN NATIONAL, INTERNATIONAL AND EUROPEAN LAW WITHIN THE CONSTITUTIONAL REVIEW IN ROMANIA

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*(Decision no. 887 of 15 December 2015, published in Official Gazette no. 191 of 15 March 2016)*

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The Constitutional Court has ruled that, by adhering to the legal order of the European Union, Romania agreed that, in those areas where exclusive jurisdiction is conferred on the European Union, regardless of the international treaties priorly signed, implementation of its obligations arising therefrom is subject to the rules of the European Union. Otherwise, this would result in the undesirable situation where, through bi or multilateral internationally assumed obligations, Member State would seriously affect the Union's competence and, in practice, would act in its place in the aforementioned areas. For this reason, in the field of competition, any State aid falls within the competence of the European Commission and appeal proceedings fall within the jurisdiction of the European Union. Therefore, pursuant to Article 11 para. (1) and Article 148 para. (2) and (4) of the Constitution, Romania applies in good faith the obligations resulting from the Accession Instrument, without interfering with the exclusive competence of the European Union and, by virtue of the compliance clause contained in the text of Article 148 of the Constitution, Romania cannot adopt a legislative act contrary to the obligations assumed as a Member State. All those already highlighted are subject to certain limitations, expressed in what the Court described as "national constitutional identity".

## I. Subject matter of the exception of unconstitutionality

The Court has been asked to settle the exception of unconstitutionality concerning the provisions under Article 38<sup>2</sup>, Article 38<sup>3</sup> para. (1), (3) and (5), Article 38<sup>9</sup>, Article 41<sup>1</sup> and Article 41<sup>2</sup> of the Government Emergency Ordinance no. 77/2014 on the national procedures in the State aid field and amending and supplementing the Competition Law no. 21/1996, published in the Official Gazette of Romania, Part I, no. 893 of 9 December 2014, as well as those of Article II of Law no. 20/2015 approving Emergency Government Ordinance no. 77/2014 on the national procedures in the State aid field

and amending and supplementing the Competition Law no. 21/1996, published in the Official Gazette of Romania, Part I, no. 160 of 6 March 2015.

The text at issue is worded as follows:

- Article 38<sup>2</sup> of Government Emergency Ordinance no. 77/2014: *“If the investigation procedure is initiated by the European Commission in relation to an allegedly unlawful aid, the provider calls for the establishment of precautionary measures under the Code of Fiscal Procedure on the assets of the beneficiary/beneficiaries of State aid in an amount equivalent to the amount of unlawful State aid examined by the European Commission, as estimated by the provider”*.

- Article 38<sup>3</sup> para. (1), (3) and (5) of Government Emergency Ordinance no. 77/2014: *“(1) Where the European Commission has decided to open an investigation procedure for State aid measures ordered by an enforceable title consisting of a judgment or an arbitration award, as of the day when the European Commission informs the provider on its decision to initiate the investigation procedure, any forced execution of such a title cannot start or, where appropriate, shall be suspended de jure.*

*(...) (3) To implement the enforceable title, within one working day following the date of communication referred to in paragraph (2), the provider of state aid requires the State Treasury where it has opened accounts, the opening of an interest-bearing special account on behalf of creditors and, where appropriate, available to the bailiff. Interest due on liquid assets in the special account is the interest on demand practised by the State Treasury and the source of wherefrom this interest is paid is the budget of the State Treasury. The request for the opening of the account contains the name of the creditors and, where appropriate, that of the competent bailiff, codified with tax identification number 8609468.*

*(...) (5) On the day of payment of the amounts in accordance with paragraph (4), the enforcement acts establishing attachment and seizure on the wealth of the provider of State aid, until the date of suspension laid down in paragraph (1) shall be cancelled as of right. The other enforcement acts remain subject to the time-limits and conditions for appeal provided for by Law no. 134/2010 on the Code of Civil Procedure, republished, with subsequent amendments and supplementations”*.

- Article 38<sup>9</sup> of Government Emergency Ordinance no. 77/2014: *“(1) Further enforcement after the suspension as of right referred to in Article 38<sup>3</sup> para. (1) and until its termination referred to in Article 38<sup>7</sup> para. (6) shall be regarded as disciplinary offence and may be penalised, depending on the seriousness of the offence, with the exclusion from the profession, if the facts do not fulfil the constitutive elements of an offence; the enforcement measures adopted within this period shall be null and void.*

*(2) Finding and sanctioning disciplinary misconduct shall be conducted in accordance with Law no. 188/2000 on bailiffs, republished with subsequent amendments and supplementations”*.

