

Decision of the Competition Council
No. 17 Of 10.02.2005
Regarding the notification of the Ministry of Public Finance
on financial measures of support for S.C. PRODITERM S.A. Bistrita

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

Having regard to the provisions of Competition Law no. 21/1996, published in Official Gazette of Romania, Part I, no. 88 on 30 of April 1996, amended and completed by Emergency Government Ordinance no. 121/2003 approved by the Law no. 184/2004;

Having regard to the provisions of Law no. 143/1999 on state aid published in the Official Gazette of Romania, Part I, no. 370 on 3rd August 1999, amended and completed by Law no. 603/2003 and by Government Ordinance no. 94/2004 regarding the settlement of some financial measures,

Taking into account the provisions of European Agreement establishing an association between Romania on the one part, and European Communities and their Member States, on the other part, ratified by Law no. 20/1993, published in Official Gazette of Romania, Part I, no. 73 on 12.04.1993;

Taking into account the provisions of the Regulation on state aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest.

On the following grounds,

1. PROCEDURE

(1) By the note 109.528/08.12.2004, registered with the Competition Council under no. RS-AS 105/13.12.2004 the Ministry of Public Finances submitted to the Competition Council according to art. 6 from the *Law 143/1999 on state aid, with subsequent amendments and completions* the notification of the financial support measure contained by GD no. 1367/2004 having as recipient S.C. PRODITERM S.A. Bistrita.

(2) In completion to the notification form supplementary information were requested by the address no. DAAS/1049/15.12.2004. The Ministry of Public Finance has sent the requested information by the address registered at the Competition Council with no. DAAS/1075/22.12.2004. The notification became effective as of the date when information sent was complete, respectively on 22.12.2004.

II. DESCRIPTION OF THE FINANCIAL SUPPORT

2.1. The legal base for granting the financial support

- The Law of the public debt no.81/1999;
- GD no.1367/2004 regarding the guaranteeing, by the Ministry of Public Finance, of certain external loans in total amount of maximum USD 215 mill., to be contracted by S.C. Distributie a Gazelor Naturale „Distrigaz SUD” – S.A. Bucuresti, S.C. Distributie a Gazelor Naturale „Distrigaz Nord”- S.A. Targu Mures, S.C. „Electrocentrale”- S.A. Bucuresti and the undertakings of the public local administration authorities, which are producers of heating energy.

2.2. The beneficiary of state support measure

(3) The beneficiary of the notified support measure is S.C. PRODITERM S.A. Bistrita.

(4) The company was set up in 1998, according to Romanian law, as a company of local interest, subsequent to the Bistrita Local Council Decision, by reorganizing of „Regia Autonoma de Termoficare si Locativa” (The Autonomous Calorific and Locative Regie) Bistrita. According to art. 3 from this decision, SC PRODITERM SA Bistrita operates under the authority of the Bistrita Local Council, the owner of the shares exercising the rights and obligations of the shareholders.

(5) The shareholders' equity of SC PRODITERM S.A. Bistrita is of ROL 42,366,860,000 entirely held by the Bistrita Local Council Decision. The company is headquartered in Bistrita and is incorporated at the Registry of Commerce under no. J06/273/1998, with the registration code R7216908.

(6) The company's main activity is represented by the performance of the following services of general public interest: production, transport and distribution of heating energy as hot water for the population, budgetary and public institutions and undertakings in the Bistrita city. Also, the company produces technological steam for the undertakings in the Bistrita city. SC PRODITERM S.A. has as secondary activities the performance of repairing and maintenance services for the installations of heating and hot water beneficiaries.

(7) The financial and economic results, for entire activity of SC PRODITERM SA Bistrita, based on the balance sheets of the last 3 years are presented in table no. 1.

Table no. 1 – Financial and economic situation of the company in the period 2002-2004
[...]¹

From data presented in table above, it can be concluded that, between 2002-2004, the company registers losses.

(8) By licenses granted by the National Regulatory Agency for Electricity (from now on, ANRE) the company was entrusted with the performance of public services of heating energy

¹ Confidential data

production, transport, distribution and supply, designated for the population, institutions and undertakings.

(9) The company performs only the public service of heating energy supply in centralized systems (it does not produce and does not deliver electric energy); the financial support measures granted by the state and notified by the Ministry of Public Finance have as purpose to ensure the required fuel for the production and supply of heating energy for heating and hot water for the population and undertakings.

(10) The company delivers the following products:

- heating energy as hot water for the preparation of domestic hot water and heating, in order to ensure the consumption of the population, public institutions and undertakings. Mainly, for the production of heating energy are used natural gases. Though, during the periods when the natural gases' pressure is insufficient (or are totally stopped) it is used black oil;
- heating energy as steam.

(11) The supply of urban heating energy for the heating and preparation of consumption hot water is made through the urban heating production system of the Bistrita city, the system was entrusted to the company under concession contract by the Bistrita County Council.

(12) In order to carry on its main activity, S.C. PRODITERM S.A. Bistrita owns of the following equipments and installations:

- **For the production of heating energy:**

The production of heating energy is realized in the Heating Plant, which became operational in 1980-1981, with an installed power of 320 Gcal (370 MWt) with the following capacities:

- 2 steam boilers type Vulcan, each of 105 to/h, 17 bar, 250 degrees C, operating on natural gas or black oil;
- 2 hot water boilers CAF 100 Gcal/h;
- 2 heat exchangers steam-water of 40 Gcal/h each, for the preparation of heating agent.

Also, undergoing installation there is a saturated steam boiler of 10t/h, 8 bar.

- **For the transport of heating energy:**

The transport system contains the primary network of 21.3 km for hot water and 4.3 km for steam network.

- **For the distribution of heating energy:**

The distribution to the population and undertakings is realized through 32 thermal points and 2 block micropoints, equipped with plate heat exchangers with an installed power of 242 Gcal/h and a secondary network of 36 km in thermal ditch with 3 and 4 pipes.

