

DECISION OF THE COMPETITION COUNCIL
No. 303 dated 12.11.2004
regarding the guarantees granted to the Ministry of Transports,
Constructions and Tourism designated for the financing of the project
„The design and construction of the Auto-road Brasov-Cluj Napoca-
Bors”

THE COMPETITION COUNCIL,

Based on:

Taking into consideration the Decree no. 57/2004 regarding the appointment of the members of the Competition Council Plenum,

Taking into consideration the dispositions of the Competition Law no. 21/1996, published in the Official Gazette no. 88/April 30, 1996, Part I, with the subsequent modifications and completions,

Taking into consideration the dispositions of the Law no. 143/1999 regarding the state aid, published in the Official Gazette no. 370, Part I, on 03.08.1999, with the subsequent modifications and completions,

Taking into consideration the dispositions of the European Agreement establishing an association between Romania, on one hand, and the European Communities and their Member States on the other hand, ratified by the Law no. 20/1993 published in the Official Gazette no. 73, Part I, on 12.04.1993,

Based on the following grounds:

I. PROCEDURE

- (1) By the address no. 2790/23.06.2004, registered to the Competition Council with no. RS-AS 71/23.06.2004, were notified, based on the art.6 in the Law

no. 143/1999 of the state aid, with the subsequent modifications and completions, the state guarantees granted to the Ministry of Transports, Constructions and Tourism.

- (2) By the address no. DAAS/473/29.06.2004 was requested supplementary information based on art.6 align.(4) in the Law no.143/1999 of the state aid, with the subsequent modifications and completions, to which it was returned at by the address no. CC/2197/20.09.2004. The ministry sends information by the address no. 4364/19.10.2004, registered at the Competition Council with no. R.G. 7384/19.10.2004. As the received answer didn't fully clarified all the aspects, it was returned to the request of supplementary information by the address no. DAAS/ 819/25.10.2004.
- (3) The requested information were submitted in the address no. 40/2547 registered at the Competition Council with no. R.G. 7488/25.10.2004. The notification became effective at the date when the information were exact and complete, namely on 25.10.2004.

II. DESCRIPTION OF MEASURE

2.1. The granting form

- (4) The notified financial support consists in the guarantee by the state, through the Ministry of Public Finance, of certain external credits contracted by the Ministry of Transports, Constructions and Tourism, as well as of the insuring bonuses, interests, commissions and other related costs. The credits are designated for finalizing the project The design and construction of the Auto-road Brasov-Cluj Napoca-Bors.
- (5) The legal basis for granting the financial support is the G.D *no. 1362/2003 regarding the approval of the contracting by the Ministry of Transports, Constructions and Tourism of certain external credits guaranteed by the Ministry of Public Finance, designated to the accomplishment of the Auto-road Brasov-Cluj-Bors*". The total amount of the external credits is EURO 2,885,000,000, being guaranteed 100% by the state.
- (6) Until now, MTCT contracted, based on the provisions of G.D 1362/18.11.2003 two external credits, guaranteed by the State: a credit in amount of Euro 33,000,000 (the contracting date: April the 28th, 2004) and a

credit in amount of Euro 73,000,000 (contracting date: July the 7th, 2004). Both loans are taken from RZBA Austria, for a 10 year period, the selection of the financier being made based on a financing offer competition.

- (7) The beneficiary of the guarantees is the Ministry of Transports, Constructions and Tourism (MTCT). As specialized body of the central public administration, the ministry establishes the national policy in the transport, construction and tourism field. One of its main attributions is to insure the whole development of the public national roads network. Therefore, MTCT must administrate the road infrastructure of national interest, for insuring the traffic in safety, fluency and continuity conditions. For accomplishing these obligations, the national authority in the transport field, initiates investments programs and maintenance/ repairing workings for the national roads and auto-roads, following in the same time their implementation.
- (8) The guarantee object of the notification are/ are going to be granted for contracting certain loans designated to the accomplishment of such an investment program: The Auto-road Brasov- Cluj Napoca-Bors.

