

DECISION OF THE COMPETITION COUNCIL
No. 152 of 09.08.2005
concerning the state aid to be granted to
S.C. TRANSTITAN S.A. Bucuresti

THE COMPETITION COUNCIL,

Having regard to 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 Gazette of Romania Part I, no. 73, of 12.04.1993,

Having regard to the provisions of the Law no. 21/1996, published in the Official Gazette of Romania, Part I, no. 88 of 30.04.1996, amended and completed by E.G.O. no. 121/2003 approved by Law no. 184/2004,

Having regard to the provisions of the Law no. 143/1999 regarding the State aid, published in the Official Gazette of Romania, Part I, no. 370 of 3.08.1999, with the subsequent modifications and completions,

Having regard the provisions of the Regulation on State aid for rescue and restructuring firms in difficulty, published in the Official Gazette of Romania, Part I, no. 1215 of 17.12.2004,

Having regard to the provisions of the Decree no. 57/2004 for the appointment of the members of the Competition Council,

Based on the following reasons,

1. THE PROCEDURE

(1) By address no. VP4 /1634/22.06.2005, registered at the Competition Council by no. RS-AS 45/22.06.2005, the Authority for the Recovery of State Assets (AVAS) notified on the basis of Art. 6 of the Law no. 143/1999 on state aid, with subsequent modifications and completions, the individual state aid for the restructuring of SC TRANSTITAN SA Bucuresti within the privatisation process.

(2) The Competition Council requested supplementary information from AVAS by note no. DAAS/24.06.2005. AVAS transmitted the answer to the information requested by note no. VP4/1890/06.07.2005 and VP4/2031/12.07.2005, registered at the Competition Council by no. RG 4814/07.07.2005 respectively RG 4951/13.07.2005.

(3) The notification became effective on the date when the information were exact and complete, 14.07.2005.

2. DESCRIPTION OF THE STATE AID MEASURES

2.1. Legal basis for the grant of the state aid

(4) The Authority for the Recovery of State Assets notified the package of measures of financial support granted to SC TRANSTITAN SA Bucuresti on the basis of the following legal acts:

- Law no. 137/2002 on measures to accelerate the privatisation;
- Government Decision no. 577/2002, to approve the Methodological Norms for the application of the GEO no. 88/1997 concerning the privatisation of companies, with subsequent amendments and completions;
- Government Emergency Ordinance no. 26/2004 on measures to finalize the privatisation of companies in the AVAS portfolio and the consolidation of some privatisations;
- Law no. 442/2004 to approve the GEO no. 26/2004 on measures to finalize the privatisation of companies in the AVAS portfolio and the consolidation of some privatisations;
- Government Emergency Ordinance no. 26/2005 on the abolition of legal provisions concerning the grant of facilities to the payment of due budgetary obligations, art. II.

2.2. The measures of financial support granted to SC TRANSTITAN SA București

(5) The measures of financial support notified by AVAS are granted in the context of the privatisation of SC TRANSTITAN SA București. The company will benefit from the facilities provided for under Law no. 137/2002, with subsequent amendments and completions and subsequent consolidations by Law no. 442/2004, GED no. 26/2004 on measures to finalize the privatisation of companies in the AVAS portfolio and the consolidation of some privatisations, corroborated with notes in the presentation file and the shares selling-purchase contract.

(6) These facilities consist of the exemption from payment of historical debts accumulated until the privatisation process, consisting of due budgetary obligations to the state budget and claims taken over in the valuation from the National House for Health Insurance.

(7) The facilities to the payment of obligations due to the state budget and AVAS, which are granted to SC TRANSTITAN SA București at the privatisation are in total amount of ROL 51,935,558,478 and consist of exemption from payment and reschedulings, as follows:

- Payment reschedulings in total amount of ROL 11,417,817,558 representing part of the VAT, special social solidarity fund for disabled persons, special funds for supporting state education, research and development fund, contribution to the pension and other social insurance for agricultors fund, accidents fund, social insurance contribution, unemployment insurance contribution owed by the

employer, the whole amount of source stoppage for obligations to the social insurance state budget and unemployment insurance budget, as well to obligations to the national unique fund for health insurance budget due on 31.12.2003, budgetary obligations registered until the date when the common order is issued and not included in this one and the sum rescheduled according to the Payment Agreement concluded between AVAS and the company (representing the contribution to the unique fund for health social insurance taken over by AVAS from CNAS – National House for Health Insurance);

- Payment exemptions in total amount of ROL 40,517,740,920 representing part of the VAT, special social solidarity fund for disabled persons, special funds for supporting state education, research and development fund, contribution to the pension and other social insurance for agricultors fund, accidents fund, social insurance contribution, unemployment insurance contribution owed by the employer as of 31.12.2003, interests and late payment fees corresponding to the obligations to the state budget, interests and late payment fees corresponding to the state social insurance budget and unemployment budget, interests and penalties corresponding to the national unique fund for health insurance budget, as well as exemptions that shall be granted to budgetary obligations registered until the date when the common order is issued.

