

**DECISION NO 326
of 20.12.2004**

**concerning the measures of financial support granted to C.N.
“Administratia Porturilor Maritime” S.A. Constanta**

THE COMPETITION COUNCIL,

Having in view the provisions of the Decree no. 57/2004 on the appointment of the Competition Council members,

Having in view the provisions of the Competition Law no. 21/1996, published in the Romanian Official Gazette, Part I, no. 88 on April 30, 1996, with further modifications and completions,

Having in view the provisions of the Law no. 143/1999 on the State aid, as published in the Romanian Official Gazette, Part I, no. 370 on August 3, 1999, with further modifications and completions,

Having in view the provisions of the Europe Agreement establishing an association between Romania, on the one hand, and the European Communities and their Member States, on the other hand, ratified by the Law no. 20/1993, published in the Romanian Official Gazette, Part I, no. 73 on April 12, 1993,

On the grounds of:

I. PROCEDURE

- (1) By the address no. 107873/19.04.2004 registered to the Competition Council under the no. RS-AS 46/21.04.2004, the Ministry of Public Finance notified on the base of art. 6 of the Law no. 143/1999 on State aid with further modifications and completions, the measures of financial support granted to S.C. „Administratia Porturilor Maritime” S.A. Constanta. The measures consist in external loans contracted by the Ministry of Public Finance on behalf of the State, credits that are subsequently sub-lent to the company and budgetary allocations that the company annually gets from the state budget through the budget of Ministry of Transport, Constructions and Tourism, destined to finance investments and/or to reimburse loans.
- (2) Through the address DAAS/312/7.05.2004, complementary information was requested on the base of art. 6 (4) of the Law no. 143/1999, with further modifications and completions. The Ministry sent the information through the address no 25/2215/28.05.2004 registered to the Competition Council under no DAAS/376/31.05.2004. As the answer received did not clarify all the aspects raised, a new complementary request of information was sent through the addresses no. DAAS/420.15.06.2004 and DAAS/619/03.08.2004.
- (3) The information requested was sent through the address no. G.M. 322/27.09.2004, registered to the Competition Council under no. DAAS/709.28.09.2004. The notification became effective at the date de information was accurate and complete, respectively 28.09.2004.

2. DETAILED DESCRIPTION OF THE SUPPORT MEASURES

2.1 The way of granting the financial support

- (4) The financial support of which C.N. „Administratia Porturilor Maritime” S.A. Constanta benefits, consists in:
 - external credits contracted by the Ministry of Public Finance on behalf of the State, credits that are subsequently sub-lent to the company;
 - budgetary allocations that the company receives annually from the state budget through the budget of Ministry of Transport, Constructions and Tourism, as coordinating authority, destined to finance investments and/or to reimburse loans.

2.2. Beneficiary of the State support measures

- (5) The beneficiary of the measures of State financial support is C.N. „Administratia Porturilor Maritime” S.A. Constanta, shares commercial company, state owned company, which is organized and functions on the base of economic financial administration and financial autonomy. The strategic management of the company is assured in accordance with the Law no. 31/1990, republished, by the General Assembly consisting in two representatives of the Ministry of Transport, Constructions and Tourism and a representative of the Ministry of Public Finance.
- (6) The company has as specific object of activity, being entrusted by the Ministry of Transport, Constructions and Tourism to carry out activities of national public interest as port administration for the maritime harbours Constanta, Mangalia, Midia and the tourist harbour Tomis, in accordance with the provisions of its setting up act, respectively the Government Decree no. 517/1998, modified and completed by the Government Decree no. 464/2003.
- (7) In order to fulfil the role of port authority and as port administration, C.N. „Administratia Porturilor Maritime” S.A. Constanta has the following attributions and obligations:
- to apply the harbour politics worked out by the Ministry of Transport, Constructions and Tourism;
 - to coordinate the activities that are carried out in maritime ports;
 - to implement development programmes of maritime harbours infrastructures;
 - to assure the functioning and administration of maritime ports;
 - to pursue or to assure the permanent supply of security services in maritime ports;
 - to assure the maintenance, repairing and maintaining of minimum technical characteristics of port infrastructures leased to it;
 - to assure the coast and floating signalization for navigation in maritime ports, on the sea and on the shipping channels of access to the sea to those ones;
 - to assure maintenance dredging to maintain the minimum depths in port and on the shipping channels of access to the sea to those ones;

- to assure anti-pollution dams when operating oil petroleum merchandise and of its derivatives in the oil petroleum terminals from the maritime ports;
- to assure the taking over of residues and of tail waters from ships, the taking over of the garbage from the ships;
- to put in an indiscriminately way at the disposal of users the port infrastructures;
- to establish an entering order of the ships in maritime ports;
- to allocate the berths from maritime ports where the ships are going to operate and to issue accosting licences to those berths;
- to pursue and to take the necessary measures so that the merchandise traffic in maritime ports as well as the way of depositing them not to affect the security of port infrastructure and ships' operation;
- to exercise control activities over the loading and download operations of the ships.
- to grand advisory opinions in order to authorise the undertakings which are going to carry out naval transport in maritime ports;
- to approve the carrying out of other activities in maritime ports, other ones than those that have to be authorised by the Ministry of Transport, Constructions and Tourism, issuing working licences;
- to keep the evidence of port workers that carry out activities of ships' loading and downloading merchandise, storing heaping, packaging activities, ships' cleaning activities and so on.

