

## **DECISION OF THE COMPETITION COUNCIL**

**No 57 on 29.03.2005**

**regarding the financial support measures granted by the Ministry of Economy and Commerce to the Commercial Company for Natural Gas Distribution „DISTRIGAZ SUD” S.A. Bucuresti**

### **THE COMPETITION COUNCIL,**

Taking into account the provisions of the Decree no.57/2004 for the appointment of the Competition Council's members,

Taking into account the provisions of the Law no. 21/1996, published in the Official Monitor no.88, Part I, on 30.04.1996, with the subsequent modifications and completions,

Taking into account the provisions of the Law no. 143/1999 regarding the State Aid, published in the Official Monitor of Romania, I<sup>st</sup> Part, no. 370 on 3.08.1999, with the subsequent modifications and completions,

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

**Based on the following reasons,**

### **I. THE PROCEDURE**

(1) By the address no. 271338/22.12.2004, registered at the Competition Council with no. RS-AS 109/23.12.2004, the Ministry of Economy and Commerce notified to the Competition Council, based on art.6 in the Law no.143/1999 regarding the state aid, with the subsequent modifications and

completions, the notification of the financial support measures granted to S.C. DISTRIGAZ SUD S.A Bucuresti.

(2) By the addresses of the State Aid Authorization Department no.DAAS/70/19.01.2005 and no.DAAS/149/09.02.2005 supplementary data were requested based on art.6 in the Law no.143/1999 regarding the state aid, with the subsequent modifications and completions. The Ministry of Economy and Commerce answered by the addresses no.155238/31.01.2005 and nr.155422/16.02.2005. The notification became effective when the data were complete and exact, namely on 16.02.2005.

## **2. DESCRIPTION OF THE MEASURE**

### **2.1. LEGAL BASIS FOR GRANTING THE STATE AID**

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

- GEO 37/2004 on measures to reduce arrears in the economy;
- GD 1649/2004 on measures to develop and finalize the privatization of the Commercial Company of Natural Gas Distribution S.C. “DISTRIGAZ NORD” S.A Targu Mures and of the Commercial Company of Natural Gas Distribution „DISTRIGAZ SUD” S.A. Bucuresti;
- Law no.563/2004 on certain measures for privatizing the Commercial Company of Natural Gas Distribution „DISTRIGAZ NORD” S.A. Targu Mures and of the Commercial Company of Natural Gas Distribution „DISTRIGAZ SUD” S.A. Bucuresti.

### **2.2. Beneficiary of the state measures of support**

#### **2.2.1. Preamble**

(4) The beneficiary of the state measures of support is S.C. DISTRIGAZ SUD S.A Bucuresti (hereinafter called DISTRIGAZ SUD). The company was set up under G.D. 334/2000 by the reorganization of the National Company of Natural Gases “Romgaz” S.A. On 30.06.2004, the registered capital of ROL 1,241,263 mill. was wholly held by the Romanian state as single shareholder, through the Ministry of Economy and Commerce.

(5) DISTRIGAZ SUD has as aim the accomplishment of the Government’s strategy for natural gas distribution, under the Romanian legislation in force.

The core business is distribution and supply of natural gas. The company also performs the following activities:

- dispatch of natural gas fuel systems and control of use of natural gas by the consumer;
- gas importing, diversification of gas sources (natural gas through, pipes, natural liquefied gas, liquefied oil gas);
- design of networks and installations for use of natural gas;
- services for the natural gas consumers, including investments for the consumers, from own resources.

(6) S.C. DISTRIGAZ SUD S.A. carries out its activity through its central headquarters in Bucharest, through 11 regional branches (Bucharest, Buzau, Brasov, Craiova, Fagaras, Galati, Pitesti, Ploiesti, Targu Jiu, Targoviste and Ramnicu Valcea) and through the service branch. S.C. DISTRIGAZ SUD S.A.'s branches don't have their own legal personality.

