

DECISION OF THE COMPETITION COUNCIL

No 331 of 27.12.2004

**regarding the financial support measures granted by the Ministry of Public
Finances to the Commercial Company for Natural Gas Distribution
„DISTRIGAZ SUD” S.A.**

THE COMPETITION COUNCIL,

Taking into account the provisions of the Decree no.57/2004 for the appointment of the Competition Council's members,

Taking into account the provisions of the Law no. 21/1996, published in the Official Monitor no.88, Part I, on 30.04.1996, with the subsequent modifications and completions,

Taking into account the provisions of the Law no. 143/1999 regarding the State Aid, published in the Official Monitor of Romania, Ist Part, no. 370 on 3.08.1999, with the subsequent modifications and completions,

Taking into account the provisions of the European Agreement regarding 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 Monitor of Romania no.73, Part I, on 12.04.1993,

Taking into account the Regulation regarding the State Aid under the form of compensations, granted to certain undertakings entrusted with the performance of a services of general economic interest,

Based on the following reasons,

I. THE PROCEDURE

(1) By the address no. 109.314/02.11.2004, registered at the Competition Council with no. RS-AS 91/08.11.2004, the Ministry of Public Finances notified to the Competition Council, based on art.6 in the Law no.143/1999 regarding the state aid, with the subsequent modifications and completions, the notification of the financial support measures granted to S.C. DISTRIGAZ SUD S.A .

(2) By the addresses of the State Aid Authorization Department no. DAAS/900/10.11.2004 other supplementary data were requested based on art.6 in the Law no.143/1999 regarding the state aid, with the subsequent modifications and completions. The Ministry of Public Finances answered by the address no 689699/18.11.2004 registered at the Competition Council with RG 8408/23.11.2004. The notification became effective when the data were complete and exact, namely on 23.11.2004.

2. DESCRIPTION OF THE FINANCIAL SUPPORT

2.1. The legal base for granting the state aid

- The Law of the public debt no. 81/1999;
- GD no. 1367/2004 on the guarantee given by the Ministry of Public Finance for certain external loans, in total amount of maximum USD 215 mill., to be contracted by S.C. for Natural Gas Distribution "Distrigaz Sud" - S.A. Bucharest, S.C. for Natural Gas Distribution "Distrigaz Nord" - S.A. Târgu Mureş, S.C. "Electrocentrale" - S.A. Bucureşti and the undertakings of the public local administration authorities, producing caloric energy;
- GD no. 754/2001 on the approval of the 100% guarantee for certain external credits in total amount of maximum USD 50 mill. for the Commercial Company "Distrigaz Sud" - S.A. for the payment of the natural gas acquisitions necessary for the functioning of the National System of Natural Gas, as well as for the guaranteeing of those credits by the Ministry of Public Finance;

- GD no. 564/2002 for the modification of art. 1 in GD no. 754/2001;
- GD no. 876/2003 on the guaranteeing by the Ministry of Public Finance of certain external credits in total amount of maximum USD 130 mill., contracted by the National Company for Natural Gas "Romgaz" - S.A., S.C. "Distrigaz Sud" - S.A. and S.C. "Distrigaz Nord" - S.A. for the payment of the natural gas acquisitions necessary for the functioning of the National System of Natural Gas.

2.2. The state aid measures' beneficiary

(3) The beneficiary of the financial support measure from the State is S.C. DISTRIGAZ SUD S.A. The company was established based on the G.D no. 334/2000, by the re-organizing of the National Natural Gas Company „Romgaz” S.A., with a social capital in total amount of ROL 1,241,263 million. It is entirely owned by the Romanian State as sole shareholder, through the Ministry of Economy and Commerce.

(4) S.C. DISTRIGAZ SUD S.A. has as purpose the accomplishment of the Government strategy established for the delivery of natural gas, with the meeting of the Romanian law in force. The core business of the company is represented by the distribution and supply of natural gas. In that context the company also performs the following ancillary activities:

- Dispatching the systems supplying with natural gas and the control of the natural gas utilization by the consumer;
- The gas import-export, diversifying gas sources (natural gas through pipes, liquefied natural gas, liquefied petroleum gas);
- Projecting the utilization networks and installations for natural gas;
- Performing services for the natural gas consumers, including making investments to the users, from their own funds, for efficient using of the natural gas.

(5) S.C. DISTRIGAZ SUD S.A. carries out its activity through its central headquarters in Bucharest, through 11 regional branches (Bucharest, Buzau, Brasov, Craiova, Fagaras, Galati, Pitesti, Ploiesti, Targu Jiu, Targoviste and Ramnicu Valcea) and through the service branch. S.C. DISTRIGAZ SUD S.A.'s branches don't have their own legal personality.

(6) Some of the obligations of S.C. DISTRIGAZ SUD S.A. are to be found in the Law of Natural Gas no. 351/2003. According to these provisions S.C. DISTRIGAZ SUD S.A. has to meet the following obligations:

- ensuring the **continuity and safety** in supplying the contracted natural gas;
- operating, maintaining, repairing, modernizing and developing the distribution system in safety, economic efficiency and environment protection conditions;
- assuring a level of deodorize of the natural gas according to the regulations in force;
- achieving the interconnections with other systems, by case, and assuring the capacity of the distribution system on long term;
- assuring the access for third parties to the distribution systems, on indiscriminately basis, in the limits of the distribution capacities, with observing the technological regimes, according to the specific reglementations issued by National Authority for Regulation in the Natural Gas Field (herein ANRGN).
- taking over the operational activities of a distribution system. for a determined period, on request and according to the ANRGN' reglementations from an initial operator who has been sanctioned with withdrawal of the distribution license;
- assuring the permanent equilibrium of the operated system;
- assuring the security conditions in supplying natural gas.

