

DECISION OF THE COMPETITION COUNCIL

No 177 on 15.09.2005

**regarding the financial support measures granted by the Ministry of Economy and Trade to the Subsidiary Company for Electricity Distribution and Supply
ELECTRICA OLTENIA SA**

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,

Based on the following reasons,

1 PROCEDURE

(1) By the address no. 156214/06.06.2005, registered at the Competition Council with no. RS-AS 29/07.06.2005, the Ministry of Economy and Commerce („MEC”) has notified, on the basis of art. 6 of *Law No. 143/1999 regarding the state aid*, as subsequently modified and amended, the financial support measures granted to the Electricity Supply and Distribution Commercial Company ELECTRICA OLTENIA SA (“SC FDFEE Electrica Oltenia SA”).

(2) With note no. DAAS/592/17.06.2005 supplementary data were requested, on the basis of art. 6 of *Law no. 143/1999*, with subsequent amendments and completions. The Notification became effective when all information was accurate and complete, respectively on 24.06.2005.

2 . DESCRIPTION OF THE MEASURE

2.1 Legal basis for granting the state aid

(3) The legal basis for granting the state aid consists of:

- GEO no. 37/2004 on measures to reduce arrears in the economy;
- GD no. 85/2005 on certain measures to develop and finalize the privatization, as well as the amendments and completions of Privatization strategy of the Electricity Supply and Distribution Commercial Company "Electrica Moldova" - S.A. and of the Electricity Supply and Distribution Commercial Company "Electrica Oltenia" - S.A;
- Law no. 507/2004 approving the Government Ordinance No. 94/2004 regarding the regulation of certain financial measures.

2.1. Beneficiary of the state measures of support

2.1.1 Preamble

(4) The Electricity Supply and Distribution Commercial Company "Electrica Oltenia " – SA is one of the Electricity Supply and Distribution Commercial Company "ELECTRICA" SA Bucharest's eight subsidiaries. The Electrica Oltenia subsidiary was established on 01.02.2002 following the government's legislative and institutional harmonization policy with the provisions and requirements of the European legislation.

(5) The main object of activity of SC FDFEE Electrica Oltenia SA is electricity distribution and supply. In addition tot that, the company performs the following activities:

- dispatching of distribution installations;
- elaborating prescriptions and norms specific to the activity of electricity distribution, according to the regulations prior issued by the National Authority of Regulation in the Energy Field (ANRE);
- projecting and implementing the communication and informatics systems, following to insure their inter-connecting and function.

(6) The distribution activity consists in the operating, maintaining and developing the distribution network in order to transmit the electricity from the transport producers/ operators /other distributors to the final consumers, according to the signed contracts, under proper safety and quality conditions.

(7) SC FDFEE Electrica Oltenia SA carries out its distribution activity based on the license issued by ANRE, through its seven branches (Arges, Dolj, Gorj, Mehedinti, Olt, Teleorman and Valcea). SC FDFEE Electrica Oltenia SA's branches don't operate as separate legal entities.

- (8) Electricity supply activity represents, according to the *Law of Electricity* no. 318/2003, the commercial activity of electricity sale-purchase, carried out by a legal person, based on the license issued by ANRE. In accordance with art. 16 para. (1) of the *Law of Electricity*, „the activities and services for which licenses are granted, are of public interest, with the exception of such activities or services that are performed exclusively for own consumption of the authorization/license owner”.
- (9) According to the provisions of the *Law of Electricity* no. 318/2003, SC FDFEE Electrica Oltenia SA has the following obligations:
- ensuring the continuity and safety in the supply of electricity upon contracts;
 - carrying out the activity of commercializing the electricity based on commercial contracts/ frame contracts – for the regulated market;
 - ensuring the users’ access under technical connection conditions and access to supply information regarding the electrical distribution network;
 - operating, renewing the technology, re-habilitating and developing the electrical distribution networks, meeting the technical regulations in force;
 - fulfilling the performance standards for the supply service;
 - ensuring, based on the frame–contracts, the supply of electricity for the captive consumers located in the areas for which SC FDFEE Electrica Oltenia SA owns supply license;
 - monitoring the safety in functioning of the electrical distribution networks, as well as the performance indexes for the distribution service.
- (10) SC FDFEE Electrica Oltenia SA receives most of its revenues from electricity supply and distribution activities. According to the additional information received from SC FDFEE Electrica Oltenia SA the company recorded for the 2004 financial year a gross profit of ROL 1,538,740.3 million and a turnover of ROL 12,936,146 million.