2.2. Description of the project

- (9) The project for the Auto-road Brasov-Targu Mures-Cluj-Oradea existed since 1996; then there were made the first studies and documents for the section Cluj-Oradea and in 1997 the studies and documents for the section Brasov-Cluj. In 2003, the paperwork was revised and updated.
- (10) The present route of the auto-road Brasov – Cluj – Bors is a priority project, of national importance, in the Plan of Fitting out of the National Territory – Section 1- Roads, approved by the Law no. 71/1996.
- (11) In the same time, the auto-road is part of the TEM international network (Trans-European Motorway). We mention that, Romania signed in 1991 the Cooperation Agreement for managing the fund for the Trans- European auto-road, which also includes this auto-road. In the same time, the section Bors-Oradea-Cluj is part from the TEN network (The European Transport Network, provided by the Decision no. 1692/96/EC of the European Parliament and the Council), the accomplishment of this project being, in fact, an obligation assumed by the Romanian Govern towards the European Union.

- (12) According to the feasibility study of the project, the total estimated value of the investment is of Euro 3,433,150,000. The project is financed from external credits and, in completion, from the state budget through the MTCT's budget.
- (13) The total length of the projected auto-road is of 415 km (starts from the locality Cristian, Brasov County and ends to the frontier with Hungary, respectively the Bors locality).
- (14) The estimated duration for accomplishing the project is of 9 years.

2.3. The project's implementation

- (15) The project company of this investment is the National Company of Auto-roads and National Roads from Romania S.A. (NCANRR). This is a legal person of national strategically interest, which is owned 100% by the Romanian State and is organized and functioned under the authority of MTCT.
- (16) According to its establishment act, respectively EGO no. 84/2003, approved by the Law no. 47/2004, the company mainly carries out activities of national public interest in the field of national roads and auto-roads management. The main activity object of the company is the design, construction, modernization, re-habilitation, repairing, maintaining and exploiting the national interest roads, for safe road traffic, as well as the coordination of the whole development of the public roads network.
- (17) For each credit is closed an implementing convention, between MTCT and NCANRR, based on which the funds designated for the project are transferred to the Project Company. MTCT deposes to NCANRR the whole responsibility for using the funds given for the project's execution.
- (18) For this, the Project Company is responsible for:
 - a. The acquisition and execution of workings, goods and services in the project with the meeting of the legislation in force regarding the public acquisitions;
 - b. The monitoring of the execution and the supervising of the project;

- c. The annual accountability of the expenses, in accordance with the general cost estimate, as well as of all the payments made in relation with the project;
- d. The preparation of the necessary information, data and documents regarding the justification of the drawing notifications and the elaboration of the periodical reports.

(19) The funds transferred by MTCT to the Project Company are exclusively used for financing the acquisitions of products, workings and services designated to the accomplishment of the project. MTCT shall monitor the utilization of the funds from the loans made by the project Company for the approved purposes.

(20) NCANRR has to insure the synthetically and analytical financial- accountable registers for managing the funds send by MTCT in different accounts, according to the legislation in force.

(21) For selecting the project's performer, MTCT submitted requests to the international financial organizations and institutions with the occasion of different meetings and presentations of the project, within certain investment forums. According to the information submitted by MTCT, the only interested firms were Bechtel International and Washington Group, the last one giving up to the steps for this project.

(22) By the G.D 1513/2003 the National Company of Auto-roads and National Roads from Romania S.A. was mandated to start the negotiation procedure with only one source, with the firm Bechtel International Inc., for closing the contract for the design and construction project of the Auto-road Brasov-Cluj Napoca-Bors. The negotiation was based on the data and information from the pre- feasibility and feasibility studies of the project. The contract was signed on 19.12.2003.

III. THE ANALYSIS OF THE SUPPORT MEASURES FROM THE STATE

(23) MTCT requested to the Competition Council by the sending address of the notification, submitted on 23.06.2004, to pronounce itself on the guarantees granted by the state to the ministry for contracting the external credits.

(24) Therefore, the present decision analyses only the state aid character of the notified measure, respectively the guarantees, the potential advantage to the lender and the fund transfer toward the Project Company.