(7) S.C. DISTRIGAZ SUD S.A. also must comply with the natural gas sector objectives. The optimal means of accomplishing these objectives are established by the Development Program of the Energetic Sector that takes into account:

- the need for ensuring natural gas quantities in underground storing facilities, with the purpose of supplementing domestic sources destined for captive consumers (for a description of the terms see point 2.2.2. below) during winter time,

- the importance of maintaining the National Transportation Systems in safe conditions for allowing non-discriminative access conditions for the beneficiaries of the subterranean imported natural gas storing warehouses' services,
- the need for ensuring safety when supplying consumers with natural gas.

(8) The natural gas public delivery activity consists in supplying a system formed from several final consumers within an area, connected through a delivery pipe, in a pressure regime of up to 6 bar. According to art. 32 from the Law on natural gas no. 351/2004, "the distribution activity of the natural gas represents a public service of national interest".

(9) The public delivery service represents the obligation of the owner of license, SC DISTRIGAZ SUD SA, to insure the technical safety in exploiting a delivery system, the continuity in supplying the gas to captive consumers connected to the delivery system, including the obligation to have natural gas stocks for insuring the high consumption in the cold period and to insure the connection to the system of all solicitors, within the provisions of the law.

(10) Taking into account the above, the **public service obligation** of SC DISTRIGAZ SUD SA to ensure the security of natural gas supply at affordable prices for the captive consumers comprises the following activities:

- a) supplying natural gas to the captive consumers;
- b) underground stocking of natural gas;
- c) natural gas delivery.

2.2.2. The market on which SC DISTRIGAZ SUD SA acts

(11) The relevant market for the service is represented by the market of natural gas delivery and supply, which is formed from two segments:

- The regulated segment;
- The competitive segment.

(12) In the regulated segment SC DISTRIGAZ SUD SA supplies and delivers natural gas to the captive consumers. According to the provisions of the GD no. 784/2000, the captive consumer is “the Romanian or foreign legal or natural person which is forced, in accordance with the delivery networks’ configuration, to contract natural gas from a certain producer, or from the distributor, owner of the delivery license”. The captive consumers connected to the delivery system for which the company has a license, have the obligation to conclude natural gas supply contracts only with DISTRIGAZ SUD.

(13) The competitive market encloses the commercialization of natural gas supply between suppliers and between suppliers and eligible consumers. The eligible consumer is the Romanian or foreign natural or legal person certified by ANRGN, which has total freedom in buying natural gas from any producer and/or supplier and which has access to the transport and/or delivery system. Eligible consumers are certified by ANRGN following the fulfillment of certain legal conditions, the main criteria being the quantity of natural gas consumed during one year which must exceed 3 million cubic meters.

(14) Both segments remain subject of specific regulations in the field. However, the public service obligation of supplying and distributing natural gas relates only to the regulated segment.

(15) The market regulator is the ANRGN. It issues licenses, authorizations, price decisions and tariffs. Along with the domestic market development and/or with the integration within the international markets, ANRGN has the obligation to decide upon a step-by-step opening, in part or in whole, of the regulated activities towards competition. The opening degree of the market is represented by the proportion of the eligible consumers in the total of consumers of natural gas.

(16) With respect to the EU objectives regarding the total opening of the market in 2007, ANRGN as of 2001 has annually established a certain degree of opening of the market by increasing the number of eligible consumers. This had the following evolution:

- 2001 – 10% market opening;
- 2002 – 20% market opening;
- 2003 – 30% market opening;
- 2004 – 40% market opening.

It is aimed that, until 2007, the natural gas market to be liberalized 100%, as it follows:

- 2005 – 50% market opening;
- 2006 – 60% market opening;
- 2007 – 1st of January – 100% - for undertakings;
- 1st of June – 100% - for population.

2.2.2.1. The regulated segment

(17) The regulated segment of the market encloses the legal monopoly activities and the delivery at regulated price, based on frame contracts, and the price and tariffs systems as established by ANRGN based on its own methodology elaborated for this purpose. The normative act regulating price and tariffs calculation is the Gas Law no. 351/2004. These regulated prices and tariffs are establishes taking into account the protective social needs for the population.

(18) SC DISTRIGAZ SUD SA, on the basis of the obligation to deliver a public service, must supply natural gas at a regulated price and on the basis of the framework-contracts concluded with the captive consumers. As can be seen at point (35) below the supply and distribution of natural gas on the regulated market is not profitable as revenues obtained from the sale of natural gas at a regulated price are smaller than the costs within this segment.

(19) In the regulated segment the company has 958,559 captive customers, structured as follows:

- private houses – 927,312;
- undertakings – 31,247.

2.2.2.2. The competitive segment

(20) On the competitive market the supply prices are freely negotiable between suppliers and eligible consumers whereas the tariffs (of distribution, transport, storing), that are also part of the final price, are fixed by ANRGN by a decision.

