

**D E C I S I O N   N O .   1 8 6**  
**on 03.10.2005**

**regarding the State aid notified by the Ministry of Public Finances intended to be granted to S.C. „Compania de Apa Someș” S.A.**

**The Competition Council**

Having regard to the Decree no. 57/2004 regarding the appointment of the Competition Council;

Taking into consideration the provisions of the Competition Law no. 21/1996, published in the Official Gazette no 88, republished in Official Gazette no. 744/16.08.2005;

Taking into consideration the provision of the Law no 143/1999 on State aid, published in the Official Gazette no 370/03.08.1999, Part I, republished in Official Gazette no. 744/16.08.2005;

Taking into consideration the dispositions of the European Agreement establishing 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, Part I , no. 73 on April the 12<sup>th</sup>, 1993;

Taking into consideration the dispositions of the Regulation on State aid as compensations granted to undertakings entrusted with services of general economic interest, published in the Official Gazette Part I, no. 1048/12.11.2004.

**Based on the following,**

**1. PROCEDURE**

- (1) By address no. 108.467/19.07.2005, registered at the Competition Council no. RS-AS 72/20.07.2005, The Ministry of Public Finances (MFP) notified, based on art. 15 from the *Law no. 143/1999 on State aid*, republished, the State aid intended to be granted to S.C. „Compania de Apa Someș” S.A.
- (2) By addresses no. DAAS/813/22.07.2005 and DAAS/886/04.08.2005, additional information were requested, based on art. 15 (4) from *Law no.143/1999*, republished.
- (3) The notification became effective as of the date when the information was accurate and complete, respectively on 31.08.2005.

**2. DESCRIPTION OF THE FINANCIAL SUPPORT MEASURE**

**2.1. Legal basis**

- (4) The legal basis for granting the financial support is the following:

- G.D. no. 639/2005 regarding the guarantee of MFP for an external loan in value of maximum EURO 7,203,215, contracted by S.C. „Compania de Apa Somes” S.A. from BERD for financing the investment program „Rehabilitation of the water supply system in towns situated in the hydrographic basin of Somes-Tisa”;
- The Agreement for finalising the *Small and Medium Town Infrastructure Development (SAMTID)*;
- G.D. no. 529/2004 for approving the technical and economic indexes of the investment programs comprised in the first phase of the SAMTID program;
- L.C.D. Dej no. 9/2004;
- L.C.D. Gherla no. 9/2005;
- L.C.D. Huedin no. 23/28.02.2005;
- L.C.D. Zalau no. 18/2005;
- L.C.D. Simleul Silvaniei no. 13/2005;
- L.C.D. Jibou no. 22/2005;
- L.C.D. Cehu Silvaniei no. 6/27.01.2005.

## **2.2. The beneficiary of the support measure**

- (5) The beneficiary of the notified support measures is S.C. „Compania de Apa Somes” S.A.; the company was set up by the reorganisation of the Regia Autonoma Judeteana Apa-Canal Cluj, according to the provisions of C.C.D. Cluj no. 213/23.12.2004, modified by C.C.D. Cluj no. 19/26.01.2005, as regional operator of public services of water supply and sewage.
- (6) The cash assets is of ROL 68,785,200 thousand, divided into 687,852 shares, with a nominal value of ROL 100 thousand each. The shareholders are the following:
  - County Council Cluj: 685,352 shares;
  - County Council Salaj: 2,000 shares;
  - Local Council Zalau: 200 shares;
  - Local Council Dej: 50 shares;
  - Local Council Gherla: 50 shares;
  - Local Council Huedin: 50 shares;
  - Local Council Simleul Silvaniei: 50 shares;
  - Local Council Jibou: 50 shares;
  - Local Council Cehu Silvaniei: 50 shares.
- (7) The company is headquartered in the city of Cluj Napoca and registered with the Registry of Commerce under no. J 12/211/1991, and Fiscal registration code no. 201217.
- (8) On 30.06.2005 S.C. „Compania de Apa Somes” S.A. had a turnover of ROL 175,602,278 thousand and a profit of ROL 17,597,117 thousand, having 872 employees. Thus, it can be considered as being a large company.
- (9) According to the statute, the main activity of S.C. „Compania de Apa Somes” S.A. is the capture, treatment and water distribution. According to art. 2 from the *Law on public services of town management no. 326/2001, establishing the legal framework regarding the set-up, organization, monitoring and control of the functioning of public services of town management in counties, cities and villages*, the public services of town management represent the total activities and utility actions of local interest, carried out

under the authority of the local public administration, having as purpose the supply of public utility services. By license granted by the National Agency of Regulation in the field of Services of Town Management (hereinafter called A.N.R.S.C.), the company is entrusted with the discharge of public services of water supply and sewage.