(13) According to the Law of public services for town management no. 326/2001, the supply of heating energy produced in a centralized system represents a **public utility services**. This service cannot be performed by undertakings under normal market conditions as certain mandatory conditions related to their supply have been imposed to the companies performing these kind of services.

(14) According to Law no. 326/2001, public services must fulfill the following conditions:

- continuity both in quality and quantity, according to the conditions stipulated in the contract;
- adaptability to consumers' requests;

- equal access to the public service, in the conditions stipulated in the contract;
- ensuring the public health and life quality.

(15) Within this context, S.C. PRODITERM S.A. Bistrita's obligations as supplier/ performer of public services, are, mainly, the following:

- a) To serve all users within its operating area for which it was authorized/ licensed;
- b) To meet the performance parameters established by the public local administration authorities, namely the national regulation authority;
- c) To supply to the public local administration authority, namely the national regulation authority, the information requested and to insure the access to the documents related to these utilities, according to the clauses in the operating contract.

2.3. The market affected by the financial support granted to the company

(16) The relevant market of the product is the market of production, distribution and supply services of heating energy called energy services of local interest. These services function in a centralized system and are organized under the management of the local public administration authorities' control, based on the local autonomy principle. The relevant geographical market is represented only by the area of Bistrita city, therefore is a market of local interest. From a prices and tariffs standpoint it is a regulated market as the undertaking sales the heating energy produced at prices regulated by the national regulating authority in the field, for home consumers as well as for the industrial ones, and it has to insure the supply of heating energy to all those connected at the network, without discrimination. In the same time, all the consumers are captive consumers as they don't have the possibility to choose their heating energy supplier.

(17) S.C. PRODITERM S.A. Bistrita insures 25% from the city's necessary of heating energy, the rest being insured through the apartment heating units. From the total heating energy produced by the company, 67% is sold to the population and the rest to undertakings and budgetary institutions. Thus, the company supplies heating energy in a centralized system in Bistrita city to 3,000 apartments (approx. 12,000 people), public and budgetary institutions and undertakings.

2.4. Ways of granting the state aid

(18) The financial support measures notified by the Ministry of Public Finance consist in the State guarantee for the external credit necessary for insuring the energetical resources for the winter 2004 – 2005 according to the provisions of art. 3 align. (1) in GD no. 1367/2004.

(19) SC PRODITERM SA Bistrita contracts a credit in amount of USD 2,000,000, 100% guaranteed by the Romanian State through the Ministry of Public Finance, in order to complete the acquisition of energetic resources for the winter 2004-2005. The credit will be reimbursed in 4.5 years from the end of the 2 years grace period. The interest rate is Libor +1% per year.

(20) According to the data presented in the notification form, SC PRODITERM SA Bistrita benefited until now by state aids, as it follows:

- subsidies for coverage the difference between the national reference price² and the local delivery price of the heating energy³, as it follows:

- ROL 40,282 mil. in 2001;
- ROL 44,859 mil in 2002;
- ROL 34,816 mil in 2003;
- ROL 31,550 mil in 2004.

- according to GD no. 1045/2003, the company benefited by a 100% State guarantee for the credit contracted in 2003, in amount of USD 2,000,000, credit which had as purpose the completion of the financing for the acquisition of energetical resources necessary for the winter 2003-2004. This is reimbursed in 6 equal semestrial rates, the grace period being of 2 years. The interest rate is Libor (3M)+ 1.85% per year for the first 3 years and Libor (3M)+ 2.15%/year for the following 2 years.

2.5. Costs arising from the operation of the public service of general economic interest

(21) The public service entrusted to SC PRODITERM SA Bistrita consists in production, transport and distribution of heating energy to the captive consumers, at regulated prices by ANRE and ANRSC. In order to perform the public service, the company registers costs with raw materials (fuels), materials, personnel, environmental, repairing and investments, contoring costs and others.

(22) At the begining of each financial year SC PRODITERM SA Bistrita funds its income and expenses budget. The company has the obligation to present to ANRSC, at the end of each year, justifying documents to show the real costs related to the public service performed in that year and the heating energy quantities produced and sold in each month. Starting from the initial data, it is applied the standard methodology and are determined the costs for the heating energy's production, transport, distribution and supply activity.

(23) S.C. PRODITERM S.A. Bistrita keeps a managing accountancy (as base for the management decisions) where the company's activities are registered separately. The activity of heating energy production and supply in form of hot water towards the captive consumers, which represents the public service obligation, is presented separately from its other activities.

(24) The separation of the accounting registers of public service obligation activity is a mandatory request imposed to the company through the license for entrusting the delivery of respective service. The results of the activity of discharging the public service, respectively the production, transport, distribution and supply of heating energy as hot water, are presented in the table no. 2.

Table no.2 **The evolution of the main financial- economic indexes**
[...]⁴

(25) From the data presented above it results that, during 2001-2004, each result of the performance of the public service is loss, due especially to the difference between the real

² The national reference price is defined in point 2.6.1.

³ The local delivery price of heating energy is defined in point 2.6.2.

⁴ Confidential data

costs it involves and the regulated price for the heating energy as hot water. The main reason of the high value of exploiting costs are the leaks within the transport and distribution system, as a result of the improper technical estate of the transport and distribution network- network over 20 years old.

2.6. The difference between the national reference price and the local delivery price for the heating energy

(26) As showed at point (16), the heating energy market is a regulated market. On this market there are two regulated prices, namely the national reference price and the local delivery price for heating energy.

2.6.1. The national reference price

(27) The national reference price was stipulated in EGO no. 162/1999 for heating energy supplied to the population in centralized system, for house heating and preparing hot water.

(28) This price is regulated first of all due to the social protection reasons. Therefore, if the local price for heating energy production and delivery (see point 2.6.2.) is higher than the national reference price, the population will pay only the last price.