(8) C.N. “Administratia Porturilor Maritime” S.A. Constanta has in its structure four sub-units with the status of branch, as follows:

- harbour communications branch;
- energy re-distribution branch;
- harbour services branch;
- harbour technical ships branch.

(9) The economic-financial situation in the period 2001-2003 of C.N. “Administratia Porturilor Maritime” S.A. Constanta is presented below:

Table no. 1		thousands Rol		
No.	Indicators	2001	2002	2003
1.	Turnover	775,963,205	996,343,681	1,070,110,110
2.	Net result : -profit -loss	190,344,695	165,537,564	99,520,362

Source: Notification submitted by the Ministry of Public Finance

From the above table it may be noticed that the company has a well economic-financial situation: the turnover has a growing trend and in each year a profit rate of minimum 9% is registered.

- (10) Out of the profit annually earned by the company, at least 50% becomes revenue to the state budget (according to the *G.O no. 64/2001 on the profit redistribution of national societies, national companies and commercial societies state owned or owned in majority by the State as well as of regies autonomous*).

2.3. Legal basis for granting the financial support measures

- (11) In accordance with the Loaning Agreement between Romania and Investment European Bank and Constanta Harbour Administration (C.N. “Administratia Portului Constanta”), signed in Luxemburg on 14 December 1995 and in Bucharest on 18 December 1995, ratified by *G.O. no. 6/1996, modified by G.D no. 1346/2000 approving the Amendment no. 1*, the Romanian State, represented by the Ministry of Public Finance, contracts a credit of Euro 35 million. The aim of it is to finance the project “**Rehabilitation of Constanta Harbour**”. This project was worked out by the Ministry of Transport, Constructions and Tourism through C.N. “Administratia Porturilor Maritime” S.A. Constanta, as execution agency. In accordance with art. 9 of the framework-agreement, the Borrower (Ministry of Public Finance) committed to release the foreign currency for the payment of interests, commissions and other taxes and to reimburse the capital over the entire period of the credit granted in accordance with its national legislation. The reimbursing period of the credit is 30.04.2001-30.10.2015. The credit reimbursement is made from the State budget through the budget of Ministry of Transport, Constructions and Tourism.

Additionally, the Romanian State annually granted budgetary allocations in total amount of 17,500,000 Euro for the fulfilment of this project.

(12) According to the Lending Agreement between Romania and Fund for International Economic Cooperation – Japan, signed in Tokyo on 27 February 1998 and ratified by *Law no. 157/28.07.1998, modified by Law no. 242/14.06.2004*, the Romanian State, represented by the Ministry of Public Finance, contracts a credit of 12,800 million JPY. The credit is destined to finance the **“Development project of South Constanta Harbour”**. The agreement implementation is made by C.N. “Administratia Porturilor Maritime” S.A. Constanta, entrusted as implementing agency. To this end, the Ministry of Public Finance concludes a sub-lending agreement with Administratia Portului Constanta, by which the later one is entrusted the entire authority and responsibility for the efficient implementation of the project. The reimbursing period of the credit is 20 February 2008-20 February 2028. In addition, the Romanian State annually grants budgetary allocations to C.N. “Administratia Porturilor Maritime” S.A. Constanta in total amount of 4,267 million JPY for the fulfilment of this project. As it is stipulated in the *Law no. 242/14.06.2004, by which the Law no. 157/1998 is modified, de ratifying the loaning agreement*, “the contribution of the Romanian Government to the fulfilment of the project, as well as the necessary funds for reimbursing the credit, for the payment of interests, commissions and other external taxes specific to the credit shall be assured from the State budget, through the budget of Ministry of Transport, Constructions and Tourism”.

(13) By the financing contract between Romania and the Investment European Bank and C.N. „Administratia Porturilor Maritime Constanta” S.A., signed in Bucharest on 6 November 2000 and ratified by *Law no. 517/2001*, Romania, represented by the Ministry of Public Finance, obtain a credit in value of Euro 15 million for financing the **“Project concerning the environment and the infrastructure of Constanta Harbour”**. Subsequently, between the Ministry of Public Finance, on one hand, and C.N. „Administratia Porturilor Maritime Constanta” S.A and Ministry of Transport, Constructions and Tourism, on the other hand, a subsidiary lending agreement was concluded, agreement by which the company was empowered the entire authority and responsibility for using the loan, for project fulfilment and for observing all obligations assumed by the financial contract.