- Article 41<sup>1</sup> of Government Emergency Ordinance no. 77/2014: *“(1) National courts will ensure the direct applicability of Article 108 para. (3) TFEU, taking any steps*

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*necessary under the applicable national procedural rules. The court judgement may order, inter alia: suspension of the payment of unlawful aid, recovery of unlawful aid, recovery of the related interest, damages for the competitors affected by the measure.*

*(2) National courts are required to verify whether the contested measure was declared State aid by the European Commission or by the provider. Where the measure was declared by the European Commission as State aid, the national court may not alter the aid character of the support measure.*

*(3) The Competition Council and/or the European Commission may intervene as amicus curiae.*

*(4) If the provider grants the aid in breach of the notification obligation or the standstill clause, the national courts may adopt measures necessary to protect interested parties, including provisional measures, if any.*

*(5) The beneficiary of unlawful State aid cannot receive any other aid before carrying out any measures ordered by the national court decision ordering recovery.*

*(6) Undertakings affected by the granting of unlawful aid can bring proceedings against the provider for that measure before the Bucharest Court of Appeal”.*

*- Article 41<sup>2</sup> of Government Emergency Ordinance no. 77/2014: “In cases where it was ordered the recovery of a State aid/de minimis aid and the aid beneficiary is undergoing insolvency proceedings, the national court competent to settle the insolvency proceedings will accept to enter the claim concerning the repayment of the aid in question in the schedule of liabilities and will ensure immediate recovery of State aid/de minimis aid, even if this involves cessation of business”.*

*- Article II of Law no. 20/2015: “(1) The provisions of Articles 38<sup>2</sup>-38<sup>9</sup> of Government Emergency Ordinance no. 77/2014 on national procedures in the State aid field and amending and supplementing the Competition Law no. 21/1996, as it was approved as amended and supplemented by this Law, shall also apply to State aid which, on the date of entry into force of this law, is under the investigation procedure conducted by the European Commission.*

*(2) In the situation provided for in paragraph (1), ongoing foreclosures against providers shall be suspended de jure at the date of entry into force of this Law.*

*(3) For investigations already initiated on the date of entry into force of this Law, the time limit referred to in Article 38<sup>3</sup> para. (3) of Emergency Government Ordinance no. 77/2014, as it was approved amended and supplemented by this Law, shall be calculated from the entry into force of this Law”.*

## **II. Grounds for the exception of unconstitutionality**

As grounds for the exception of unconstitutionality, first, it was claimed that the International Centre for Settlement of Investment Disputes (ICSID) delivered an arbitration award granting to the authors of the exception compensation of RON 376.433.229 plus interest.

Subsequently, the Bucharest Tribunal allowed the forced execution of the arbitration award and rejected the appeal brought by the Romanian State, so that a part of the amounts due were paid as “distribution of amounts from the forced execution”.

The authors of the exception of unconstitutionality claim that, during execution, they were informed on the fact that Law no. 20/2015 had entered into force, as well as that, under that law, “acts of enforcement which gave rise to seizure and attachment in the enforcement files were abolished as of right”. Furthermore, under the provisions of Article 38<sup>2</sup> of Emergency Government Ordinance no. 77/2014, as introduced by Article I point 16 of Law no. 20/2015, precautionary measures were imposed over their assets for enforcement of an alleged debt and thus, they were converted from creditors against the Romanian State into debtors thereof.

In this context, the authors of the exception of unconstitutionality claimed that the provisions criticised are contrary to the constitutional provisions of Article 1 para. (3) and (4) on the rule of law, namely the principle of the separation and balance of powers, Article 11 para. (1) on international law and national law and Article 15 para. (2) stating that “*The law shall only take effect for the future, except the more favourable law which lays down penal or administrative sanctions*”. Article 21 para. (1)-(3) concerning free access to justice and the right to a fair trial and Article 44 para. (1) stating that “*The right to private property and claims on the state shall be guaranteed. The content and limits of these rights are established by law*” in conjunction with the provisions of Article 53 on restricting the exercise of certain rights or freedoms, Article 75 on Chambers’ notification, Article 76 on the majority vote needed for the adoption of organic laws and Article 126 para. (1) stating that “justice is administered by the High Court of Cassation and Justice and the other courts established by law”.

### III. Constitutional Court’s arguments

#### 1. Preliminary issues

##### ***Intervention in the case by the European Commission as amicus curiae***

The Court observed that, under Article 23<sup>3</sup> para. (2) of Council Regulation (EC) no. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, the European Commission has lodged *amicus curiae* written observations on the exception of unconstitutionality in question, whereby it essentially asked the Court to reject as unfounded the exception of unconstitutionality and, in the alternative, to the extent that there are doubts about any issues relating to the interpretation of European Union law in the area of State aid, it invited the Court to stay proceedings and refer to the Court of Justice of the European Union questions it deemed necessary as to settle the exception of unconstitutionality, under Article 267 of the Treaty on the Functioning of the European Union, without making any specific request to intervene as a party to the dispute. The Court held that the intervention as *amicus curiae* in the proceedings before the Constitutional Court is not an extension of

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the existing procedural framework, whereas the parties in constitutional proceedings are those that have this capacity in the main proceedings. Submission of written observations, in those circumstances, does not amount to awarding any standing to the European Commission within the meaning of the Code of Civil Procedure in conjunction with Article 14 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court; it is construed as the expression of views/positions of a third person on the issue of constitutionality raised in the main proceedings, with a view to supporting the Constitutional Court's decision in the case.

