

D E C I S I O N No. 62/04.04.2005

regarding the guarantee granted by the Bacau City Hall to *Regie Autonome* of Town Management Bacau, for contracting a loan to co-finance the Project „Improvement of water supply systems, collection and treatment of waste water in the city of Bacau”

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, I Part on 30.04.1996, amended and completed by the EGO no.121/2003, approved by the Law no.184/2004;

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, with subsequent modifications and completions;

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 12th, 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 the note no. 3611/27.10.2004, filed at the Competition Council no. RS-AS 90/29.10.2004, Bacau City Hall notified, based on art. 6 from the *Law no. 143/1999 regarding state aid with subsequent modifications and completions*, the guarantee granted to secure an external loan by 'Regia Autonoma de Gospodarie Comunala Bacau' (*Regie Autonome* of Town Management).
- (2) With the notes DAAS/875/05.11.2004, DAAS/893/09.11.2004, DAAS/176.16.02.2005 and DAAS/209/01.03.2005, additional information were requested, based on art. 6 para. (4) from *Law no.143/1999, with the subsequent modifications and completions*.
- (3) The notification became effective as of the date when the information was accurate and complete, respectively on 21.03.2005.

2. DESCRIPTION OF THE MEASURE OF FINANCIAL SUPPORT

2.1 The beneficiary of the support measure granted by the state

- (4) The beneficiary of the notified support measure is „Regia Autonoma de Gospodarie Comunala” Bacau (hereinafter referred to as RAGC Bacau) under direct supervision from Bacau Local Council.
- (5) RAGC Bacau was established according to the provisions of Law no.15/1990, of the G.D. no.1330/1990 and of the Bacau County Prefecture Decision no.34/1991, as a company with legal person status, functioning based on economic management and financial autonomy for the management of goods in the public domain (the water supply and sewage systems) required to discharge the public services of water supply and sewage systems.
- (6) The net worth of RAGC Bacau amounts to ROL 468,066,717 thousands.
- (7) The company is headquartered in the city of Bacau and registered with the Registry of Commerce under no. J04/244/1991 and fiscal registration code R954851.
- (8) The economic and financial results obtained by RAGC Bacau in 2002-2004 are presented in Table no. 1.

Table no. 1 - Economic and financial results of RAGC Bacau

-ROL thou.-

No.	INDICATOR	2002	2003	2004
1.	TURNOVER	152,437,506	145,832,023	160,023,248
2.	NET PROFIT	21,956,080	7,500,955	8,895,535

Source: Notification Form

Data in Table no. 1 show that in each year of the analyzed period RAGC Bacau has a positive financial result for it entire activity.

- (9) According to its statute the main object of activity of RAGC Bacau is represented by the discharge of the following services of public town management: the sourcing, transport and distribution of drinking water and the collection, transport and treatment of waste water. 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 entirety of 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) In accordance with the Decision of the Local Council no. 110/2001 and the A.N.R.S.C Order no. 341/06.12.2004 issuing the license to discharge the public service of water supply and sewage, RAGC directly administers and operates the public systems for the supply of drinking water and sewerage in the city of Bacau.
- (11) The obligations to consumers of RAGC Bacau, 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 utilities' documents, according to the clauses of the operating agreement.

- (12) Given the above, the public services of general economic interest entrusted to the company are:
- supply of drinking water (the public service of drinking water supply entails mainly the sourcing, treatment of water, transport and distribution of drinking water);
 - sewerage (the public service of 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) The services for the supply of drinking water and sewerage services represent 96% from the total activity carried out by RAGC Bacau. Given the fact that there is only one sewerage network in the city of Bacau, RAGC takes over both the waste domestic water as well as industrial, the latter activity having a non significant contribution to the entire activity of RAGC Bacau. We mention that each undertaking has the obligation to ensure the treatment of the waste industrial water resulted from its activity before discharging it in the sewerage network.
- (14) The weight of the public services of water supply and sewerage for the population and public institutions represents 90% of the total public services discharged by RAGC Bacau.
- (15) The ancillary activities carried out by RAGC Bacau reside in checking and repairing of water meters and emptying of septic tanks.