In the case of SC DISTRIGAZ SUD SA the negotiated price with the eligible consumers are very close to the regulated ones.

(21) Even if natural gas sale prices to eligible consumers are close to the price level on the regulated market, the activity of SC DISTRIGAZ SUD SA on the competitive segment is profitable because costs incurred by this activity are smaller. The lower costs of the competitive activity particularly relate to the following aspects:

- the distribution tariff related to the eligible consumers – the regulated component of the final sale price of natural gas – is set by ANRGN at a level higher than that applicable to captive consumers;
- for the supply activity in the competitive segment it is not necessary to purchase natural gas to be stored for winter peaks (this obligation only applies for the regulated segment). This means that gas acquisitions regularly do not exceed consumption and therefore – unlike in the regulated segment (where gas acquisitions exceed consumption) the revenues in the competitive segment cover acquisition costs;
- in view of the much lower volume of sales of gas in the competitive segment (15% of the overall sales in 2004) its share in the financial expenses related to contracted loans for the purchase of natural gas is considerably lower than the share of the regulated segment in these expenses. For the competitive segment, unlike the regulated segment, gas acquisitions do not exceed consumption. Therefore, the volume of the loans, which are necessary for the gas acquisitions for the competitive segment, could in principle be exclusively financed by the contracted commercial loans via the revenues of this segment.

(22) Within DISTRIGAZ SUD SA's activity area there are 46 clients licensed as eligible consumers.

(23) The share of S.C. DISTRIGAZ SUD S.A.'s sales on the competitive market in the total sales of natural gases was of 9% in 2002, 12.6% in 2003 and of 15.4% in 2004.

2.2.2.3. The geographical market

(24) By its license the company's activity of distributing and supplying natural gas is limited to 20 counties, respectively 560 localities in the Southern region of Romania.

(25) S.C. DISTRIGAZ SUD S.A.'s market share is:

- 100% of the regulated segment for which DISTRIGAZ SUD SA owns licenses for the delivery activity. Due to the exclusivity of the license there is no possibility that new competitors could enter the market in this segment.
- 32% on the market of natural gas delivered in Romania, comprising both the competitive as well as the regulated segments. The main competitors on this market are S.C. DISTRIGAZ NORD S.A. and S.N.P. PETROM S.A. Now, the three companies own together a quota of approx. 98%.

2.2.3. Costs arising from the operation of the public services

(26) The public service discharged by SC DISTRIGAZ SUD SA comprises supplying and distributing natural gas to captive consumers at prices regulated by ANRGN. In order to discharge the public service the company incurs costs with the purchase of gas from the domestic market as well as imported, costs with the underground storage of the safety stocks, as well as other costs related to discharging of the public service.

(27) SC DISTRIGAZ SUD SA is keeping management accounts (as a basis for management decisions) where company's activities are posted separately. The natural gas supply and distribution activity to the captive consumers related to the public service obligation is, thus, separated from the remainder of the company's activities. This separation is made only in the management accounting of the company due to the fact that according to the provisions of the Accounting Law no. 82/1991, with subsequent modifications and completions, the financial accounting of a company is kept for the overall business of that company.

(28) Before each financial year, SC DISTRIGAZ SUD SA is setting up a cost and revenues budget, which is analyzed and must be approved by the Ministry of Economy and Trade, the Ministry of Public Finances and to the Government of Romania. Usually, the approved cost and revenues budget is published in the Official Journal. Also, the tariffs of SC DISTRIGAZ SUD SA for the next year

are being set-up and they are submitted for adjustment and approval to A.N.R.G.N.

(29) In the costs and revenues budget of the company, as well as in the note for the tariffs fundamentation, the revenues are separately presented (from the revenues from the regulated market, revenues for the system services) and expenses (storing and operating expenses, maintenance costs, employment costs, other costs) related to the exploiting activity, as well as investment projects planned for the respective year.

(30) The natural gas supply cost are based taking into account the following costs:

- cost for buying natural gas;
- cost of other services acquisition (transport and storage);
- tax on gas;
- costs of the company related to the natural gas supply.

(31) At the same time, an estimation of the profit ceiling is determined by multiplying the total quantity of natural gas earmarked for captive consumers during the estimation period of the tariff by the limit of profit which is of USD 5 for every 1000 cubic meters of natural gas earmarked for the consumption of captive consumers.

(32) The company's public service obligation is to ensure the continuity and safety in natural gas supply, including building up of precautionary supplies to cover potential winter peak consumption. In order to meet this obligation S.C. DISTRIGAZ SUD S.A. acquires natural gas from the domestic suppliers as well as from the external ones. From the domestic natural gas suppliers the most important are ROMGAZ and PETROM.

(33) Due to the decrease of the internal natural gas stocks, SC DISTRIGAZ SUD SA had to increase every year the quantities of imported natural gas. The proportion of imports in the total natural gas acquisitions increased continuously from 13.3% in 2001, to approx. 39.3% in 2004. Since external gas acquisitions are more costly than domestic acquisitions (as it is observed in table no. 1) from a value point of view the proportion of external acquisitions in the total acquisition costs is even bigger, representing 66% in 2004 as it can be seen in table no. 2 presented below.