(29) Therefore, by establishing the national reference price it is aimed to realise an equilibrium between the supportability of the population and the possibilities to subsidy from the state budget. As far as the social dimension is concerned, in funding this price it is taken into account the proportion of the cost of heating energy in the budget of a family with an average income.

(30) The level of the national reference price for heating energy is established in advance, by Government decision at ANRE's proposal, as an average between the local prices of the producers using the same type of fuel, added to the related delivery tariffs. In the same time, the national reference price takes into account the possibility to be subsidized from the State's budget.

(31) The standard methodology to calculate this price is established by A.N.R.E.order. The factors influencing the national reference price modification are: the fuel's price, the electric energy's price, the index for modifying consumption prices, the exchange rate (ROL/USD or, after case, ROL/EURO).

(32) The national reference price during 2001 - 2004 was regulated by the following administrative acts in this manner:

Table no. 3 *The administrative acts through which the national reference price was established for the period 2001- 2004*

	2001	2002	2003	2004
The normative act for establishing the national reference price	- GD no. 724/26.07.2001	- GD no.1303/27.12.2001; - GD no.	GD no.686/03.07.2002	GD no.1155/23.07.2004

		340/.03.04.200 2 - GD no. 686/ 03.07.2002;		
The national reference price (ROL/GCAL)	550,000	575,000 600,000 800,000	800,000	896,000

Source: The national legislation in force

2.6.2. The local delivery price for heating energy

(33) The local delivery price for heating energy is established by the National Regulation Authority for the Local Management Services (named from now on ANRSC) for the population as well as for the undertakings. The methodology for establishing the local delivery price is applied by ANRSC to all producers which do not produce heating energy in co-generation. As mentioned at point (22), the undertaking has the obligation to present to ANRSC, at the end of each year, the justifying documents from which to come forth: the real costs related to the public service performed in that year and the quantities of heating energy produced and sold each month.

(34) Starting from these entering data the standard methodology is applied and the costs for the producing, transport, distribution and supplying heating energy is determined. Funding the prices is made separately for each activity/ service, the local delivery price being the result of adding the price for the production activity to the tariff for the transport service and the price for the service of delivery and supply.

(35) The local delivery prices are established at the beginning of each year and adjusted at the beginning of the second semester of the year. The steps are the following:

- identifying the regulating activities and services;
- identifying the sources for producing heating energy;
- estimating the quantities delivered to the final customers, based on the undertaking's accomplishments in the previous year;
- allocating the costs with technological fuel;
- allocation of direct costs, exclusively those with the fuel, on activities/services and production sources;
- allocating the indirect costs and the general management costs, on services, proportionally with the value of the direct costs, exclusively the fuel;
- establishing the total costs for producing heating energy under the form of hot water and steam;
- establishing the unit costs;
- re-distribution on activities of the costs related to the own consumption;
- allocation of the financial costs on regulated services;
- establishing the total costs for regulated services.

(36) When the local price for GCAL is higher than the national reference price, in accordance with EGO no.162/1999, the difference is subsidized as it follows:

- a) from the state budget, within the limit of the sums approved by the state budget law;
- b) from the local budgets, for that part uncovered from the state budget.

(37) As it can be seen from the Annex to this decision during 2001-2004, the national reference price was lower than the heating energy's local delivery price established for SC PRODITERM SA Bistrita. In order to cover the difference between them, the company receives, in accordance with EGO no.162/1999, subsidies in amount of ROL 151,506,694 thousand (see table no.4).

Table no. 4 - *The evolution of the quantity delivered to the population and of the value of the subsidy granted to the company in order to cover the difference between the national reference price and the local delivery price, during 2001-2004*

	Quantity of heating energy delivered to the population			Subsidies' amount
	Total, from which:	Fuel – natural gas	Fuel - black oil	
	Gcal	Gcal	Gcal	ROL thousand
Total 2001	168,946	166,509	2,437	40,282,247
Total 2002	103,897	98,851	5,046	44,858,815
Total 2003	52,376	44,020	8,356	34,815,763
Total 2004	25,781	20,273	5,508	31,549,869
Total general	351,000	329,653	21,347	151,506,694

Source: Supplementary information

The subsidy of ROL 151,506,694 thousand exclusively covers the company's losses came from the difference between the national reference price and the local delivery price for the heating energy divided to the total of heating energy's quantity delivered to the population. The manner for calculating the subsidy can be seen in table no.6 in the Annex that presents in detail, on each month, the evolution of the national reference price, the local delivery price, the difference between them and of the subsidies granted for covering this difference.

2.7. Costs incurred by the obligation of public service higher than the local delivery price of the heating energy

(38) When analyzing the measures of support for S.C. PRODITERM S.A. Bistrita, one must consider that, for the services of production and supply of heating energy, the company registers high costs which cannot be cover by selling the heating energy at a local delivery price established by A.N.R.S.C.

(39) The unitary exploiting cost of the service for hot water has been calculated based on the expenses registered each year in the analyzed period, respectively the costs with raw materials, employment, environment, repairing and investments, countering and others and the real production of heating energy delivered in the respective year.

(40) In reality the local delivery price established by A.N.R.S.C. does not cover all costs due to the fact that fuel price increase estimates are not considered. Subsequent to the fuel price increase during the year A.N.R.S.C. is adjusting the energy price only when the increase is more than 5% and the adjustment refers only to the fuel; however, it is common knowledge

that as a chain effect, the raw materials and materials prices increase also. This increase is not considered when adjusting but only when prices are reviewed, once a year. Thus, there is a gap during the year between the costs of the energy operator and the local delivery price.