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

- (16) 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 sewerage. These services represent 96% from the total activity of RAGC Bacau.
- (17) 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. The geographical market is represented by the city of Bacau, a market of local interest. This is a regulated market, prices and tariffs of the services are not

determined by supply and demand but approved by the local public administration – the Local Council of Bacau – and adjusted and agreed by A.N.R.S.C. The service provider is bound to ensure the supply of services to all 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.

- (18) RAGC Bacau is the only provider of public services for the supply of drinking water and sewerage in the area it discharges the service, respectively the city of Bacau.

2.3. Ways of granting the financial support

- (19) The notified financial support consists in guaranteeing by the Local Council of the city of Bacau for 100% of an external loan contracted by RAGC Bacau from the European Bank for Reconstruction and Development. The value of the loan is of EUR 13,001 thousand to be reimbursed in 2009-2016, with an interest rate of Euribor + 3,65% per annum.
- (20) The loan is earmarked to co-finance the Project „Improvement of the systems for water supply, collection and treatment of waste water in the city of Bacau” (hereinafter referred to as the ‚Project’), project for which RAGC Bacau benefits of non reimbursable financial assistance in value of EUR 39,005 thousand by the Instrument for Structural Policies for Pre-Accession (ISPA). The terms for realizing the Project, the financing modalities and of its implementation are regulated by the *Financing Memorandum from 16 March 2004, between the Government of Romania and the European Commission, regarding the non-reimbursable financial assistance granted through the Instrument for Structural Policies for Pre-Accession.*
- (21) The legal basis for granting the notified financial support is the *Local Council Decision no. 228/2004 regarding the approval by the Local Council of the city of Bacau of the Guaranteed Project Assistance Agreement between the city of Bacau and the European Bank for Reconstruction and Development.*

2.4. Description of the Project

(22) Considering the age and the considerable worn out ratio of the public water and sewerage infrastructure in the city of Bacau, the Local Council identified the necessity to realize investments to modernize it. Due to the fact that RAGC Bacau is entrusted with the discharge of public services of water supply and sewerage in the city of Bacau, the obligation to realize the Project „Improvement of the systems for water supply, collection and treatment of waste water in the city of Bacau” belongs to RAGC Bacau.

(23) The value of the Project „Improvement the water supply systems, collection and treatment of waste water in the City of Bacau” is of EUR 52,056 thousand and is financed as follows:

- a. EUR 39,005 thousand – ISPA assistance (75% from the Project value);
- b. Co-finance portion (25% of the Project value), as follows:
 - EUR 13,001 thousand – EBRD loan guaranteed by the Local Council;
 - EUR 50,000 – own funds of RAGC Bacau.

(24) The Project „Improvement the water supply systems, collection and treatment of waste water in the City of Bacau” consists in investments for the treatment and distribution of drinking water, the collection and discharge of waste water in the city of Bacau. The financed components of the Project are the following:

- A. Collection and treatment of drinking water;
- B. Collection and purification of waste water;
- C. Technical assistance, supervision during implementation and publicity.

(25) The A component contains the following investment objectives:

i. Construction and revamping of the main duct connecting Bacau and the water source

The new gross water sourcing will comprise a DN 1,200 pipe and will include an operational room with safety valves, a new pumping station which will temporarily compensate the insufficient gravitational debits in accordance with the level of the water in the lake and with temporary water requirements in Bacau.

ii. treatment station for drinking water

This station includes quick gravitational filters and equipments for coagulation, chlorination and loss detection. The new station for water treatment will have a maximum of 63,000 m³ /day, appropriately treated water.