### ***Background of the dispute***

By Emergency Government Ordinance no. 24/1998 on the LFA scheme, republished in the Official Gazette of Romania, Part I, no. 545 of 8 November 1999, it was established that *"a geographical area may be declared less-favoured area for a period of at least 3 years but not more than 10 years"*. By virtue of this status, companies benefited from:

*"a) exemption from:*

*- customs duties and value added tax on imported machinery, tools, installations, equipment, means of transportation, and other goods subject to depreciation, for purposes of investment in the area;*

*- customs duties and value added tax on machinery, tools, installations, equipment, means of transportation, and other goods subject to depreciation, domestically produced, for purposes of investment in the area;*

*b) the repayment of customs duties on imported raw materials, spare parts and/or components necessary for own production in the area. Repayment of sums will be made based on the approval by the regional development agencies of the documents proving valorisation of production by economic operators. The amounts necessary for the refund to operators in the area of customs duties paid by them will be made available to the Agency for Regional Development from the Regional Development Fund. In the case of less-favoured areas belonging to two or more administrative-territorial units, the amounts necessary for the refund to operators in the less favoured area of the customs duties paid by them will be provided by the National Agency for Regional Development from the National Fund for Regional Development;*

*c) exemption from corporation tax, over the duration of the less-favoured area;*

*d) exemption from charges levied on change of destination or for removing from the civil circuit the land intended for the investment;*

*e) granting, with priority, from the Special development fund available to the Government, constituted under Government Emergency Ordinance no. 59/1997 on the destination of the amounts collected by the State Ownership Fund within the privatisation process of companies where the State is a shareholder, of certain amounts for the purpose to:*

*- encourage the export business of finished products and/or industrial services, as appropriate;*

- *guarantee external credits, within an annual ceiling established by the Ministry of Finance;*
- *finance special programmes, approved by Government decision;*
- *finance investment projects by trading companies through the State's contribution to the share capital".*

By Government Decision no. 194/1999 declaring mining area of Ştei-Nucet, Bihor county, as a less-favoured area, published in Official Gazette of Romania, Part I, no. 134 of 1 April 1999, the area of Ştei-Nucet was declared less-favoured area for a period of 10 years. In this context, the claimants, Romanian legal entities and natural persons with Swedish citizenship, started a series of investments in that area. For investment protection, Romania and Sweden have signed the Bilateral Investment Treaty which entered into force on 1 April 2003.

These incentives were repealed as follows: sub-paragraph a) – by Law no. 345/2002 on value added tax, published in Official Gazette of Romania, Part I, no. 653 of 15 September 2003, sub-paragraph (c) – by Law no. 414/2002 on Corporate Tax, published in the Official Gazette of Romania, Part I, no. 456 of 27 June 2002, and the other incentives granted – by Government Ordinance no. 94/2004 on the regulation of certain financial measures, published in Official Gazette of Romania, Part I, no. 803 of 31 August 2004, and, following the withdrawal of tax relief, the claimants requested the establishment of an arbitral tribunal pursuant to the Bilateral Investment Treaty.

On 11 December 2013, the arbitral tribunal found that by revoking the incentives, Romania had infringed the clause for fair and equitable treatment set forth in the Bilateral Investment Treaty, denying the claimants' legitimate expectations with respect to the availability of the aforementioned tax incentives until 1 April 2009. It ordered the Romanian State to pay EUR 82 million and the total amount with interest equalled EUR 178 million.

Following that judgment, the Romanian authorities have compensated a tax debt of the complainants amounting to EUR 76 million and the complainants took measures of attachment on the accounts of the Ministry of Public Finance, foreclosing the amount of EUR 10,17 million. Following the adoption of the law under examination, the State, on a voluntary basis, opened a blocked account for an amount of EUR 106,5 million.

On 26 March 2014, the European Commission issued an order suspending the payment of sums of money resulting from the arbitration award, although previously, the Bucharest Tribunal had allowed the execution (24 March 2014). On 1 October 2014, the European Commission opened an investigation procedure.

As a consequence of the entry into force of the law under examination, precautionary measures were imposed in accordance with Article 38<sup>2</sup> of Emergency Government Ordinance no. 77/2014; the enforcement proceedings were suspended and enforcement measures already taken against the State were abolished. Against them, the applicants also raised an objection to enforcement.

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On 30 March 2015, the European Commission declared that the respective compensation is State aid which is incompatible with the internal market. Following the decision of the European Commission of 30 March 2015, the Romanian authorities started recovery actions of sums of money already paid (compensation/attachment), and against these implementing measures, the claimants have also formulated objection to enforcement.