(41) The high operating costs of S.C. PRODITERM S.A Bistrita are due mainly to the following causes:

1) internal causes:

- a) the low using degree of the production capacities especially in the hot season (approx. 5%) leads to the accomplishment of high specific consumptions of fuel, electricity and water, as well as to continuously high conventional costs;
- b) the low output of the steam boilers type Vulcan of 105 t/h and of the hot water boilers CAF of 100 Gcal/h that function a large number of hours per year at part capacities, as they function since 1980;
- c) the low level of the deliveries (max.20% compared to the period before 1990) lead to very high specific technological consumptions within the powerplant, in comparison with their proportion in the quantities of produced and delivered. Actually, these technological consumptions can be considered as relatively constant from a quantity point of view, having small variations according to the production's level, but decisively influencing the net heating output of the powerplant, which significantly drops due to the low production;
- d) the high level of the losses within the heating energy's transport and delivery system due to the physical usage of the networks, with a age over 20 years of exploiting, from wich only 10% were rehabilitated and modernized.

2) External causes:

- a) heating energy technological fuel, raw materials and materials are purchased at comparable or even higher prices than those operated with on international level. In turn, heating energy is sold on the local market at a price regulated by A.N.R.E and A.N.R.S.C. which is lower than the average price operated with on an international level;
- b) the increase of the fuel price is not taken into consideration. As mentioned at point (40), the regulating authority adjusts the energy's price only if the its increase exceeds 5%, and the adjustment refers strictly to the fuel, but it is known that in a chane effect, the raw materials and materials' price also increases;
- c) although all company technologies are old, the price structure approved by A.N.R.S.C. does not comprise the development quota for upgrading these technologies. Thus, the company makes investments, repairs and other upgrades in the energetic system which it operates but these expenses are not always reflected in the local delivery price of heating energy. Due to the old technologies, the undertaking registers losses on the production and transport networks, losses leading to the costs' increase;
- d) the population pays a national reference price, approved by Government Decision and established mainly according to the purchasing power of the population, the difference between this and the local delivery price being subsidized. This subsidy hardly reaches the producer, because the local budget which ensures a significant percentage of it does not have the liquidities required to pay in due time. As a result of the delays in actually receiving the subsidy's amounts, the real value of the subsidies which is strongly diminished by the inflation rate; this way, a part from the real costs remains uncovered. For example, for S.C.

PRODITERM S.A Bistrita the subsidy for the heating energy delivered to the population for 2001 was cashed in at the end of 2003;

e) another cause of the gap between the local delivery price and the real cost is represented by the obligation of S.C. PRODITERM S.A Bistrita, as operator of the public service, of not interrupting the supply on Bistrita city area. This situation generates big losses because the network is oversized and the costs related to this activity are considerable.

(42) In table no. 5, presented in detail in the Annex, are presented the evolutions of the local delivery price under the form of hot water and the real cost of producing and delivering it, during 2001- 2004.

Table no. 5 – *Evolution of the losses registered by the company during 2001- 2004 as a result of the difference between the local delivery price and the cost of the heating energy as hot water*

[...] ⁵

As it can be seen, during the analysed period, the exploiting costs of the service of producing and delivering heating energy is higher than the local delivery price, established by ANRSC, to the population as well as to the undertakings.

(43) Therefore, the difference between the real cost of the service of public general interest and the local delivery price of the heating energy leads to the registering of a loss in total amount of ROL 121,293,572 thousand, related to the activity of performing the public service. We mention that the calculation manner for these losses can be seen in Table no.7 in the Annex which presents in detail, for each month, the evolution of the difference between the local delivery price and the real production and delivery cost of the heating energy as hot water, separately for the population and for undertakings.

3. ASSESSMENT OF THE STATE MEASURE OF SUPPORT

(44) As mentioned at point 2.4. the company benefited from state support consisting in subsidies for covering the price difference for the heating energy delivered to the population and 100% guarantees for the credits contracted for completing the financing for acquiring the energetical resources necessary for the winter 2003-2004, respectively 2004-2005.

(45) *The Guidelines on the state aid granted under the form of guarantees* establish the criteria according to which the state aids granted under the form of guarantees should be assessed.

(46) In accordance with point 4.2 in the *Guidelines on the state aid granted under the form of guarantees*, an individual state guarantee is not considered state aid if it cumulatively meets the following conditions:

- a) the borrower person is not in a difficult financial situation;
- b) the borrower person is, in principle, capable to obtain a credit under market conditions, from the financial markets, without any intervention from the State;

⁵ Confidential data

- c) the guarantee is granted in relation to a precise financial operation, it refers to a maximum pre-established sum, it doesn't cover more than 80% from the loan to be reimbursed or from other financial obligation, excepting from the equities or other similar instruments, and is not unlimited in time;
- d) the guarantee implies the payment of a premium at the market price.

(47) Assessing the economic-financial situation of SC PRODITERM SA Bistrita shows the fact that the company is in difficulty, and therefore it doesn't fulfil the condition stipulated at point 4.2. letter a) in the *Guidelines on the state aid granted under the form of guarantees*. Therefore, it is no doubt that there is a state aid element in the case of the state guarantees having as beneficiary S.C. PRODITERM S.A. Bistrita.

(48) Due to the difficult financial- economic situation of the beneficiary, the amount of the state aids consisting in 100% guarantees is equal to the credits contracted and covered by the state's guarantee.

(49) Therefore, during the assessed period (2001-2004), S.C. PRODITERM S.A. Bistrita benefits from the following state aids in total amount of ROL 266,994,694 thousand, splitted as it follows:

- subsidies for covering the price difference for the heating energy delivered to the population, in total amount of ROL 151,506,694 thousand;
- the state guarantee granted for the credits contracted for completing the financing of the acquisition of energetical resources necessary for the winter 2003-2004, respectively 2004-2005, in total amount of USD 4,000,000, respectively ROL 115,488,000⁶ thousand.

(50) Point 1.1. in the Guidelines on the state aid under the form of guarantees stipulates that usually the beneficiary of such assistance is the borrower because it enables the latter as it gives him the possibility to contract the loan that would not obtain without this guarantee.

(51) In certain circumstances, according to point. 2.2. from the *Guidelines on the state aid under the form of guarantees*, the lender can also be the beneficiary of a guarantee granted by the State for example may be the case where the guarantee is given ex-post related to a loan, in this case the guarantee can be a state aid for the lender.