- (10) S.C. „Compania de Apa Someș” S.A directly administers and operates the public systems for the supply of drinking water and sewage in the area it serves, based on the direct delegation contracts concluded with the local authorities.
- (11) The obligations of S.C. „Compania de Apa Someș” S.A, as a provider of public services of town management are, in principle, the following:
  - a) to supply all consumers in the coverage area for which it was authorized/certified;
  - b) to observe the performance parameters set by local public administration authorities, or by the national regulating authority;
  - c) to provide the local public administration authority, respectively the national regulating authority the information required and to allow access to the documents, according to the clauses of the operating agreement.
- (12) Given the above said, the public services of general economic interest entrusted to the company are:
  - supply of drinking water (entails mainly the sourcing, treatment of water, transport and distribution of drinking water);
  - sewerage (entails the following: collection and transport of waste domestic water from users to the treatment facilities, treatment of waste water and its disbursement, collection, evacuation and adequate treatment of the waste from drainage slots and the assurance of their functionality, the supervision of the evacuation of industrial waste water in the sewerage system, evacuation and treatment of sludge and other similar waste derived from the activities mentioned above, as well as their storage).
- (13) According to the information contained in the notification, the services for the supply of drinking water and sewerage services represent 100% from the total activity carried out by S.C. „Compania de Apa Someș” S.A.
- (14) Given the fact that there is only sewage network in the area it serves, S.C. „Compania de Apa Someș” S.A. takes over both the domestic and meteoric waste water as well as industrial, the latter activity having a non significant contribution to the entire activity of S.C. „Compania de Apa Someș” S.A. According to the legislation in force, each undertaking has the obligation to ensure the pre-treatment of the waste industrial water resulted from its activity before discharging it in the sewerage network.

### **2.3. The market affected by the financial support granted**

- (15) The relevant market affected by the granting of the financial support analyzed in the present decision is represented by the market of public services of water supply and sewage.
- (16) The public services of water supply and sewerage function in a centralized system and are organized under the coordination and control of the local public administration authorities, based on the local autonomy principle.

- (17) The relevant geographical market is represented by the following cities from Cluj and Salaj Counties: city of Cluj-Napoca and rural localities around it, city of Gherla, Dej, Zalau, Huedin, Jibou, Cehu Silvaniei, Simeul Silvaniei; therefore, it is regional market.
- (18) From the point of view of prices and tariffs this is a regulated market because the tariffs are adjusted and agreed by A.N.R.S.C. and approved by the local councils. The service provider is bound to ensure the supply of services to all consumers connected to the network, without discrimination. Also, all consumers connected to the drinking water and sewerage network of the city are captive consumers, because they do not have the possibility to choose their service supplier.
- (19) S.C. „Compania de Apa Somes” S.A. is the only provider of public services for the supply of drinking water and sewage in the area it serves.

#### **2.4. Ways of granting the financial support**

- (20) The financial support notified by the MPF comprise the following:
- 100% State Guarantee of an external loan, contracted by S.C. „Compania de Apa Somes” S.A from EBRD. The value of the credit is of EURO 7,200,000 and is to be refunded in the period between 2009-2020, at an interest rate equal with Euribor (6 M) + 1% margin p.y;
  - State budget allocations through the National Fund of Pre-Accession in the value of EURO 1,769,544;
  - Local budget allocations in the value of EURO 1,480,792.
- (21) The funds are ment to cofinance the project „Rehabilitation of the water supply system in towns situated in the hydrographic basin of Somes-Tisa” (hereinafter called Project). For this Project, SC „Compania de Apa Somes” SA benefits from grants from PHARE funds in the value of EURO 5,000,000, within the SAMTID Program<sup>1</sup>.

#### **2.5. Description of the Project**

- (22) SAMTID Program is the result of a national strategy, aiming the modernizing the system of water supply and sewage in small and medium towns – which did nor disposed from sufficient funds for such investments and neither could they attract international financing - in view of delivering in good conditions the public service of water supply and sewage at community standards. The SAMTID program promotes also an institutional development. Through this program, 2 important conditions have been imposed for the potential applicants: the towns wishing to obtain financing within the Program must be organised in an association of the towns (on a certain area or hydrographic basin) and to entrust the public service of water supply and sewage to a regional operator at county level or the hydrographic basin.
- (23) The Project, eligible within SAMTID Program, contains 7 localities, namely: 3 from Cluj County (Dej, Gherla si Huedin) and 4 from Salaj County (Zalau, Simleul Silvaniei,

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<sup>1</sup> SAMTID- multi-annual program for rehabilitation of water infrastructure in small and medium towns, having as objective solving the technical problems of the local infrastructure and services quality of water supply and sewage.

Jibou si Cehu Silvaniei). Due to the fact that the water adduction for Salaj County is localised in Cluj County, the localities from the two counties have been comprised in one single project, namely the “Rehabilitation of the water supply system in towns from the hydrographic basin of Somes-Tisa”.