Table no. 1 The average prices for the acquisition of natural gases, from the domestic production and imports

[...]¹

Table no. 2 Evolution of natural gas acquisitions and imports during 2001 – 2004

[...]²

(34) Due to the increase of the imports' share within the total amount of natural gas necessary to fulfill the obligation of insuring the continuity and safety of supply the company had to take up credits from the financial markets, some of which were secured by state guarantees (presented at point (47)). The costs related to these credits had a strong impact on the expenses the company had to bear in order to fulfill its public service obligation.

(35) As mentioned at point (27) above, SC DISTRIGAZ SUD SA keeps a management accounting where activities carried out by the company are posted separately; results of these activities are shown below, in table no. 3

Table no. 3 Evolution of the main economic –financial indicators

[...]³

(36) As it can be seen from the table no. 3, during 2001-2004 though per total activity, SC DISTRIGAZ SUD SA registers profit, the activity related to the performance of the public service, namely the supply with natural gas to captive consumers registers total losses amounting ROL 352,242 mill.

(37) Losses of ROL 352,242 mill. incurred from the discharge of the public service are due to the high costs incurred by the public service obligation, costs which can not be recovered by revenues obtained from the sale of natural gas at a regulated price. The significant amount of the costs arising from the public service obligation has three main reasons:

- the big volume of the financial expenses, borne by the company due to the contracted loans necessary for buying natural gas needed for the safe functioning of the public interest service, having an increasing trend, respectively of 4.17 times in the reference period. This is due to both the price increase of the natural gas on the domestic market, as well as to the fact that the supply is increasingly depending on more expensive gas imports.

¹ Confidential date

² Confidential date

³ Confidential date

- significant underground stocking costs, for the summer period, in relation to the safety stocks for the regulated segment which according to the Orders of the Ministry of Economy and Commerce already have to be build up over the summer period.
- the delay in consumption and the fact that acquisitions exceed what usually is consumed, as it is explained below.

(38) SC DISTRIGAZ SUD SA is obliged to deposit underground natural gas for completing the internal sources designed for captive consumers, during the cold season, as well as for safe functioning of the Natural Gas Distribution System and safety supply with natural gas of captive consumers, based on the obligation to discharge the public service. The stock building obligation and the level of safety stock are imposed by the orders issued by the Ministry of Economy and Commerce (Orders no. 313/2001, no. 153/2002, no. 487/2002, no. 255/2003, no. 38/2004).

(39) According to these Orders S.C. DISTRIGAZ SUD S.A. on the basis of discharging the public interest service, is obliged to deposit underground, during the hot season, a certain quantity annually established in order to ensure the winter peak consumption. Thus, the company has significant costs storing the safety stocks, which are a part of the total costs related to the public service obligation. These costs are presented in Table no. 4.

Table no. 4 Cost level for storing gas for the cold season

[...]

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(40) During the hot season, following the consumption decrease, the incomes decrease also, and therefore the cash recourses for financing the activity become insufficient. The natural gas quantities which are to be stored as safety stocks for covering the consumption peaks during the cold season are paid at the moment of acquisition (beginning in April) but the counter value thereof shall be cashed in the cold season (in December and January) when the consumption's peaks are reached and they shall be delivered to the final consumers.

(41) The analysis of the supplementary information received, it indicates that in 2001-2004 there were periods when estimated consumption peaks have been

⁴ Confidential data

surpassed, as well as periods when these were not reached. However, overall between 2001-2004, the purchased quantity of natural gas for the captive consumers is by 154,606 thousand cubic meters higher than the quantity delivered to them. The average purchase cost (including the counter-value of the purchase costs and of the transport and storage services) in the analyzed period has been of ROL 2.255 million to 1,000 cubic meters, leading to a liquidities blockage of ROL 348,636.5 million.

(42) The costs to build safety stocks require to contracted loans which have an important weight in the total costs incurred by the discharge of the public service, respectively the supply and distribution of natural gas to captive consumers.

(43) The information submitted to the Competition Council further indicates that all loans contracted with state guarantees are earmarked for the payment of the natural gas purchases necessary to meet the legal requirements in relation to ensuring the eligible consumers natural gas winter supply. These loans are indeed not necessary to purchase natural gas required for the supply to the eligible consumers because the competitive market segment activity is financially self sustainable, as it results from table no. 3 (revenues related to this activity are higher than the costs incurred).

2.3. The costs for securing the natural gas supply

(44) In order to undertake the necessary acquisitions of natural gas - needed for the safe functioning of the National System of Natural Gas supplies and ensuring the population's and the undertakings' current consumptions including the necessary natural gas supplies for potential peak consumption in winter - the efforts with acquisitions made by the company can be observed in Table no. 2 (column 2 and 3).

(45) Thus, S.C. DISTRIGAZ SUD S.A. contracted credits from commercial banks, under market conditions without any state intervention. Among these, in 2001 a USD 10 mill credit was contracted at an annual interest rate of 6%, and a USD 30 mill. in 2002, at an interest rate of 7.25%, USD 15 mill. credit at an interest rate of 3.62% and USD 1.95 mill. at a rate of 5.71%.

(46) In addition to the commercially financed credits above further credits were contracted that were supported by state guarantees.