(26) The B component contains the following investment objectives:

i. Renovation of the sewerage network

Currently, the total length of the sewage network is 258 km connecting, 86% of Bacau population. Approximately 80 km of the sewage network are over 30 years old and require careful supervision. As a result of inspections, RAGC Bacau identified the necessity of replacing 7.3 km of DN 400 mm pipes, 3.5 km of DN 500 mm pipes, 0.6 km. of DN 600 mm. pipes. Major defects identified are sub -dimensioning diameters of pipes, cracks at welding points, leading to frequent blockages and to the increase of infiltration and exfiltration debits. The investment includes the acquisition of equipments for sewage washing, inspection rooms and hydraulic programmes for sewage. After implementing this objective actual infiltrations will be reduced by approximately 20%, i.e. 10,000 m³/day.

ii. Renovation of the purification station of waste water (SEAU)

Currently SEAU does not meet the standards of *Directive no.91/271/CEE regarding the purification of urban waste water* .SEAU is not dimensioned for the future needs of Bacau, being equipped with worn out installations, with small purification efficiency and high energy consumptions. The SEAU Project will rehabilitate the network for an annual average debit of 58,000 m³ /day meeting the above mentioned Directive requirements. This investment objective requires installing equipments for measuring entry debits, installing automated equipments for probe taking and appropriate waste water analysis facilities, as well as equipments to record debits of waste water.

(27) The C component includes the following activities:

- preparing tender documents;
- supervision during the implementation;
- ensuring publicity for the Project.

(28) Deadlines to finalize investments within the project are shown in Table no.2.

Table no.2 - Financing sources and deadlines to finalize investment objectives included in the Project

No.	INVESTMENT OBJECTIVES	FINANCING SOURCES	DEADLINE
1.	Rehabilitation of sewage network	Own sources of RAGC Bacau	Dec. 2006
2.	Rehabilitation of the purification station for waste water (SEAU)	EBRD loan	Mar. 2008
3.	Construction and rehabilitation of the main duct connecting Bacau to the water source	ISPA funds	May 2008
4.	Drinking water treatment station	ISPA funds	May 2008

Source: Financing memorandum

3. ANALYZING THE SUPPORT MEASURE FROM THE STATE

3.1. State aid in the sense of Law 143/1999 on State aid, with further modifications and completions

(29) In order to ascertain the applicability of the rules on State aid, the Competition Council has to analyze, if the measure constitutes aid within the meaning of *Law 143/1999 on State aid, with further modifications and completions*.

(30) Art. 2 of *Law 143/1999 on State aid, with further modifications and completions* 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 affects trade, incompatible with a normal competition environment.

3.1.1. The object of the decision

(31) Based on the notification received by the Competition Council from the Local Council of Bacau City, the object of the present decision is the financial support under the form of municipal guarantee granted to RAGC Bacau. The guarantee has been granted for contracting a loan from EBRD for financing an

investment objective regarding the infrastructure of water and sewerage of the city.

3.1.2. No exemption according to the Guidelines on guarantees

- (32) The financial measure in question is a guarantee. 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.
- (33) 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 granted 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.

Presently, the above mentioned conditions are not cumulatively fulfilled.

- (34) Analyzing the overall economic and financial position of RAGC Bacau it can be concluded that the company is not in difficulty. It results from the plausible information sent by the beneficiary that RAGC Bacau can obtain loans from the Romanian Commercial Bank, at market terms, without the state intervention. Thus, the Competition Council considers the conditions from paragraph (33) a) and b) from the *Guidelines on the state aid granted under the form of guarantees* to be met.
- (35) However, since the municipal guarantee is of 100% and RAGC Bacau does not pay any premium to the Local Council in the account of the guarantee, the conditions provided at paragraph (33) c) and d) from the *Guidelines on the state aid granted under the form of guarantees* are not met. Consequently, the rules on guarantees do not exclude the applicability of the rules on state aids concerning the guarantee from which RAGC Bacau benefits.
- (36) 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 under the form of guarantees 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.”

- (37) Because the Romanian Commercial Bank would have granted RAGC Bacau a similar loan without the Local Council guarantee with an annual interest rate of 11.5%, the Competition Council considers that this rate can be taken as reference when calculating the financial support under the form of guarantee.
- (38) In these circumstances, the financial support granted under the form of guarantee is equal to the net grant equivalent¹ of the loan guaranteed by the Local Council (in amount of EUR 13,000 thousand), calculated as the discounted difference between the market interest rate and the interest rate obtained due to the municipal guarantee, respectively: EUR 7,495.58 thousand, the equivalent of ROL **269,706,211.43 thousand**.²
- (39) Since the service in question has the character of a public-service-obligation, recent case law of the ECJ in the context of the definition of state aid in this field and art. 4 of *the Regulation on state aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest* has to be taken into account.