2.1.2 Market on which SC FDFEE Electrica Oltenia SA operates

- (11) The relevant market for the service is represented by the electricity distribution and supply market, which consist of two sub-markets:
- Regulated segment; and
 - Competitive segment.
- (12) The electricity regulated market and associated services operates by means of commercial contracts, with prices regulated by ANRE, which establishes also the quantities contracted on wholesale transactions between the producers and the suppliers to captive consumers.
- (13) The competitive electricity market operates by means of
- a) bilateral negotiated contracts closed between the electricity producers and the suppliers;
 - b) bilateral negotiated contracts closed between the electricity suppliers and the eligible consumers;
 - c) import and export electricity contracts;
 - d) transactions through bidding on the spot market;

e) specific services transactions.

The price of the electricity sold on the competitive market is established freely through direct negotiations but within a certain ceiling established by ANRE.

(14) The market regulator is ANRE which issues licenses, authorizations, decisions of prices and tariffs. During the development of the domestic market and/or of the integration in the international markets, ANRE has the obligation to decide the step-by-step opening, in whole or in part, of the regulated activities towards competition. Opening the electricity market is made by progressively increasing the proportion of the competitive market, according to the provisions of the energetic strategy and policy.

(15) In accordance with the EU's objectives towards full market opening until 2007, ANRE has established each year starting 2000 a certain market opening degree by increasing the number of the eligible consumers. At the end of 2004 the market opening degree was 55%.

(16) The market share of S.C. FDFEE Electrica Oltenia S.A. is of 15.56%.

(17) The main competitors of S.C. FDFEE Electrica Oltenia S.A. on the domestic market are Energy Holding, Hidroelectrica and Luxten Lighting.

3 PRIVATIZATION OF S.C. FDFEE ELECTRICA OLTENIA S.A.

3.1 Description of the privatization process

(18) In order to privatize the main state owned electricity supply and distribution companies the Ministry of Economy and Commerce have appointed in 2003, based on a competitive tender, a consortium of consultants led by Banc of America Securities Limited.

(19) The activity of the Consultant was structured in two main phases namely:

- Phase I – “Preparation for privatization” which included the following tasks: legal and regulatory analysis, due diligence and privatization strategy;
- Phase II – “Implementation of the approved strategy” which included the following tasks: preparation of the Transaction and providing the assistance over the privatization process.

(20) During the first phase, the Consultant has performed a synthetic analysis of the legal and regulatory framework in which S.C. FDFEE Electrica Oltenia S.A. carries its activities, in order to identify any shortcomings and inconsistencies that could occur in the privatization process. In addition to that the Consultant has carried technical, financial, commercial and legal due diligence as well as a preliminary valuation for Electrica Oltenia.

(21) Based on the information and on the analysis above, it was issued the Privatization strategy which has indicated the percentage of shares that must be sold, as well as the process and criteria used in pre-qualifying the potential investors.

(22) During the second phase, the company was prepared for privatization and the consultant provided the required assistance and support to the Seller in closing the privatization transaction.

(23) [...] ¹.

(24) Following the reports and recommendations of the Consultants, the Romanian Government has passed GD No. 531/2004 for approving the privatization strategy of the Electricity Supply and Distribution Commercial Company "Electrica Moldova" - S.A. and of the Electricity Supply and Distribution Commercial Company "Electrica Oltenia" - S.A. The strategy has provided, among others, for:

- Privatization of SC ELECTRICA SA's subsidiaries with strategic investors that could prove sufficient technical and management capabilities, respectively financial capacity to sustain the development of the companies taken over;
- Reaching a competitive level on the local and regional market in terms of technical and economical performance of the companies, considering the liberalization of the sector;
- Sale to strategic investors a stake of 51% of the share capital of FDFEE Electrica Oltenia, through a combination of direct sale of 24.62% of the existing shares simultaneously with a capital increase and issuance of new shares to the strategic investors.