- (24) As the regional operator from the hydrographic basin Somes-Tisa delivering the public service of water supply and sewage is S.C. “Compania de Apa Somes” S.A., it has been entrusted with the obligation to carry out the project.
- (25) The value of the Project is of EURO 16,819,061, being financed as follows:
- PHARE funds – EURO 5,000,000;
  - National Pre-Accession Fund – EURO 1,769,544;
  - Credit from BERD guaranteed by the State– EURO 7,200,000;
  - Local budgetary allocations – EURO 1,480,792;
  - Own contribution of S.C. “Compania de Apa Somes” S.A. – EURO 1,368,725.
- (26) The scope of the Project is to improve the water request management, operational management of the distribution systems, as well as the quality of the supplied water to a number of 181,600 persons from 7 cities, having as effect increasing of life quality through improvement of the water supply system.
- (27) This project aims to solve the following prioritaire problems in the water supply system for the 7 cities:
- important water losses from the distribution networks (28% from the water in Zalau, 51% in Simleul Silvaniei, 46% in Jibou, 72% in Cehu Silvaniei, 26% in Dej, 36% in Gherla si 43% in Huedin);
  - the lack of counting for the use of water supplied to consumers in Zalau, Simleul Silvaniei, Jibou, Cehu Silvaniei;
  - interventions, respectively frequent interruptions of drinking water supply, leading to supplementary costs and negative effects on the network;
  - effects on the area, infrastructure and circulation, due to the frequent interventions, having a negative impact on the environment;
  - high production costs and low efficiency;
  - the necessity to extend the network due to the low degree of servicing the population in some localities (e.g.. 52.73% in Simleul Silvaniei, 68,55% in Jibou, 61.29% in Cehu Silvaniei).
- (28) The investment belong to the public property and represent replacement of the worn out water pipes, locating the waterworks, the basins and monitoring points for water pressure. The reahabilitation works for water supply system in the cities from the hydrographic basin of Somes-Tisa are the following:
- replacement of 112 km distribution network;
  - monitoring the system in 62 different points;
  - rehabilitation of 6 pumping stations;
  - rehabilitation of 4 collectors;
  - complete counting of consumers.
- (29) The implementation of the Project will lead to the reduce of operational costs, servicing and energy costs. Also, it is forecast the decrease of the number of interventions, water losses due to the optimization of the pumping stations. Thus, the

investment will lead to the decrease of losses, improvement of services quality and the degree of satisfaction of the consumers.

- (30) From the total value of the Project, EURO 13,969,544 represent eligible costs (investment objectives) and Euro 2,849,517 are considered non-eligible (consultancy, assistance, etc). The investment objectives, costs and the execution deadlines are presented in Table no. 1.

Table no.1 – *Investment objectives from the Program and execution deadlines*

CRT. No.	INVESTMENT OBJECTIVE	COST (Euro)	EXECUTION DEADLINE
1.	Replacement of 112 km distribution network	12,025,468	-01.09.2006 (for Salaj County) - 30.06.2008 (for Cluj County)
2.	Monitoring the sistem in 62 points	824,105	-01.09.2006 (for Salaj County) - 30.06.2008 (for Cluj County)
3.	Rehabilitation of 6 pumping stations	395,483	-1.09.2006 (for Salaj County) - 30.06.2008 (for Cluj County)
4.	Rehabilitation of 4 collectors	224,629	-1.09.2006 (for Salaj County) - 30.06.2008 (for Cluj County)
5.	Complete counting of consumers	499,859	-1.09.2006 (for Salaj County) - 30.06.2008 (for Cluj County)
	<b>Total</b>	<b>13,969,544</b>	

Source: supplementary information

### 3. ANALYZING THE STATE SUPPORT MEASURE

#### 3.1. The object of the decision

- (31) Based on the notification received by the Competition Council from MFP, the object of the present decision is the financial support under the form of budgetary allocations (granted from the central and local budget) and a guarantee for contracting a EBRD loan to SC „Compania de Apa Somes”. The financing is ment exclusively for investment objectives regarding the infrastructure of water and sewerage of the 7 localities provided for in point (23), located in the hydrographic basin Somes-Tisa.
- (32) In order to ascertain the applicability of the rules on State aid, the Competition Council has to analyze if the measures constitute aid within the meaning of *Law 143/1999 on State aid, republished*.
- (33) *Law 143/1999 on State aid* lays down that, except where otherwise provided, aid which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods is, insofar as it significantly affects trade, incompatible with a normal competition environment.
- (34) The financial support intended to be granted to S.C. „Compania de Apa Somes” S.A. impies State resourses, is selective and may confer an economic advantage to the company. It also creates the premises for distorting the competition and the trade between Romania and Member States of the EU. Therefore, it constitutes State aid in the meaning of the Law no. 143/1999.

### **3.2. Analysis of the measure of financial support based on the *Guidelines regarding state aid granted under the form of guarantees***

- (35) The *Guidelines regarding State aid granted under the form of guarantees* provide the criteria for the assessment of the State aids granted under the form of guarantees.
- (36) According to point 4.2. of the *Guidelines on the State aid granted under the form of guarantees*, an individual state guarantee does not constitute State aid if the following conditions are simultaneously fulfilled:
- a) the debtor is not in a difficult situation;
  - b) the debtor is, in principle, able to contract a loan under market conditions, without the State intervention;
  - c) the guarantee is related to a certain financial operation, a certain maximum amount, does not cover more than 80% from the loan or other financial obligation, except for bonds or other similar instruments, not unlimited in time;
  - d) the guarantee implies the payment of a prime at market price.
- (37) Analyzing the overall economic and financial situation of S.C. „Compania de Apa Someș” S.A. it can be concluded that the company is not in difficulty. From the information sent by the beneficiary, it results that S.C. „Compania de Apa Someș” S.A. can obtain loans from a commercial bank, on market conditions, without the State intervention. Thus, the Competition Council considers the conditions from paragraph 4.2 a) and b) from the *Guidelines on the State aid granted under the form of guarantees* to be met.
- (38) However, if the guarantee covers more than 80% of the loan, the Competition Council notes that the condition provided at paragraph 4.2. c) from the *Guidelines on the State aid granted under the form of guarantees* are not met. Consequently, it is considered that the guarantee in favor of S.C. „Compania de Apa Someș” S.A. represents State aid. [Accordingly to supplementary information granted by the Ministry of Public Finances, the premium risk established to be paid by SC Compania de Apa Someș SA for the guarantee is 2.25%. The grantor did not presented any information about the level of the premium requested by a commercial bank in similar conditions. Thus, it is considered that the guarantee for S.C. „Compania de Apa Someș” S.A. represents state aid.](#)