### ***The context in which the impugned provisions were enacted***

National procedures in the field of aid have been regulated by Government Emergency Ordinance no. 117/2006 on national State aid procedures, published in Official Gazette of Romania, Part I, no. 1.042 of 28 December 2006, approved with amendments by Law no. 137/2007, published in Official Gazette of Romania, Part I, no. 354 of 24 May 2007, repealed by Article 51 para. (2) of the Government Emergency Ordinance no. 77/2014 on the national procedures in the State aid field and amending and supplementing the Competition Law no. 21/1996, published in the Official Gazette of Romania, Part I, no. 893 of 9 December 2014. Thus, Government Emergency Ordinance no. 117/2006 established the method of collaboration between providers of state aid, beneficiaries, the Competition Council and the European Commission in the field of State aid. But the European Union legislation on State aid was changed radically in the modernisation process launched by the European Commission, so that it was necessary to modify national procedures as well so that Romania could meet its commitments as a Member State of the European Union. In that context, it was adopted Government Emergency Ordinance no. 77/2014 on the national procedures in the State aid field and amending and supplementing the Competition Law no. 21/1996. Government Emergency Ordinance no. 77/2014 was subject to Parliament's approval, under the constitutional provisions, which endorsed that Emergency Ordinance with amendments, adopting Law no. 20/2015 approving Emergency Government Ordinance no. 77/2014 on the national procedures in the State aid field and amending and supplementing the Competition Law no. 21/1996, published in the Official Gazette of Romania, Part I, no. 160 of 6 March 2015. Therefore, the criticised provisions have been adopted in the legislative process for approval of an emergency ordinance, *i.e.* in the course of the legislative procedure initiated under Article 115 para. (5) of the Constitution.

## **2. Admissibility of the exception of unconstitutionality**

### ***The extrinsic challenge of unconstitutionality concerning Article 41<sup>2</sup> of Government Emergency Ordinance no. 77/2014:***

The Court held that the challenges were aimed at a hypothetical situation at the time when the precautionary measures were ordered, *i.e.* situation occurred after the issuance of the European Commission's decision whereby it found that the measure represented State aid incompatible with the common market and that the sums already paid needed to be recovered; therefore, the present case relates to objections to

enforcement regarding the precautionary measures ordered and not to the State aid recovery in the event of insolvency proceedings. Accordingly, the impugned text was irrelevant to the resolution of the case, so that, having regard to Article 29 para. (1) of Law no. 47/1992, the Court found that the exception of unconstitutionality of Article 41<sup>2</sup> of Government Emergency Ordinance no. 77/2014 was inadmissible.

***The challenges of unconstitutionality concerning Article 38<sup>2</sup>, Article 38<sup>3</sup> para. (1), (3) and (5), Article 38<sup>9</sup> and Article 41<sup>1</sup> of the Government Emergency Ordinance no. 77/2014 on the national procedures in the State aid field and amending and supplementing the Competition Law no. 21/1996, as well as Article II of Law no. 20/2015.***

The Court found that the exception of unconstitutionality raised in relation to these texts satisfies the conditions governing admissibility laid down in Article 29 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court.

### **3. Substantive analysis of the exception of unconstitutionality**

#### ***General considerations***

The Court has held that Regulations, as secondary legislative acts adopted at European Union level, are directly applicable in the legal order of the Member State. Therefore, the Member State does not have an express obligation to implement the regulation, which represents a valid obligation with regard to the other secondary acts as, for example, Directives. Therefore, the Member State is under an obligation to comply with the provisions of the regulations, either by making the necessary administrative arrangements, or by developing legislation to create the necessary framework for public authorities to carry out the obligation incumbent on the State. Even if the regulation is directly applicable, it provides a set of rules of general applicability at European Union level, and the European legislator, depending on the scope of the regulation, to a varying extent, may leave the Member States some room for manoeuvre to attain the objective laid down by its provisions.

Competition field is one in which the Romanian State, as all other Member States, has transferred its competences, this area coming under the exclusive competence of the European Union in accordance with Article 3 para. (1) letter b) of the Treaty on the Functioning of the European Union (the establishment of the competition rules necessary for the functioning of the internal market). Of course, the issue of State aid is subsumed to the competition field. In relation to the above, the Court observes that Article 2 para. (1) of the Treaty becomes applicable in this area; under that article “*when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts*”.

Ascertaining compatibility of State aid is an exclusive competence of the European Commission, and verification of Commission’s acts compliance with primary and secondary acts of the European Union is made by the European Union courts (Court of



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First Instance and the Court of Justice of the European Union). In this respect, according to Article 108 para. (2) of the Treaty on the Functioning of the European Union, the Commission “shall decide to abolish or alter aid by the State concerned”. Therefore, national courts do not have the power to ascertain the compliance or non-compliance of State aid with EU law (see the judgment of 12 February 2008 in Case C-199/06 *CELF and Ministre de la Culture et de la Communication*, para. 38, or the judgment of 21 November 1991 in Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v. France*, paragraph 14). In contrast, national courts have the power to protect the rights of persons affected by implementation of State aid contrary to the basic treaties in the phase preceding the Commission’s decision and to implement the Commission’s decision. Thus, national courts in order to protect the interests of third persons, have the power to act *ad interim* (*Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v. France*, para. 12, and Case C-39/94 *SFEI and Others*, paragraph 52) and, accordingly, for example, may place the corresponding amounts of State aid into a blocked account.