The reimbursing period of the credit is 25.01.2006-25.07.2015. The necessary funds in order to reimburse the loan, to pay the debts and other costs related to the loan are assured from own resources of the company.

2.4. The necessity of granting the financial support

2.4.1. General context

- (14) Sea ports play an important role not only as a focal point for the sea transport at the crossroad between sea transport and land transport, favorising a balanced and lasting transport system, but also as a centre of social and economic regional development. Indeed, sea ports have been considered during the history as factors stimulating trade and as poles of regional and national development, supplying services of public general economic interest. At present, seaports gain a more and more commercial character which makes port authorities to act not only as “owners” of public goods in the general interest but as well as undertakings.
- (15) Constanta Harbour, through its geographical position, dimension and infrastructure characteristics, has real perspectives for capturing new traffic and developing the economic activity, both for the national necessities and of the foreign partners. In order to capitalize this potential, investment projects are necessary for developing the harbour infrastructure and supra-structure, as well as of other environment investments.

2.4.2. Objectives of granting the financial support

- (16) The notified financial support is destined to finance the following investments projects:
1. Rehabilitation project of Constanta Harbour;
 2. Project concerning the environment and the infrastructure of Constanta Harbour;
 3. Development project of South Constanta Harbour.

1. REHABILITATION PROJECT OF CONSTANTA HARBOUR

(17) By this project, are financed the completion and repairing of the profile of the South Pier between km2-660 and km 5-560 and of North Pier between km 0-690 and km 4-850.

These works were necessary having in view the continues deterioration of the Piers due to storms and two ships that stranding in 1995 destroyed the North Pier, causing two gaps. The execution of this project aimed the assurance of harbour aquarium with implications in navigation security and ships' operation.

(18) The works consist in:

- completion of the nucleus of unsorted stones;
- completion of the landmark of natural blocks;
- completion and repairing of protection cloaks of pre-manufactured blocks of stabilopod type;
- execution of concrete flagstone on the piers' crowning where it was not made.

(19) The investment objectives, respectively the piers, are part of the harbour infrastructure and are the public property of the Romanian State according to the Law no. 213/1998 on public property and its legal regime.

(20) According to the Loan Agreement, C.N. „Administratia Porturilor Maritime Constanta” S.A will purchase equipment, will provide services and commission works for the Project, by international tender open at least to companies from all EU member states and Romania.

(21) The total cost of the project estimated by EIB is of Euro 70,000,000, and it is financed as follows:

- a. from EIB loan: Euro 35,000,000;
- b. from PHARE programme: Euro 17,500,000;
- c. from the State budget: Euro 17,500,000.

(22) The borrowed amounts are exclusively used to finance this Project. In order to ensure this, EIB, prior to the drawing of each loan tranche, requires proof demonstrating that C.N. “Administratia Porturilor Maritime” S.A. Constanta has incurred expenses strictly related to the items financed by the bank, according to the technical description of the Project.

2. PROJECT CONCERNING THE ENVIRONMENT AND THE INFRASTRUCTURE OF CONSTANTA HARBOUR

(23) The implementing scope of this Project is represented by the setting up of an efficient working framework for collecting, treating, stocking and storing sea and harbour waste as well as the extension of supply capacity of energy for South Constanta Harbour, by setting up two new supplying lines of 110 kV in North Eforie station, as well as of a new internal sub-station of 20 kV in Harbour IV and of two transformers of 20/110 kV 40 MVA. The switching to 110kV of Harbour IV Station and the extension and amplification of North Eforie Station has priority due to the fact that the actual connections station cannot assure the necessary power in view to carry out the future actions in South Constanta Harbour.

(24) The project consists in working out the preparing research, building, goods and services supply, starting the functioning and operation the management facilities of the waste in Constanta Harbour together with the modernization of energy supplying outfits in the harbour.

The project has the following investment projects:

- to acquire a multifunctional ship for collecting the waste;
- to acquire a station for the treatment of tail waters in the terminal for petrochemical products;
- works related to the platform for waste;
- a special place for cremation;
- electrical works;
- environmental studies.

(25) By the Financing Agreement concluded with EIB, C.N. “Administratia Porturilor Maritime” S.A. Constanta committed to purchase goods and services and to commission works for the Project, through international tender open to participants from all countries.

(26) The total cost of the Project estimated by EIB is of Euro 30,500,000, of which:

- d. EIB loan: Euro 15,000,000;
- e. Own sources: Euro 15,500,000.

(27) The borrowed amounts are used exclusively to finance this Project. In order to ensure this, EIB, prior to the drawing of each loan tranche, requires proof

demonstrating that C.N. “Administratia Porturilor Maritime” S.A. Constanta has incurred expenses strictly related to the items financed by the bank, according to the technical description of the Project.