#### **3.2.1. Assessment of the aid**

- (39) As to the State aid element involved, point 3.2. of the *Guidelines on the State aid granted under the form of guarantees* provides, that the State aid can be calculated “in the same way as the net grant-equivalent of a loan granted in preferential conditions, the interest bonus representing the difference between the market interest rate and the interest rate obtained with State guarantee, after any premiums have been paid.”
- (40) As the State aid grantor has presented in the annex to the notification form the offer received by S.C. „Compania de Apa Someș” S.A. from a commercial bank, ready to grant a similar loan, under market conditions, with an annual interest rate of Euribor

(3M)+ 1.5% margin p.y., the Competition Council considers that this rate can be taken as reference when calculating the financial support under the form of guarantee.

- (41) In these circumstances, the financial support granted under the form of guarantee is equal to the net grant equivalent<sup>2</sup> of the loan guaranteed by the State (in amount of EUR 7,200,000), calculated as the discounted difference between the market interest rate and the interest rate requested due to the State guarantee, respectively: EUR 296,243 the equivalent of ROL 10,426,864,871.<sup>3</sup> This value is diminished with the premium risk paid of Euro 162,000, thus the amount of the financial support under the form of guarantee is Euro 134,243, respectively RON 4,724,950,871.
- (42) Also, as mentioned in point (20), the company will benefit from budgetary allocations granted from the central and local budgets amounting Euro 3,250,336, respectively ROL 114,402,076,192.
- (43) Thus, the total financial support for SC „Compania de Apa Somes” SA for financing the investment project amounts to EURO 3,384,579, respectively ROL 119,127,027,063 (see points (41) and (42)).

### **3.3. Analysis of the financial support in the context of the rules on regional aid for investment**

- (44) Taking into account that the aid is designed to finance some investment objectives, the Competition Council assessed the aid under Art. 2 and Art. 14 of *Law no 143/1999, with subsequent amendments and completions*, and the *Regulation on Regional Aid* (hereinafter the Regulation). The sector concerned is not covered by any specific rules, however the adjacency to the rules on SGEI is visible.
- (45) S.C. „Compania de Apa Somes” S.A. is located in the Nord-West Development Region of Romania. As stated under para. (8) of this decision, S.C. „Compania de Apa Somes” S.A. is not a company in difficulty, thus being eligible for regional aid in accordance with Art. 1 (4) of the Regulation.
- (46) In accordance with Art. 5 of the Regulation, the notified aid is aid for initial investment as it serves the expansion, rationalization and modernization of an existing unit.
- (47) The Competition Council notes that the State aid in favor of S.C. „Compania de Apa Somes” S.A. is not granted as part of a scheme for regional State aid, prior authorized. It must be underlined that the State did not merely pursue a specific or sectoral policy in granting the aid, nor did it primarily follow the goal to promote the region. The measure must rather be assessed in the context of the obligation to provide a service of general economic interest.
- (48) In the present case however, the regional development is not the primary goal of the aid grantors. The aim is rather, to provide a proper water and sewage network for the 7

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<sup>2</sup> The grant equivalent has been calculated according to Annex 2 point 3 of the Regulation regarding regional state aid, considering the terms of the loan, the reimbursement schedule as well as the discount rate (inflation rate) for Euro of 2.1% between 2005-2020.

<sup>3</sup> The NBR exchange rate from 28.07.2005, respectively 1 Euro =35,197 ROL was used for calculations.



localities in the Counties Cluj and Salaj. The administration of such a system has to be considered a public service obligation entrusted by the State to S.C. „Compania de Apa Somes” S.A. Taking into account the nature of the investment project, the Competition Council concludes that the rules on SGEI seem to be “closer” than those on regional aid. At the same time, the Competition Council acknowledges that the rules on services of general economic interest are derogatory provisions.