Therefore, irrespective of the legislative or administrative behaviour of the Member State, courts have the power to order themselves *ad interim* measures in the field of State aid, giving prevalence to the obligations arising from the application of the Treaty on the Functioning of the European Union. However, if the Member State’s legislative behaviour comes to prevent proper implementation of European Union acts, it means that the Member State establishes a legislative framework able to meet the undertaken obligations. In projecting the *ad interim* measures that can be ordered at administrative level, the State has a broad discretion, the only condition is that it must not distort the existing competitive environment.

#### ***Relevant national legislation***

The Court held that the adoption of Government Emergency Ordinance no. 77/2014 on national State aid procedures, and amending the Competition Law no. 21/1996, as well as Law no. 20/2015 for approval thereof, has as its rationale the need to fulfil the obligations arising under Article 108 of the Treaty on the Functioning of the European Union. From a procedural point of view, the impugned legal texts are an implementation at national level of Council Regulation (EC) no. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, published in the Official Journal of the European Union, L Series, no. 83 of 27 March 1999 (repealed and replaced by Regulation (EU) 2015/1.589 of the Council of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, published in the Official Journal of the European Union, L Series, no. 248 of 24 September 2015).

#### ***Challenges of unconstitutionality concerning Article 38<sup>2</sup> of Government Emergency Ordinance no. 77/2014***

As concerns the challenges of unconstitutionality against Article 38<sup>2</sup> of the Emergency Ordinance in relation to Article 11 para. (1) of the Constitution, the Court

held that Article 2 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded, part of the Treaty of Accession, ratified by Law no. 157/2005, published in the Official Gazette of Romania, Part I, no. 465 of 1 June 2005, provides that *“from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on Bulgaria and Romania and shall apply in those States under the conditions laid down in those Treaties and in this Act”*. Therefore, by adhering to the legal order of the European Union, Romania agreed that, in those areas where exclusive jurisdiction is conferred on the European Union, regardless of the international treaties priorly signed, implementation of its obligations arising therefrom is subject to the rules of the European Union. Otherwise, this would result in the undesirable situation that, through bi or multilateral internationally assumed obligations, Member State would seriously affect the Union’s competence and, in practice, would act themselves in the aforementioned areas. For this reason, in the field of competition, any State aid falls within the competence of the European Commission and appeal proceedings fall within the jurisdiction of the European Union. Therefore, pursuant to Article 11 para. (1) and Article 148 para. (2) and (4) of the Constitution, Romania applies in good faith the obligations resulting from the Accession Instrument, without interfering with the exclusive competence of the European Union and, as established in its case-law, by virtue of the compliance clause contained in the text of Article 148 of the Constitution, Romania cannot adopt a legislative act contrary to the obligations assumed as a Member State. All those already highlighted are of course subject to limitations under the Constitution, expressed in what the Court described as *“national constitutional identity”* (see Decision no. 683 of 27 June 2012, published in Official Gazette of Romania, Part I, no. 479 of 12 July 2012, and Decision no. 64 of 24 February 2015, published in Official Gazette of Romania, Part I, no. 286 of 28 April 2015). Moreover, Article 6 para. (10) of the same Act states: *“(10) With effect from the date of accession, Bulgaria and Romania shall withdraw from any free trade agreements with third countries, including the Central European Free Trade Agreement. To the extent that agreements between Bulgaria, Romania or both those States on the one hand and one or more third countries on the other, are not compatible with the obligations arising from this Act, Bulgaria and Romania shall take all appropriate steps to eliminate the incompatibilities established. If Bulgaria or Romania encounters difficulties in adjusting an agreement concluded with one or more third countries before accession, it shall withdraw from that agreement, in accordance with the clauses of the Agreement”*. That being so, the exception of unconstitutionality of the provisions of Article 38<sup>2</sup> of Government Emergency Ordinance no. 77/2014 was declared unfounded.

**Challenges of unconstitutionality concerning Article 38<sup>3</sup> para. (1), (3) and (5) of Government Emergency Ordinance no. 77/2014**

As concerns the challenges of unconstitutionality against Article 38<sup>3</sup> of the Emergency Ordinance in relation to Article 1 para. (4) of the Constitution, the Court analysed whether by regulating the suspension as of right of the forced execution measures after the communication to the provider of the European Commission's decision opening the investigation procedure, the legislator has breached the principle of separation of powers, *i.e.* whether the law under examination intervenes in the enforcement procedure. Another issue to be examined was whether the State avoided execution, *i.e.* if it avoided the voluntarily enforcement of an arbitration award and thus violated the right to private property of the beneficiary (Articles 21 and 44 in conjunction with Article 53 of the Constitution).

The Court has held in this respect that the source of State aid can be both a legislative or administrative decision and a decision of international law. The judicial or the arbitral decision is not a primary but a secondary source, since it is the result of non-executed primary obligations. Regardless of the case giving rise to State aid, the provider (*i.e.* the State) may take precautionary measures under Article 38<sup>2</sup> of Government Emergency Ordinance no. 77/2014. The fact that the judicial or arbitral decision obliges the Romanian State to pay sums of money in connection with which the European Commission has opened the investigation procedure does not amount to intervention by the legislator during enforcement of a judgement or an arbitral award, but to establishing a regulatory framework to prevent the granting of State aid under the conditions in which the European Commission has ordered an investigation. Therefore, the legislator does not intervene in the implementation and enforcement of the act of justice, it sets out the interim measures which may be ordered until the European Commission gives its opinion on the admissibility or non-admissibility of the possible State aid. The fact that, regardless of the nature of the granting authority, the European Commission has the competence to determine this status, does not mean that the courts or the arbitration panel grants such aid *proprio motu*; the aid is granted subject to some legislative, administrative or international law acts, so that what it is specifically censored is not the court order, but the content of the primary source.