(52) The guarantees granted by the Ministry of Public Finances for the contracted credits, represent ex-ante 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.

(53) The Government Decisions approving the state guarantees for external credits which are to be contracted by the company, are established the maximum credit values which are to be guaranteed (together with the interests and afferent commissions), the purpose of the credit and the guarantor (Ministry of Public Finances). Based on these G.D.s, the company 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.

(54) 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%

⁶ The amount of state aid is calculated at the rate of BNR ROL/USD on 16.12.2004, 1 USD=28.872 ROL.

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.

(55) 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).

(56) Taking into account all the above, it is considered that the financing banks have not been favorite compared with the others. 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 - S.C. PRODITERM S.A. Bistrita.

4. THE ASSESSMENT OF THE SUPPORT MEASURE GRANTED BY THE STATE

(57) The support granted to S.C. PRODITERM S.A. Bistrita by state resources transfer gives it an economic advantage that can affect the trade between Romania and the Member States and, therefore, may be state aid for S.C. PRODITERM S.A.

(58) The financial measures mentioned at point 2.4. notified to the Competition Council by the Ministry of Public Finance is the object of this decision. As the objective for which the guarantee is granted is the assurance a part of financial resources for the financing the current consumptions of the population and undertakings in the cold seasons, under the conditions imposed by the State for the National Energetic System Security, and the subsidies have been granted for covering the difference between the two regulated prices, the financial aid measures will be analyzed in the context of fulfillment by S.C. PRODITERM S.A. Bistrita of the obligation to discharge a service of economic general interest.

4.1. Obligation of service of general economic interest

(59) The financial support granted to a company entrusted with a service of general economic interest is not considered state aid for the purposes of Art. 2 align.1 of *Law 143/1999 on state aid, modified and completed by the Law no.603/2003*, if the following conditions are cumulatively met:

a) the obligation to discharge a service of general economic interest is entrusted through a normative/administrative act and is clearly defined;

b) the parameters based on which the compensation is calculated must be established in advance, in an objective and transparent way, in order to avoid granting an economic advantage to the beneficiary;

c) the compensation must not exceed the amount necessary to totally or partially cover the costs incurred through the service of general economic interest, taking in consideration the relevant incomes and a reasonable profit in performing these obligations;

d) if the undertaking entrusted with the service of general economic interest was not selected through open public tender which would have allowed the selection of an bidder able to discharge this public service at the lowest costs, then the level of compensation must be set based on a comparative analysis of the company's costs and the costs of well-managed and profitable enterprise which meets all the conditions set for the performance of the particular public service, given the relevant incomes and a reasonable profit from the meeting of the service of general economic interest obligations.

4.1.1. Entrusting the obligation to perform the public service of general economic interest by a normative/ administrative act

(60) The Competition Council notes that the producing, delivering and supplying heating energy are vital both for the undertakings, as well as for population of Bistrita city. Any interruption in the supply and distribution of heating energy has a major negative impact. Assuring the continuity and security in supplying hot water represents a public interest necessity

(61) S.C. PRODITERM S.A. Bistrita is entrusted with the production, transport, distribution and supply of heating energy for the population, institutions and heating agents, under the ANRE licenses no. 1088/2000, 1089/2000 and 1090/2000. In the licenses are mentioned, among other things, the obligations regarding: continuity in supplying heating energy, ensuring access to heating networks for new customers, achieving performance standards. Also, by GEO no.162/1999, producers and suppliers of heating energy are under the obligation to sell heating energy to the population at a regulated price which is lower than the costs incurred by the discharge of the service (national reference price).

(62) According to Law of the public services of town management no. 326/2001, supplying with heating energy public services must fulfill the following main conditions:

- meeting the quantity and quality demands of users, according to the contract provisions;
- 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;
- protecting the public estate and environment by observing the legal provisions;
- informing and consultation the citizens with the purpose of protecting the health of the population benefiting from these services.

(63) The supply of town heating energy for heating and preparing hot water for consumption is made through the heating energy system of the Municipality of Bistrita and is part of the technical- municipal infrastructure of the town. The City Council of Bistrita Municipality provides to the Company the heating system needed for accomplishing services of general economic interest through concession contract.

(64) S.C. PRODITERM S.A. Bistrita is under the obligation to perform the public service, ensuring the effective functioning of services relating to the production, transport, distribution and supply of heating energy that are essential for the population, institutions and undertakings of Bistrita city. It is furthermore required to provide these services at a regulated price that is intended to ensure the affordability for the consumer.

(65) Given the above data, the Competition Council concludes that the condition stipulated at point (59) letter a) is fulfilled, condition saying that the obligation to perform a service of general economic interest must be entrusted through a normative/administrative act and to be clearly defined.

4.1.2. The ex-ante calculation based on which the compensation is calculated

(66) The compensation of the public service obligation must be calculated on pre-established parameters, in an objective and transparent manner and may not grant an economic advantage to the beneficiary, against its competitors.

(67) The two parameters based on which the level of the compensation is calculated are the national reference price, established by ANRE, and the local delivery price established by ANRSC. These parameters are established in advance by Government decision on the proposal of ANRE, respectively ANRSC. The methodology used to establish the national reference price is based on the following:

- price of fuel used for the production of caloric energy;
- the electric energy price;
- the consumer price index;
- the USD/ROL exchange rate.

The local delivery price is set based on the methodology of establishing regulated prices for purchase/sale, transport and distribution tariffs for heating energy issued by ANRSC. The producers of heating energy submit to the regulatory authority the own price calculation; this contains the costs incurred in the previous 12 months, fixed and variable, as well as estimated costs for the following 12 months of operation. The regulatory authority analyses the variable costs (price of fuel, specific consumptions related to the production of caloric energy, losses of caloric energy in the transport and distribution networks), as well as fixed costs and approves the local delivery price of the caloric energy, resulting different local delivery prices specific to each company.