3. THE BENEFICIARY OF THE AID MEASURES (SC TRANSTITAN SA BUCURESTI)

[...]¹

4. DESCRIPTION OF THE PRIVATIZATION PROCESS

[...]²

5. STATE AID ASSESSMENT OF THE MEASURES – ARE THE MEASURES STATE AID?

(26) The criteria, which allow to be established if a measure is State aid, are presented in art. 2 (1) of Law no.143/1999 on State aid, with subsequent amendments and completions. According to the Law, the State aid represents 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.

¹ Confidential data

² Confidential data

(27) The financial support granted to SC TRANSTITAN SA Bucuresti notified by AVAS consists in the State revenues renouncement; therefore there are involved State resources.

(28) The financial support measures granted based on provision of GEO no. 26/2004, modified and completed by Law no. 442/2004 are targeted at companies to be privatized, among which SC TRANSTITAN SA. Thus, the financial support granted to SC TRANSTITAN SA has a selective character.

(29) Although the undertaking has been privatized through an open outcry auction with two bidders, the granting of the financial support measures to SC TRANSTITAN SA creates an economic advantage in that the company is exempted from the payment of some debts due to its budgetary creditors, as well as the payment of interest rates and delay penalties related to the outstanding budgetary obligations. Thus the company is advantaged in comparison with its competitors.

(30) The granting of financial support to TRANSTITAN SA creates the premises for the potential distortion of competition on the relevant markets, as the company is helped to survive on these markets. In addition, there is no doubt that the financial support granted to TRANSTITAN SA may affect the trade with the Member States as long as the company's products envisaged to be manufactured by the undertaking will compete, especially on the Romanian market, with similar products made by companies from the European Union.

(31) In conclusion, the financial support measures are considered State aid and fall under the provisions of Law no. 143/1999 on State aid, with further modifications and completions.

6. COMPATIBILITY WITH STATE AID LEGAL BASE

(32) Article 2 of the Law no. 143/1999 on State aid, with further modifications and completions, stipulated that the State aids granted by the State or from State resources that distort or threaten to distort competition and affect the trade with the Member States are incompatible with a normal competitive environment.

(33) The State aid objective is the restructuring of SC TRANSTITAN SA Bucuresti in order to restore its viability until the end of the restructuring period. If the conditions stated in the Regulation on State aid for rescue and restructuring aid in difficulty are observed, the State aid may be considered compatible.

(34) The restructuring aid is conditioned by the implementation of a restructuring viable and coherent plan, demonstrating the long term viability of the company. To this effect, the Regulation states that the restructuring usually involves one or more of the following elements: the company's re-organization and rationalization on a more efficient base, generally implying the retreat from actions that are generating losses, the restructuring of the existing activities that may become again competitive and sometimes the diversification towards new and profitable

activities. In general, the industrial restructuring must be accompanied the financial restructuring (capital injections, reduction of debts degree, etc.).

(35) The Competition Council evaluates the State aid granted to SC TRANSTITAN SA, in accordance with the criteria stipulated in the Regulation on State aid for rescuing and restructuring firms in difficulty, published in the Official Gazette no. 1215/17.12.2004 and issued in the application of Law no. 143/1999 on State aid, with further modifications and completions. In order to be considered compatible with a normal competitive environment, the State aid must fulfill the criteria set in the above mentioned Regulation.