(25) In accordance with the jurisprudence of the European Court and with the jurisprudence of the European Commission, the ‘state aid’ term, as described in Art. 87(1) in the EC Treaty is characterized by the following four definite elements: (i) any benefit (ii) granted by the state or from state resources (iii) to a certain undertaking or sector (selectivity), (iv) which could distort the competition and affect the trade between the Member States.

(26) Art. 2 in the Law no.143/1999 of the state aid, with the subsequent modifications and completions, defines the state aid as being any support measure granted by the state or by the administrative- territorial units, from state resources or resources of the administrative- territorial units, regardless the form, which distort or threaten to distort the competition, by favoring certain undertakings, of the production of certain goods, or performing certain services or affects the trade between Romania and the Member States of the European Union, being considered compatible with the normal competitive environment.

(27) In consequence, the notified financial support measure must be analyzed by considering the fulfillment of the criteria of defining the state aid.

(28) The support measures granted by the state for The design and construction of the Auto-road Brasov - Cluj Napoca - Bors, object of the present decision, are:

- the guarantees granted to MTCT for contracting certain external credits necessary for financing the project;
- funds transfer from MTCT towards the National Company of Auto-roads and National Roads from Romania S.A with the purpose of implementing the project;
- the potential advantage granted to the lender by the state issuing the state guarantee.

Therefore:

(29) These measures involve without question the state resources.

- (30) As MTCT is a body of the public central administration, fulfilling the role of public authority in the transport, construction and tourism field, by its status it cannot be beneficiary of a state aid.
- (31) With regard to CNADNR, it is considered that the transfer of funds in order to implement the project does not confer to it any economic advantage due to the fact that:
- (32) The investment objective of the project, respectively the auto-road is part from the road infrastructure of the Romanian state. It represents a public infrastructure objective, and the users' access is guaranteed in a free undiscriminating manner.
- (33) According to the Law no. 213/1998 regarding the public property and its legal regime, the national roads – auto-roads, the express roads, the main, secondary national European roads, - belong to the public field of the Romanian State. As a national administration of the roads, the company has as obligation to coordinate the whole development of the public roads network in accordance with the national economy demands and with those of defense and to implement the programs for construction, modernization, rehabilitation of these roads. NCANRR is only the implementing agency for that investment and not its owner.
- (34) In conclusion, finalizing the Design and construction of the Auto-road Brasov-Cluj Napoca-Bors has as purpose the accomplishment of the road infrastructure of national interest, in order to carry on the traffic in safety conditions, at standards harmonized with those of the European Union. In fact, the financial support represents a benefit for the national economy, as a whole and, not finally, for all the end users of the auto-road (citizens, undertakings, etc.).
- (35) Regarding the potential advantage granted to the lender by issuing the state guarantee, this was analyzed on the basis of the *Instructions regarding the state aid under the form of guarantees*. According to paragraph 2.2 of the Guidelines on State aid granted in form of guarantees, if a State guarantee is given ex post in respect of a loan or other financial obligation already entered into without the terms of this loan or financial obligation being adjusted, or if one guaranteed loan is used to pay back another, non-guaranteed loan to the same credit institution, then there may also be an aid to the lender, in so far as the security of the loans is increased. Such aid is able of favouring the lender

and distorting competition, and generally falls within the scope of the Law no. 143/1999 on State aid, with subsequent amendments and completions.