(68) As it was also mentioned at point (22), at the beginning of each financial year, SC PRODITERM SA Bistrita funds a income-costs budget. This way, based on the previous year's data it is forecast that the quantities of heating energy (due to the number of consumers and the average yearly consumption per person- at hot water- and per apartment – at heating), the subsidies to be received as well as a volume of the credits necessary for performing the public service in safety conditions. Also, are forecast the expenses incurred by the performance of the public service (with raw materials, the personnel, financial costs).

(69) The information submitted to the Competition Council prove the fact that the procedure mentioned at point (68) is developed based on the ex-ante calculation criteria, the parameters according to which the compensation for the performance of the service of general economic interest is established being also established in advance.

4.1.3. There is no over-compensation

(70) The compensation shouldn't exceed the costs related to the service of general economic interest.

(71) Table no. 2 proves that during the period 2001- 2004 the incomes from the performance of the service of general economic interest represented by the delivery of heating energy at regulated prices to the consumers are lower than the costs involved by this activity, is registered loss from the performance of public service obligation. As the undertaking keeps an accountancy where the activities carried out by the company are registered separately, any possible cross-subsidy is eliminated.

(72) From the above presented information, it results that during 2001-2004, as also mentioned at point 2.4. the activity of performing the general public service is supported in the following way:

- subsidies, in total amount of ROL 151,506,694 thousand exclusively used for covering the difference between the national reference price and the local delivery price of the heating energy;
- the state guarantee granted for the contracted credits aimed to complete the financing of the acquisition of the energetical resources necessary for the winter 2003-2004, respectively 2004- 2005, in total amount of USD 4,000,000, respectively ROL 115,488,000 thousand.

(73) From the table no.5 it results that during the assessed period S.C. PRODITERM S.A. Bistrita registered losses caused by the difference between the local delivery price established by ANRSC for the heating energy delivered as hot water and the real cost of production and delivery.

(74) Taking into account the losses of ROL 121,293,572 thousand registered by the undertaking due to the performance of the service of general economic interest, it can be seen that the facilities under the form of guarantees granted to the company, in amount of ROL 115,488,000 thousand don't cover all the company's losses. This way, the compensation from State resources for the performance of public service is smaller than the costs related to this activity. Therefore, it can be concluded that this compensation doesn't exceed the necessary for performing the service of general economic interest of delivering and supplying heating energy.

4.1.4. Entrusting the service through public tender or efficient performance of the service

(75) Entrusting the service of general economic interest of heating energy production to S.C. PRODITERM S.A. Bistrita wasn't made through a public tender.

(76) The service of heating energy production was entrusted to S.C. PRODITERM S.A. Bistrita by ANRE license. This way, in order to establish the level of the compensation it is necessary an analysis of the costs that another undertaking, well managed and performing the same service, would have had. On the Romanian heating energy market also act other suppliers and producers (ex. Termica Vaslui, Termica Botosani, CET Govora, CET Bacau, etc.), but a comparison with these undertakings wouldn't be relevant as they are all public undertakings, receiving support from the state in order to perform their obligation of public service of general economic interest. However, making a comparative analysis with other undertakings producing and supplying heating energy, it can be noticed that their situation is similar to the situation of the analyzed undertaking, respectively the real costs of the service exceed local delivery prices set by ANRSC and the causes leading to this situation are in fact similar.

(77) As the four conditions mentioned at point (59) are not cumulatively met, respectively the condition provisioned at point (59) letter d) couldn't be proved, the support measures for S.C. PRODITERM S.A. Bistrita, notified by the Ministry of Public Finance is state aid, within the meaning of art.2 in the *Laaw no.143/1999 on the state aid*, with the subsequent modifications and completions and those of the *Regulation on the state aid under the form of compensations granted to certain undertakings entrusted with the performance of a service of general economic interest*.

(78) The facilities from which the company benefited, which were notified after their granting represent illegal state aid, according to the art. 3¹ in the Law no. 143/1999 on the state aid, with the subsequent amendments and completions.

4.2. Compatibility of the Aid

(79) 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

(80) 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 level should not exceed what is necessary to discharge the service of general economic interest, taking into account the revenues arising from its performance.

(81) As discussed under point 4.1.1. above, S.C. PRODITERM S.A. Bistrita is exercising a service of general economic essential for the population, institutions and undertakings within Bistrita City and that obligation is clearly defined by license.

(82) S.C. PRODITERM S.A. Bistrita operates its service is under the public ANRE licenses no. 1088/2000, no. 1089/2000 and no. 1090/2000. 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. PRODITERM S.A. Bistrita has been officially entrusted with the public service that it discharges.

(83) Covering the consumption peaks for the cold periods of the year, insuring the stability and continuity in supplying the population and undertakings with heating energy, request the acquisition of a high volume of fuel, fact that led to the contracting of credits with the state guarantee.

(84) In the same time, under the conditions of a regulated market for discharging this service the company can not impose on its consumers a price that is sufficient to cover its operating costs. This is the main cause for which the company has annual losses. Furthermore, the compensation granted to the company does not fully cover all the costs that are currently being incurred by the provision of the public service.

(85) Therefore, it can be considered that the state aid granted to S.C. PRODITERM S.A. Bistrita does not exceed what is necessary to discharge under normal conditions of continuity, safety and comfort the public service of production, transport, distribution and supply of heating energy within the Bistrita city.

(86) Therefore, one can conclude that the state aid granted to S.C. PRODITERM S.A. Bistrita under the form of subsidies and Governmental guarantees aren't an over-compensation, as they don't exceed the costs related to the obligation of public service of general interest.

(87) Not granting this state aid would lead to the blocking of the company's activity as it doesn't have the funds necessary for the acquisition of fuel and, consequently, to the stoppage of the performance of the service of general economic interest. This fact would have serious repercussions on the population and undertakings within Bistrita city, which are left without the heating energy, necessary especially during the cold periods of the year.