(25) The Privatization announcement was published in the specialized Romanian and international press (including *Financial Times*, international edition on April 28th, 2004). The Announcement has requested Expression of Interest from strategic investors that would fulfill the following criteria:

- Technical and operational expertise (number of customers and quantity of electricity sold at least equal with Electrica Oltenia's);
- Adequate financial strength and resources (total value of the assets and of the share capital three times higher than Electrica Oltenia's, a strong credit profile);
- Satisfactory experience and involvement in similar transactions.

(26) Following the publishing of the privatization announcement in June 2004 have been received Expression of Interest from the following 5 investors: CEZ A.S. (Czech Republic), E. ON Energie AG (Germany), Public Power Corporation (PPC Greece), AES (USA), Union Fenosa (Spain).

(27) The pre-qualified investors have purchased the Presentation File which included the nature and the amount of the facilities which were going to be granted to the company. Starting July 21st of 2004, they had access to the data room constituted at the subsidiary's headquarters in Craiova as well as to the virtual data room. The only company who did not enter into the data rooms was PPC Greece, which withdrew from the project.

¹ Confidential data.

(28) On August 27th, 2004, CEZ and E.ON Energie have submitted Position Papers for FDFEE Electrica Oltenia, being the only investors who have remained in the competition. All the potential investors have been informed about the nature and amount of the facilities which are granted for the privatization of FDFEE Electrica Oltenia, thus they could take them into account.

(29) In autumn 2004 started the due diligence process (second phase of access of the work teams in the Data rooms) as well as discussions between specific workgroups. [...] ².

(30) Following the results of such clarifications, the negotiation commission, assisted by the consultants, has presented to the Czech and German investors at the end of October a revised set of Transaction Documents based on which CEZ and E.ON Energie have submitted the Binding Bid for FDFEE Electrica Oltenia. The Binding Bids have been submitted on November 8th, 2004.

(31) Following such submission, the parties started the final stage of clarification discussions on the share sale-purchase contract with a view to close the transaction during the first half of the year.

(32) Following the analysis of the Binding Bids, the Negotiation Commission has selected the Binding Bid submitted by CEZ for Electrica Oltenia as the winning bid.

(33) Under the condition of fulfilling the conditions precedent to pre-closing and closing, CEZ will own after the Closing date a number of shares representing 51% of the share capital of FDFEE Electrica Oltenia. This will be achieved by purchasing of a number of existing shares representing 24.62% of the share capital of FDFEE Electrica Oltenia from SC ELECTRICA SA and issuance of new shares following a capital increase at FDFEE Electrica Oltenia.

(34) The value of the transaction corresponding to the purchase by CEZ of a 51% stake in Electrica Oltenia is EUR 151 million.

(35) The selection process was a competitive process, open to all participants operating in the electricity supply and distribution sector and was transparent and non-conditional. Out of the five pre-qualified investors, four have purchased the Presentation File of the company and only two investors have submitted Binding Bids for acquiring the company. The Investors had sufficient time and information (access to data room, meetings with the management and site visits, facilities which could be granted) to assess thoroughly the situation of Electrica Oltenia for the purpose of the Binding Bid.

(36) On the basis of the facts presented above, the Competition Council considers that the privatization of SC FDFEE Electrica Oltenia SA was done through an open, non-discriminatory and transparent competitive tender process. The procedure has ensured, in accordance with market economy principles, the achievement of a price that reflects the fair market value of FDFEE Electrica Oltenia, considering that all factors that influence the value

² Confidential data.

of the company have been discussed during the negotiations and have been reflected in the final price offered by CEZ.

3.2 Financial support measures of which S.C. FDFEE Electrica Oltenia S.A. benefits for the purpose of privatization

(37) At privatization, S.C. FDFEE Electrica Oltenia S.A. benefited from a series of facilities in accordance with the provisions of *GEO no. 37/2004 on measures to reduce arrears in the economy*, modified by *GO no. 94/2004 regarding the regulation of certain financial measures*. In fact, with this ordinance, the Romanian Government intended to create a mechanism whereby a decrease in overdue receivables and payables in the economy is achieved, coupled with an increase of the attractiveness of the companies operating in the utilities sector for strategic investors.