- (49) In addition, the Competition Council underlines that all the investment objectives which will be achieved within the Project are not part of the private patrimony of the beneficiary, respectively S.C. „Compania de Apa Somes” S.A., but part of the water and sewage public infrastructure of the cities, which is property of the Romanian state.
- (50) Leaving these general considerations aside, concerning the compatibility of the measure in the context of the regional aid Regulation, the Competition Council concludes the following:
- (51) Art. 8 of the Regulation provides that, in order to ensure that the productive investment benefiting from aid is viable and sound, the recipient’s contribution to its financing must be at least 25 %.
- (52) As shown in para. (25) of this decision, S.C. „Compania de Apa Somes” S.A. ‘s contribution to the achievement of the Project ensured from own resources, not touched by any financial support from the state, is EURO 1,368,725 (standing for 8.1% of the Project’s total costs). The Competition Council underlines that these costs are dedicated to cover non-eligible expenses, the company having no contribution from its own sources to the financing of the eligible costs (i.e. own sources not touched by state support). Thus, the criterion regarding the beneficiary’s contribution is not fulfilled.
- (53) Regarding the maintaining of investments for a period of minimum 5 years, given that they are part of the technical-urban infrastructure of the city, it may be deemed that they shall be maintained for the whole duration of their functioning.
- (54) Vis-à-vis the above arguments, the Competition Council concludes that the criteria to authorize a regional aid for investments are not cumulatively met.
- (55) Since the service of water supply and sewage delivered by S.C. „Compania de Apa Somes” S.A. has the character of a public service obligation, by derogation from the general State aid rules, the recent case law of the ECJ in the context of the definition of State aid in this field (Altmark-Judgement) and *the Regulation on State aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest* have to be taken into account.

### **3.4. Analysis of the measures based on the provisions of the *Regulation on State aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest***

#### **3.4.1. General considerations**

- (56) The financial support granted to a company entrusted with the obligation to deliver a service of general economic interest is not considered State aid for the purposes of Art. 2 of *Law 143/1999 on State aid*, 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 revenues and a reasonable profit from meeting the service of general economic interest obligations.

#### **3.4.2. The condition from par. 3.4.1. a):**

- (57) S.C. „Compania de Apa Someș” S.A. is entrusted to deliver public services of water supply and sewage by the license approved by C.C.D. no. 213/2004. In this administrative act there are provided, among others, the specific obligations of the undertakings delivering services of general economic interest as follows: continuity in supplying water and sewage, ensuring access to networks for new customers, equal treatment to all consumers, achieving performance standards. Also, by G.D. no. 1591/2002, the company is obliged to deliver these services at prices and tariffs approved by the Local Councils of 7 localities and established by the ANRSC.
- (58) According to Law no. 326/2001, public services must fulfill the following main conditions:
  - a) Continuity both in quality and quantity, according to the conditions stipulated in the contract;
  - b) Adaptability to consumers' requests;
  - c) Equal access to the public service, in the conditions stipulated in the contract;
  - d) Ensuring the public health and life quality.
- (59) Regarding the above presented facts, we underline that S.C. „Compania de Apa Someș” S.A. is under the obligation to ensure the effective functioning of services relating to the transport, distribution and supply of drinking water that are essential for the population, institutions and undertakings, as well as collection, transport and treatment of domestic and meteoric waste water. Furthermore, it is required to provide these services at a regulated price that is intended to ensure the affordability for the consumer. Consequently, one can conclude that S.C. „Compania de Apa Someș” S.A. is entrusted, by administrative act, with the discharging of a service of general economic interest.

### **3.4.3. The condition from par. 3.4.1. b):**

- (60) According to this criterion the compensation for the discharge of the public service of general economic interest obligation must be calculated on pre-established objectives and transparent parameters and may not grant an economic advantage to the beneficiary.
- (61) According to the provisions of G.O. no. 32/2002 *on the management and functioning of public services of water supply and sewage*, establishing, adjusting, modifying the prices and tariffs for the public services of water and sewerage must be approved by ANRSC, irrespective the organizational or property form of the operators delivering such services. The level of prices and tariffs approved by ANRSC is mandatory for all operators and must assure a balance between the affordability of the consumers and the economical viability of the operators of public services.
- (62) The prices and tariffs for public services of water supply and sewage are justified in advance according to transparent parameters such as: production and operating costs, repairs and maintenance costs, the annual depreciation of tangible and intangible assets; when setting up prices and tariffs it is taken into consideration the interest and the credits that need to be repaid, for creating, developing and modernization sources of the technical-municipality systems, as well as a reasonable profit, provided that the structure and the level of tariffs represent the real cost of supplying/delivering the service, to discourage the excessive consumption, to encourage the efficient supply of services, to assure the environment protection, to encourage capital investment and to be correlated with the users' affordability degree.
- (63) The operators which request the establishment, adjustment or amendment of prices and tariffs for water supply and sewage have the obligation to transmit A.N.R.S.C. the following documents:
- a request for establishing, adjustment or amendment, which comprises: the present prices, the requested prices and the justification for the proposal of establishment, adjustment or amendment;
  - the justification fiche of requested prices and tariffs;
  - other data and information necessary for the justification of the proposed prices and tariffs.
- (64) The justification of prices for drinking water/sewerage is set up in advance, based on the following elements:
- I. Costs from the previous period:
    1. material costs: water; technological losses; energy; technological materials; annual depreciation; administration repairs; repairs for third parties; water quality protection costs. etc;
    2. employment costs (salaries, employer's contribution to the social insurance fund and to the health insurance fund, unemployment fund);
    3. financial expenses (interest, commissions, etc.).
  - II. Revenues from the previous period from production, transport, distribution of drinking water and revenues from sewage;
  - III. Previous period profit;
  - IV. Developing quota;

- V. Drinking water quantity delivered, including own consumption;
- VI. Quantity of domestic and meteoric waste water processed;
- VII. Price/unitary tariff from the previous period.

