

DECISION OF THE COMPETITION COUNCIL

No. 7 Of 19.01.2005

concerning the notification of the Ministry of Public Finance regarding the financial support for S.C. CET BRASOV S.A.

CONSILIUL CONCURENTEI,

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

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

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

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

Taking into account the provisions of the Regulation on state aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest, published in Official Gazette of Romania, Part I, no. 1048 on 12.11.2004.

On the following grounds,

1. PROCEDURE

(1) By the note no. 109.528/08.12.2004, registered at the Competition Council with the no. RS-AS 105/13.12.2004, the Ministry of Public Finance notified to the Competition Council under Art. 6 of *Law 143/1999 on state aid, with subsequent amendments and completions*, the financial support under the form of guarantees for S.C. CENTRALA ELECTRICA DE TERMOFICARE BRASOV S.A. (herein SC CET BRASOV SA).

(2) As the data presented in the notification were not complete, supplementary information has been requested by address no. DAAS/1049/15.12.2004, to which have been answered in address no 2316/21.12.2004, registered at the Competition Council with no. RG/9121/27.12.2004. The notification became effective on the date the information were complete, namely on 27.12.2004.

2. DESCRIPTION OF THE FINANCIAL SUPPORT

2.1. Legal base

- The Law on Public Debt no. 81/1999;
- The G.O. no 1367/2004 regarding the guarantee of the Ministry of Public Finances for external loans in maximum value of USD 215 mill., which will be contracted by the natural gases national distribution companies S.C. "Distrigaz SUD" - S.A. București, S.C. de Distribuție a Gazelor Naturale "Distrigaz Nord" - S.A. Târgu Mureș, S.C. "Electrocentrale" - S.A. București and the economic companies of the local public administration authorities, producing heating energy;
- The GO. no. 1006/20022004 regarding the guarantee of the Ministry of Public Finances for cofinancing the acquisition of energetic resources for the winter 2002-2003, with subsequent amendments and completions.

2.2. The beneficiary of state support measure

(3) The beneficiary of the notified state measure of support is S.C. CET BRASOV S.A.

(4) The company was set up in 2002, according to Romanian law, as a company of local interest, subsequent to the Brasov Local Council Decision no 312/2002, by being taken over from SC TERMOELECTRICA SA to the public domain of the Brasov municipality. According to art. 7 from this decision, SC CET Brasov SA operates under the authority of the Brasov City Local Council, the owner of the shares exercising the rights and obligations of the shareholders. In 2003 the company merged, according to LCD no. 379/2003, with R.A. TERMO.

(5) The shareholders' equity of SC CET BRASOV SA is of ROL 1,754,091,582 thousand entirely held by the Brasov City Local Council. The company is headquartered in Brasov and is incorporated at the Registry of Commerce under no. J08/799/2002, with the registration code R14716787.

(6) The main activity of the undertaking is the delivery of the following public interest services: producing, transport, distribution and supplying the heating energy as hot water designed for the population, institutions and undertakings in the Brasov city. Also, in cogeneration the company produces and supplies electric energy. S.C. CET BRASOV S.A. has as ancillary activities the preparation of dehardened and demineralized water as well as the production of measurements and control instruments and equipments.

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

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

Indexes	2002	2003	30.06.2004
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Total turnover	248,989,458	759,094,009	551,961,182
Profit/loss	- 136,781,733	-209,064,111	-165,575,326

Source: Notification form

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

(8) The company delivers the following products:

- heating energy as hot water for the preparation of domestic hot water and heating, in order to ensure the consumption of the population, public institutions and undertakings;
- electric energy.

(9) By licenses granted by the National Regulatory Agency for Electricity (from now on, ANRE) the company was entrusted with the performance of public services of heating energy and electricity production, transport, distribution and supply, designated for the population, institutions and undertakings. This service cannot be performed by undertakings under normal market conditions as certain mandatory conditions related to their supply have been imposed to the companies performing these kind of services

(10) According to art 16(1) in the *Law of Electrical Energy no. 318/2003* „the activities and services for which the licenses are being granted are of public interest, excepting those exclusively designated for the consumption of the license or authorization’s owner”.