Such a precautionary measure is ordered under the conditions of the Code of Fiscal Procedure and aims at the seizure of property of the beneficiary of the potential State aid in an amount equivalent to the amount of State aid under examination. It should be noted that, symmetrically, the State opens an interest-bearing special account on behalf of creditors and, where appropriate, available to the bailiff. Thus, the interim measures are equivalent and symmetrical between the provider and the beneficiary of the State aid examined by the European Commission and are ordered to ensure, on the one hand, that the beneficiary will receive the money relating to the State aid examined should the European Commission decide on its compatibility with the Treaty on the Functioning of the European Union, and, on the other hand, that the provider of state aid will be able to recover sums of money related to State aid examined and already paid before the beginning of the Commission's investigation if the latter should find the

incompatibility of State aid with the Treaty on the Functioning of the European Union. Finally, they avoid distortions of competition in the common market.

With regard to the challenge of unconstitutionality on establishing grounds for suspension as of right of enforcement, the Court found that the legislator is entitled to establish such rules. Therefore, the suspension as of right governed by Law no. 20/2015 is not an isolated provision in the national legislative framework, and it can be found, for example, in Law no. 85/2014 on proceedings preventing insolvency and insolvency proceedings, published in the Official Gazette of Romania, Part I, no. 466 of 25 June 2014 [Article 75 para. (1)]. Such a temporary measure is taken to guarantee the unity of the whole enforcement process in order to protect the interest of both the beneficiary and the State aid grantor. If the benefit that could be classified as State aid has not been fully enforced, the beneficiary, as a result of the measure of suspension as of right, could not be subjected to an action for the return of benefits in relation to the outstanding amounts, or become unable to enforce the undisbursed amounts if an incompatibility decision is given by the European Commission. Furthermore, the provider will not be asked to fulfil an obligation in respect of which, according to the Commission's decision, it could initiate recovery procedures.

Apart from the above, the Court noted that Law no. 20/2015 states that, for enforcement of the enforceable title, the provider of state aid requires the State Treasury where it has opened accounts, to open an interest-bearing special account on behalf of creditors and, as appropriate available to the bailiff [Article 38<sup>3</sup> para. (3)]. Interest due on liquid assets in the special account is the interest on demand practised by the State Treasury and the source of payment of this interest is the budget of the State Treasury. Furthermore, the State Treasury shall preserve the available amount until the communication of the European Commission's decision on the compatibility of that State aid with the internal market to the provider [Article 38<sup>6</sup> para. (2)]. At the conclusion of the investigation, the provider of State aid, within 5 working days of receipt, shall communicate a copy of the European Commission's decision on the compatibility of that State aid with the internal market to the creditors and, where applicable, to the bailiff. Following receipt of the European Commission's decision finding that the aid is compatible with the internal market, on the basis of it, the measures concerning the non-availability of the deposited amount or, as the case may be, suspension of enforcement shall cease [Article 38<sup>7</sup> para. (2)]. At the same time, under this procedure, pursuant to Article 38<sup>4</sup>, creditors dissatisfied with the amounts, as well as the bailiff dissatisfied with the amount of enforcement costs may ask the provider to increase the amount of State aid, and the provider is obliged to settle the request within the statutory time limits defined by law, and the person who considers himself injured party may bring an appeal against such resolution before the administrative court under the Administrative Litigation Law no. 554/2004, published in Official Gazette of Romania, Part I, no. 1.154 of 7 December 2004, as subsequently amended and supplemented. Therefore, the provider of state aid is required to amend

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the sum deposited, according to the judgements of the courts in any legal proceedings, by increasing or decreasing the amount deposited, as appropriate, and non-payment of the amounts within the time limit laid down in Article 38<sup>3</sup> para. (4) or, as the case may be, non-modification of the amount thereof within the time limit set in Article 38<sup>5</sup> attracts the cessation of the suspension of the forced execution (Article 38<sup>5</sup> and Article 38<sup>6</sup>). Thus, the law provides for a series of guarantees that are capable of preserving the right to property of the creditors covered by the impugned rules as an application of the provisions of Article 44 of the Constitution. In those circumstances, the provisions of Article 53 of the Basic Law have no impact on the present case.