(38) Consequently, in accordance with *art. 6 para. (2)¹* of the ordinance, the commercial overdue receivables of SC FDFEE Electrica Oltenia SA were taken over by means of protocol by the Authority for State Assets Recovery (AVAS) in order to be recovered.

(39) On the basis of the commercial receivables takeover protocol mentioned above, the Ministry of Public Finances will proceed to the issuance of treasury bills on the domestic market, in ROL or foreign currency, with a total value amounting to the value of the commercial receivables taken over by AVAS.

(40) [...]³.

(41) In addition to that, the company is benefiting of the cancellation of interest and delay penalties corresponding to its obligations towards the electricity generators and the electricity transporters companies [...]⁴.

3.3 Financial support measures granted by S.C. FDFEE Electrica Oltenia S.A. to its customers on the basis of GEO No. 37/2004

(42) In accordance with the provisions of GEO No. 37/2004, the legal persons that use electricity and pay in full the invoices representing the current and overdue obligations corresponding to the electricity consumption up to June 30th, 2004, will benefit from the cancellation of penalties and delay penalties.

(43) As regards the remaining consumers that do not settle their current and overdue obligations towards S.C. FDFEE Electrica Oltenia S.A., such receivables will be taken over by AVAS for recovery, as mentioned in paragraphs (38)-(39). The penalties and delay penalties corresponding to such receivables are cancelled.

(44) [...]⁵.

³ Confidential data.

⁴ Confidential data.

4 Analysis of the financial support measures granted at the privatization of SC FDFEE Electrica Oltenia SA and their state aid character

4.1 The analysis of the financial support measures from which SC FDFEE Electrica Oltenia SA benefits

(45) These facilities have been granted to FDFEE Electrica Oltenia and may fall within the scope of Law no.143/1999 on the State aid, as these constitute selective State financial support measure which may have the potential to distort the normal competitive environment by giving an economic advantage to the company thereby affecting trade between Romania and the Member States of the EU.

(46) However, in this context one needs to note that these facilities are being provided to FDFEE Electrica Oltenia within the context of its privatization, after which the Romanian State will still continue to maintain a significant share in the company. Therefore, in as far as the behavior of the State within the privatization can be compared to that of any other market operator of a comparable dimension, the facilities may be free of aid.

(47) In order to establish whether the grant of the facilities within the privatization involves elements of State aid it needs to be assessed whether a private investor/vendor in similar circumstances would have done the same. Therefore, it needs to be examined, considering all options at the disposal of the State, whether the granting of the facilities represented the economically most advantageous option for the State.

(48) The measures provided by GEO no. 37/2004 aim to reduce the budgetary arrears in the economy and to increase the attractiveness at privatization of the companies in the field of utilities. In the case of FDFEE Electrica Oltenia, these measures aim to ensure the maximization of the price that would be received by the Romanian State after the sale of the controlling interest, thus the state acts such as a private investor in a market economy.

a) takeover by AVAS of the overdue commercial receivables from S.C. FDFEE Electrica Oltenia S.A.

(49) At privatization, the company will receive financial support consisting of taking over by AVAS of SC FDFEE Electrica Oltenia SA's commercial overdue receivables, [...] ⁶. This support action can fall under the provisions of Law No. 143/1999 regarding the state aid as it has a selective character, provides an advantage to SC FDFEE Electrica Oltenia SA and can distort the competition and the trade with Member States.

(50) [...] ⁷.

(51) [...] ⁸.

⁵ Confidential data.

⁶ Confidential data.

⁷ Confidential data.

⁸ Confidential data.

(52) Regarding the above mentioned facts, the Competition Council notes that the Romanian State acted like a prudent private investor, interested in maximizing the benefits obtained from the company's sale.

b) Cancellation of the penalties and delay payment penalties corresponding to the obligations towards electricity suppliers

(53) In addition to that, the interest, penalties and delayed penalties of any kind amounting to [...] ⁹, corresponding to the obligations towards electricity suppliers will be cancelled. Consequently, the facility that SC FDFEE Electrica Oltenia SA receives can fall under the provisions of Law no. 143/1999 regarding the state aid.