(47) The state financial support given to S.C. DISTRIGAZ SUD S.A. in that respect consists in guarantees granted, in the name of the State, by the Ministry of Public Finance, covering 100% from the value of the external credits, in the following manner:

- in 2001 an external credit was contracted from Citibank International PLC for a one year period, in total amount of USD⁵10 mill, with an interest rate of [...] ⁶. The commission paid by the company to MPF for the granted guarantee was of USD 10,000;
- in 2002 the company contracted an external credit from Citibank International PLC for a 3 year period, in amount of USD⁷ 40 mill. with an interest rate of [...] ⁸. The commission paid by the company to MPF for the granted guarantee was of USD 40,000;
- in 2003 an external credit was contracted from Citibank International PLC in total amount USD 40 mill for a 5 year period. The credit was contracted with an interest rate of [...] ⁹. The commission paid by the company to MPF for the granted guarantee was of USD 40,000;
- in 2004 the company is to contract a credit of USD 50 mill. from ABN AMRO Bank for a 5 year period. The credit is contracted with an interest rate of [...] ¹⁰. The commission paid by the company to MPF for the granted guarantee was of USD 50,000.

(48) The total value of state financed credits received between 2001 and 2004 by SC DISTRIGAZ SUD SA and guaranteed by the State designated for financing the current consumption of the population and the undertakings and the functioning in safety conditions of the National System of Natural Gas is of USD 140 millions.

⁵ The loan was totally reimbursed in accordance with the provisions form the contract.

⁶ Confidential date

⁷ The residual value to be reimbursed from this loan, at 25.11.2004, is of USD 7.14 mill., meaning 17.8% from the total credit amount.

⁸ Confidential data

⁹ Confidential data

¹⁰ Confidential data

3. THE ASSESSMENT OF THE FINANCIAL SUPPORT MEASURE

(49) The *Guidelines of the Competition Council on the state aid granted under the form of guarantees* set out the criteria according to which state support granted in the form of guarantees needs to be assessed.

(50) Accordingly to point 4.1. of the *Guidelines of the Competition Council on the state aid granted under the form of guarantees*, a individual state guarantee does not constitute state aid if all the following conditions are fulfilled:

- (a) the borrower is not in financial difficulty;
- (b) the borrower would in principle be able to obtain a loan on market conditions from the financial markets without any intervention by the State;
- (c) the guarantee is linked to a specific financial transaction, is for a fixed maximum amount, does not cover more than 80% of the outstanding loan or other financial obligation and is not open-ended;
- (d) the market price for the guarantee is paid.

(51) Taking into account the economical and financial situation of S.C. DISTRIGAZ SUD S.A., it can be observed that the undertaking is not in difficulty. Also, as mentioned in point (45), the company is capable to contract loans on the market conditions, without any state intervention. Thus, the Competition Council considers that the conditions stipulated in point 4.1. letters (a) and (b) from the *Guidelines on the state aid granted under the form of guarantees* are fulfilled.

(52) However, since presently the guarantees cover more than 80% of the loans one needs to note that the condition set forth in point 4.1.(c) of the *Guidelines on the state aid granted under the form of guarantees* is not fulfilled and that therefore the existence of aid within the guarantees granted to SC DISTRIGAZ SUD SA cannot be excluded.

(53) Consequently, the guarantees may contain state aid. In accordance with point 3.2 of the *Guidelines on the state aid granted under the form of guarantees* one way of establishing the cash grant equivalent contained in a state guarantee is as follows: “The cash grant equivalent of a loan guarantee in a given year can be calculated in the same way as the grant equivalent of a soft loan, the interest subsidy representing the difference between the market rate and the rate obtained due to the State guarantee after any premiums paid have been deducted”.

(54) In that respect the Competition Council considers that the interest rates for the contracted commercial loans mentioned above can be considered as a reference for the calculation of the interest subsidy contained in the state guaranteed credits.

(55) This leads to the following grant equivalents¹¹ for the guarantees at hand:

- the grant equivalent of the USD 10,000,000 credit, state guaranteed, taken in 2001, minus the premium paid by the undertaking, respectively:

$$\text{USD } 138,508.76 - \text{USD } 10,000 = \text{USD } 128,508.76;$$

- the grant equivalent of the USD 40,000,000 credit, state guaranteed, taken in 2002, minus the premium paid by the undertaking, respectively:

$$\text{USD } 1.630.781,16 - \text{USD } 40.000 = \text{USD } 1.590.781,16 ;$$

- the grant equivalent of the USD 40,000,000 credit, state guaranteed, taken in 2003, minus the premium paid by the undertaking, respectively:

$$\text{USD } 531,813.16 - \text{USD } 40,000 = \text{USD } 491,813.16 ;$$

- the grant equivalent of the USD 50,000,000 credit, state guaranteed, taken in 2004, minus the premium paid by the undertaking, respectively:

$$\text{USD } 4,275,302.77 - \text{USD } 50,000 = \text{USD } 4,225,302.77.$$

(56) The total value of the financial assistance in the form of state guarantee presently amounts to USD 6,436,405.85, respectively ROL 193,543 million¹².

(57) Point 2.1.1. of the *Guidelines on the state aid granted under the form of guarantees* stipulates that usually the beneficiary of such assistance is the borrower because it enables the latter – as has been demonstrated above – to obtain better financial terms than those normally available on the market.