3. DEVELOPMENT PROJECT OF SOUTH CONSTANTA HARBOUR

- (28) The scope of the project is to extend the manipulation facilities of containers in South Constanta Harbour, in order to meet the future growing of containers' traffic.
- (29) Constanta Harbour, one of the biggest harbours from Europe, in 1998 had an operating capacity of minimum 85 million tones per year. The registered traffic was much under the capacity and potential offered by its structure. The research made both by Romanian and foreign specialists showed that the foreseen exports and imports, even in the most optimistic scenario, will not generate traffic to catch up with the level of the installed capacities or of the potential of Constanta Harbour. Based on its extremely advantageous position of Constanta Harbour and on the characteristics of its infrastructure, the specialist recommended to capture as much as possible the transit and distribution traffic in the region of Black Sea. The level of transit traffic through Constanta Harbour in 1996 and 1997 was of only 5-6% out of the total maritime traffic that was carried out through it.
- (30) Based on statistic data and foreseeing related to the evolution of merchandise traffic in 1998, a raise both in the total volume of merchandise and of traffic with merchandise in containers comes out (table no.2), fact that represent an important argument for the building of a new containers terminal in South Constanta Harbour.

Table no. 2

TEU	
YEAR	TRAFFIC OF CONTAINERS
1995	45,000-65,000
2000	85,000-145,000
2005	160,000-320,000
2010	310,000-540,000

Source: Viability Study of the Project

- (31) The percentage of merchandise in containers within the total traffic was growing in the period 1995-2010, as follows:

Table no. 3

YEAR	TOTAL TRAFFIC MERCHANDISE (million tones)	MERCHANDISE IN CONTAINERS (million tones)	PERCENTAGE of merchandise in containers (%)
1995	28.6-30.7	0.34-0.36	1.19-1.17
2000	33.3-42.3	0.85-1.45	2.5-3.5
2005	40.0-60.4	1.60-3.20	4.0-5.3
2010	49.1-84.1	3.10-5.40	6.3-6.5

Source: Viability Study of the Project

- (32) Having in view these trends of the harbour services market it was considered necessary the construction of a modern containers terminal (**object no. 1 of the project**), able to operate Post Panamax ships; the building of such containers terminal is stipulated by the Ministry of Transport, Constructions and Tourism in its Development Strategy of transport infrastructure. In order to take over and carry out the mentioned traffic volume to transit in the future, the containers terminal shall have to progressively extend assuring permanently the suitable operating capacities.

The investments for building the containers terminal aim:

- the operating fronts of the ships, the operative berths;
- the platforms storing the containers;
- the acquisition and installing the manipulation equipment and accomplishment of necessary facilities (cranes, trailers, equipments for heaping, terminal tractors, trailers, portainers);
- the construction and equipping the grouping warehouse and a complex of buildings;
- rail way terminal.

These investments were finalized on 31.12.2003.

Currently, the execution of complementary works is made as compared with the initial project, consisting in building of a road path (**object no. 2 of the project**) for the railway marshalling in Constanta Harbour.

- (33) By building and operating the new containers terminal on the Breakwater II S from Constanta Harbour, the operating capacities of merchandise from containers will grow to apx. 325,000 TEU, fact that will lead to the growing of containers traffic in Constanta Harbour, and especially of the transit traffic, and implicitly a grow of the revenue of all units involved in this activity,

respectively harbour operators, the company and the State, as owner of it. By its organizing and equipping structure, containers terminal – implicitly Constanta Harbour – will become an inter-modal and multi-modal centre for the commercial activity of merchandise transport and distribution, effectively contributing to the extension of internal hinterland as well as to the relations with new partners.

(34) The total estimated cost of the Project was of JPY 17,067 million, the equivalent of USD 152 million, of which:

- loan from the Fund for Economic International Cooperation of Japan: JPY 12,800 million, the equivalent of USD 114 million;
- sources from State budget: JPY 4,267 million, the equivalent of USD 38 million.

(35) The investments related to the containers terminal were finalized at the end of 2003. The cost of these investments is of JPY 8,480 million, the equivalent of USD 80 million, of which:

- credit from the Fund for Economic International Cooperation of Japan: JPY 7,600 million, the equivalent of USD 71.5 million;
- budgetary allocation: JPY 852 million, the equivalent of USD 8.2 million;
- own sources: JPY 28 million, the equivalent of USD 0.3 million.

(36) As the real value of the containers terminal was lower than that estimated, it was decided with the agreement of the Fund for Economic International Cooperation of Japan, the extension of initial project by building a new road path over the railway marshalling in the harbour. The finalizing term of these complementary investments is 31 December 2004.

The estimated value is JPY 2,081 million, the equivalent of USD 19.6 million and is financed as follows:

- credit from the Fund for Economic International Cooperation of Japan: JPY 1,748 million, the equivalent of USD 16.5 million;
- budgetary allocation: JPY 324 million, the equivalent of USD 3 million;
- own sources: JPY 9.3 million, the equivalent of USD 0.09 mil.

At the end of 2004, the remained not drawn sums of the credit will be annulled.