(7) These are some of DISTRIGAZ SUD's obligations, pursuant to the Law on Natural Gas 351/2003 as follows:

- ensuring continuity and safety in the supply of natural gas upon contracts;
- operation, maintenance, repair, modernization and development of the distribution system under safety, economic efficiency and environment protection conditions;
- ensuring a level of natural gas odorizing as provided by the rules in force;
- achieving interconnections with other systems, on a case by case basis, and ensuring the long-term capacity for the distribution system;
- ensuring third parties access to the distribution systems, under non-discriminatory terms, within distribution capacities, in line with the technological rules, as regulated by the special authority ANRGN;
- taking over for a fixed period of time, upon ANRGN's request and its regulations, of the operations of a distribution system whose initial operator was sanctioned by withdrawal of the distribution license;
- ensuring the permanent balance of the operated system;
- ensuring the safety conditions in the natural gas supply.

(8) Also, DISTRIGAZ SUD must comply with the general objectives of the natural gas sector. The best means to meet these criteria had in view:

- the necessity to store natural gas in the underground storehouse, in view of completing the internal sources for captive consumers during winter time (se definition of terms under pa. 2.2.2.),

- importance of maintaining under safety conditions the National Transportation Grid, in order to create non-discriminatory access conditions for the beneficiaries of underground storage services of imported natural gas,
- necessity to ensure safety for the natural gas supply to consumers.

(9) The natural gas distribution activity consists in the supply of a system of several final consumers in one area, connected through distribution pipes, under a 6 bars pressure regime. Pursuant to art. 32 of the Law on Natural Gas 351/2003 the activity of natural gas distribution is a public service of national interest.

(10) The activity of natural gas supply is a selling-buying commercial activity developed by a legal entity under a supply license.

(11) DISTRIGAZ SUD was entrusted with the natural gas distribution and supply through licenses issued by the National Agency for Regulation in the field of Natural Gas (ANRGN), recorded under no. 331/2004, no. 332/2004 and no. 333/2004.

(12) In order to perform the obligation of public service, to ensure continuity and safety in the supply of natural gas, DISTRIGAZ SUD purchases natural gas both on the domestic market and from imports. The main domestic natural gas suppliers are ROMGAZ and TRANSGAZ.

(13) The turnover and the profit registered by DISTRIGAZ SUD in the last three years is described in the table below:

**Table no. 1 Evolution of turnover and net profit during 2001- 2003** **mill. ROL**

<b>Index</b>	<b>Financial exercise</b>		
	<b>2001</b>	<b>2002</b>	<b>2003</b>
TURNOVER	10,873,964	14,131,331	18,451,082
of which :			
Achieved on the Romanian	10,873,964	14,131,331	18,451,082
NET PROFIT	81,842	1,725,170 <sup>1</sup>	59,811

<sup>1</sup> This year's result was influenced by the take over of the allowances constituted during the 2001 financial year.

(14) DISTRIGAZ SUD makes almost its entire incomes from distribution and supplying of natural gas. Also, a small percentage from the total incomes is held by incomes from check-ups and revision of installations.

### **2.2.2. The market on which DISTRIGAZ SUD operates**

(15) The relevant market for this service is the distribution and supply of natural gas, made up of two segments:

- a) regulated segment
- b) competitive segment

(16) In the regulated segment, DISTRIGAZ SUD supply and distributes natural gas to captive consumers. Under GO 784/2000, a captive consumer is ‘an individual or a legal entity that is bound, under the distribution system configuration, to contract natural gas from a particular producer or distributor, who is the supply license holder.’ Captive consumers who are connected to the distribution system for which DISTRIGAZ SUD has license are bound to sign contracts of supply of natural gas only with this company.

(17) The competitive segment includes trading of natural gas among suppliers and among suppliers and eligible consumers. The eligible consumer is an individual or a legal entity, Romanian or foreign, accredited by ANRGN, who has full liberty to buy natural gas from any producer and/or supplier and who has access to the transportation system and/or distribution. Eligible consumers are certified by ANRGN following the fulfillment of certain legal conditions, the main criteria being the quantity of natural gas consumed during one year which must exceed 3 million cubic meters.

(18) Both segments remain subject of specific regulations in the field. However, the public service obligation of supplying and distributing natural gas relates only to the regulated segment.