(58) Under certain circumstances it however cannot be ruled out that also the lender will benefit from the guarantee (see point 2.2. of the *Guidelines on the state aid granted under the form of guarantees*). This according to point 2.2.2. for example may be the case where the guarantee is given after the financial obligation has already been entered into without its terms being adjusted or the guaranteed loan is used to pay back a loan to the same credit institution. Such guarantee can favor the lender and distort competition.

¹¹ The subsidy equivalent has been calculated according to Annex 2 point 3 of the Regulation on regional aid, by taking account of the respective terms of the loans as well as their reimbursement schedules and the USD discount rate as follows: 2.8% in 2001, 1.6% in 2002, 2.2% in 2003 and 3% between 2004-2009.

¹² It was considered the National Bank of Romania exchange rate at 25.11.2004: 1 USD=30.070 ROL.

(59) The guarantees granted by the Ministry of Public Finances, for the external credits contracted by SC DISTRIGAZ SUD SA, represent a prior condition for entering into force of these credits. The guarantees were issued before using any money from this credit. The guarantees were not granted for an existing loan or any other financial obligation or for a guaranteed credit used to repay another non-guaranteed credit.

(60) The Government Decisions approving the state guarantees for external credits which are to be contracted by DISTRIGAZ SUD establish the maximum credit values which are to be guaranteed (together with the interests and afferent commissions), the purpose of the credit and the guarantant (Ministry of Public Finances). Based on these G.D.s, SC DISTRIGAZ SUD SA established in advance with Ministry of Public Finances the credit parameters (the granting period/maturity, the grace period, withdrawal period and the way of reimbursement). Thereafter, standard offer requests were issued addressed to external first rank banks.

(61) The offer request contained the necessary information so that the interested banks could create a competitive price structure: the type of the loan, the beneficiary of the loan, the 100% state guarantee (by mentioning the GD's number), the credit value, the maturity of the loan, withdrawal period, the grace period, the way of reimbursement, the reply form, the deadline for the offers and any other data necessary to make a pertinent offer. As the offer is standard, all banks received the same information, being equally treated, in conditions of transparency and free access for transmitting the offers.

(62) After analyzing all offers received until the date mentioned in the offer request, the best offer was chosen. As all the banks are first rank banks and the criteria of the credit being the same, the main criterion for choosing was the cost of the credits (interest and the corresponding fees).

(63) Taking into account all the above, it is considered that the financing banks have offered their facilities at competitive pricing conditions thereby excluding any potential advantage deriving from the state guarantee. Consequently, the Competition Council comes to the conclusion that the state guarantees do not give any advantage to the lender but only to the borrower.

4. ANALYZING THE FINANCIAL SUPPORT FROM THE STATE

(64) This advantage that SC DISTRIGAZ SUD SA has benefited from transfers an economic advantage to the company from state resources that may affect trade between Romania and the EU. Thus the advantage contained within the guarantees may constitute a state aid to DISTRIGAZ SUD.

(65) The financial measures mentioned in point (47), notified to the Competition Council by the Ministry of Public Finance, represent the object of the present decision. These measures are analyzed in the context of meeting the public service of general economic interest by S.C. DISTRIGAZ SUD S.A.

4.1. The obligation of service of public economic interest

(66) The financial aid granted to a company which provides a service of public economic interest is not considered as state aid in the meaning of art. 2 align. (1) of the Law no. 143/1999 on state aid, amended and completed by Law no. 603/2003, if the following conditions are fulfilled:

a) the obligation for providing the service of public economic interest has been stipulated in a legal/administrative act and it must be clearly defined;

b) the parameters on the basis of which the compensation is calculated must be established in advance, in an objective and transparent manner and must not provide an economic advantage which would advantage the respective economic agent in comparison with its competitors;

c) the compensation cannot overcome what is necessary for fully or partially cover the costs for providing the service of public economic interest, based on the relevant accounting documents and a reasonable profit;

d) when the company fulfilling the obligation of providing a service of public economic interest hasn't been designated following a public tender procedure, which could allow to select an economic agent able to provide that service at the lowest costs, the level of the necessary compensation must be determined based on a comparative analyze of the costs of the company with the costs that a company acting in the same sector of activity, having a good management and the adequate technical

equipment so that it could be able to fulfill the necessary conditions for providing the public service, would have barred for providing that obligation so that it would get a reasonable profit.

4.1.1. Clearly defined service of public interest entrusted by legal/administrative act

(67) The Competition Council takes account of the fact that the activity of ensuring the supply and distribution of natural gas are vital for both undertakings and day-to-day life of the Romania's population. Any breakdown in the supply and distribution of natural gas has a major negative impact. Assuring the fluency and safety supplying of natural gas, in any meteorological conditions, even in the peak winter periods, represents a service of public interest.

(68) The obligation of discharging the service of national economic interest has been conferred on SC DISTRIGAZ SUD SA by the licenses no. 331/2004, no. 332/2004 and no. 333/2004, issued by the National Regulation Agency in the Natural Gas Field (ANRGN). Furthermore, the law and license governing the supply and distribution activities set out clear parameters on which terms the service is to be provided.