3. ASSESSING THE NOTIFIED SUPPORT MEASURES

The character of State aid of measures under the art. 87(1) of the EC Treaty and under the Law no. 143/1999 of State aid with further modifications and completions

- (37) In accordance with both the European Court jurisprudence and decisional practice of the European Commission, the term of “state aid”, as it is described in Article 87(1) of the EC Treaty is characterized by the following four elements: (i) any benefit (ii) granted by the State or from State sources (iii) to a certain undertaking or sector (selectivity criterion), (iv) that may distort competition and affect the trade between Member States.
- (38) Art. 2 of the Law no. 143/1999 on State aid, with further modifications and completions, defines the *state aid* as “any measure of support from the State or from the local administrative authorities, or from the resources of the State or of the local administrative authorities, regardless of its form, that distorts or threatens to distort competition, through favouring certain undertakings, the production of certain goods or the provision of certain services or affects the trade between Romania and the Member States of the European Union is considered incompatible with a normal competition environment.”
- (39) The financial support measures granted by the Romanian State to C.N. “Administratia Porturilor Maritime” S.A. Constanta in order to achieve the 3 investments projects have to be assessed in the light of the above four mentioned elements.

I. In case of the REHABILITATION PROJECT OF CONSTANTA HARBOUR

- (40) The support measures granted for achieving this objective consist in budgetary allocations and an external loan that is entirely reimburse by the State. As a consequence:
- A. as concerns the transfer of State resources – there is no doubt that State resources are involved;
- B. with regard to the second criterion, in order to determine whether by the financial support measures granted to achieve this project, there is or there is not conferred an economic advantage to C.N. “Administratia Porturilor Maritime” S.A. Constanta, the following have been considered:
- (41) Financing of the investments related to this project has been done from an external loan contracted by the Romanian State from EIB as a Borrower and

by the undertaking as an implementing agency and from budgetary allocations. Given the fact that the borrowed funds would not have been obtained by the undertaking in similar terms without the State intervention, from this point of view it can be considered that an advantage is conferred to the undertaking through the financing of this project.

(42) Judging from the point of view of the destination of the amounts resulted from the loan and budgetary allocations, we note that the investment objectives of the project, respectively the piers, are a part of the port access and safety infrastructure. According to „*Vademecum on Community rules on State aid and financing of the construction of seaport infrastructure*”, published in Brussels on 15.01.2003, this harbour infrastructure category consists in: maritime access and protection works (dams, piers, canal locks and other measure of protection against the waves, shipping channels, inclusively dredging and ice breaking, lighthouses, buoys, beacons, floating pontoons) as well as connections of the lands with general public transport facilities, such as: connections with national transport networks, as well as the infrastructure for utilities necessary in harbour zone. These infrastructure works are considered to be part of the general ones, public, because they are owned by the public domain of the State and the access of potential users is publicly and indiscriminately guaranteed. From this point of view, it is considered that the support granted by the state for financing these general port infrastructure investment objectives do not involve a benefit for the undertaking in the sense of art. 87 (1) of the EC Treaty.

(43) According to the Law no. 213/1998 regarding public ownership and its legal status, piers belong to the public ownership of the Romanian state. C.N. Administratia Porturilor Maritime Constanta is only the implementing agency of the investment and not the owner of it. Judging from the point of view of the activities carried out by C.N. “Administratia Porturilor Maritime” S.A. Constanta we note that, according to G.D. no. 517/1998 regarding the establishment of Compania Nationala „Administratia Porturilor Maritime Constanta” S.A., with subsequent modifications and completions, the undertaking has the obligation, in its capacity of port authority, to implement programs for the development of sea port infrastructure and to ensure the maintenance, repairing and the minimum technical characteristics for it. These do not represent commercial or economic activities.

- (44) The repairing and modernization of the two piers in order to increase the harbour safety represent works that are directly linked to the position of public authority, and do not confer an advantage to the company that carry out the investment. The investment is in the benefit of all undertakings entering in the harbour and eventually in the benefit of the community; the achievement of this investment is not a commercial activity, its aim being to assure the security of the navigation and of harbour operators.

C. Regarding selectivity, in order to assess how this criterion is met, firstly it has been analyzed the economic character of the activity involved by realising the Project. As stated in par. (43) and (44), by the implementation of the Rehabilitation project of Constanta Harbour, the undertaking fulfils an obligation deriving from its port authority status and does not carry out an activity with economic character. As a result, C.N. “Administratia Porturilor Maritime” S.A. Constanta is acting only as an authority in this field and not in an economic agent capacity.