- (36) The guarantees provided by the Ministry of Public Finance are considered as a precedent condition in order that the external loans contracted by MTCT to become effective. The guarantees are provided by the MFP before drawing any of the loan tranches. The Lender (Raiffeisen Zentralbank Osterreich Aktiengesellschaft) requested to the Borrower (MTCT), under the Facility Agreement, to provide a security for the due and complete satisfaction of all payment obligations of the Borrower in the form of unconditional and irrevocable guarantee to be issued by the Romanian State. The Competition Council notes that the Borrower has committed to secure that the Romanian State through the Ministry of Public Finance will issue and maintain a guarantee. It cannot be considered that the guarantee was issued for an existing loan or for another financial commitment that had already been entered into or was a guaranteed loan used to repay another non-guaranteed loan.
- (37) Based on the GD no. 1362/18.11.2003 which was published in the Official Gazette no. 851/29.11.2003 the Government of Romania disseminated to all interested parties the information regarding the issuing of a sovereign guarantee for external loans and the terms related to the transaction , as such as all interested banks had the same information in order to make an informed decision.
- (38) The request for proposals was agreed by MPF with MTCT and contained a list of top international banks capable to finance a project of this scale with a total value estimated at EUR 2.885 bln. This list is usually used by MTCT in order to secure finance for large investment projects with a significant infrastructure component. The request was sent to the following banks: ABN AMRO Bank, HVB Bank, Deutsche Bank, Ing Bank, Raiffeisen Bank, Credit Suisse First Boston, JP Morgan, Citibank, UBS Warburg, BRD-Groupe Societe Generale on December 23rd, 2003.
- (39) The text of the request of proposals clearly showed all the banks in advance that the financing was based on 100% state guarantee and, therefore, all banks will benefit of an equal treatment, transparent procedure and free access in order to submit their offers on an equal footing. The request for proposals contained uniform evaluation criteria used to assess the banks' proposals, as follows:

- price;
- terms;
- extent of underwriting;
- size of the un-guaranteed facility;
- tenor of the facilities, including grace periods;
- relevant experience.

(40) In addition, by way of comparison, we have looked at other transactions backed by a MPF guarantee existing on the market as of the same date. As a result, the Motorway financing has been concluded within competitive market terms (an interest margin of 200-240 basis points over a benchmark pricing for a facility with a 10 year tenor) comparable to the interest paid on the recent Eurobond issues of the Romanian State on the international capital markets.

(41) Based on the above, we consider that the financing bank was not favored against the other banks submitting financing proposals and, therefore, the 100% guarantee does not contain aid in favor of lender.

(42) Taking into account that a measure cannot be considered as state aid, in accordance with the Law no. 143/1999 of the state aid, with the subsequent modifications and completions, with the exemption when the four criteria are cumulatively met and taking into account that the second and third condition (advantage which would favor certain undertakings, the production of certain goods or the performance of certain services) are not met, it isn't necessary that the fourth condition, respectively the distort of the competition and the affecting of the trade with the Member States of the European Union, to be analyzed.

(43) Regarding the facts presented above, we consider that the financial support measures granted by the state for financing the project The Design and construction of the Auto-road Brasov-Cluj Napoca-Bors are not state aid, as the four elements characterizing a state aid are not cumulatively met.

DECIDES

Art. 1. In the basis of art. 8 align. (2) corroborated with art.12 align. (2) letter a) in the Law no.143/1999, with the subsequent modifications and completions the guarantees granted to the Ministry of Transport, Constructions and Tourism for "The Design and construction of the Auto-road Brasov-Cluj Napoca-Bors" do not represent a state aid.

Art. 2. In the basis of art. 8 align. (2) corroborated with art.12 align. (2) letter a) in the Law no.143/1999, with the subsequent modifications and completions, the funds granted by the Ministry of Transport, Constructions and Tourism to the National Company of Auto-roads and National Roads from Romania S.A. do not represent state aid, being designated for the financing of a public infrastructure objective.

Art. 3. In the basis of art. 8 align. (2) corroborated with art.12 align. (2) letter a) in the Law no.143/1999, with the subsequent modifications and completions, the guarantees granted by the Ministry of Transport, Constructions and Tourism to secure the external loans do not involve state aid elements for the lender.

Art. 4. This Decision becomes applicable on the date of its communication.

Art. 5. This Decision will be communicated by the General Secretariat from within the Competition Board:

- to the Ministry of Public Finance, Apolodor Street no.17, sector 1, Bucharest
- to the Ministry of Transport, Constructions and Tourism, bd Dinicu Golescu, nr. 38, sector 1, Bucuresti.

Art. 6. The General Secretariat and the Directorate of State Aid Authorization from within the Competition Board will pursue the accomplishment of this Decision.

PRESIDENT

MIHAI BERINDE