

DECISION NO. 135

Dated

**Regarding the financial aid notified by the Ministry of Public Finance
for S.C. „Rompetro Rafinare”- S.A. Constanta**

COMPETITION COUNCIL,

Considering the provisions of Decree no. 57/2004 for appointing the members of the Competition Council,

Considering the provisions of Competition Law no. 21/1996, published in the Official Gazette no. 88/30.04.1996, Part I, as subsequently amended and completed,

Considering the provisions of Law no. 143/1999 regarding the state aid, published in the Official Gazette no. 370/3.08.1999, Part I, as subsequently amended and completed,

Considering the provisions of the European Treaty instituting an association between Romania, on the one hand and the European Community and its state members, on the other hand, ratified by Law no. 20/1993, published in the Official Gazette no. 73/12.04.1993, Part I,

On the grounds of the following considerations,

1. PROCEDURE

- (1) By letter no. 107.295/03.02.2004, registered with the Competition Council with no. RS-AS/07/06.02.2004, Ministry of Public Finance forwarded to the Competition Council the notification of the measure of

financial aid granted to S.C. “Rompetrol Rafinare”-S.A. Constanta, regarding the settlement of certain budgetary debts of the company. The measure consists in the subscription and payment by the state of the bonds issued by S.C. “Rompetrol Rafinare”-S.A. Constanta.

(2) By letter no. DAS/68/18.02.2004 additional information was requested. The Ministry sent information by letter no. 686286 dated 26.02.2004, registered with the Competition Council cu with no. RG 715/03.03.2004. Since the information received did not clarify all the envisaged aspects, the Competition Council by letters no. DAAS/140/16.03.2004, DAAS 309/06.05.2004, CC808/16.06.2004, CC1909/11.08.2004, CC/2528/23.11.2004, CC/44/17.01.2005 and CC/585/22.04.2005 requested their completion, pursuant to art. 6 para. (4) of Law no. 143/1999, as subsequently amended and completed.

(3) The notification became effective on the date when the information was accurate and complete, respectively on 27.05.2005.

2. DESCRIPTION OF THE MEASURE

2.1. The beneficiary of the support measure from the state

(4) The beneficiary of the support measure is S.C. “Rompetrol Rafinare”-S.A. Constanta, an undertaking set up in 1991, that operates the Petromidia refinery and has as main object of activity the processing of crude oil and wholesale marketing of oil products.

(5) On January 26th 2001, the Petromidia refinery was taken over by the Rompetrol Group. The share capital of the company is of ROL 21,099,276,002,000, out of which ROL 14,300,993,354,800 represents contribution in kind and ROL 6,798,282,647,200 contribution in cash.

(6) As of the date of the take over by Rompetrol Group of the Petromidia refinery, the latter was facing major financial difficulties, being practically on the brink of liquidation - registering real debts of approximately USD 285 million, out of which the debts to the state budget were in amount of USD 181.9 million representing 64%. This historic debt constituted a financial burden for the company, bearing

delay interest and penalties calculated at a very high rate (penalties of 0.5% per month and interest of 0.06% per day).

- (7) During February-May 2001, the company which has purchased the majority stake of the undertaking, The Rompetrol Group NV, secured the refinery's financing needs from own resources as well from loans obtained from the international banking market, in order to allow the resuming of the production and the payment of current debts. Thus, the undertaking would be able to pay to the state budget in a short time, USD 61.9 million in 2001, USD 190.4 million in 2002, and in 2003 the total payment to the state budget reached the amount of USD 371.6 million. Thus, in 2002, Petromidia became the largest private taxpayer to the state budget, paying its current debts on time. The investor's efforts have focused on the stringent needs to upgrade Petromidia's technology as, on the moment of the privatization, it was not able to produce any kind of fuel at European standards, the production being thus limited by the impossibility of selling the products obtained.
- (8) The relevant market for the product is the market for crude oil processing and marketing oil products. The geographic area where the products are marketed is represented by the territory of Romania. The company exports to European countries such as: Georgia, Republic of Moldova, Bulgaria and Turkey.
- (9) The market share of S.C. "Rompetrol Rafinare"-S.A. is of 28%. The main competitors of the beneficiary are: S.N.P. Petrom S.A. – member of the OMV Group si S.C Rafo Onesti S.A.