D. Related to the distortion of competition and of commercial relations between Member States:

- (45) The competition between harbours is influenced by the harbour politics of the Member States. There is no uniform harbour organization at European level. The complexity of legal regimes regulating the harbours from the Member States and the level of transparency in the financial relations amongst public sector, harbours and public investors, make difficult the state aid approaching from the point of view of affecting competition. Two big groups of Member States according the financing way of the harbour infrastructure: States that offer State funds for its financing (Belgium, France, Germany, Italy, Netherlands) and the States in which the public infrastructure is directly financed by the harbours, these ones being private entities carrying out commercial activities (Denmark, Finland, Ireland, Spain, Portugal, United Kingdom). As above showed, Constanta Harbour is in the first category and in direct or indirect competition with all European public or private harbours. In conclusion, theoretically, the granting of the financial support from the State for financing “Rehabilitation Project of Constanta Harbour” may affect the competition with Member States.
- (46) Having in view the above mentioned presentation, it is considered that the financial support measures granted by the State to C.N. “Administratia Porturilor Maritime” S.A. Constanta, exclusively for the “Rehabilitation

Project of Constanta Harbour”, are not State aid measures as the four elements characterizing a State aid are not cumulatively fulfilled.

II. In case of PROJECT CONCERNING THE ENVIRONMENT AND THE INFRASTRUCTURE OF CONSTANTA HARBOUR

(47) The financial support measure consists in an external credit contracted by the Ministry of Public Finance, loan that afterwards was sub-lent in the same conditions to C.N. „Administratia Nationala a Porturilor Maritime” S.A. Constanta. Consequently:

A. as concerns the transfer of State resources is mentioned that:

(48) Art. 4. (1) of the Law no. 517/2001 concerning the ratification of the Contract between Romania and European Investment Bank, and C.N. “Administratia Porturilor Maritime” S.A. Constanta stipulates that „The funds necessary in order to reimburse the loan, the payment of the interests and of costs related to the loan shall be assured from the own resources of the company”. By the address no. 25/2351/07.06.2004, registered to the Competition Council under no. DAAS/402.08.06.2004, the Ministry of Transport, Constructions and Tourism, as coordinating authority, specifies that the State do not finance in any kind this loan, the company having the entire responsibility for its reimbursement and the payment of the interests and commissions involved. Till the present, the company observed all its obligations related to this credit.

(49) The assessment of the balance sheets of the company from the moment of contracting the credit until now, respectively 2000-2003, as well as the foreseeing of profit-and-loss account over the next 5 years, shows a well and constant economic-financial situation of the company, thus being demonstrated the fact that the company is able to pay the contracted credits. When contracting the credit, in 2000, the company has registered a general liquidity rate of 2.42% (over the average of 1.5%), facts demonstrating its capacity to observe the financial obligations.

The own contribution of the company in financing this project is of 50% (Euro 15.5 million), in addition to the funds obtained as a result of contracting the credit.

(50) Although until now the project has been financed from the undertakings resources, and taking into account the economic and financial position of the

company it can be appreciated that the same thing will happen as well next years, we have to note, however, that the State, through the Ministry of Public Finance, is the main borrower (the undertaking is the one being sub-lent funds from the state). Thus, in the event where C.N. “Administratia Porturilor Maritime” S.A. Constanta will not be able to repay all instalments, the state will be the one meeting these obligations. So indirectly, state resources can be involved in financing the project.

B. Regarding the economic advantage, we note the following:

- (51) From the point of view of the way of granting the financial support it can be considered that an advantage is being conferred to the undertaking to realise this project (see par. 41).
- (52) Analyzing from the point of view of the destination of the sub-lent funds, we note that these are destined, on one hand, to achieve the environment investments (the acquisition of a multifunctional ship for collecting the waste and of a station for the treatment of tail waters in the terminal for petrochemical products; works related to the platform for waste; a special place for cremation) and, on the other hand, to modernize the utilitarian infrastructure existing in the harbour (modernization of energy supplying equipments).
- (53) As harbour authority, C.N. “Administratia Porturilor Maritime” S.A. Constanta has to assure the taking over of residues, of tail waters and of the garbage from the ships and to implement development programmes of maritime harbours infrastructures, assuring in the same time the upkeeping, repairing and maintaining of its minimum technical characteristics. These activities are not of economic kind; the company gets no commercial advantage and implicitly from the investments execution. The achievement of these investments is directly linked with the position of public authority, the beneficiaries of the investments being in an equal and indiscriminately way all harbours operators, all ships entering in the harbours, and eventually the population of Constanta County.

C. Regarding the selectivity criteria, again a distinction has to be made between the two situations the company can be by exerting these activities, namely, that of an undertaking or that of a port authority.

(54) According to „Vademecum on Community rules on State aid and financing of the construction of seaport infrastructure”, published in Bruxelles in 15.01.2003, „financing the construction of seaports infrastructure required or directly related to the exertion of public authority capacity, such as those related to health, maritime and port safety, environment protection, customs or immigration services, do not normally involve state aid”. As mentioned in par. 53, by implementing of the Project concerning the environment and the infrastructure of Constanta Harbour, the undertaking performs an obligation deriving from its status of port authority and does not carry out an economic character activity.

D. As concerns the last criterion of definition of state aid it is specified that having in view the sensitivity of the problem of harbour competition, the support of the State in order to achieve this investment project may affect competition with other European harbours, especially with those from South-East Europe.