(65) Starting from these entry data, the prices/tariffs adjusted for the next period are determined taking into consideration the following criteria:

- For expenses for untreated water, energy and materials representing an important part of costs, the amendment of purchasing prices compared to the previous period is done within the limit of market prices;
- Specific consumption of untreated water, energy, fuels and materials shall be considered to a level equal to the one from the previous amendment;
- For employment costs, the justification is made according to the legislation in force, correlated with the economical efficiency principle;
- Depreciation costs and/or royalty are taken into consideration, observing the legal regulations in force;
- In the delivery price of water shall be included the technological losses for the production system, transport and distribution, approved by the authorities of the local public administration;
- The supplied drinking water quantities and the domestic and meteoric waste water processed shall be taken into consideration at the level from the previous approval.

(66) As regards the operators which are subject to development programs and rehabilitation of utilities (as the case of S.C. „Compania de Apa Someș” S.A., involved in the Project), the prices and tariffs for the services of water supply and sewerage are agreed by ANRSC by observing the conditionality for the reimbursement of the loan and interest provided in the Financing Memorandum. At the same with the Fundamentation Note for calculation for the prices and tariffs, the operator submits to ANRSC a Technical Memorandum with the main characteristics from the feasibility studies of the investments to be realized in the water and sewerage infrastructure.

(67) Before the beginning of each financial year S.C. „Compania de Apa Someș” S.A. is justifying its costs and revenues budget, which is subject to the analysis and approval of the Local Councils. In the budget, the revenues and expenditures related to the operating activity, as well as the planned investments to be achieved in the respective year are distinctly presented. The projected investments are presented by programs and components, specifying the cost of each component, the financing sources, and related deadlines. Thus, the costs related to investments required by the good functioning of the public system of water and sewerage are set in advance.

#### **3.4.4. The condition from point 3.4.1. c):**

(68) Condition 3.4.1.c) provides that this compensation must not be higher than the costs imposed by the discharging the service for general economic interest.

(69) As pointed in para. (43), the financial support to be granted to S.C. „Compania de Apa Someș” S.A is in total amount of ROL 119,127,027,063.

- (70) The State aid under the form of guarantee and budgetary allocations is designed to co-finance the Project. The eligible costs of the Project are financed 35.8% from PHARE funds. Granting the financial support by the State was necessary to ensure the co-financing of the beneficiary, of 64.2% from the eligible costs of the Project (an indispensable condition for obtaining the non-reimbursable financing within SAMTID Program).
- (71) Analyzing the economic and financial position of the company it can be observed that the company does not have sufficient resources to sustain by itself the co-financing of a project of this size. Thus, at the beginning of 2005, the company had no possibility to support the costs of the Project, being forced to apply for financing from EBRD. In order to grant the loan in the given conditions, EBRD has requested for the State guarantee.
- (72) As pointed in para. (40), given the good economic and financial position, S.C. „Compania de Apa Someș” S.A could have obtained this loan from a commercial bank but at a higher interest rate, respectively 3.606% (as compared to a rate of only de 3.097% related to the EBRD loan obtained with the guarantee of the State).
- (73) According to the feasibility study related to the investment and of the Financing Memorandum, in order to cover the costs related to the EBRD loan (interest, fees, installments) S.C. „Compania de Apa Someș” S.A has to adjust its tariff as follows: in 2005 by 2% from the previous year's tariff; by 12.3% in 2006 and 2007 and by 6% in 2008. These increases will be adjusted accordingly to the inflation rate; therefore, in real terms, the tariffs increases will be higher than the provisioned ones in the Memorandum. According to studies of the regulatory authority, the above percentages, representing maximum ceilings by which the consolidated tariff can be adjusted for the public services of drinking water supply and sewerage, given consumers' affordability.
- (74) In the hypothesis in which S.C. „Compania de Apa Someș” S.A would have not received the financial support from the State for cofinancing the Project, the cost that the company would have had to bear from own sources and contracted loans under market conditions were significant higher. The difference between the total cost of the public services of water supply and sewage under the conditions of benefiting from a financial support from the State and the total costs under the conditions of financing the Project from own resources are presented in Table 3.

Tabelul nr.3 – *Additional costs incurred by delivering the public service under the condition of financing the Project from company's own resources between 2005-2020*

Year	Unitary cost of the service of general economic interest, with State aid <sup>4</sup>	Unitary cost of the service of general economic interest, if financing from own resources <sup>5</sup>	Total water supplied and purified	Difference between the total cost of the service if granting State aid and financing from own resources
	ROL/cm	ROL/cm	thousand cm	Thousand ROL
(1)	(2)	(3)	(4)	(6)=[(2)-(3)]*(4)

<sup>4</sup> The State aid is represented by the State guarantee for the EBRD loan and transfers from the State budget and the local budgets.

<sup>5</sup> It is taken into consideration the hypothesis that the company would contract a loan in amount of EURO 7,203,215 from a commercial bank and finance from its own sources EURO 3,281,746.