3.1.3. No exemption according to the Art. 4 of the *Regulation on state aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest* (Altmark-Judgement)

3.1.3.1 General

- (40) 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 with subsequent amendments and completions*, 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;

¹ 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 2005-2019.

² The NBR exchange rate from 15.03.2005, respectively 1 Euro=ROL 35,982 was used for calculations.

- 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.

3.1.3.2. The condition from par. 3.1.3.1. a):

- (41) RAGC Bacau is entrusted to deliver public services of water supply and sewage by the license approved by A.N.R.S.C. Order no. 341/06.12.2004. In the license 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, 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 Council and established by the ANRSC.
- (42) According to the *Law on town management no. 326/2001*, the water supply and sewage services are public utility services.
- (43) 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.

(44) Organization, operation and functioning of public services must ensure:

- a) Meeting the quantity and quality demands of users, according to the contract provisions;
- b) 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;
- c) Protecting the public estate and environment by observing the legal provisions;
- d) Informing and consultation the citizens with the purpose of protecting the health of the population benefiting from these services.

(45) The supply of the public service of drinking water and sewerage is achieved through the public system for water and sewerage, part of the technical-municipal infrastructure of the town. The administration of the water and sewerage system, necessary for delivering the general economic interest service is entrusted to the autonomous regie by the Local Council of Bacau city through H.C.L.M. no. 110/2001.

(46) Regarding the above presented facts, we underline that RAGC Bacau is under the obligation to ensure the effective functioning of services relating to the production, transport, distribution and supply of drinking water that are essential for the population, institutions and undertakings of Bacau city, as well as the collection, transport and treatment of the waste domestic and meteoric water from the city of Bacau. It is furthermore required to provide these services at a regulated price that is intended to ensure the affordability for the consumer. Consequently, one can conclude that RAGC Bacau is entrusted, by licenses, with the discharging of a service of general economic interest.

3.1.3.3. The condition from par. 3.1.3.1. b):

- (47) 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.
- (48) 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 users and the economical viability of the operators of public services.
- (49) The prices and tariffs for public services of water supply and sewage are defined in advance according to transparent parameters such as: production and operating costs, repairs and maintenance costs, the annual depreciation of investment; 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 investments and to be correlated with the users' affordability degree.
- (50) The operators which demand 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.
- (51) 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:
 - untreated water;

- technological losses;
 - energy;
 - technological materials;
 - administration repairs;
 - repairs for third parties;
 - research and studies;
 - cooperation;
 - commissions and fees;
 - protocol, advertising;
 - post and telecommunications;
 - water quality protection costs;
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.

(52) 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 with 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 taken into consideration at the previous approval.

- (53) In the case of the operators which are subject to development programs and rehabilitation of utilities (as the case of RAGC Bacau, involved in the Project „Improvement the water supply systems, collection and treatment of waste water in the City of Bacau”), 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.
- (54) Before the beginning of every financial exercise RAGC Bacau is justifying its revenues and expenditures budget, which is subject to the analysis and approval of the Bacau Local Council. In the budget are distinctly presented the revenues and expenditures related to the operating activity, as well as the planned investments to be realized in the respective year. 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. At the same with the 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.

3.1.3.4. The condition from point 3.1.3.1. c):

- (55) Condition 3.1.3.1.c) provides that this compensation must not be higher than the costs imposed by the discharge of the service for general economic interest.
- (56) As pointed in para. (38), the financial support granted to RAGC Bacau by the Local Council under the form of guarantee is in total amount of ROL 269,706,211.43 thousand.
- (57) The guarantee was granted to contract an EBRD loan in amount of EUR 13,001 thousand earmarked to co-finance the Project „Improvement the water supply systems, collection and treatment of waste water in the City of Bacau”. The project is financed 75% from ISPA funds. Contracting such a loan was necessary to ensure the co-financing of the beneficiary, respectively RAGC Bacau, of 25% from the value of the project (an indispensable condition for obtaining the non-reimbursable financing from ISPA Program).