(19) The market regulator is the ANRGN. It issues licenses, authorizations, price decisions and tariffs. Along with the domestic market development and/or with the integration within the international markets, ANRGN has the obligation to decide upon a step-by-step opening, in part or in whole, of the regulated activities towards competition. The opening degree of the market is

represented by the proportion of the eligible consumers in the total of consumers of natural gas.

**(20)** With respect to the EU objectives regarding the total opening of the market in 2007, ANRGN as of 2001 has annually established a certain degree of opening of the market by increasing the number of eligible consumers. This had the following evolution:

- 2001 – 10% market opening;
- 2002 – 20% market opening;
- 2003 – 30% market opening;
- 2004 – 40% market opening.

It is aimed that, until 2007, the natural gas market to be liberalized 100%, as it follows:

- 2005 – 50% market opening;
- 2006 – 60% market opening;
- 2007 – 1<sup>st</sup> of January – 100% - for undertakings;  
- 1<sup>st</sup> of June – 100% - for population.

#### **2.2.2.1.      *Regulated segment***

**(21)** The regulated segment of the market encloses the legal monopoly activities and the delivery at regulated price, based on frame contracts. The price and tariffs systems are established by ANRGN based on its own methodology elaborated for this purpose. The normative act regulating price and tariffs calculation is the Gas Law no. 351/2004. These regulated prices and tariffs are establishes taking into account the protective social needs for the population.

**(22)** Under the obligation of public service, DISTRIGAZ SUD must supply natural gas at a regulated price and under the framework contracts to the captive consumers.

(23) Distrigaz Sud exploits a delivery network of 13,712 km of main pipes and branch pipes. Until November the 30th, 2004, the company delivered 4.4 billions square meters natural gas through its delivery and supply network.

(24) The company has 958,559 captive clients, structured as below:

- private houses – 927,312;
- undertakings – 31,247.

#### **2.2.2.2. Competitive segment**

(25) On the competitive market the supply prices are freely negotiable between suppliers and eligible consumers whereas the tariffs (of distribution, transport, storing), that are also part of the final price, are fixed by ANRGN by a decision. In the case of SC DISTRIGAZ SUD SA the negotiated price with the eligible consumers are very close to the regulated ones.

(26) Within DISTRIGAZ SUD SA's activity area there are 46 clients licensed as eligible consumers.

(27) The share of S.C. DISTRIGAZ SUD S.A.'s sales on the competitive market in the total sales of natural gases was of 9% in 2002, 12.6% in 2003 and of 15.4% in 2004.

#### **2.2.2.3. Geographic market**

##### **2.2.2.3. The geographical market**

(28) By its license the company's activity of distributing and supplying natural gas is limited to the South Romania, the company owning licenses issued by ANRGN for 20 counties, respectively 560 localities.

(29) [...]<sup>2</sup>

(30) The main competitors of the company re: SC Distrigaz Nord SA Targu Mures SNP PETROM SA Bucuresti.

### **3. Description of the privatization process**

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<sup>2</sup> Confidential data

(31) In view of privatizing the main state companies from the natural gas field, in 2003, the Ministry of Economy and Commerce (MEC), through the Office for State Holdings (OPSPI), upon an open auction, appointed a syndicate of financial consultants led by Credit Suisse First Boston International.

(32) Upon the reports and recommendations of the Consultants, on 4.11.2003, the Romanian Government adopted G.D. no. 1283/2003 approving the Strategy for privatization of DISTRIGAZ SUD Bucuresti and SC DISTRIGAZ NORD SA Târgu Mureş, which provided, among others:

- insuring the long term existence of the company by maximizing the level of investments and the know-how transfer to enhance the company's operation efficiency;
- attracting active strategic investors from the gas sector likely to identify the opportunities to efficiently use the company's resources and to create added value;
- offer to strategic investors 51% participation to DISTRIGAZ SUD's registered capital, through a combination between MEC's direct sale of 30% of existing shares, the increase of registered capital, and issuance of new shares in favour of the strategic investors.

(33) The privatization announcement was published in the Romanian and international press (including the *Financial Times*, international edition, in 5 December 2003). The announcement requested letter of interest on behalf of the strategic investors who met the following criteria:

- annual incomes of over USD 1,000 million for each of the past three financial years, obtained from business in the natural gas and energy utilities field;
- technical and managerial experience of at least three years in the gas and energy utilities field, appropriate to the size or the proposed privatization;
- creditworthiness letter issued by a reputed banking institution.