(69) According to the provisions of Law of Natural Gas the supply and distribution of the natural gas represents a public service of national interest. Organization, operation and functioning of public services must ensure:

- a) Meeting the quantity and quality demands of users, according to the contract provisions;
- b) The optimal operation in safety, profitability and economic efficiency conditions of buildings, equipments, installations and all assets, according to the projected technological parameters and in compliance with the requested conditions, operation guidelines and organization and functioning regulations;
- c) Protecting the public estate and environment by observing the legal provisions;
- d) Serving all the consumers from the area for which they have been licensed;

- e) Observing all the performance parameters established by the public administration authorities, respectively ANRGN.

(70) S.C. DISTRIGAZ SUD S.A. discharges a public service obligation and has to assure, on the basis of the framework-contracts of natural gases supply for the regulated market, the supply of natural gases for the captive consumers in the areas in which it has a distribution license and to assure the continuous and safety supply of the contracted natural gases.

(71) Given the above mentioned, the Competition Council concludes that the condition from point (66) letter (a), according to which the obligation to discharge a general economic interest service must be granted through a normative/administrative act and must be clearly defined is fulfilled.

4.1.2. Predefined parameters of the compensation

(72) The compensation of the public service obligation must be calculated on pre-established objective and transparent parameters and may not grant an economic advantage to the beneficiary.

(73) As it was explained at point (28), before each financial year, the cost and revenues budget of SC DISTRIGAZ SUD SA is analyzed and approved by the Ministry of Economy and Trade, the Ministry of Public Finances and the Government of Romania. All the revenues and expenses (storing and operating expenses, including financial expenses related to loans contracted for the purchase of natural gas, maintenance costs, employment costs, other costs) are separately presented and the tariffs of SC DISTRIGAZ SUD SA for the next year are being set-up and submitted for adjustment and approval to A.N.R.G.N.

(74) The final price for the captive consumers is defined in advance and published in the Official Journal through ANRGN's Order. This price is established according to objective criteria such as the price of natural gas, consumer price index, the exchange rate, the tariff for transport and the tariff for the distribution and supply.

(75) The information submitted to the Competition Council indicates that the above procedure is carried out according to predefined criteria that are applied to the parameters obtained from the performance of previous years and includes an estimation of the necessary credit volume that needs to be contracted in order to ensure the discharging of the public service obligation. Therefore, it can be

concluded that the compensation for discharging the public service obligation is undertaken on the basis of predefined and objective parameters.

4.1.3. No overcompensation

(76) The compensation must not exceed the costs incurred through the service of general economic interest.

(77) Table no. 3 indicates that in the analyzed period (2001-2004), the revenues from the supplying of natural gas at regulated prices to the captive consumers are lower than the costs incurred by this activity, so that losses are registered from the activity of discharging the public service of natural gas supply and distribution.

(78) In order to cover the costs deriving from the gas acquisitions in excess of actual consumption that cannot be recovered by the ordinary revenues discharging the public service requires external financing which is financed by the state guaranteed credits mentioned under point 2.3. above.

(79) The major impact of both the financial expenses volume related to the contracted credits for the acquisition of natural gas, as well as the costs for storing the safety stock, is reflected by the undertaking's results for the activity of discharging the public service during 2001-2004, as reflected in the following table:

Table no. 5 The activity results for discharging the public service

[...]¹³

(80) From the information above it follows that during 2001-2004 the activity of discharging the public service of general economic interest received public funding of ROL 193,543 million in the form of state guaranteed credits whereas in the same period it incurred total losses of ROL 352,242 mill.

(81) Therefore, the state financed compensation for the public service remains below the actual costs and consequently one can conclude that the compensation does not exceed the amounts necessary for discharging of the public service of the natural gas supply and distribution.

¹³ Confidential data

4.1.4 Entrusting through public bid or efficient operation of the service

(82) The entrusting of the general economy interest service of distribution and supply of natural gas to DISTRIGAZ SUD was not made through public bid.

(83) The carrying out of the distribution of natural gas service was entrusted to SC DISTRIGAZ SUD S.A. through A.N.R.G.N. license. Therefore, for establishing the level of compensation, a costs analysis for another well managed economic player, carrying out the same activity is required. There are also other players performing on the Romanian distribution and supplying of natural gas market (for example DISTRIGAZ NORD S.A.) but a comparison between these companies is irrelevant as these are public companies granted with state support for fulfilling their general interest public service obligation.

(84) As the four conditions mentioned at point (66) are not fulfilled cumulative, meaning that the condition provided for at point (66) letter d) could not be demonstrated, the measures of support for S.C. DISTRIGAZ SUD S.A., notified by the Ministry of Public Finance constitute state aid in the sense of art. 2 of Law 143/1999 on state aid, with subsequent modifications and completions and of the *Regulation on state aid in the form of compensations granted to companies for designated to perform services of general economic interest*.

4.2. COMPATIBILITY OF THE AID

(85) According to the *Regulation on state aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest* compensations granted in view of discharging the service of general economic interest may constitute state aid compatible with a normal competition environment if the following conditions are met:

- a) the state aid is necessary for discharging a service of general economic interest;
- b) the state aid does not unduly affect the trade between Romania and the EU Member States.