2.3. Modality of granting the measure of financial aid

- (10) By the GEO no. 118/2003, regarding the measures for settlement of certain budgetary debts of S.C. „Rompetrol Rafinare”- S.A. Constanta, as it was approved by Law no. 89 dated April 8th 2005, published in the Official Gazette no. 320 dated April 15th 2005, the budgetary receivables held by the state against the undertaking are converted into convertible bonds. Art. 3 (1) of the ordinance stipulates that the amount of the bonds issue equals the value of debts owed by S.C. "Rompetrol Rafinare"-S.A. to the state budget as of September 30th 2003, respectively ROL 21,776,998,718,567, as they were set by the General

Division of Public Finance of Constanta County by the Fiscal Certificate for legal persons no. 23133/04.11.2003.

- (11) The bonds issued by S.C. "Rompetro Rafinare"-S.A. are dematerialized, transferable, convertible at maturity, with a nominal value of EURO 25, bearing interest equal to EURIBOR for 12 months plus a margin of 1.5% per year. In case the annual rate of profit achieved by the issuer in the previous year is more than 10%, the interest for the current year shall be EURIBOR for 12 month plus a margin of 2% per year.
- (12) The bonds mature in 7 years from the date of issuance, respectively September 30th 2010. S.C. „Rompetro Rafinare”-S.A. Constanta shall be able to redeem the bonds before maturity, in which case it shall pay the interest accrued up to the redemption date.
- (13) The bonds which are not redeemed are to be converted on maturity date, at the issuer's option, into ordinary shares ranking 'pari passu' to the ordinary shares existing at the date of issuance. According to Art. 7 of the Law no. 89/2005 „the nominal value, of a share or the total value denominated in ROL, of the shares resulted from the subsequent modification, either the increase or decrease of the nominal value of a share on the date of issuance denominated in ROL, will equal the nominal value of a share on the date of issuance denominated in ROL multiplied by the EURO/ROL exchange rate communicated by the National Bank of Romania for the maturity date, and the EURO/ROL exchange rate communicated by the National Bank of Roman for the issuance date”.

III. ANALYSIS OF THE MEASURE OF SUPPORT FROM THE STATE

3.1. The state aid character of the measure

- (14) The term of 'state aid' as described in Article 87(1) of the EC Treaty, is characterized by the following four defining elements: (i) any benefit (ii) granted by the state or from sources of the State (iii) to a certain undertaking or sector (selectivity), (iv) that may distort the competition and affect the commerce between the Member States.

(15) In order to be considered state aid within the meaning of *Law no. 143/1999 regarding the state aid* as subsequently amended and completed, the financial aid must cumulatively meet the four conditions stipulated by article 2 of the Law:

- to be granted by the state or from the state's resources,
- the measure must be selective,
- to ensure an advantage to the undertaking,
- to distort or threaten to distort the competition and to affect the trade of Romania with the Member States of the European Union.

(16) Considering that the measure consists in the conversion of budgetary debts into bonds, there is no doubt that state resources are involved.

(17) The financial aid measures granted pursuant to the provisions of GEO no. 118/2003 are granted only to S.C. "Rompetrol-Rafinare" – S.A. Constanta, therefore having a selective character.

(18) As regards the distortion of competition, we consider that the granting of such financial support may affect the competition on the relevant market. Because the company is involved in export operations, we also consider that the commerce with the Member States may be affected.

(19) In order to evaluate whether the transfer of state resources is favourable to S.C. "Rompetrol Rafinare"- S.A. Constanta conferring it an advantage, „the principle of the prudent private creditor in the market economy” was applied. The evaluation of this principle is presented hereinafter.

3.2. Applying the principle of the prudent private creditor in the market economy

(20) The EC treaty institutes the principle of equality among the public and private undertakings. Thus, the Member States can hold and manage undertakings, can acquire shares and/or bonds, invest in public and private companies, participate to economic activities as private law subjects.