(55) Having in view the above mentioned presentation, it is considered that the financial support measures granted by the State to C.N. “Administratia Porturilor Maritime” S.A. Constanta, exclusively for the “Project concerning the environment and the infrastructure of Constanta Harbour”, are not State aid measures as the four elements characterizing a State aid are not cumulatively fulfilled.

III. In case of DEVELOPMENT PROJECT OF SOUTH CONSTANTA HARBOUR

(56) The support measures granted to achieve the two investment objectives within the project, respectively the containers terminal and the road path, consist in budgetary allocations and an external loan, which is entirely reimbursed by the State.

(57) The character of State aid of funds shared within this project must be clearly assessed for each of two investments objectives.

Objective no. 1: Containers terminal

- A. as concerns the transfer of State resources – there is no doubt that State resources are involved. The State as unique shareholder of the company, is the one that allocates the financial support for the investment project;
- B. in order to verify whether the transfer of State resources is favouring C.N. „Administratia Nationala a Porturilor Maritime” S.A. Constanta, offering to it an economic advantage, Competition Council applied the “private investor principle”. The assessment of this principle is presented below.

Private investor principle application

- (58) Art. 295 of EC Treaty stipulates that “This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.” The Member States may own and manage undertakings, may acquire shares, may invest in public or private companies, and may take part within undertakings as subjects of private law. The Treaty sets up the equality principle between the private and public undertakings.
- (59) According to the private investment principle, the funds allocated by the State for a certain company do not involve state aid measures if, in similar conditions, a private investor, of comparable size with that of the public authority would have acted in the same way, having in view a reasonable recovery rate. In normal market conditions, a private investor seeks to maximize its profit. The investment profitability on long run has to be taken into consideration.
- (60) In this case, the State is the sole shareholder of C.N. “Administratia Porturilor Maritime” S.A. Constanta. In this position, taking also into account the aspects shown at para. (29)-(33), it decides to invest in the achievement of the Development Project of South Constanta Harbour –containers terminal”. To this end, in 1998 it contracted a loan from the Fund for International Economic Cooperation – Japan. The loan is sub-lent to C.N. “Administratia Porturilor Maritime” S.A. Constanta, but the State committed to reimburse it. The other funds necessary for the investment will be annually allocated to the company from the State budget over the duration of its execution.

- (61) When the State decided to invest in containers terminal objective, respectively in 1998, C.N. Administratia Porturilor Constanta S.A. earned total revenues of RoI 292 billion and a gross profit of 27% out of them (RoI 80 billion). These sums corroborated with the registration of liquidity and solvability rates over the average, respectively 3.23 and 2.54, show a good economic-financial situation of the company, demonstrating capacity to pay its financial obligations. The building of containers terminal was finalized in 2003, the objective functioning from the beginning of 2004. During the entire duration of investment execution, respectively 1998-2003, the company registered profit. So, the State invests in a profitable company. This is the first element that a private investor has to take into consideration when it decides to invest.
- (62) The company profitability when deciding to make an investment is not the only element that a private prudent investor takes into account. In its conception, this thinking way must be corroborated with that of obtaining an appropriate recovering rate of the investment.
- (63) In the viability study of the project, made at the end of 1997, the specialists had estimated a favourable internal rate of investment recovery, respectively 10%. In these conditions, the majority shareholder of the company, the State itself, invests in a viable objective.
- (64) C.N. “Administratia Porturilor Maritime” S.A. Constanta does not operate the containers terminal. In order to choose the operator, in October 2003 an international public tender was organized, without pre-selection, where 5 undertakings participated, the winner of the tender being Dubai Ports International. In order to use this terminal, the operator paid in advance the sum of USD 2 million to C.N. „Administratia Nationala a Porturilor Maritime” S.A Constanta and will pay annually, for 18 years, a sum as a “rent”, as follows:
- [...]¹
- (65) The total value of the investment related to the containers terminal is of apx. USD 80 million. Whether only the revenue from renting the terminal is taken into consideration, respectively [...] ²it may be seen that the investment may be depreciated in 18 years.

¹ Confidential data

² Confidential data

(66) The effects of building the containers terminal are extended beyond the obtaining revenues from its renting. Thus, this investment significantly contributes to the growing of transit and distribution traffic, especially of the traffic with containers, in Constanta Harbour. By financing this objective, the State, as majority shareholder, also sought to make efficient the other activities of the company in the harbour. Thus, it was estimated that the functioning of the terminal will complementary capture in average minimum 8 ships per month. These ships will pay not only the tariffs for using the terminal but only other tariffs that will represent complementary revenue for the company. Consequently, a medium ship that will operate the containers terminal will pay to the company the following tariffs:

- access tariff: USD 1,371 /month;
- wharfage tariff: USD 1,465 / month;
- basin tariff: USD 37 / month;
- supervising tariff: USD 1,295 / month.