(34) The privatization process could also be attended by syndicates which met the following conditions:

- a strategic investor appointed to lead/represent that syndicate in all matters;
- the strategic investor(s) must hold at least 51% of the shares acquired (through the transaction) in the particular company;



- annual combined incomes of over USD 1,300 million for each of the previous three financial years mainly obtained from business in the natural gas sector and/or energy utility field;
- for the syndicate leader, technical and managerial expertise of at least 3 years in the natural gas sector and/or energy utility field, adequate for the size and profile of the transaction;
- creditworthiness letter provided by the strategic investor leading/representing the syndicate, issued by a reputed banking institution.

(35) After the privatization announcement was published, 5 potential strategic investors send letters of interest (from within and outside the EU): Enel S.p.A – Italy, OAO Gazprom – Russia, Gaz de France – France, E.On Ruhrgas AG – Germany, Wintershall – Germany.

(36) The relevant documentation submitted with the letters of interest were analyzed, and based on Consultants' recommendations, all the above-mentioned potential bidders were declared pre-qualified for the continuation of the process of privatization.

(37) As of January 2004, those pre-qualified investors who signed the confidentiality agreement were granted access to the bidding specification file and to the data room set up by the consultants, in material and electronic form, where all information related to the company's financial status were included (including the status of debts and penalties to the suppliers), and they were offered the opportunity to meet the management of the company and to make visits on company sites.

(38) On March 15, 2004, there were received preliminary and non-binding bids from Enel S.p.A, OAO Gazprom, Gaz de France, E.On Ruhrgas AG. They took part in negotiations on the contractual form of the privatization. Negotiations took place in a non-discriminatory and transparent manner and everybody was able to convey comments on the draft contract of privatization, both in writing and within interactive meetings held at OPSI headquarters in Bucharest.

(39) All the preliminary and non-binding bids were deemed to meet the conditions stipulated for further participation in the privatization process. After negotiations, the negotiation commission and the Consultants drafted the revised framework of the transaction documents which was conveyed to the bidders in order to submit their final engaged bids.

(40) The privatization draft contract was sent on May 14, 2004 to all pre-qualified investors who were asked to send comments on this draft as part of the preliminary and non-binding bids. Each bidder received the same revised draft (all bidders were equally treated). This draft included data on the facilities which are the object of this decision – those included in Government Emergency Ordinance 37/2004 (GEO 37/2004) and those related to the not covering by the company of losses incurred after the conversion into shares. On this topic, the position of all investors was very clear during negotiations, as they were able to fully seize the impact of these facilities on the value of the company, and accordingly, the price offer took these into account.

(41) The deadline to submit the final offers was set for July 15, 2004. Three investors submitted their proposals for Distrigaz Sud privatization on this date, namely:

- Enel S.p.A – Italy;
- Gaz de France – France;
- OAO Gazprom – Russia;
- E. ON Ruhrgas AG – Germany.

(42) MEC, through OPSPI, analyzed the bids submitted by the four candidates and began direct talks with Gas de France (GDF), the highest bidder, with the intention to reach a final agreement regarding the contractual framework applicable to the transaction. The privatization contract between MEC/OPSPI and GDF ('Privatization Contract') was signed on October 18, 2004, the value of acquisition of the controlling interest being of [...]<sup>3</sup>.

(43) Notwithstanding the meeting of all conditions for the pre-finalization and finalization, GDF shall acquire, as of the finalization date, 51% shares of Distrigaz Sud's registered capital. This will be achieved through the purchase of a number of shares amounting of about 30% of Distrigaz Sud's registered capital from MEC/OPSPI, and the underwriting of an additional number of shares within an increase in Distrigaz Sud's registered capital.