- (21) According to the private prudent creditor principle, funds granted by the state to an undertaking do not involve state aid unless, in similar circumstances, a private creditor, of comparable profile with that of the public authority, would have acted similarly, following the recovery of the amounts owed by the undertaking and the related interest.
- (22) In the present case, the state held over S.C. Rompetrol-Rafinare S.A. Constanta, as of September 2003, a receivable in amount of approximately USD 603 million, representing budgetary debts increased by interest and delay penalties. So, the conduct of the state had to be compared with that of a creditor following, mainly, to maximize the recovery ratio for the receivables held over the undertaking.
- (23) The Competition Council notes that, as of September 2003, the undertaking had a difficult economic and financial situation. Although operationally the undertaking has a substantially better position than the previous year, posting positive operating earnings before depreciation (USD 15.497 thousand), however its overall activity is seriously affected by the financial burden, determined mainly by the accrual of large debts to the state, influencing negatively the undertaking's result in that moment.
- (24) Analysing the financial position of the undertaking, the Competition Council notes its impossibility to meet at that moment the pastdue obligations to the state as well as its inability to operate with such a high payable debt in the balance sheet.
- (25) The Competition Council notes that if the state had not taken any measure and had maintained the claim against the undertaking, the interest and delay penalties for failure to pay the debts would have continued accruing (the delay interest is of 0.06% per day and the applied delay penalties are of 0.5% per month, resulting this way an accumulated nominal rate of 27.9% per year, respectively a real accumulation rate of 12.09% per year¹). During the first year, the penalties and the supplementary delay interests would have totalized an approximate amount of EURO 44.2 million, during the second year an

¹ The real accumulation rate was calculated by applying an inflation rate at the level of 2003, respectively 14%.

approximate amount of EURO 88.3 million, following for the amount to increase up to EURO 879.5 million in the following 7 years.

Table no. 1 – *The situation of the penalties and delay interests the company would have accrued during the term 30.09.2003-30.09.2010*

EURO mill.			
Date	Principal	Penalties	Total
30.09.03	365.2	205.1	570.3
30.09.04	365.2	249.3	614.5
30.09.05	365.2	293.4	658.6
30.09.06	365.2	337.6	702.8
30.09.07	365.2	381.8	747.0
30.09.08	365.2	425.9	791.2
30.09.09	365.2	470.1	835.3
30.09.10	365.2	514.3	879.5

Source: Supplementary information

From the analysis of data presented in Table no. 1, it can be noted that, from 30.09.2003 up to 30.09.2010 the undertaking would have accrued interests and delay penalties amounting to EURO 309.2 million, which would have been added to the value of the budgetary debts the undertaking had at 30.09.2003, namely EURO 570.3 million, thus resulting a total value of the debts towards the state in amount of EURO 879.5 million in 2010.

- (26) As it can be noticed, in this situation, the undertaking's debt towards the state would have artificially increased year by year. Considering the financial forecasts enclosed in the company's Business Plan, it can be noted that the plan would not have had enough financial resources for covering the debts. The effect of these debts would have been felt financially by a difficult access or even blocking the access to finance of the undertaking, leading in a short time to the insolvency of the undertaking. Thus, a necessary decision has to be made by the state, as a creditor of the undertaking: either to foreclose the receivables held and to recover this way a part of them by liquidating the undertaking, or to find a way allowing to recover the receivable over the undertaking to a greater extent.

- (27) In these circumstances the Competition Council analysed the following hypotheses: what would the state have obtained as a creditor if it had resorted to the foreclosure of the budgetary receivables and thus liquidating the undertaking and what is obtained by the state by converting the debts into convertible bonds.

Hypothesis of liquidating the company on 30.09.2003

- (28) The Competition Council compares the state's conduct to that of a private creditor that tries to obtain the recovery of the amounts owed by the debtor in financial difficulty. In this respect, a company in financial difficulties can propose its creditors to reach an agreement in order to remedy its position and avoid liquidation; each creditor must take a decision comparing the amount recovered as a result of the proposal and the amount that it might obtain from liquidating the debtor company. If it is reached the conclusion that, in the case of the liquidation, by selling the assets only the creditors with mortgages and preferred creditors would be satisfied, the simple liabilities not being covered, the acceptance by the simple non-preferred creditors, to reschedule their debts would not be a disadvantageous alternative for them.
- (29) The Romanian legal practice in the field of liquidation and bankruptcy shows that part of the legal recovery of receivables against third parties extends considerably the liquidation procedures. No significant file lasted less than 5 years, which is proved currently by the existence in courts of certain bankruptcy cases for important Romanian companies, such as Comtim SA Timișoara, Navrom Galați SA, and others.
- (30) According to *Law 64/1995 regarding the procedure of legal restructuring and bankruptcy*, Rompetrol could have proposed to the bankruptcy judge a legal restructuring plan. It is worth noticing that by the restructuring plan, any receivables can suffer significant decreases, except for the secured debts. Thus, there were cases in which even the budgetary receivables were significantly decreased and their payment was scheduled for a period of up to 3 years. Moreover, in order to get the creditors' vote, a plan needs the favourable vote of 3 out of the 8 categories stipulated by law. It is considered that the categories that are not favoured by such a plan also vote. Thus, in most cases, a diligent debtor can successfully propose a restructuring plan with good chances to