- (58) Analyzing the economic and financial position of RAGC Bacau at the moment of contracting the loan guaranteed by the Local Council, 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, in 2003 the company made a net profit in amount of ROL 7,500,955 thousand, the equivalent of EUR 208 thousand. According to *G.O. no. 64/2001 regarding the distribution of the profit at national companies, commercial companies entirely held by the state or with majority state equity, as well as the regies autonomes*, the net profit of the company is distributed as follows:
- 45% for investments;
 - 45% contribution to the local budget;
 - 10% the employees' participation quota to the profit.
- (59) In consequence, from the profit made in 2003 only EUR 93.6 thousand (representing 45% of the total profit) could be used for investments. Out of this money, EUR 50 thousand have represented the own contribution of RAGC Bacau to the financing of the Project „Improvement the water supply systems, collection and treatment of waste water in the City of Bacau”, and the remainder EUR 43.6 thousand have been utilized for other investments required in the public water and sewerage system. It is clear that, as at the moment of 2003, when the co-financing of the project was considered, RAGC Bacau was not able to support it, being thus forced to resort to the EBRD loan. In order to grant the loan in the agreed terms EBRD has requested the guarantee of the Local Council.
- (60) As pointed in 2.4., RAGC Bacau, given the relatively good economic and financial position (established based on liquidity, profitableness, risk and activity ratios), could have obtained this loan from another commercial bank but at a higher interest rate, respectively 11.5% (as compared to a rate of only 5.72%, related to the EBRD loan obtained with the guarantee of the municipality).
- (61) According to the feasibility study related to the investment and of the Financing Memorandum, in order to meet the expenses related to the EBRD loan (interest, fees, installments) RAGC Bacau has to adjust its tariff, in the first year from starting the investment with 30% from the previous year's tariff and in the second year by 20%. According to studies done by ANRSC, 30%, respectively 20%, represent the maximum percentage by which tariffs can be adjusted for the public services of water supply and sewerage, considering the consumers' affordability.

(62) In the hypothesis RAGC Bacau would have taken the credit from the Romanian Commercial Bank with an 11.5% interest, the costs related to the credit were higher than the expenses related to the EBRD credit that RAGC Bacau had to pay. The difference between the total cost of the public services of water supply and sewage under the conditions of taking the EBRD credit guaranteed by the Local Council and their total costs under the conditions of contracting the credit from a commercial bank (without the municipal guarantee) results from the data presented in Table no. 3.

Table no.3 – *Supplementary costs incurred by contracting a credit under normal market conditions, during 2005-2016*

Year	Unit cost of the service of general economic interest if taking the EBRD credit with the municipal guarantee	Unit cost of the service of general economic interest if taking the credit from BCR under market conditions	Difference between the unit cost of the service of general economic interest if taking the EBRD credit with the guarantee and the unit cost if taking the credit without the municipal guarantee	Total quantity of supplied and treated water	Difference between the total cost of the service of general economic interest if taking the EBRD credit with the guarantee and the total of the service if taking the credit without the municipal guarantee
	ROL/mc	ROL/mc	ROL/mc	Mc	Thousand ROL
2005	6,390.86	8,255.04	1,864.18	14,185,578	26,444,470.8
2006 (estimated)	6,940.60	8,722.20	1,781.6	14,185,578	25,273,025.8
2007 (estimated)	7,204.37	8,891.47	1,687.1	14,185,578	23,932,488.6
2008 (estimated)	7,525.86	9,136.5	1,610.64	14,185,578	22,847,859.3
2009 (estimated)	7,525.86	9,136.5	1,610.64	14,185,578	22,847,859.3
2010 (estimated)	7,525.86	9,136.5	1,610.64	14,185,578	22,847,859.3
2011 (estimated)	7,525.86	9,136.5	1,610.64	14,185,578	22,847,859.3
2012 (estimated)	7,525.86	9,136.5	1,610.64	14,185,578	22,847,859.3
2013 (estimated)	7,525.86	9,136.5	1,610.64	14,185,578	22,847,859.3
2014 (estimated)	7,525.86	9,136.5	1,610.64	14,185,578	22,847,859.3
2015 (estimated)	7,525.86	9,136.5	1,610.64	14,185,578	22,847,859.3
2016	7,525.86	9,136.5	1,610.64	14,185,578	22,847,859.3