(11) According to the *Law on town management no 326/2001*, public services must comply with the following essential requirements:

- a) continuity from the point of view of the quantity and quality, under the contracts’ conditions;
- b) adaptability to the consumers requests;
- c) equal access to the public service, under the contracts’ conditions;
- d) assuring the public health and the quality of life.

(12) S.C. CET BRASOV S.A’s obligations as heating and electrical energy producer are, according to art. 30 in the *Law of Electrical Energy no. 318/2003*, the following:

- to insure the electrical energy deliveries, respectively heating energy produced in co-generation and the system technological services, with the fulfillment of the criteria imposed by licenses, contract clauses and regulations in force;
- to offer in undiscriminating conditions the whole available electrical power, as well as system technological services;
- to maintain a stock of fuel at a sufficient level or, after case, a sufficient water supply, in order to carry on the obligations to continuously produce and supply electrical and heating energy as provisioned by the regulations in force;
- to comply from an operational point of view with the transport and system operator’s demands and to establish, after case, its own operative management positions.

(13) Supply of urban heating energy for the heating and preparation of consumption warm water is accomplished through the urban heating system of the Brasov city, which is entrusted for administration to the company by the Local Council of Brasov city by LCD no. 378/25.08.2003.

(14) In order to carry out its main business, S.C. CET BRASOV S.A. has the following installations and equipment:

- a cogeneration plant having 2 energetic groups of 50 MW each and 320 Gcal/h operating in cogeneration using solid fuel (lignite) and natural gas;
- 1 hot water boiler of 100 Gcal/h, operating on gas and black oil;
- 31 neighborhood heating stations, with a total capacity of 158.67 Gcal/h, operating on gas;
- 63 thermal points.

The distribution of heating energy is made through the primary networks with a length of 65.14 km and through secondary networks totalling 483.169 km.

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

(15) The company activates on the market of heating energy production and supply and on the market of electrical energy production and supply.

(16) The market affected by the financial support's granting, assessed in the present decision, is the market of the production, delivery, transport and supply services for the heating energy. These services represent 75% from S.C. CET BRASOV S.A.'s total activity, and the financial support measures granted by the State and notified by the Ministry of Public Finance aim to insure the fuel necessary for the production and supply of heating energy designated for heating and insuring the hot water for the population and the undertakings.

(17) These services, named energy services of local public interest, function in centralized system and are organized under the management and control of the local public administration authorities, based on the local autonomy principle. The geographical market is represented only by the area of Brasov city, therefore is a market of local interest.

(18) From the point of view of prices and tariffs it is a regulated market, because S.C. CET BRASOV SA sells heating energy at prices established by ANRE both for the household consumers as well as for the undertakings and it is obliged to supply heating energy to all consumers connected to the network, without discrimination. Therefore, all these consumers are captive consumers as they don't have the possibility to choose their own heating energy supplier.

(19) S.C. CET BRASOV S.A. is the only producer and supplier of heating energy in the area it serves. Out of the total heating energy produced by the company, 90% is sold to the population, and rest to the budgetary institutions and undertakings. Thus, the company supplies heating energy in a centralized system in Brasov city to 53,260 apartments (approx. 120,000 people), public and budgetary institutions and undertakings.

2.4. Financial support measures to be granted to SC CET BRASOV SA

(20) The financial support measures notified by the Ministry of Public Finance consist in a 100% guarantee for 2 external credits contracted in order to co-finance the acquisition of energy resources for the winter 2002-2003, respectively for the winter 2004-2005, as follows:

- the guarantee granted by the State, based on G.D no. 1006/2002 for contracting an external credit from HVB Bank amounting to USD 7,000,000, equivalent of ROL 198,576,000 thousand¹. The credit will be reimbursed in 7 equal semi-annual installments, with a 2 years grace period; the interest will be paid each semester, interest rate being equal to Libor + 3.75%/year;
- the guarantee granted by the State, based on G.D no. 1376/2004 for contracting an external credit from ABN AMRO Bank amounting to USD 8,000,000, equivalent of ROL 226,944,000 thousand². The credit will be reimbursed in 9 equal installments, with a 2 years grace period; the interest will be paid each semester being equal to Libor + 1%/year

(21) As the undertaking is in an economical-financial difficult situation, registering losses each year between 2002-2004, the state aid under the form of guarantee was considered equal with the total amount of the two credits, respectively USD 15,000,000, equivalent of ROL 425,520,000 thousand.