Abolition of enforcement acts whereby seizure and attachment were imposed until the date of suspension as of right is merely a consequence of the latter, this complementary measure ensuring the unitary character of the procedure, because otherwise, either the suspension as of right becomes devoid of purpose, or enforcement measures are further applied and the suspension as of right would only concern hypothetical, future enforcement acts. There is no breach of the right to private property, but, on the contrary, the State ensures the performance of its incumbent obligations, but in compliance with EU regulations on State aid. The need to regulate a uniform and coherent procedure for managing the obligations incumbent on Romania pursuant to Article 108 of the Treaty on the Functioning of the European Union cannot be qualified as a violation of the right to private property, on the contrary, the precautionary measures imposed on the provider ensure the performance of the latter's obligations if the European Commission determines the compatibility of State aid with the common market.

Therefore, both the precautionary measures ordered and the suspension as of right of forced execution, as well as the abolition as of right of enforcement measures ordered before the opening of the investigation procedure by the European Commission are preventive and provisionally, without qualifying the payment obligation of the State as having the character of State aid or as compatible or incompatible with the internal market rules. Therefore, the exception of unconstitutionality concerning Article 38<sup>3</sup> para. (1), (3) and (5) of Government Emergency Ordinance no. 77/2014 was declared unfounded.

#### ***Challenges of unconstitutionality concerning Article 38<sup>9</sup> of Government Emergency Ordinance no. 77/2014***

The Court held that the regulation of a case of disciplinary offence on the bailiff may not be converted into an interference with the act of justice. First of all, justice is served by the courts, and not by the bailiff, and, secondly, it is for the legislature to regulate disciplinary offences of this socio-professional category, and slippages in the application of disciplinary sanctions will be examined by the courts. This measure is also a guarantee for compliance with Romania's obligations undertaken under the Accession Instrument, the legislator seeing that, from a regulatory viewpoint, no representative of the State would perform acts which endanger the obligations undertaken. Moreover,

under the provisions of Article 2 para. (2) of Law no. 188/2000 on bailiffs, republished in the Official Gazette of Romania, Part I, no. 738 of 20 October 2011, bailiff acts are acts of public authority. That being so, the Court found that the exception of unconstitutionality of the provisions under Article 38<sup>9</sup> of Government Emergency Ordinance no. 77/2014 is unfounded.

***Challenges of unconstitutionality concerning Article 41<sup>1</sup> of Government Emergency Ordinance no. 77/2014***

The Court held that the challenges made in relation to this legal text are based on a confusion; while the impugned legal text provides the possibility of any national court to directly apply the provisions of the Treaty and, consequently, to take appropriate procedural steps, the authors of the exception of unconstitutionality induce confusion that any claim of a beneficiary of State aid against the Romanian State (even deriving from a court ruling) would fall under the notion of State aid. From the analysis of the impugned provisions, the Court notes that it cannot be concluded that the State assumes *ab initio* that the benefit to which it is bound by a judgment or arbitration award is State aid, but rather provisional measures shall be ordered only if in connection with this benefit the European Commission opened an investigation. The opening of an investigation is the European Commission decision, it cannot be censored by the Constitutional Court; it is however recalled that, according to Regulation (EC) no. 659/1999, before the opening of a formal investigation procedure, the European Commission triggers a preliminary screening and, depending on its outcome, *i.e.* if there are doubts about the status as State aid or its compatibility with the common market, it decides on whether or not it opens a formal procedure, aspects that are also referred to in Regulation (EU) no. 2015/1.589 of the Council of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union. For the reasons set forth above, the exception of unconstitutionality of the provisions of Article 41<sup>1</sup> of Government Emergency Ordinance no. 77/2014 was declared unfounded.

***Challenges of unconstitutionality concerning Article II of Law no. 20/2015***

The Court found that by applying such precautionary measures to an enforcement procedure ongoing at the time of entry into force of the law, *i.e.* suspension as of right of forced execution and abolition as of right of acts of enforcement which gave rise to seizure and attachment, it was not infringed the principle of non-retroactivity of civil law. Moreover, as consistently held by the Constitutional Court in its case-law, a law is not retroactive when it amends for the future a state of law previously created nor when it suppresses future effects of legal situations created under the rule of the old law, because in these cases the new law does nothing but deny the survival of the old law and regulate action following its entry into force, *i.e.* in its own field of application [Decision no. 458 of 2 December 2003, published in the Official Gazette of Romania, Part I, no. 24 of 13 January 2004]. Therefore, the ongoing forced execution procedure, suspended *de jure* as a consequence of the entry into force of this law, and the ordering

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of the precautionary measures provided for by the law analysed in respect of State aid on the date of entry into force of this law, in the investigation procedure conducted by the European Commission, does not mean a retroactive application of the law, but its application to situations classified as *facta praeterita* but to pending situations which are undergoing execution at the moment of entry into force of the law. The Law acts in its own field of application, being of immediate application also in relation to such situations.

### **IV. Constitutional Court's arguments**

The Court dismissed, as inadmissible, the exception of unconstitutionality of the provisions of Article 41<sup>2</sup> of Government Emergency Ordinance no. 77/2014 on the national procedures in the State aid field and amending and supplementing the Competition Law no. 21/1996. Furthermore, it ascertained that provisions of Article 38<sup>2</sup>, Article 38<sup>3</sup> para. (1), (3) and (5), Article 38<sup>9</sup> and Article 41<sup>1</sup> of the Government Emergency Ordinance no. 77/2014 on the national procedures in the State aid field and amending and supplementing the Competition Law no. 21/1996, as well as those of Article II of Law no. 20/2015 Law no. 20/2015 for approval of this emergency ordinance are constitutional in relation to criticisms made, and it dismissed as unfounded the exception of unconstitutionality in relation to those texts.