(estimated)					
TOTAL					281,280,718.9

Source: Supplementary information

As it results from the presented data, if RAGC Bacau would take a credit under normal market this would lead to supplementary costs of ROL 281,280,718.9 thousand, which would reflect in an tariff increased with 40% from one year to another, in the first three years from the start of the investment and with 30% in the forth year. Taking into account the presented facts, it was considered that this tariff increase would have exceeded the affordability degree of the consumers.

- (63) From the comparison analysis of the supplementary costs incurred by taking a credit under normal market conditions, in amount of ROL 281,280,718.9 thousands and of the financial support under the form of guarantee, amounting ROL 269,706,211.43 thousands results that the latter is just a compensation granted to RAGC Bacau for performing the obligation of service of general economic interest of supplying drinking water and sewage. Without the guarantee of the Local Council, RAGC Bacau would have had to take a loan, for whose reimbursement it would have had to increase the tariff at a level which would not have been affordable to the beneficiaries of public services.

3.1.3.5. Condition in 3.1.3.1. d):

- (64) RAGC Bacau was not entrusted with the service of general economic interest to supply drinking water and sewage following a public tender procedure.
- (65) The public service to supply drinking water and sewage was entrusted to RAGC Bacau by license from A.N.R.S.C. Thus, in order to establish the compensation level, it is necessary to analyze the costs that another well-run undertaking would have had, in providing the same service, but such analysis could not be realized.
- (66) Considering the above, the Competition Council concludes that the four conditions under point 3.1.3.1. are not met cumulatively, mainly the condition under par. 3.1.3.1. (d) was not proved. Therefore, the measures of support for RAGC Bacau, notified by the Local Council of Bacau, constitute state aid for the purposes of *art. 2 of Law 143/1999 on State aid, with subsequent modifications 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*.

- (67) The value of the state aid granted to RAGC Bacau is amount of ROL 269,706,211.43 thousand.

3.1.4. Conclusion

- (68) On the basis of the above analysis, the Competition Council concludes that the guarantee constitutes state aid. The measure is granted through state resources and can distort competition and the trade with the Member State by favoring RAGC Bacau. The Competition Council concludes also, that the measure does not fall under the exemption according to the rules on state guarantees. Furthermore, the measure does not fulfill the conditions set out in the Art. 2 of *Regulation on state aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest* (Judgment of the ECJ in the Altmark-Case) for not to be consider state aid.

3.2. Assessment of the compatibility of the aid with a normal competition environment

3.2.1. General

- (69) 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 Treaty³. 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. The rules on services of general economic interest however are derogatory provisions. They only

³ 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.

potentially apply, if an approval according to the prevailing general rules is not possible.

(70) The measure in question seems to qualify as an initial investment in the sense of Art. 5 of the *Regulation on regional aid*. In this context, initial investment is an investment in fixed capital relating to the setting-up of a new establishment, the extension of an existing establishment, or the starting-up of an activity involving a fundamental change in the product or production process of an existing establishment through rationalization, diversification or modernization.

(71) Only where an approval on the basis of the general rules, in this case the rules on regional aid, would not be possible, recourse to the rules on SGEI would be permissible.

3.2.2. Analysis of the guarantee of the Local City Council in the context of the rules on regional aid for investments

(72) The Competition Council assessed the aid under Art. 2 and Art. 14 of *Law 143/1999, with further modifications and completions*, and the *Regulation on Regional Aid* (hereinafter the Regulation). The sector concerned here is not obviously covered by any specific rules, however, as mentioned above, the adjacency to the rules on SGEI is visible.