(22) According to the supplementary information received, S.C. CET BRASOV S.A is also the beneficiary of other measures support, as follows:

Table no. 2 – Measures support for SC CET Brasov SA in the period 2002-2005

-ROL thousand-

Natura ajutorului de stat	2002	2003	2004	2005	Total
Budgetary allowances for investments	-	9,309,000	31,066,000	-	40,375,000
Subsidy covering the difference between the national reference price ³ and the local delivery price ⁴ of the heating energy	-	74,399,457	242,521,857	413,611,441	730,532,755
TOTAL	-	83,708,457	273,587,857	413,611,441	770,907,755

Source: Supplimentary information

(23) The total aid granted to S.C. CET BRASOV S.A is of ROL 1,196,427,755 thousand, out of which ROL 425,520,000 thousand represent state aid under the form of guarantee granted by the Ministry of Public Finances (see point 20) and ROL 770,907,755 thousand represents budgetary allowances for investments and subsidies for covering the difference between the national reference price and the local delivery price of the heating energy (see point 22).

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

¹ The credit has been contracted in USD, the amount in ROL is calculate at the rate of BNR ROL/USD on 23.12.2004, respectively 28,368 ROL/USD.

² The credit has been contracted in USD, the amount in ROL is calculate at the rate of BNR ROL/USD on 23.12.2004, respectively 28,368 ROL/USD.

³ The national reference price is defined in point 2.6.1.

⁴ The local delivery price of heating energy is defined in point 2.6.2.

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

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

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

(27) The separation of the accounting registers of public service obligation activity is a mandatory request imposed to the company through the license for entrusting the delivery of respective service. The results of the activity of discharging the public service, respectively the production, transport, distribution and supply of heating energy as hot water, are presented in the table no. 3.

Table no.3 The evolution of the main economical-financial indicators -ROL thousand -

	2002	2003	2004
Revenues from the producing, transport and distribution and supply of heating energy as hot water (public service)	129,839,859	401,349,607	532,349,159
Expenses from the producing, transport and distribution and supply of heating energy as hot water (public service)	199,546,679	528,073,253	728,700,378
Gross result from the producing, transport and distribution and supply of heating energy as hot water (public service)	-69,706,820	-126,723,644	-196,351,221

Source: Supplimentary information

(28) From the above data from the above table it can be seen that between 2002-2004, the result from the delivering the public general interest service of producing, distribution and supplying heating energy is negative, due to the high costs incurred from selling at regulated prices. The main reason of the high value of exploiting costs are the leaks within the transport and distribution system, as a result of the unproper technical estate of the transport and distribution network- network over 25 years old.

(29) As mentioned at point (22) in 2003 and 2004 the company benefited from investment budgetary allowances. These have been designated for the financing of investments required for the safe operation of the public service of general economic interest, considering the age and high worn out ratio of the equipment and installations. These investments were required for the operation at normal parameters of the public service of distribution and supply of

heating energy, leading to the reduction of the water and energy leakages from the heating networks.

(30) Objectives financed from these allowances are:

- in 2003:
 - upgrade of a boiler: ROL 1,264 mln.;
 - upgrade of Carfil thermal point: ROL 8,045 mln.;
- in 2004:
 - upgrade of a boiler : ROL 1,348 mln;
 - metering of schools and apartment buildings: ROL 13,652 mln;
 - secondary technical networks Carfil thermal point: 10,066 mln;
 - recirculation of used water: ROL 6,000 mln .

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

(31) As mentioned in point (18) the heating energy market is a regulated one. There are two reference prices, respectively the national reference price and the local delivery price.

2.6.1. The national reference price

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

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

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

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

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

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

Table no. 4 The administrative acts through which the national reference price was established for the period 2001- 2004

	2001	2002	2003	2004
The normative act for establishing the national reference price	- GD no. 724/26.07.2001	- GD no.1303/27.12.2001; - GD no. 340/.03.04.2002 - GD no. 686/03.07.2002;	GD no.686/03.07.2002	GD no.1155/23.07.2004
The national reference price (ROL/GCAL)	550,000	575,000 600,000 800,000	800,000	896,000

Source: The national legislation in force

2.6.2. The national reference price

(38) The local delivery price for heating energy is established by ANRE, both for the population as well as for the undertakings. The methodology for establishing the local delivery price is applied by ANRE to all producers which produce heating energy in co-generation. As mentioned at point (25), the undertaking has the obligation to present to ANRE, at the end of each year, the justifying documents from which to come forth: the real costs related to the public service performed in that year and the quantities of heating energy produced and sold each month.