### **V. Note**

**In parallel, the Court of Justice of the European Union was referred to with the action brought on 28 November 2015 – Micula *e.a.* v. Commission (Case T-704/15)<sup>1</sup>:**

#### **Parties:**

*Applicants:* Viorel Micula (Oradea, Romania), European Drinks SA (Ștei, Romania), Rieni Drinks SA (Rieni, Romania), Transilvania General Import-Export SRL (Oradea), West Leasing International SRL (Pântășești, Romania) (representatives: J. Derenne, A. Dashwood, D. Vallindas, lawyers)

*Respondent:* European Commission

#### **Form of order sought**

The applicants claim that the Court should:

annul Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania [Arbitral award Micula

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<sup>1</sup> Text taken from address <http://curia.europa.eu/juris/document/document.jsf?text=&docid=174525&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=837505>.

v. Romania of 11 December 2013 (notified under document C(2015) 2112]) (OJ 2015 L232, p. 43);

alternatively, annul the contested decision insofar as

it identifies Viorel Micula as an ‘undertaking’, and therefore part of the alleged single economic unit constituting the beneficiary of the aid,

identifies the beneficiary of the aid as a single economic unit comprising Viorel Micula, Ioan Micula, S.C. European Food SA, S.C. Starmill S.R.L., S.C. Multipack, European Drinks SA, Rieni Drinks SA, Scandic Distilleries SA, Transilvania General Import-Export SRL, and

orders, at Article 2 para. (2), that Viorel Micula, Ioan Micula, S.C. European Food SA, S.C. Starmill S.R.L., S.C. Multipack, European Drinks SA, Rieni Drinks SA, Scandic Distilleries SA, Transilvania General Import-Export SRL, and West Leasing SRL shall be jointly liable to repay the State aid received by any one of them;

order the Commission to bear the costs of these proceedings.

### **Pleas in law and main arguments**

In support of the action, the applicant relies on eight pleas in law.

First plea in law, alleging a lack of competence and misuse of powers. By its mischaracterisation of the execution of the ICSID arbitral award (the ‘Award’) as the granting of State aid within the meaning of Article 107 para. (1) TFEU, the Commission is effectively asserting powers, which it enjoys in relation to State aid granted by Romania following that country’s accession to the EU, retrospectively to the pre-accession period. The Commission manifestly lacks competence to use its State aid powers in this way. The adoption of a decision having such purpose and effect further entails the misuse of those powers.

Second plea in law, alleging a violation of Article 107 para. (1) TFEU

First, the decision does not demonstrate the existence of an economic advantage as it identifies the execution/implementation of the Award as the incompatible aid. The present case meets the conditions of the Asteris case-law (judgment of 27 September 1988 in Asteris and Others, 106/87 to 120/87). Any advantage (quod non) pre-dates Romania’s accession to the EU and is thus outside the scope of EU State aid rules. Second, the decision does not demonstrate the existence of selectivity. The Bilateral Investment Treaty Romania-Sweden (“BIT” – the legal basis of the Award) establishes a system of general liability that is equally applicable to any investor. Third, the decision does not demonstrate that the measure in question is imputable to the Romanian State. Romania has no margin of appreciation to execute the Award.



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Third plea in law, alleging a violation of Article 351 TFEU and general principles of law. Article 351 TFEU protects the obligations incurred by Romania through the execution of the BIT with Sweden, while it was still an agreement between a Member State (Sweden) and a third country (Romania), against any possible post-accession effects of the EU State aid rules.

Fourth plea in law, alleging a violation of the principle of the protection of legitimate expectations. The EU authorities actively encouraged the conclusion of BITs, and consequently caused to entertain a legitimate expectation that an effort to enforce such a BIT through arbitration would not be blocked e.g. under State aid rules.

Fifth plea in law, alleging in the alternative, that the alleged aid should be considered as compatible aid. The national measure in question which was at the origin of the arbitration and the Award was never the subject of a definitive finding of incompatibility. In any event, it would have been compatible with EU State aid rules.

Sixth plea in law, alleging, in the alternative, that the decision incorrectly determines the beneficiaries of the alleged aid. The decision does not demonstrate either that Viorel and Ioan Micula form part of the alleged single economic unit, or that there is a single economic unit in this case.

Seventh plea in law, alleging errors in the recovery ordered by the decision. As the decision incorrectly determines the beneficiaries of the alleged aid, it orders the recovery from individuals and companies which are not beneficiaries of the alleged aid.

Eighth plea in law, alleging a violation of an essential procedural requirement (right to be heard). The decision opening the formal investigation procedure did not mention at any point the applicants European Drinks, Rieni Drinks, West Leasing and Transilvania General Import-Export.