4.2.1. State aid necessary for discharging a service of general economic interest

(86) In order to be able to assess the necessity of the aid with respect to the discharging of the service the following conditions should be observed:

- the beneficiary needs to be officially entrusted with discharging a clearly defined service of general economic interest; and
- the compensation should not exceed what is necessary to discharge the service of general economic interest, taking into account the revenues arising from its performance.

(87) As discussed under point 4.1.1. above S.C. DISTRIGAZ SUD S.A. is exercising a service of general economic interest, essential for the population, institutions and undertakings in the Southern part of Romania, which is clearly defined by license.

(88) S.C. DISTRIGAZ SUD S.A. operates its service under the public ANRGN licenses no. 331/2004, no. 332/2004 and no. 333/2004. The licenses in conjunction with the relevant law clearly define the obligations of the service that the company is supposed to discharge. Therefore it can be concluded that S.C. DISTRIGAZ SUD S.A. has been officially entrusted with the public service that it discharges.

(89) Ensuring the high levels of consumption for the cold periods of the year, refilling the safety stocks as well as ensuring a stability and fluency in supplying the population and economic operators with natural gas requires the purchasing of a supplementary volume of natural gas from external markets in order to complete the domestic deficit of energy resources, ultimately leading to the necessity of contracting external credits with state guarantees.

(90) Therefore, for example, for the cold season period October 2004 – March 2005 S.C. DISTRIGAZ SUD S.A. have to purchase an estimate of 4,667 millions cubic meters of natural gas, from which an estimate of 1,165 millions cubic meters from import. It is estimated that during this period the financial effort will be of 346 millions USD, in which the loan guaranteed by the Romanian state will be of 50 millions USD, representing 14.5% of the total financial effort.

(91) It also follows, from the assessment under point 4.1.3. above, that the company is only partially compensated for the costs of providing the public

service which it cannot cover by its own sources. Therefore, one can conclude that the state aid granted to S.C. DISTRIGAZ SUD S.A. does not exceed what is necessary to discharge under the necessary conditions of continuity and safety the public service of supply and distribution of natural gas.

(92) Therefore, it can be concluded that the state aid granted to S.C. DISTRIGAZ SUD S.A. as governmental guarantees does not represent an over-compensation because it does not exceed the costs which are absolutely necessary in order to perform the obligation of a service of general economic interest.

4.2.2. No unduly affect the trade between Romania and the EU Member States

(93) In this context it needs to be noticed that the activity of distribution and supply of natural gas of SC DISTRIGAZ SUD SA is limited only to the Southern area of Romania as the company's licenses issued by A.N.R.G.N. are limited to 20 counties, respectively 560 localities in that respective region. Thus, SC DISTRIGAZ SUD SA carries out business only regionally (the Southern part of Romania) and no other undertaking can enter in the regions where DISTRIGAZ SUD owns licences. Furthermore, a spillover of the compensation to the competitive segment appears to be excluded because of the actual under-compensation of the public service. It therefore is more likely that also part of the revenues of the competitive segment need to be used to cover losses incurred by the public service, which has a further mitigating effect. Therefore, the Competition Council considers that the trade with the Member States is not significantly affected.

(94) Thus the two conditions provided in the *Regulation on state aid in the form of compensations granted to companies for designated to perform services of general economic interest*, are cumulatively met.

(95) The total amount of state aid granted to S.C. DISTRIGAZ SUD S.A. amounting to ROL 193,543 million, notified by the Ministry of Public Finance is compatible with normal competitive environment.

DECIDES

Art. 1. The measures of support notified by the Ministry of Public Finance that are granted to S.C. DISTRIGAZ SUD S.A. constitute state aid in the sense of art. 2 of Law 143/1999 on state aid, modified and completed by Law 603/2003 and G.O. 94/2004 on regulating some financial measures.

Art. 2. The state aid granted in form of state guarantees for external credits taken during 2001-2004 represents a necessary compensation for achieving, under normal conditions of safety and continuity, the service of general economic interest of supplying and distributing natural gas, compensation that does not affect unduly the commerce between Romania and EU Member States.

Art. 3. On the basis of art. 12 align. (2) letter b) corroborated with art. 14 align. (1) letter j) of Law no 143/1999 on state aid, with subsequent modifications and completions, the state aid for S.C. DISTRIGAZ SUD S.A. is authorized as a state aid to achieve under normal conditions of safety and continuity the service of general economic interest.

Art. 4. According to dispositions of art. 24 of Law 143/1999, with subsequent modifications and completions, the Ministry of Public Finance will annually submit to the Competition Council information on the state aid granted to S.C. DISTRIGAZ SUD S.A. in view of monitoring the aid.

Art. 5. The present Decision is applicable upon its communication.

Art. 6. According to provisions of art. 29 of Law 143/1999 on state aid, with subsequent modifications and completions, the present decision may be appealed by the interested persons before the Bucharest Court of Appeal, administrative section, within 30 days from its communication.

Art. 7. The present decision will be communicated by the General Secretariat within the Competition Council to:

- The Ministry of Public Finance, Apolodor Street no. 17, sector 5, Bucharest;
- S.C. DISTRIGAZ SUD S.A., Marasesti Boulevard no. 4-6, sector 4, Bucharest.

Art. 8. The General Secretariat and the Department for Authorization of State Aid within the Competition Council shall pursue the fulfillment of the present decision.

PRESIDENT

MIHAI BERINDE