7. ELIGIBILITY OF SC TRANSTITAN SA Bucuresti – FIRM IN DIFFICULTY

(36) In order to benefit of State aid in accordance with the Regulation on state aid for rescuing and restructuring of firms in difficulty, the company must be in difficulty. According to the Regulation, the Competition Council considers that a company is in difficulty when it is not capable to cover its loses either from its own financial resources or from resources got from owners/shareholders or creditors, and which in the absence of an exterior intervention of public authorities, will almost lead on short or medium term to its economic market exit. In article 2 (2) b) and c) of the Regulation on State aid for rescuing and restructuring of firms in difficulty, a joint-stock company is considered as being in difficulty when mote than half of its own capital, as the accounting evidence of the company show, and more than quarter of this capital was lost during the 12 months, and a company, irrespective of its legal for, is considered in difficulty when it fulfills the conditions the allow the application of the procedure concerning the legal reorganization and bankruptcy.

(37) In this way, the Competition Council retains that according to data from the balance sheet SC TRANSTITAN SA Bucuresti had in 2003 (the year prior to the privatization) a loss of ROL 11,255,179 thousand, higher than its shareholders' equity (ROL 5,909,725 thousand). The equity decreased twice as much as the shareholders equity only in the last 12 months (in 2003 equity was of ROL -36,575,579 thousand versus ROL -25,320,399 thousand in 2002). However, in the last three years prior to privatization the undertaking posted negative equity, therefore meeting the criteria for legal reorganization and bankruptcy.

(38) The Competition Council concludes that the condition provided in art. 2 para. (2) b) and c) from the Regulation is fulfilled as such as SC TRANSTITAN SA is considered „firm in difficulty”.

8. HISTORY OF THE COMPANY'S FINANCIAL DIFFICULTIES

(39) Although the undertaking's turnover remains at a level approximately constant, the operating results of SC TRANSTITAN SA are in decline. The equity was negative even from 2001 due to significant operating expenses showing the fact that the undertaking is not profitable without required investments to improve the fleet. In 2003 the accrued losses are much higher than the

value of the shareholders equity and reserves meaning the undertaking was practically insolvent. In these circumstances, AVAS as a majority shareholder decided to privatize the company.

(40) Causes leading to the difficulty of the undertaking:

- diminishing of, until complete interruption, industrial construction projects and other state objectives after 1999 while SC TRANSTITAN SA has been established for this kind of transportation;
- restriction of activity to almost complete stop of large companies from Bucharest (Masini Unelte, Republica, etc) traditional beneficiaries for which SC TRANSTITAN SA was executing merchandise transports;
- the worn out and obsolete transportation means requiring high consumption of fuel and spare parts leading to high operating expenses;
- the highly specialized business of SC TRANSTITAN SA and its related endowment did not allow for the extension of the activity leading to a constant diminishing of the survival conditions for the undertaking;
- a gap between the increase of personnel expenses in total expenses and the level of the production increase and obtained revenues.

(41) Taking into consideration this difficult situation, AVAS decided to grant facilities at the privatization of the Company, conditioned by the implementing of some restructuring measures. According to the information contained by the AVAS notification, the dossier drawn-up at privatization contained information for the potential investors that payment facilities for budgetary obligations will be granted. Subsequently, these facilities were considered by the investors participating at the privatization procedure, respectively the open outcry auction.

(42) Through the share purchase and sale agreement the investor assumed a contribution to the technological and environmental restructuring in amount of ROL 6,600 million. In addition, the buyer assumed the other sources required to implement the restructuring program of the undertaking, in total his contribution amounting to ROL 41,480 million. It has been mentioned that he already paid an advance to purchase equipments needed to carry out the activity according to the assumed restructuring programme.

(43) The state contribution to the financial restructuring of the undertaking amounts ROL 51,936 million. The state contribution refers exclusively to the historical debts of the undertaking accrued by 31.12.2003 in view of being exempt from payment.

9. CRITERIA WHICH MUST BE FULFILLED FOR GRANTING STATE AID

(44) The measures mentioned in paragraph 2.2. together with the restructuring plan will:

- restore the long term viability of SC TRANSTITAN SA;
- avoid undue distortion of competition;
- be proportionate to the costs and benefits of restructuring (aid limited to minimum necessary);
- respect “the first time, last time” principle

- ensure the fulfillment of the restructuring strategy and commitment to monitoring its progress by the Competition Council.