4.2.2. The state aid doesn't unduly affect the trade between Romania and the EU Member States

(88) It needs to be noted that the activity of the company is restricted to a limited geographical area, represented only by the Bistrita city. S.C. PRODITERM S.A. Bistrita. is the only operator on this market. The company is not involved in import-export activities. Under these circumstances it is considered that the commerce with the Member States is not unduly affected.

(89) Thus, the two conditions provided in the *Regulation on state aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest* are cumulatively met.

(90) From the above mentioned facts it results that the state aid in amount of ROL 266,994,694 thousand, from which ROL 151,506,694 thousand represents subsidies and ROL 115,488,000 thousand represents state guarantees, is compatible with the normal competitive environment.

DECIDES

Art. 1. The measures of financial support granted during 2001-2004 to S.C. PRODITERM S.A. Bistrita constitute state aid for the purposes of Art. 2 of *Law 143/1999 on State aid, modified and completed by Law 603/2003 and GO 94/2004 on regulation of financial measures*.

Art.2. The notified state aid represents a necessary compensation to achieve, under normal conditions of safety and continuity the service of general economic interest to produce, transport, distribute and supply heating energy, and this compensation does not unduly affect the trade between Romania and the EU Member States.

Art.3. Pursuant to Art. 12 art. 2 (b) corroborated with Art. 14 par. 1 (j) of *Law 143/1999 regarding state aid with subsequent modifications and completions*, is authorized the state aid for S.C. PRODITERM S.A. Bistrita as aid to achieve under conditions of safety and continuity the service of general economic interest.

Art.4. Pursuant to Art. 24 of *Law 143/1999 with subsequent modifications and completions*, supplier will annually convey to the Competition Council information regarding the state aid granted to S.C. PRODITERM S.A. Bistrita, in view of monitoring the aid.

Art.5. This decision is applicable as of its date of communication.

Art.6. Pursuant to Art. 29 of *Law 143/1999 regarding state aid with subsequent modifications and completions*, this decision may be appealed by he interested persons before the Bucharest Court of Appeal, the administrative section, within 30 days from its communication.

Art.7. This Decision shall be communicated by the General Secretariat of the Competition Council to:

- The Ministry of Public Finance, Apolodor Street, no.17, sect. 5, Bucuresti;
- S.C. PRODITERM S.A. Bistrita, Strada Parcului, nr. 1, Bistrita, jud. Bistrita-Nasaud.

Art. 8. The Secretariat-General and the Directorate for State Aid Authorization of the Competition Council shall pursue the fulfillment of the present Decision.

PRESIDENT

MIHAI BERINDE

ANNEX

Table no. 6 *The evolution of the local delivery price, the national reference price and of the subsidy granted for covering the difference between them during 2001-2004*

	Local delivery price without VAT population, natural gas	Local delivery price without VAT population, black oil	Local delivery price with VAT population, natural gas	Local delivery price with VAT population, black oil	Reference price without VAT	Reference price with VAT	Difference between the reference price and local delivery price without WATT, natural gas	Difference between the reference price and local delivery price without WATT, black oil	Difference between the reference price and local delivery price with WATT, natural gas	Difference between the reference price and local delivery price with WATT, black oil	Quantity of natural gas delivered to the population	Quantity of black oil delivered to the population	Subsidy's value
	ROL/Gcal ₁	ROL/Gcal	ROL/Gcal	ROL/Gcal	ROL/Gcal	ROL/Gcal ₁	ROL/Gcal	ROL/Gcal	ROL/Gcal	ROL/Gcal	Gcal	Gcal	ROL thousand
1	2	3	4	5	6	7	8=2-6	9=3-6	10=4-7	11=5-7	13	14	15=10x13+11x14
Jan	389,576	715,000	463,595	850,850	294,118	350,000	95,458	420,882	113,595	500,850	22566	0	2,563,385
Feb	406,232	715,000	483,416	850,850	294,118	350,000	112,114	420,882	133,416	500,850	26318	1407	4,215,929
Mar	419,062	715,000	498,684	850,850	294,118	350,000	124,944	420,882	148,683	500,850	24657	1030	4,181,961
Apr	659,405	737,000	784,692	877,030	294,118	350,000	365,287	442,882	434,692	527,030	16997	0	7,388,452
May	663,039	737,000	789,016	877,030	294,118	350,000	368,921	442,882	439,016	527,030	5512	0	2,419,856
June	666,882	737,000	793,590	877,030	294,118	350,000	372,764	442,882	443,589	527,030	5188	0	2,301,341
July	666,882	737,000	793,590	877,030	294,118	350,000	372,764	442,882	443,589	527,030	2993	0	1,327,662
Aug	666,882	737,000	793,590	877,030	294,118	350,000	372,764	442,882	443,589	527,030	3567	0	1,582,283
Sept	666,882	737,000	793,590	877,030	462,185	550,000	204,697	274,815	243,589	327,030	4935	0	1,202,114
Oct	666,882	737,000	793,590	877,030	462,185	550,000	204,697	274,815	243,589	327,030	7862	0	1,915,100
Nov	666,882	737,000	793,590	877,030	462,185	550,000	204,697	274,815	243,589	327,030	20126	0	4,902,481
Dec	666,882	737,000	793,590	877,030	462,185	550,000	204,697	274,815	243,589	327,030	25788	0	6,281,684
Total 2001	550,514	715,000	655,112	850,850	352,524	419,503	197,991	362,476	235,609	431,347	166,509	2437	40,282,247
Jan	802,400	991,200	954,856	1,179,528	483,193	575,000	319,207	508,007	379,856	604,528	23788	638	9,421,711
Feb	896,600	1,059,400	1,066,954	1,260,686	483,193	575,000	413,407	576,207	491,954	685,686	19354	479	9,849,728
Mar	896,600	1,059,400	1,066,954	1,260,686	483,193	575,000	413,407	576,207	491,954	685,686	15879	748	8,324,636
Apr	896,600	1,059,400	1,066,954	1,260,686	483,193	575,000	413,407	576,207	491,954	685,686	9592	758	5,238,576
May	896,600	1,059,400	1,066,954	1,260,686	504,202	600,000	392,398	555,198	466,954	660,686	3343	311	1,766,499
June	896,600	1,059,400	1,066,954	1,260,686	504,202	600,000	392,398	555,198	466,954	660,686	452	751	707,238
July	896,600	1,059,400	1,066,954	1,260,686	504,202	600,000	392,398	555,198	466,954	660,686	663	518	651,825