(44) Based on the above, the Competition Council concludes that the privatization of Distrigaz Sud Bucuresti was made under an open bidding procedure, non-discriminatory, transparent and unconditional:

- a competitive, transparent and unconditional process took place, open to all the bidders in the gas sector;

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<sup>3</sup> Confidential data

- the bidding conditions and the bidding process rules were the same for all three bidders who expressed their clear intention to buy the controlling interest of Distrigaz Sud Bucuresti;
- the Privatization Contract was signed with GDF, the highest bidder; and
- all bidders benefited from sufficient time (between January and July 2004) and from information (access to the data room set up in material and electronic form, the opportunity to meet the company' management and to make visits on company sites, access to the draft Privatization Contract), in order to make a proper evaluation of Distrigaz Sud and based their final bid.

(45) This procedure ensured, pursuant to the principles of the market economy, a competitive price which reflect the correct market value of Distrigaz Sud, since all the factors which may have influence over the value of the company were discussed during negotiations and were finally reflected in the price offered by GDF.

#### **4. Financial facilities provided for in the Privatization Contract**

1. Measures of financial support provided by GEO 37/2004
2. Not covering by the company of losses incurred after the conversion of debts into shares

##### **4.1. Measures of financial support provided by GEO 37/2004**

(46) Through GEO 37/2004, the Romanian Government wanted to create a mechanism through which arrears in the economy may be reduced and the degree of attractiveness of companies at issue may be increase for the strategic investors. The relevant provisions in GEO 37/2004 are Arts. 1, 6, 8 and 10.

##### *a) Provisions of Art. 6 of GEO 37/2004*

(47) Art. 6 (1) of the ordinance provides that outstanding commercial claims of Distrigaz Nord and Distrigaz Sud over natural gas consumers, except individual residential household and collective consumers, up to ROL 6,100 bill., are to be taken over via a protocol agreement in view of recovery by the Authority for State Asset Recovery (AVAS), within 30 days as of entry into force of the emergency ordinance.

(48) Thus, by protocol agreement outstanding claims amounting at ROL 2,914,880,714,334, belonging to 152 undertakings, were delivered to AVAS. From these, 73 undertakings, whose claims amounted at ROL 1,028,375,606,824 were under liquidation or judicial reorganization.

(49) The Ministry of Public Finance, under the protocol agreement to take over commercial claims mentioned at point (47), launches bonds on the domestic market, in ROL or foreign currency, of a total face value equal to the value of commercial claims taken over by AVAS. After the issuing of state bonds, the Ministry for Public Finance transferred into Distrigaz Sud's account the amount of ROL 2,914,880,714,334.

(50) Distrigaz Sud can only use those amounts in order to reduce its own debts to the natural gas suppliers, respectively to the National Company for Natural Gas "Romgaz" SA, the National Company for Natural Gas Transportation "Transgaz" SA and the National Oil Company "Petrom" SA.

(51) With the amounts received from the Ministry of Public Finance (MFP) the following debts of SC Distrigaz Sud SA to the natural gas suppliers, amounting ROL 2,914,880,714,334, were paid:

- to Romgaz 2,831,591,281,665 ROL;
- to Transgaz 83,289,432,669 ROL.

(52) Pursuant to Art. 6(4), interest rates, penalties for late payments and penalties of any kind, owed to natural gas consumers by Distrigaz Sud SA and Distrigaz Nord SA, whose commercial claims were taken over by AVAS, shall be annulled.

(53) On 28.06.2004, the amounts annulled by Distrigaz Sud, pursuant to Art. 6(4) are of ROL 3,095,791,186,251.

*b) Provisions of Art. 8 of GEO 37/2004*

(54) Align.2 of art.8 provisions that the interests, delay majorities and penalties of any kind deed by SC Distrigaz Nord SA and SC Distrigaz Sud SA to Romgaz, Transgaz and Petrom are being annulled.

(55) This way, were exempted from the payment SC Distrigaz Sud SA's delay penalties deed to the gas suppliers, in total amount of ROL 4,620,441,194,065, as follows:

- to Romgaz	ROL 3,663,499,019,358;
- to Transgaz	ROL 336,927,019,524;
- to Petrom	ROL 619,988,155,183.

*c) Provisions of article 1 of the GEO no. 37/2004*

(56) According to art. 1(4), the legal entities who pay the whole value of the bills standing for current and arrear obligations for natural gas consumption by June 30, 2004, shall benefit from write-off of penalties and penalties for late payments.