10. DESCRIPTION OF THE RESTRUCTURING PLAN

[...]³

10.1. Relevant markets

[...]⁴

10.2. Organisational restructuring

[...]⁵

10.3. Technical and technological restructuring

[...]⁶

10.4. Financial restructuring

[...]⁷

10.5. Restructuring measures for environmental protection

[...]⁸

11. RESTORING THE LONG TERM VIABILITY OF THE COMPANY

[...]⁹

12. PREVENTING ANY EXCESSIVE DISTORTION OF THE COMPETITION (COMPENSATORY MEASURES)

[...]¹⁰

³ Confidential data

⁴ Confidential data

⁵ Confidential data

⁶ Confidential data

⁷ Confidential data

⁸ Confidential data

⁹ Confidential data

¹⁰ Confidential data

13. AID LIMITED TO MINIMUM NECESSARY (PROPORTIONALITY OF THE AID)

(86) According to art. 15 of the Regulation on state aid for rescue and restructuring of firms in difficulty, the amount and the intensity of the State Aid must be limited to the minimum necessary to allow the company's restructuring according to the financial resources of the company and the shareholders. The beneficiary of the State Aid must make a significant contribution to the restructuring costs, from its own resources, including the sale of assets not essential for the company's restructuring or from sources drawn under market conditions, not affected by State Aid. According to the provisions of art. 15 para. (2) in the Regulation, for SMEs a contribution of at least 40% is considered as acceptable.

(87) SC TRANSTITAN SA Bucuresti restructuring cost, amounting ROL 93,416 million is formed from:

- the cost of the organizational restructuring	ROL 3,817 mil.
- the cost of the technological restructuring	ROL 20,759 mil.
- the cost of the environmental restructuring	ROL 545 mil.
- the cost of the financial restructuring	ROL 68,295 mil.

(88) SC TRANSTITAN SA Bucuresti restructuring cost, amounting ROL 93,416 million is sustained from the following:

- the own sources of the buyer	ROL 41,480 mil.
- state aid	ROL 51,936 mil.

(89) From the total restructuring cost amounting ROL 93,416 mil, 44.4% shall be financed from the Buyer's own sources and 55.6% from the financial support granted by the state.

(90) The main shareholder's contribution of 44.4% to cover the restructuring costs is ensured from a capital infusion of the buyer. As regards whether or not the majority shareholder is able to contribute more to the restructuring costs, such considerations have been assessed when analyzing the quality and level of contribution. In view of the above contribution, which is considered significant, the shareholder is not able to contribute more to the restructuring costs.

(91) The state aid's intensity, calculated as a proportion between the state aid's value and the total cost of restructuring, is of 55.6%. We mention that, SC TRANSTITAN SA Bucuresti is an SME according to the Regulation on the state aid for SMEs.

(92) With regard to the above presented facts, the Competition Council considers as significant the beneficiary's contribution of 44.4% to financing the restructuring costs, this proving the confidence in the restructuring practical value and the fact that the amount and the intensity of the state aid were limited strictly to the minimum necessary, allowing the restructuring according to the company's and the main shareholder's existing financial resources. This way it is avoided that the company receives a surplus of liquidities to be used in aggressive purposes, of market distortion.

14. OBSERVANCE OF “FIRST TIME, LAST TIME” PRINCIPLE

(93) SC TRANSTITAN SA Bucuresti did not benefit of any rescuing and/or restructuring State Aid, fulfilling this way art. 18 in the Regulation which stipulates that the restructuring aid must be granted only one time.

15. THE COMPANY’S AFFILIATION TO A GROUP

(94) In accordance with the provisions of art. 2 para. (5) in the *Regulation*, a firm belonging to a group is not normally eligible to receive rescue and restructuring State Aid, excepting when it can be proved that the firm’s difficulties are its own and not a result of arbitrary allocations of costs within the group, and that the difficulties are too serious to be solved by the group.

(95) The tax facilities to be granted to SC TRANSTITAN SA refer to hystorical debts – effect of the economic results obtained in the years before the sale of the majority stake, so are the company’s own debts.

(96) As a result of the company’s privatization process and of the signing of the sale-purchase contract, SC TRANSTITAN SA Bucuresti’s new owner is the natural person Abou Chama Ousama, who does not own shares in other companies. Therefore, there is not a case of TRANSTITAN SA’s affiliation to a group.