2005	5,515.7	5,654.7	54,340	7,553,260
2006 (estimated)	5,689.7	5,828.7	56,000	7,784,000
2007 (estimated)	6,047.7	6,186.7	56,000	7,784,000
2008 (estimated)	6,428.7	6,567.7	56,000	7,784,000
2009 (estimated)	6,749.7	6,888.7	56,000	7,784,000
2010 (estimated)	7,086.7	7,225.7	56,000	7,784,000
2011 (estimated)	7,440.7	7,579.7	56,000	7,784,000
2012 (estimated)	7,812.7	7,951.7	56,000	7,784,000
2013 (estimated)	8,202.7	8,341.7	56,000	7,784,000
2014 (estimated)	8,611.7	8,750.7	56,000	7,784,000
2015 (estimated)	9,042.7	9,181.7	56,000	7,784,000
2016 (estimated)	9,996.7	10,135.7	58,000	8,062,000
2017 (estimated)	10,241.7	10,380.7	59,000	8,201,000
2018 (estimated)	10,490.7	10,629.7	60,000	8,340,000
2019 (estimated)	10,733.7	10,872.7	60,000	8,340,000
2020 (estimated)	10,979.7	11,118.7	60,000	8,340,000
<b>TOTAL</b>				<b>126,676,260</b>

As results from the data presented above, financing the Project from own resources would lead to additional costs for the public services of drinking water and sewerage supply of ROL 126,667,626 thousand, which would be reflected in a tariff increase by another 6% in 2005, 5% in 2006, 13% in 2007, as compared to the increases provided in the Financing Memorandum and the EBRD agreement. Having in view the facts presented in para. (73), this tariff increase would have been unaffordable for the consumers.

(75) From the comparison analysis of the additional costs incurred by hypothetical financing the Project from own resources, in amount of ROL 126,667,626 thousand and from the financial support under the form of state guarantee and budgetary allocations, amounting ROL 119,127,027 thousand, results that the latter is just a compensation granted to S.C. „Compania de Apa Someș” S.A for performing the obligation of service of general economic interest of supplying water and sewage. Without the State aid, S.C. „Compania de Apa Someș” S.A could not cofinance the Project without an increase of

the tariff at a level which would not have been affordable to the beneficiaries of public services.

**3.4.5. Condition in 3.4.1. d):**

(76) S.C. „Compania de Apa Somes” S.A was not entrusted with the service of general economic interest to supply water and sewage following a public tender procedure.

(77) The public service to supply drinking water and sewage was entrusted to S.C. „Compania de Apa Somes” S.A by an administrative act and a comparative analysis of its costs with those of a well-run undertaking providing the same service could not be made by the grantor.

(78) Considering the above, the Competition Council concludes that the four conditions under point 3.4.1 are not met cumulatively, mainly the condition under par. 3.4.1 (d) was not proved. Therefore, the support State measures, notified by MFP in favor of S.C. „Compania de Apa Somes” S.A, constitute State aid for the purposes of *art. 2 of Law 143/1999 on State aid*, with subsequent amendments and completions and of the *Regulation on State aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest*.

**3.4.6 Assessment of the compatibility of the state aid in the context of the *Regulation on State aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest***

**3.4.6.1. General considerations**

(79) The ECJ has consistently held that Article 86 EC may provide for an exemption from the ban on State aid for undertakings entrusted with a service of general economic interest (SGEI). It has been implicitly confirmed in the Judgment of the ECJ in the Altmark Case, that State aid which compensates for the costs incurred by an undertaking in providing an SGEI can be regarded as compatible with the common market if it meets the conditions of Article 86(2) of the EC Treaty<sup>6</sup>. The ECJ has made it clear that, for a measure to benefit from such exemption, the principles of definition, entrustment and proportionality must all be fulfilled. The Competition Council considers that, where these principles are fulfilled, the development of trade is not affected to an extent contrary to the interests of the Community.

(80) 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 cumulatively:

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<sup>6</sup> Judgment of 24 July 2003 in Case C-280/00 *Altmark Trans*, paragraphs 101 to 109. In those paragraphs the Court examined the question of whether some state payments to transport undertakings classified as state aid could be found to be compatible with the common market under Article 77 of the EC Treaty as reimbursement for the discharge of public service obligations. It did not rule out this possibility, provided that the binding conditions laid down by the secondary legislation for the transport sector were met. This reasoning must apply *mutatismutandis* to undertaking entrusted with an SGEI outside the transport sector and in relation to Article 86(2) EC.