(57) The debts paid by legal entities gas consumers, until June 30, 2004 represented ROL 261,927,512,508, whereas penalties and penalties for late payments that were written-off according to the provisions of article 1(4) by Distrigaz Sud amounted ROL 512,369,713,608.

*d) Provisions of article 10 of the GEO no. 37/2004*

(58) According to article 10, for the dividends related to the financial year 2001, owed to the OPSPI by SC Distrigaz Nord SA and SC Distrigaz Sud SA and paid to the state budget, no penalties, increases and interest rates for late payments shall be charged as calculated until the account of OPSPI is credited.

(59) The penalties owed to the OPSPI that were not charged amount 10,120,133,888 ROL.

**4.2 Not covering by the company of losses incurred after the conversion of debts into shares**

(60) Distrigaz Sud was forced by legislative means to convert their claims to certain debtors (state owned undertakings) into shares at nominal value. As those companies were privatized by AVAS, Distrigaz Sud would recover the countervalue of its own shares in those companies.

(61) The Privatisation contract provides that Distrigaz Sud shall transfer to AVAS all the shares resulted from the conversion into shares of all the claims

hereinbefore mentioned at point (60), in the total amount of ROL 356,866,127,173.

(62) AVAS shall pay into the account of the company all the amounts resulting from the selling of the shares, whereas all the differences from the nominal value of the shares after conversion and the value resulting from selling, shall be covered by the Ministry for Public Finance and paid into the company's account.

(63) Synthetically, the measures provisioned in the privatization contract can be presented as follows:

**Table no. 2** Measures enclosed in the privatization contract

<b>Measures from which SC DISTRIGAZ SUD SA benefits</b>		<b>Measures granted by SC Distrigaz Sud SA to its clients</b>	
<b>Measure</b>	<b>Amount (ROL)</b>	<b>Measure</b>	<b>Amount (ROL)</b>
The taking over of Distrigaz claims by AVAS (art. 6(1) in EGO no 37/2004)	2,914,880,714,334	Exemption of interests and penalties for the late payment (art. 6(4) in EGO no 37/2004)	3,095,791,186,251
Exemption of interests and penalties for the late payment towards the suppliers (art. 8(2) in EGO no 37/2004)	4,620,441,194,065	Exemption of interests and penalties for the late payment (art. 1(4) in EGO no 37/2004)	512,369,713,608
Annulled penalties for the dividends towards OPSPI (art. 10 in EGO no 37/2004)	10,120,133,888		
Not covering of losses incurred after the conversion of debts into shares	356,866,127,173		
<b>TOTAL FACILITIES</b>	<b>7,902,308,169,460</b>		<b>3,608,160,899,859</b>

## **5. Analysis of the financial measures provided by the Privatization Contract of Distrigaz Sud and their state aid character**

## **5.1 The analysis of the financial support measures from which SC DISTRIGAZ SUD SA benefits**

(64) As explained under point (63) above, Distrigaz Sud has benefited from public facilities amounting to ROL 7,902,308,169,460. These facilities have been granted to Distrigaz Sud and may fall within the scope of Law no.143/1999 on the State aid, as these constitute selective State financial support measure which may have the potential to distort the normal competitive environment by giving an economic advantage to SC Distrigaz Sud SA thereby affecting trade between Romania and the Member States of the EU.

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

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

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

### **a) Art.6(1) in EGO no.37/2004**

(68) The taking over by AVAS of SC Distrigaz Sud SA's commercial outstanding claims amounting ROL 2,914,880,714,334, for recovering them, can fall under the incidence of the Law no.143/1999 on the State aid, as it is a selective support measure, giving an advantage to SC Distrigaz Sud SA, and therefore being possible to distort the competition and the commerce with the Member States.

(69) When the bidding offers for the acquisition of the company were made, there was a certain uncertainty regarding the degree of Distrigaz Sud chances to recover the debts, existing the risk that this uncertainty degree to be highly over-assessed by the investors, which from prudence reasons could be tempted to take exaggerated protection measures when elaborating the price offers, this way disadvantaging the Romanian State.