Thus, in a year, the company obtains, in addition to the revenue obtained from renting the terminal, revenue of minimum USD 400,128:

$(\text{USD } 1,371 + \text{USD } 1,465 + \text{USD } 37 + \text{USD } 1,295) \times 8 \text{ ships/month} \times 12 \text{ months} = \text{USD } 400,128 \text{ per year.}$

During the assessed period, respectively 2004-2021, the company foresees to obtain complementary revenues from imposing tax to ships in minimum sum of USD 7.2 million.

(67) The total revenues foreseen to be obtained from the exploitation of the containers terminal is of minimum USD 95.2 million (USD 88 million resulting from renting the terminal + USD 7.2 million resulting from the imposition of taxes to ships that use the terminal).

(68) In these conditions, it comes out an average investment recovery rate of USD 5.288 million per year. Taking into account that the investment value is of USD 80 million, it results a recovery period of the investment of apx. 15 years.

(69) Having in view the volume of the investment and the standardized functioning duration of the equipments and of constructions related to the containers terminal (in average of 30 years), it is appreciated that 15 years period being an appropriate duration for recovering the investment.

(70) A private investor that would have had the financial power to make such an investment would have sought to obtain a long term profit as compared with the ordinary investor that seeks to earn an immediate profit.

(71) From the foreseeing of cash-flow and of profit-and-loss account it comes out that during the entire period of recovering the investment, respectively the next 15 years, the exploitation of the containers terminal is a long term profitable activity. Thus, the profit of the company is presented in table no. 5.

Table no. 5

Billion Rol															
Year	20 04	20 05	20 06	20 07	20 08	20 09	20 10	20 11	20 12	20 13	20 14	20 15	20 16	20 17	20 18
Profit	120	63	82.6	85.1	108.3	111.1	117	127.8	177.3	178	194.9	227.8	293	293.3	325.8

Source: Address of the beneficiary with complementary

(72) From the financial-economic foreseeing of the company it comes out that after recovering the investment, the profit will continually grow from Rol 374.5 billion in 2019 to Rol 390.9 billion in 2021.

(73) The object of obtaining profit on long term must not be viewed as a lonely objective but as one integrated in the development program of the harbour, part of the harbour strategy on long term. The target of this program is to transform the Constanta Harbour in an inter-modal centre for merchandise transport and distribution commercial activity. According to „Vandemecum on Community rules on State aid and financing of the construction of seaport infrastructure”, published in Brussels on 15.01.2003, „the private investor principle” also allows decisions that may be seen as parts of the logic of an investor that is undertaking a structural, global or sectoral politic, guided by a foreseeing on long term.

(74) As concerns the aspects related within the para. (60)-(73), the conclusion is that the State by granting financial support to C.N. „Administratia Porturilor Maritime S.A.” Constanta in order to achieve the “Development project of South Constanta Harbour – Investment objective: Containers terminal” is acting as a private prudent investor using its resources in order to obtain profit on long term in conformity with “the private prudent investor”.

Objective no. 2: Road path

A. This objective is mostly financed from budgetary allocations and credit reimbursed by the State. Consequently, there is no doubt that State resources are involved

B. As regards the observance of the second criterion, the economic advantage, the analysis was based on the elements contained in para. (41)-(43) from this decision, considering that the passage road way is a public good, part of the general port infrastructure and to which any potential user can have access in a non discriminatory manner.

C. The financial support is selectively granted to C.N. Administratia Porturilor Maritime S.A. Constanta, but this support does not directly favour the company, being destined to make an investment in general infrastructure of public interest.

D. Based on the assessment made in the para. (45) of the present draft decision it is considered that the financial support may affect hypothetically the competition with the Member States.

(75) Having in view the above mentioned aspects, it may be summarized that the financial support measures granted by the State to C.N. “Administratia Porturilor Maritime” S.A. Constanta, exclusively for the achievement of the “Development project of South Constanta Harbour – Investment objective: Road path”, do not represent State aid measures as the four elements characterizing the State aid are not cumulatively fulfilled.

DECIDE

Art. 1. Within the meaning of art. 8 (2) corroborated with art. 12 (2) a) of the Law no. 143/1999 on State aid, with further modifications and completions, the financial support measures granted to C.N. „Administratia Nationala a Porturilor Maritime Constanta” S.A. in order to achieve the “Rehabilitation project of Constanta Harbour”, “Project concerning the environment and the infrastructure of Constanta Harbour”, “Development project of South Constanta Harbour” do not represent State aid.

Art. 2. The present Decision shall become effective at its communication date.

Art. 3. The present decision shall be communicated by the Secretariat General of the Competition Council to:

- the Ministry of Public Finance, 17 Apolodor Street, sector 5, Bucharest;
- C.N. „Administratia Porturilor Maritime” S.A. Constanta, Incinta Port, Gara Maritima Constanta, 8700, Constanta, Romania.

Art. 4. The Secretariat General and the Authorization State Aid Directorate of the Competition Council shall pursue the fulfilment of the present Decision.

PRESIDENT

MIHAI BERINDE