get the creditors' vote, even if the majority of creditors oppose it, regardless of the importance of the budgetary or secured character of receivables. According to the law, it is sufficient the non-disfavouring of 2 of the categories and the favourable vote of one (which can be the category of salaries category) in order to approve a plan.

- (31) In the case in which no restructuring plan was approved or, being approved, after a certain period the bankruptcy judge acknowledges the non-fulfilment of the obligations undertaken by the plan, the bankruptcy procedure is initiated. This procedure consists of liquidating all assets of the debtor, distributing the liquidities to the creditors and the dissolution of the undertaking. The liquidation of assets consists, on the one hand, of selling the tangible and intangible assets of the company, but also the execution of those owing money to the bankrupt debtor.
- (32) After liquidating the assets, as liquidities are collected, the liquidators distribute the proceeds to creditors based on a hierarchy established by law and in which the budgetary receivables are placed on a **4th position** in the case in which the amounts do not result from selling certain assets that were not subject to security.
- (33) In most of the cases involving guaranteed creditors, the amounts resulted from the sale of the assets making subject of security do not cover the total value of the guaranteed debts. Consequently, for all the other categories of creditors, including budgetary ones, there are no other amounts left to be distributed.
- (34) The information transmitted by the Ministry of Public Finance show what would have happened with the State receivables in the event of an insolvency procedure being initiated as per *Law no. 64/1995 regarding the legal restructuring and bankruptcy procedure*, assuming that the state would have succeeded to obtain the dismissal of Rompetrol objection regarding the initiation of the liquidation procedures.

(35) [...] ²

(36) [...] ³

² Confidential data

³ Confidential data

- (37) Table no.2 presents the scenario of the company's theoretical liquidation, on 30.09.2003.
[...]⁴

The premise of converting the budgetary debts into bonds

- (38) The Competition Council notes that by converting the budgetary debts into bonds, the state follows to recover the receivables held over the undertaking and to collect related interest of about USD 25 million/year.
- (39) Regarding the recovery ratio of the receivables if converting historical debts into bonds, at that moment the state took into consideration several options:
- a) the undertaking would redeem the bonds on the maturity date, in which case the state would collect USD 778 million (converted receivables+ related interest), the recovery ratio would be of 129%;
 - b) the undertaking would redeem bonds prior to the maturity date, in which case the state would collect the bonds value + related interest up to the redemption date, the recovery ratio being between 100% and 129%;
 - c) the undertaking does not redeem its bonds on maturity, in which case the state would cash only the related interest, respectively USD 175 million, the recovery ratio of the receivables held being of 29%;
 - d) selling the bonds on the capital market, in which case the state would collect the related interest up to the selling date + the price of the related bonds.
- (40) At the moment when it choused to convert receivables into bonds, the state followed the viability prospects of the undertaking, in order to make sure that it disposes of a potential allowing to pay mainly the related bond interest and then their redemption. Thus, the state analyzed the worldwide, regional and national outlook for the market where the undertaking was active, namely the oil market, as well its present and the future economic and financial. The Competition Council notes that the Ministry of Public Finance acted as any private creditor who before

⁴ Confidential data

making any decision analyses the economic and financial position of the undertaking in order to see if this has the capacity to pay its obligations.