(73) RAGC Bacau is located in the East development region of Romania. As stated under par. (34) of this decision, RAGC BACAU is not a company in difficulty, thus being eligible for regional aid in accordance with Art. 1 (4) of the *Regulation on Regional Aid*.

(74) In accordance with Art. 5 of the *Regulation on Regional Aid*, the notified aid is aid for initial investment as it serves the expansion, rationalization and modernization of an existing unit in the sense of the provision.

(75) The guarantee granted by the Local City Council to contract the EBRD credit is granted individually to RAGC Bacau in view of co-financing the Project. The Competition Council therefore notes that the aid in question is not granted in the framework of any regional scheme previously approved. Therefore, the aid is considered as ad hoc aid which has to be assessed on its own merits. An individual ad hoc aid payment made to a single firm, or aid confined to one area of activity, may have a major impact on competition in the relevant market, and its effects on regional development

are likely to be too limited. Such aid generally comes within the ambit of specific or sectoral industrial policies and is often not in keeping with the spirit of regional aid policy as such. The latter must remain neutral towards the allocation of productive resources between the various economic sectors and activities. The Competition Council considers that, unless it can be shown otherwise, such aid does not fulfill the necessary requirements set out in the Regulation.

- (76) It has to be noted however, that the municipal authorities do not merely pursue a specific or sectoral policy in granting the aid. Nor do they 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.
- (77) Regional aid measures differ from the other categories of government support in that they are reserved for particular regions and have as their specific aim the development of those regions. In the Romanian context, this applies to all of the country. Regional aid is designed to develop the less favored regions by supporting investment and job creation in a sustainable context. It promotes the expansion, modernization and diversification of the activities of establishments located in those regions and encourages new firms to settle there. In order to foster this development and reduce the potential negative effects of any relocation, the granting of such aid is consequently made conditional on the maintenance of the investment and the jobs created during a minimum period in the less favored region.
- (78) In the present context however, these objectives are not the primary goals of the aid granters. The aim is rather, to provide a reliable water management system for the community of Bacau. The maintenance of such a system has to be considered to be a public service obligation of the state. Following 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. They only potentially apply, if an approval according to the prevailing general rules is not possible.
- (79) 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, RACG Bacau, but part of the water and sewage public infrastructure of the city of Bacau which is property of the Romanian state, namely public property of the Local City Council of Bacau (*Law 213/1998 on public property and legal status*).

(80) Leaving these general considerations aside, the Competition Council concludes the following concerning the compatibility of the measure in the context of the regional aid regulation:

(81) Art. 8 of the Regulation on regional aid 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 %. This criterion is presently not fulfilled.

(82) As shown under par. (23) of this decision, RAGC Bacau's contribution to the achievement of the project ensured from own resources, not touched by any financial support from the state is Euro 50.000, standing for 0.96% of the Project's total costs. The Competition Council underlines that these costs are dedicated to cover non-eligible expenses, RAGC Bacau 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 contribution of the beneficiary is far below the threshold of 25 % percent set out in Art. 8.

(83) 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.

(84) Vis-à-vis the above arguments, the Competition Council concludes that the criteria to authorize a regional aid for investments are not met cumulatively. An analysis of the measure according to the derogative provisions of the *Regulation on state aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest* is therefore systematically possible.

3.2.3 Analysis of the guarantee of the Local City Council 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*

(85) 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:

(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.

3.2.3.1. The state aid is necessary for operating a service of general economic interest

(86) 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.

(87) As discussed under point 3.1.3.2. above RAGG Bacau is exercising a service of general economic essential for the population, institutions and undertakings and that it is clearly defined by license.

(88) RAGG Bacau operates its services is under the public ANRSC license. The license in conjunction with the relevant law clearly defines the obligations of the service that the company is supposed to discharge. Therefore, it can be concluded that RAGC Bacau has been officially entrusted with the public service that it discharges.