Aug	896,600	1,059,400	1,066,954	1,260,686	672,269	800,000	224,331	387,131	266,954	460,686	0	0	0
Sept	896,600	1,059,400	1,066,954	1,260,686	672,269	800,000	224,331	387,131	266,954	460,686	1925	0	513,886
Oct	896,600	1,059,400	1,066,954	1,260,686	672,269	800,000	224,331	387,131	266,954	460,686	4547	97	1,258,526
Nov	958,800	1,283,600	1,140,972	1,527,484	672,269	800,000	286,531	611,331	340,972	727,484	8681	51	2,997,079
Dec	958,800	1,283,600	1,140,972	1,527,484	672,269	800,000	286,531	611,331	340,972	727,484	10627	695	4,129,110
Total 2002	886,080	1,083,923	1,054,436	1,289,868	516,216	614,297	369,864	567,707	440,139	675,571	98,851	5,046	44,858,815
Jan	958,800	1,283,600	1,140,972	1,527,484	672,269	800,000	286,531	611,331	340,972	727,484	11458	395	4,194,212
Feb	958,800	1,283,600	1,140,972	1,527,484	672,269	800,000	286,531	611,331	340,972	727,484	11228	0	3,828,432
Mar	958,800	1,283,600	1,140,972	1,527,484	672,269	800,000	286,531	611,331	340,972	727,484	8914	0	3,039,423
Apr	1,322,012	1,976,493	1,573,194	2,352,027	672,269	800,000	649,743	1,304,224	773,194	1,552,027	2428	3166	6,791,032
May	1,322,012	1,976,493	1,573,194	2,352,027	672,269	800,000	649,743	1,304,224	773,194	1,552,027	564	1147	2,216,256
June	1,322,012	1,976,493	1,573,194	2,352,027	672,269	800,000	649,743	1,304,224	773,194	1,552,027	0	1213	1,882,608
July	1,322,012	1,976,493	1,573,194	2,352,027	672,269	800,000	649,743	1,304,224	773,194	1,552,027	1158	0	895,359
Aug	1,322,012	1,976,493	1,573,194	2,352,027	672,269	800,000	649,743	1,304,224	773,194	1,552,027	952	0	736,081
Sept	1,322,012	1,976,493	1,573,194	2,352,027	672,269	800,000	649,743	1,304,224	773,194	1,552,027	0	0	0
Oct	1,502,727	1,976,493	1,788,245	2,352,027	672,269	800,000	830,458	1,304,224	988,245	1,552,027	1972	0	1,948,819
Nov	1,537,497	1,976,493	1,829,621	2,352,027	672,269	800,000	865,228	1,304,224	1,029,621	1,552,027	2162	1258	4,178,491
Dec	1,537,497	1,976,493	1,829,621	2,352,027	672,269	800,000	865,228	1,304,224	1,029,621	1,552,027	3184	1177	5,105,050
Total 2003	1,095,543	1,943,739	1,303,697	2,313,049	570,086	678,402	525,457	1,373,653	625,294	1,634,647	44,020	8,356	34,815,763
Jan	1,587,106	1,976,493	1,888,656	2,352,027	672,269	800,000	914,837	1,304,224	1,088,656	1,552,027	3232	1776	6,274,935
Feb	1,587,106	1,976,493	1,888,656	2,352,027	672,269	800,000	914,837	1,304,224	1,088,656	1,552,027	2927	1609	5,683,707
Mar	1,587,106	1,976,493	1,888,656	2,352,027	672,269	800,000	914,837	1,304,224	1,088,656	1,552,027	2226	1744	5,130,083
Apr	1,633,575	1,976,493	1,943,954	2,352,027	672,269	800,000	961,306	1,304,224	1,143,954	1,552,027	2073	379	2,959,635
May	1,633,575	1,976,493	1,943,954	2,352,027	672,269	800,000	961,306	1,304,224	1,143,954	1,552,027	717	0	820,215
June	1,633,575	1,976,493	1,943,954	2,352,027	672,269	800,000	961,306	1,304,224	1,143,954	1,552,027	719	0	822,503
July	1,689,368	1,976,493	2,010,348	2,352,027	672,269	800,000	1,017,099	1,304,224	1,210,348	1,552,027	563	0	681,426
Aug	1,689,368	1,976,493	2,010,348	2,352,027	752,941	896,000	936,427	1,223,552	1,114,348	1,456,027	563	0	627,378
Sept	1,689,368	1,976,493	2,010,348	2,352,027	752,941	896,000	936,427	1,223,552	1,114,348	1,456,027	259	0	288,616
Oct	1,745,553	1,976,493	2,077,208	2,352,027	752,941	896,000	992,612	1,223,552	1,181,208	1,456,027	991	0	1,170,577
Nov	1,745,553	1,976,493	2,077,208	2,352,027	752,941	896,000	992,612	1,223,552	1,181,208	1,456,027	2610	0	3,082,954
Dec	1,745,553	1,976,493	2,077,208	2,352,027	752,941	896,000	992,612	1,223,552	1,181,208	1,456,027	3393	0	4,007,840

Total 2004	1,656,798	1,976,493	1,971,590	2,352,027	686,843	817,344	969,955	1,289,650	1,154,246	1,534,683	20,273	5,508	31,549,869
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Source: Supplimentary information

Table no.7 – The evolution of the local delivery price, the heating energy’s cost, the hot water sold quantities and of the uncovered losses of *S.C. PRODITERM S.A. Bistrita* [...] ⁷

⁷ Confidential data