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

#### **3.4.6.2. The State aid is necessary for discharging a service of general economic interest**

- (81) In order to appreciate the necessity of granting the State aid for operating the service of general economic interest, the following conditions must be considered:
  - the beneficiary must be officially entrusted the obligation to discharge a public service of general economic interest, clearly defined;
  - the compensation level must not exceed what is necessary for the supply of the respective public service, taking into account the relevant revenues and a reasonable profit resulting from discharging these obligations.
- (82) As mentioned under point 3.4.2 above, S.C. „Compania de Apa Someș” S.A is delivering a service of general economic essential for the population, institutions and undertakings and this obligation is clearly defined by administrative act. Thus, it can be considered that S.C. „Compania de Apa Someș” S.A was officially entrusted with the obligation to deliver a public service.
- (83) Also, from the assessment from point 3.4.4, it results that, under the condition of a regulated market from the point of view of prices and tariffs, in order to perform this service the company cannot set its own prices to the consumers, prices that could cover the real operating costs. For establishing the prices and tariffs it must be taken into account the consumers' affordability degree. This is the main cause for which S.C. „Compania de Apa Someș” S.A receives the State aid. The compensation granted to S.C. „Compania de Apa Someș” S.A does not exceed the costs incurred by the performance of the above-mentioned public service of general economic interest, in the hypothesis of financing the investments from own sources, obtained under normal market terms.
- (84) Therefore, one can conclude that the State aid granted to S.C. „Compania de Apa Someș” S.A does not exceed what is necessary to discharge under normal conditions of continuity, safety and comfort the public services of drinking water and sewerage supply within the 7 localities in Cluj and Salaj Counties.
- (85) By implementing this Project it is aimed the significant improvement of the performance indicators of the public services of water and sewage supply in the 7 localities, as follows:
  - supply of drinking water supply shall fulfill the standards provisioned in the Directive on drinking water no. 98/83/CE for 182,000 inhabitants from the 7 cities;
  - extension of a distribution network with 112.7 km;
  - installing counters in all 7 localities;
  - eliminating river water pollution according to standards of Directive no. 91/271/CEE on cleaning the town waste water and their drainage into non-sensitive water sources;
  - improving the biological performance of water treatment;



- reducing the risks regarding the health of the population;
- safe storage of the sludge in accordance with the Directive no. 86/278/CEE.

#### **3.4.6.3. No undue affect of the trade between Romania and the EU Member States**

(86) It needs to be noted that the activity of the company is restricted to a limited geographical area represented by the area of the Cluj and Salaj Counties. S.C. „Compania de Apa Someș” S.A is the only operator on this market. The company is not involved in export operations. Under these circumstances it is considered that granting this State aid does not unduly affect the trade between Romania and the Member States.

#### **3.4.6.4 There is no over-compensation**

(87) The State aid granted to S.C. „Compania de Apa Someș” S. does not represent an over-compensation because it does not exceed the costs which are absolutely necessary in order to perform the service of general economic interest under safety, continuity and comfort conditions in the area it serves.

(88) Thus, the two conditions provided at para. (80), also 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.

#### **3.4.6.5 Transparency**

(89) In order to maximize the transparency, in the Financing Memorandum of the Project it is provisioned that the body involved in the management and implementation of the Project must have a separate accounting system, or an adequate accounting coding system for all the involved transactions, therefore facilitating the checking, by the national control authorities and by the Commission, of the incurred costs, to make sure that these were correctly allocated for the Project. It shall be insured the availability of all justifying documents on the costs for the Project on a 5 year period from the date of last payment.

(90) The exemption provided for in the *Regulation on State aid in the form of compensations granted to certain undertakings entrusted with services of general* is applicable to ad-hoc State aid analysed in this decision. As it was shown State aid has been granted for the compensation of a clearly defined general obligation of public services of general economic interest. The ad hoc measures are proportionate to the public service costs discharged by S.C. „Compania de Apa Someș” S.A; thus, it does not distort competition in such a manner to impede on the common interest.

(91) The state aid under the form of guarantee and budgetary allocations amounting of ROL 119,127,027,063, is compatible with a normal competitive environment.

### **DECIDES**

**Art.1.** The financial aid granted to S.C. „Compania de Apa Someș” S.A for financing the Project „Rehabilitation of the water supply system in towns from the hydrographic

basin of Somes-Tisa” represents State aid in the sense of art. 2 of *Law no 143/1999 on State aid, republished*.

**Art.2.** The notified state aid represents a compensation necessary to accomplish in normal safety and continuity conditions for the services of general economic interest of supply with drinking water and sewerage, compensation which does not unduly affect the trade between Romania and the Member States of the European Union.

**Art.3.** Pursuant to Art. 21 alin. 2 (b) corroborated with Art. 23 alin. 1 (j) of *Law no 143/1999 regarding state aid, republished*, the state aid for S.C. „Compania de Apa Somes” S.A, is authorized as aid to achieve under conditions of safety and continuity the service of general economic interest.

**Art.4.** Pursuant to Art. 32 of republished Law 143/1999, the grantor shall annually submit to the Competition Council information regarding the state aid granted to S.C. „Compania de Apa Somes” S.A, in view of monitoring the aid.

**Art.5.** The present Decision shall become effective upon its communication date.

**Art.6.** Pursuant to Art. 46 of *Law 143/1999 regarding state aid with subsequent modifications and completions*, this decision may be appealed by the interested persons before the Bucharest Court of Appeal, the Administrative Section, within 30 days from its communication.

**Art.7.** The present decision shall be communicated by the Secretariat General of the Competition Council to:

- Ministry of Public Finances, Apolodor Staeet no. 17 sect.5, Bucuresti;
- S.C. „Compania de Apa Somes” S.A, Bd. 21 Decembrie nr. 79, Cluj Napoca, Judetul Cluj.

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