(89) Also, from the assessment made at point 3.1.3.4, it results that, under the conditions of a regulated market from the point of view of prices and tariffs, in order to perform this service the company cannot impose its own prices to the consumers, prices that could cover the real operating costs (including the supplementary financial costs related to the loan taken under normal market conditions, without the municipality guarantee); in establishing the prices and tariffs it must be taken into account the consumers' affordability degree. This is the main cause for which RAGC Bacau receives the Local Council's guarantee to contract the EBRD loan. The compensation granted to RAGC Bacau under the form of a guarantee does not exceed the costs incurred by the performance of the above-mentioned public service of general economic interest, in the scenario of financing the investments from sources obtained under normal market terms.

(90) Therefore, one can conclude that the state aid granted to RAGC Bacau 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 city of Bacau.

(91) By implementing this Project it is aimed the significant improvement of the performance indicators of the public services of water and sewage supply in Bacau county, as follows:

- for drinkable water:

- drinking water supply shall fulfill the standards provisioned in the Directive on drinking water no. 98/83/CE;
- contribution to the implementation of the Directive on water no. 2000/60/CE by increasing the efficiency in water utilization, improving the management of the resources according to the existing demand;
- for a new duct, maximum usage of the gravity potential shall make the system more efficient, will reduce the pumping costs and will significantly increase the water quality;
- eliminating of the serious risks on the population's health due to environmental threats for the underground water sources, by developing some water sources with high durability and quality degree.

- for the waste water:

- meeting the standards of the Directive nr. 91/271/CEE on cleaning the town waste water and their drainage into non-sensitive water sources;
- reducing the risks regarding the health of the population in Bacau by rehabilitating the sewage network;
- storage in safety of the mud in accordance with the Directive no. 86/278/CEE.

3.2.3.2. No unduly affect the trade between Romania and the EU Member States

(92) It needs to be noted that the activity of the company is restricted to a limited geographical area represented by the area of the city of Bacau. RAGC Bacau 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.

3.2.3.3. There is no over-compensation

- (93) The state aid granted to RAGC Bacau under the form of guarantee for obtaining an EBRD loan 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 for the citizens of the city of Bacau.
- (94) Thus, the two conditions provided at point (85), 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.

3.2.3.4. Transparency

- (95) RAGC Bacau keeps a separate management accounting in which the company's activities are separately registered. This way, the operating activities of the services for supply with drinking and waste water which are public services are registered distinctly from the other services. According to the provisions of art. 20 align. 5 of Law nr. 326/2001 on public services of town management, the undertakings discharging public services have to keep separate records of the performed activities, with separate accounting for each type of service, so that their activities are easy to assess, monitor and control.
- (96) 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 subjected Project. It shall be insured the availability of all justifying documents on the costs made for the Project's accomplishment, on a 5 year period from the date of last payment.
- (97) The exemption provided for in the regulation on SGEI is applicable to the ad hoc measure in question. As analyzed above, the measures compensated for clearly defined public service obligations duly entrusted to RAGC Bacau. As stated earlier, the ad hoc measure is proportionate to the net public service costs of RAGC Bacau. The measure does not distort competition to an extent contrary to the Community interest since they are proportionate to the net public service cost of RAGC Bacau and since RAGC Bacau did not behave in an anti-competitive manner in its commercial activities.

- (98) The state aid under the form of guarantee, notified by the Local Council of Bacau County, in total amount of ROL 269,706,211.43 thousands, is compatible with the normal competitive environment.

DECIDE

Art.1. The municipal guarantee granted to RAGC Bacau represents state aid in the sense of art. 2 of *Law 143/1999 on State aid, with the subsequent modifications and completions*.

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. 12 align. 2 (b) corroborated with Art. 14 par. 1 (j) of *Law 143/1999 regarding state aid with subsequent modifications and completions*, the state aid for RAGC Bacau is authorized 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, the grantor shall annually submit to the Competition Council information regarding the state aid granted to RAGC Bacau in view of monitoring the aid.

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

Art.6. Pursuant to Art. 29 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:

- Bacau Local Council, Str. Marasesti nr. 6, cod 5500, judetul Bacau;
- RAGC Bacau, Str. Narciselor nr. 14, Judetul Bacau.

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

PRESIDENT

MIHAI BERINDE