(41) The Competition Council notes that the overall position of the companies active in the oil sector, as of September 2003 was favorable. Thus:

- globally, the demand was registering a sustained increase, both for crude oil and petroleum products, due to the economical increase in Asia and USA, thus constituting the core of the global increase of the oil field;
- the refining margin was continuously increasing due to a period of resettlement of the margins on a new level, lower to the one in the initial period of the Iraq War, but superior to the one in the period 2001-2002; also, the prospects for 2004 and the long term projections indicated an increasing trend of the margins on all major markets;
- due to the increase of the product quality obtained by applying more severe specifications imposed not only by the European and American legislation, but also by other large consumers like China and India, a more emphasized differentiation on the crude oil market starts profiling according to the sulphur content;
- at that precise moment, Europe was far away from the economic growth of USA and China, recording even a slight decrease in certain countries. The European refineries will however take advantage of the economical increase of USA, the opening of the transatlantic arbitrage representing a strong support factor for the market of the European products;
- regionally, was registered the increase of the request for crude oil with high content of sulphur (from ex Soviet Union, Iraq, Saudi Arabia and Iran), thus envisaging a Mediterranean market with crude oil offer of Ural type (with high sulphur content) with an increasingly high discount compared to the crude oil Brent type (without sulphur content). This would have implicitly led to the supplementary increase of the refining margin, proportionally with the quantity of processed Ural crude oil for refineries with facilities of this kind.
- nationally, a continuous increase of the demand for vehicle fuels on the internal market could be noticed, as a result of the increase of the number of motor vehicles in Romania.

(42) As regards the possibility to revive the company, Competition Council emphasize the fact that the business plan presented by the company stipulates measures meant to lead to the company's viability and, implicitly, to the yearly payment of interest related to the subscribed bonds, such as:

- significant reduction of processing costs from USD 50/ton of crude oil before privatization to a value of under USD 20/ton of crude oil in 2003;
- the implementation of a coherent investment program that allowed the company, starting with the mid 2003 to obtain only EURO 3 fuels, using only crude oil with a high content of sulphur, whose price is lower, thus accomplishing increases in the gross margin;
- the modern management methods and personnel qualification;
- the investments in information technology and performing software;
- the improvement of the return on intangible assets and the return on total assets due to the increase of turnover and of processed quantities;
- the improvement of return of clients, suppliers and stocks.

(43) In order to optimize the sales, S.C. "Rompetrol - Rafinare" S.A. aimed to fulfil the following objectives during the period 2004 – 2010: to become the main provider of petroleum products in the region, to ensure its own logistics for distributing petroleum products in the region, to diminish the costs related to the supply with raw materials, respectively the costs related to the export of finished products, to increase the quantity of products obtained as per the quality norms of EU and to reduce the general administrative expenses up to a level of USD 9/processed ton.

(44) [...] ⁵

(45) The Competition Council, based on information sent by the grantor, notes that financially in 2004-2010 by the implementation of the investment program the undertaking estimates to obtain sufficiently

⁵ Confidential data

high profits [...] ⁶to cover annual interest of cca. USD 25 million related to the issued bonds, as resulting from Table no. 3.

Table no. 3 - *The forecasted situation of the operational profit*
[...]⁷

(46) [...] ⁸

(47) [...] ⁹

(48) The Competition Council notes that the state, when making the transaction, considered the existing and future position of the Romanian capital market. This was given to the possibility to list the issued bonds on the stock exchange between 2004-2010.

(49) The Competition Council notes that, as of 2003, two stages of development were envisaged for the stock market evolution: one previous to the accession of Romania to the European Union, a period with strong dynamics when significant increases of the stock market transactions were estimated and one after accession, characterized in general by the consolidation of the capital market and of appreciation mainly of the securities issued by large listed companies (especially by the companies which activate in the oil and pharmaceutical field) due to the restructuring and economic concentration process. In addition, the existence of a clear EU accession calendar and the favorable external context on the world financial market were the main reasons for which specialists of the Romanian stock market forecasted for 2010 a market capitalization of EURO 20-25 billion (compared to approximately EURO 6 billion in 2003). In these circumstances, the Competition Council notes that the state, as any other private creditor, has looked to dispose of all information regarding trading of bonds on the capital

⁶ Confidential data

⁷ Confidential data

⁸ Confidential data

⁹ Confidential data

market in order to make a correct decision regarding the conversion of the undertaking's debt into bonds.

- (50) Also, the Competition Council notes that, in the case when at maturity the undertaking does not redeem its bonds, the state will take over the shares resulted from the conversion, these being assimilated to a security which a commercial bank would claim in the event of not paying back a loan on maturity.