(97) Though the Buyer of the majority stake in SC TRANSTITAN SA Bucuresti proved that it has the financial sources – it contracted the main installation necessary to perform new activities in the firm, the main investment from the restructuring program, paying the advance towards the supplying firm – the Competition Council takes note that the main shareholder cannot deal with the financial difficulties of SC TRANSTITAN SA as well as with the the company’s restructuring without an intervention from the state, the company’s debts to the state budget and AVAS amounting ROL 51,936 million. Taking into account the company’s difficult situation, the buyer of the majority stake could not rely, when applying the restructuring plan, on the company’s contribution, and therefore, it assumed a contribution to the restructuring plan representing 44.4% from the total cost, contribution which, in comparison to the Buyer’s financial resources, is significant. In the same time, it totally paid the commercial debts accumulated by the company before the privatization, in amount of ROL 755,062,327, respectively:

- ROL 275,477,107 to the department of Local Taxes and Fees Sectorul 3 Bucharest, representing the company’s debts to the local budget;
- ROL 465,000,000 representing the payment of the debt to the Romanian Commercial Bank;
- ROL 14,585,220, to ROMTELECOM.

16. ANNUAL MONITORING AND REPORTING

(98) Under Art. 18 of the Regulation on the rescuing and restructuring of firms in difficulty, the Competition Council monitors on a constant basis the implementation of the restructuring program, seeking that it does observe the objectives that were set.

(99) The Competition Council shall monitor the implementation of the restructuring program until the end of the restructuring period in order to make sure that there will be no increases of the production capacity, major deviations from achieving the restructuring measures, and that the aid shall not lead to additional liquidities which may be used for activities other than those in the restructuring program.

17. CONCLUSIONS

(100) Taking into account the above presented facts, the Competition Council ascertains that the state aid intended to be granted to SC TRANSTITAN SA Bucuresti is compatible with the normal competitive environment and does not unduly affect the trade with the Member States of the European Union.

(101) Not granting the state aid would lead, according to AVAS, to the company's liquidation with the following consequences:

- Collective dismissals of personnel, having as immediate and long term effect the increase of the number of unemployed persons in the area;
- The increase of the budgetary costs on the unemployed allocations, support allocations, and other forms of social protection for the dismissed persons which, from tax payers to the budget, become consumers of financial resources;
- Decrease of the amount of contributions paid by the company, related to the employed personnel;
- Partial recovery of the debts by the budgetary and third parties creditors;
- Decrease in the activity volume of the suppliers of raw materials and materials, which are collaborating with SC TRANSTITAN SA Bucuresti.

DECIDES

Art. 1. The financial support measure notified by the Authority for the Recovery of State Assets having as beneficiary SC TRANSTITAN SA Bucuresti constitutes state aid for the purposes of Article 2 para. (1) in Law 143/1999, with the subsequent ammendments and completions.

Art. 2. Under Article 12 para. 2 (c), corroborated with Article 14 para. 1 (e) of Law 143/1999, with subsequent amendments and completions, we authorize the state aid for restructuring to be granted to SC TRANSTITAN SA Bucuresti, provided that the conditions under Articles 3 and 4 of this decision are met.

Art. 3. The company is bound to implement in whole the restructuring program to which it has committed.

Art. 4. The company will not increase its production capacities over the level of 2006 for two years after the end of the assumed restructuring plan, namely until the end of 2009.

Art. 5. If the conditions imposed by the present decision are not met, the provisions of art. 13 in the Law no. 143/1999 on the state aid, with the subsequent modifications and completions shall be applied.

Art. 6. The value of the state aid which is to be granted is of ROL 51,935,558,478.

Art. 7. This Decision is applicable as of the date when communicated.

Art. 8. Under Article 24 of Law 143/1999, with subsequent modifications and completions, the Authority for the Recovery of State Assets shall submit to the Competition Council information on the state aid granted, in order to inventory and to monitor it. In the same time, the Authority for the Recovery of State Assets shall submit to the Competition Council annual reports regarding the implementation of the restructuring program. The first report shall be submitted within 6 months as of the issuing of the decision. The following reports will enclose the necessary data on the stage (physical and in value terms) of the restructuring plan's implementation. In the same time, it shall be reported the information on the application of the compensatory measures related to the production capacities imposed by the present decision.

Art. 9. According to the provisions of art. 29 of the Law no. 143/1999 on state aid, with subsequent amendments and completions, the present Decision may be appealed by concerned persons before the Bucharest Court of Appeals, the Administrative Litigations Section, in 30 days from its communication.

Art. 10. The present Decision shall be communicated by the Secretariat-General of the Competition Council to:

- the Authority for the Recovery of State Assets, st. Cpt. Av. Alexandru Serbanescu, no. 50, sector 1, Bucharest;
- SC TRANSTITAN SA Bucuresti, Str. Alea Fizicienilor no.1, sector 3, Bucharest.

PRESIDENT

MIHAI BERINDE