(70) As mentioned at point (48) from the total of the customers - 152 undertakings - who's debts were taken over by AVAS, 73 were in liquidation or judicial re-organizing. As far as the rest of the clients, it cannot be calculated the degree of the debts' recovery, this being possible to vary between 0% to 100%, according to the appealing degree of the capitalised goods and the number of those interested to participate to the selling procedures.

(71) If the State would have not ordered the taking over of Distrigaz Sud's claims by AVAS, it is possible that GDF might deduce these sums from the offered price supposing that it doesn't recover them.

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

**b) Art.8 (2) in EGO no.37/2004**

(73) Annulment of the interests, delay majorities and penalties of any kind, deed by SC Distrigaz Sud SA to Romgaz, Transgaz and Petrom can fall under the incidence of the Law no.143/1999 on the State aid, as it is a selective support measure, giving an advantage to SC Distrigaz Sud SA and thus being able to distort the competition and the commerce with the Member States.

(74) Regarding the advantage granted to Distrigaz Sud by these facilities, the Competition Council assessed the measure in which the state acted like a prudent private investor. The facility provided by art. 8(2) didn't raise any difficulty in calculating the amount, its level being known by all the possible investors that could accurately take it into account in the offer. This way, the investors took into account the facility when submitting their purchase offers, offers showing the advantage given to SC Distrigaz Sud SA.

(75) Any existing debts of the company would have led to the decrease of the corresponding amount at the evaluation of the company and as a consequence, a



decrease in the price offered by bidders. It can be said therefore, that the majorities and penalties deed by Distrigaz Sud to its suppliers were paid by GDF, as part of the price paid in the privatization process, and that the buyer's "loss" due to the company not paying its obligations was recovered by the proper increase of the immediate incomes – the price paid by the investor.

(76) The Competition Council considers that the State acted according to the principle of a private investor in a market economy, this being the classical approach of any seller trying to clarify as much as possible the situation of the sold good, for maximizing its market value.

**c) Art.10 in EGO no.37/2004**

(77) If the State gives up to any incomes (here the annulment of the penalties for the dividends towards OPSPI), granting this way an advantage to an undertaking falls under the incidence of the Law no. 143/1999 on the State aid, with the subsequent amendments and completions.

(78) The Competition Council assessed the degree in which the State acted as a private prudent investor in relation with the advantage granted to Distrigaz Sud by the annulment of the penalties for the dividends toward OPSPI. The existence of this obligation would have had as result the proper deduction of the sum related to it when assessing the company and therefore, the reduction of the price offered by the bidders.

(79) Therefore, it can be said that the annulment of the penalties for the dividends towards OPSPI were paid by GDF as part of the price paid in the privatization process, and that the seller's "loss" resulted from the fact that the company didn't paid these obligations, was recovered by increasing of the immediate incomes – the price paid by the investor. Therefore, the State acted according to the principle of a private investor in a market economy.

**d) Not covering by the company of losses incurred after the conversion of debts into shares**

(80) As mentioned at point (60) Distrigaz Sud was forced on legal way to convert its claims, owed by several debtors - State owned companies- to nominal value. These shares were transferred towards AVAS, which has to repay to Distrigaz Sud the price received from the sale of these shares, the difference to the nominal value following to be given to the company by MPF.

(81) Until now, AVAS couldn't sale all the shares received by Distrigaz Sud after converting the debts and so the value of the difference to be paid by MPF isn't known.

(82) Before submitting the offer, all investors were officially informed to consider the ROL 356,866,127,173 amount related to the conversion into shares of the debts transferred towards AVAS, as already cashed in. Therefore this aspect was also taken into account in the offer, being showed in the offered price.

(83) In the absence of this mechanism it is very likely that the investors would have deduced these sums from the offered price, supposing that these aren't going to be recovered. Under these circumstances, the Competition Council considers that the Romanian State acted as a prudent investor, interested in maximizing immediately the benefits obtained from the company's sale.

## **5.2. The analysis of the financial support measures granted by SC Distrigaz Sud SA to its clients**

(84) The facilities granted by Distrigaz Sud in the basis of art.1(4) an art. 6(4) in the EGO no.37/2004 can fall under the incidence of the Law no.143/1999 on the State aid, as they have selective character, giving an advantage to SC Distrigaz Sud SA's clients and being possible to distort the competition and the commerce with the Member States.