(54) [...] ¹⁰.

(55) [...] ¹¹.

4.2. Analysis of financial support measures granted by SC FDFEE ELECTRICA OLTENIA SA to its customers

(56) The facilities granted by FDFEE Electrica Oltenia on the basis of GEO no. 37/2004, and mentioned in sub-chapter 3.3. from the present decision can fall under the provisions of Law no. 143/1999 regarding the state aid as they have a selective character, provide an advantage to the customers of SC FDFEE Electrica Oltenia SA and therefore can distort the competition and the trade with Member States.

(57) The beneficiaries of the financial support measures granted by SC FDFEE Electrica Oltenia SA, and the corresponding amounts are presented in the following table:
[...] ¹²

(58) In the case of the five companies that benefit of financial support greater than ROL 4 billion (see points 3 and 5 from Table no. 1), the state aid character of the financial support measures and their compatibility with the normal competitive environment will be object of a subsequent analysis of the Competition Council. The Ministry of Economy and Commerce will report to the Competition Council, in accordance with the *Regulation regarding the reporting procedures and monitoring of the state aid*, published in the Official Gazette, Part I no. 443 dated May 18th, 2004, the state aids mentioned at points 1,2,4,6 from Table no. 1, in order to issue the situation of the state aid granted in Romania.

5. Conclusions

⁹ Confidential data.

¹⁰ Confidential data.

¹¹ Confidential data.

¹² Confidential data.

(59) Competition Council notes that the privatization procedure has facilitated the payment of a competitive price, in accordance with the market economy principle and reflects the fair market value of FDFEE Electrica Oltenia, because all factors that influence the value of this company were known by all the investors - including the nature and the amount of the facilities which could be granted - and were reflected in the end in the offer submitted by CEZ. The Purchaser had sufficient time and complete information to perform a throughout assessment for the purpose of its bid.

(60) [...] ¹³.

(61) [...] ¹⁴

(62) [...] ¹⁵.

(63) [...] ¹⁶.

(64) [...] ¹⁷

(65) [...] ¹⁸.

(66) Consequently, the Competition Council considers that the facilities granted to SC FDFEE Electrica Oltenia does not qualify as state aid because they were part of the package offered to any potential investor during an open and transparent competitive bid which resulted in the establishing of a fair market value. Acting as such, the state has observed the private investor principle, obtaining a competitive price from the privatization of a profitable company, in good economic and financial standing and with real development prospects in the future, while maintaining its position as shareholder with 49% of the share capital.

DECIDES

Art. 1. Based on art. 12 para. (2) lett. a) of Law No. 143/1999 regarding the state aid, as subsequently amended and completed, it is considered that the support measures notified by the Ministry of Economy and Commerce and granted at the privatization of SC FDFEE ELECTRICA Oltenia SA, respectively the annulment of interests, delay majorities and penalties deed to its suppliers of electricity and the takeover of overdue receivable by AVAS, does not qualify as state aid as described by art. 2 of Law no. 143/1999, with the subsequent amendments and completions.

Art. 2. The present decision will be applicable at the date of communication.

¹³ Confidential data.

¹⁴ Confidential data.

¹⁵ Confidential data.

¹⁶ Confidential data.

¹⁷ Confidential data.

¹⁸ Confidential data.

Art. 3. In accordance with provisions of art. 29 of *Law no. 143/1999 regarding the state aid*, as subsequently amended and modified, the present decision can be challenged by interested parties at the Bucharest Court of Appeal, Administrative in 30 days from notification.

Art. 4. The present decision will be communicated to the General Secretariat of the Competition Council:

- Ministry of Economy and Commerce, Calea Victoriei No. 152, sector 1, Bucharest;
- S.C. FDFEE ELECTRICA OLTENIA S.A., 2 Brestei Street, Craiova.

Art. 5. The General Secretariat and the State Aid Authorization Department of the Competition Council will follow the implementation of the present Decision.