The conduct of other private creditors

- (51) In order to have an overall image of the entire operation, the Competition Council analyzes the behaviour of the other creditors of the undertaking as of September 2003.

- (52) [...] ¹⁰

- (53) Thus, the Competition Council notes that, based on supplementary information received from the grantor, the other creditors did not consider the company as bankrupt and acted accordingly:

[...] ¹¹

It is to be noticed that none of the company's creditors have requested the repayment of the granted loan nor have initiated the enforced execution or liquidation procedure against the company.

- (54) The Competition Council notes though that the state conduct cannot be compared to the one of the private creditors with secured debts, due to the fact that the pledged receivables are ranking over the budgetary ones. Thus, the conduct of the banks, for example, is justified by the fact that, even if the company was executed, they would still recover their receivables. Given the lower rank of their receivables, the ordinary creditors would not have recovered any part of the receivables; thus, the payment rescheduling arrangement was the only acceptable solution for these creditors.

¹⁰ Confidential data

¹¹ Confidential data

Conclusions

(55) According to the community jurisprudence, the decisive test used by the Commission for applying the principle of the private prudent creditor is to verify if, in similar conditions, a private creditor would have acted likewise. The comparative analysis of the aforementioned two situations revealed the following results:

- Should the undertaking be liquidated, the amount available to the creditors for recovery of receivables is assessed to USD 272.6 million. From this amount, the creditors with receivables ranking over the budgetary ones (liquidation taxes, creditors with guarantees, amounts owed to the employees, guaranteed letters of credit) would have cashed USD 114.9 million. The remainder, respectively USD 157.7 million, would have reverted to the state in its quality of budgetary creditor, amount that stands for approximately 26% of the owned receivables value;
- Provided the State converted the debts into bonds, it would have cashed on the period 2004-2010 a precise interest of approximately USD 175 million¹² and thus avoids the risk and uncertainty related to the hypothetical liquidation procedure. Moreover, when completing the transaction, the State took also into account the following facts: up to the maturity date the undertaking could redeem the bonds (and thus, the state could completely recover its debts and could cash in also the interest accrued until the moment of redemption); it could sell these bonds on the capital market; the undertaking's bonds which were not redeemed could be transformed in shares which are predicted to record a continuous positive evolution.

(56) Comparing the recovery ratio for the receivables held over the undertaking in these two scenarios the state, opting for the conversion of the debts into bonds, acted as a creditor following to recover the loaned amounts and the collection of supplementary revenues from related interest, without artificially increasing the indebtedness ratio of the undertaking.

¹² The interest was calculated at EURIBOR rate of 2.2% per year, as quoted in September 2003.

(57) Considering the stipulations made in section 3.2, it could be figured that, by converting the budgetary debts of S.C. "Rompetro - Rafinare" S.A. Constanta in bonds, the State acts a prudent private creditor in order to recover the held receivables, acting in accordance with **the principle of the prudent private creditor in a market economy.**

(58) The Competition Council notes that the notified measure – respectively the conversion of the budgetary debts into bonds – does not represent state aid because the four criteria of state aid are not met cumulatively.

DECIDES

Art.1. Pursuant art. 8 paragraph (2) corroborated with art. 12 paragraph (2) section a) from the Law no. 143/1999 regarding the state aid, as subsequently completed and amended, the financial support granted to S.C. “Rompetro – Rafinare” S.A. Constanta by means of converting the receivables to the state budget in bonds, does not stand for state aid as the state acts as a private creditor.

Art.2. The present Decision is enforced on the date of its communication.

Art.3. According to the provisions of art. 29 from Law no. 143/1999 regarding the state aid, as subsequently completed and amended, the present Resolution can be appealed to Bucharest Court of Appeals, the Administrative Litigation Section, in 30 days since its communication.

Art.4. The General Secretariat within the Competition Council shall communicate the present Decision to:

- the Ministry of Public Finance, having its premises located in 17th Apolodor Street, 1st district, Bucharest;
- S.C. "Rompetro - Rafinare" S.A., having its premises located in DJ 226 St., km 23, Constanta, Constanta county.

Art.5. The General Secretariat and the State Aid Authorization Division within the Competition Council shall follow up the fulfilment of the present Decision.

PRESIDENT

MIHAI BERINDE