(85) These facilities' state aid character and their compatibility with the normal competitive environment shall be object of a subsequent analysis of the Competition Council.

## **6. Conclusions**

(86) The Competition Council notes that it took place a competitive, transparent and un-conditioned bidding process, all bidders being treated equally, without discrimination, benefiting of sufficient time and complete information to make a proper assessment of Distrigaz Sud as base for the final offers, and the privatization contract was closed with GDF, who offered the highest price.

**(87)** In the draft of the privatization contract which was submitted to all pre-qualified bidders, were enclosed data related to the facilities provisioned in EGO no.37/2004 and to the facility consisting in not covering by the company of losses incurred after the conversion of debts into shares. This way, all the interested parties were informed by the existence of these facilities and could take it into account when submitting their offers.

**(88)** It may be considered the measures provisioned in the privatization contract are of two types:

- measures for the annulment of certain obligations of the undertakings, precisely quantified (i.e. amount of penalties and dividends annulled),
- measures by which the State meant to clarify the situation that risk to be overrated by the investors in an unfavourable manner for the state, that would lead to a considerable decrease of the price offered (taking over of claims by AVAS and not covering by the company of losses incurred after the conversion of debts into shares).

**(89)** [...] <sup>4</sup>

**(90)** [...] <sup>5</sup>

**(91)** As far as the advantage given to SC Distrigaz Sud SA by granting these facilities is concerned the Competition Council assessed in which degree the State acted as a private prudent investor. Any existing commercial obligations (towards the natural gas suppliers) and fiscal obligations (towards OPSPI) would have had as result the deduction of these sums from the company's value accordingly, for taking into account their payment, and hence the reduction of the price offered by the bidders.

**(92)** It can be concluded that the advantage offered to SC Distrigaz Sud SA resulted from the application of EGO no.37/2004 and from the measure of not covering by the company losses incurred after the conversion of debts into shares was paid by GDF as part of the price offered in the privatization process and that the seller's "loss" due to the fact that the company didn't paid these obligations was recovered by increasing of the immediate incomes - the price paid by the investor.

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<sup>4</sup> Confidential data

<sup>5</sup> Confidential data

**(93)** The solutions presented were considered to be the best ones in order to maximize the net incomes from the privatization paid to the state. Therefore, the State behaved as a private investor would behave in similar conditions.

**(94)** In conclusion, the Competition Council considers that the facilities granted to SC Distrigaz Sud SA are not state aid as they are part of the package offered to any potential investor within a transparent and opened bidding procedure after which the real market value was established. Acting this way, the State fulfilled the private investor's principle, obtaining a price higher than it was expected from a profitable company's privatization, with a healthy financial situation and with real development perspectives in future, in which the State will still own 49% of the registered capital.

## **DECIDES**

**Art. 1.** Based on art.12(2) letter a) in the Law no.143/1999 on State aid, with the subsequent modifications and completions, it is found that the support measures notified by the Ministry of Economy and Commerce that are granted to SC DISTRIGAZ SUD SA consisting in annulment of majorities and delay penalties due to the natural gas suppliers, the annulment of the penalties for the dividends toward OPSPI, taking over the outstanding claims by AVAS and not covering by the company of losses incurred after the conversion of debts into shares, doesn't constitute state aid in the sense of art. 2 of Law 143/1999 on State aid, with the subsequent amendments and completions.

**Art. 2.** The present Decision is applicable upon its communication.

**Art. 3.** According to provisions of art. 29 of Law 143/1999 on state aid, with subsequent modifications and completions, the present decision may be appealed by the interested persons before the Bucharest Court of Appeal, administrative section, within 30 days from its communication.

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

- The Ministry of Economy and Commerce, Calea Victoriei nr.152, sector 1, Bucharest;

– S.C. DISTRIGAZ SUD S.A., B-dul Marasesti no.4-6, Bucuresti.

**Art. 5.** The General Secretariat and the Directorate for Authorization of State Aid within the Competition Council shall pursue the fulfilment of the present decision.

**MIHAI BERINDE**

**PRESIDENT**