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

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

- identifying the regulating activities and services;
- identifying the sources for producing heating energy (separate sources and/or co-generation);
- estimating the quantities delivered to the final customers, based on the undertaking's accomplishments in the previous years, taking into account the losses in the transport network and the quantities produced as well as the power plants' own consumption;
- allocating the costs with technological fuel;
- allocation of direct costs, exclusively those with the fuel, on activities/services and production sources;
- allocating the indirect costs and the general management costs, on services, proportionally with the value of the direct costs, exclusively the fuel;
- establishing the total costs for producing heating energy under the form of hot water and steam;
- establishing the unit costs;
- re-distribution on activities of the costs related to the own consumption;
- allocation of the financial costs on regulated services;
- establishing the total costs for regulated services.

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

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

(42) As it can be seen from the Annex to this decision during 2003-2004, the national reference price was smaller than the local delivery price for heating energy, established for SC CET BRASOV SA and the same situation is forecast to be maintained in 2005. In order to cover the difference between them, the company receives, in accordance with EGO no.162/1999, subsidies in amount of ROL 730,532,755 thousand (see table no. 5).

Tabelul nr. 5 - The evolution of the quantities delivered to the population and the value of the subsidies granted for covering the difference between the national reference price and the local delivery price during 2003-2005

Period	Quantities delivered to the population (Gcal)	Subsidies (ROL thousand)
Total year 2003 ⁵	135,749	74,399,457
Total year 2004	404,692	242,521,857
Total year 2005 (forecast)	522,000	413,611,441
Total general		730,532,755

Source: Supplementary information

The subsidy of ROL 730,532,755 thousand exclusively covers the difference between the national reference price and the local delivery price for the heating energy divided to the total heating energy's quantity delivered to the population. The manner for calculating the subsidy can be seen in table no.7 in the Annex that presents in detail, on each month, the evolution of the national reference price, the local delivery price, the difference between them and of the subsidies granted for covering this difference.

2.7. Costs higher than the local delivery price for the heating energy due to the public service obligation

(43) When analyzing the measures of support for S.C. CET BRASOV S.A., one must also consider that, for the services of production and supply of heating energy, the company registers costs higher than the local price for supplying heating energy established by ANRE,

⁵ SC CET BRASOV SA receives subsidies for heating energy delivered to the population starting with 01.11.2003 when it merged according to LCD no. 379/2003 with RA Termo (in June 2002-October 2003 SC CET BRASOV SA did not receive subsidies for the heating energy delivered to the population, because in this period it was only a producer of heating energy; distribution and supply of heating energy to the population was performed by RA Termo).

as it can be observed from the company's management accountancy, where the costs are separately kept

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

(45) Actually, the local delivery price established by ANRE does not cover all costs due to the fact that fuel price increase estimates are not considered. Subsequent to the fuel price increase during the year, ANRE is adjusting the energy price only when the increase is more than 5% and the adjustment refers only to the fuel, without taking into account the raw materials and materials' prices that increase chain effect. This increase is not considered when adjusting but only when prices are reviewed, once a year. Thus, there is a gap during the year between the costs of the energy operator and the local delivery price.

(46) The high operating costs of S.C. CET BRASOV SA are due mainly to the following causes:

1) internal causes

a) the low using degree of the production capacities especially in the hot season (approx. 5%) leads to the accomplishment of high specific consumptions of fuel, electricity and water, as well as to continuously high conventional costs;

b) the low output of the steam boilers and of the hot water boilers that function a large number of hours per year at part capacities, as they function since 1960-1970;

c) deliveries reduced level (aprox. 20% compared with the period before 1990) lead to very high own technological consumption in the interior of the plant compared with the produced and delivered heating energy. Actually, these technological consumptions can be considered as relatively constant from the point of view of quantity, varying very little in accordance with the production level, but having a decisive influence on the net thermal productivity of the plant, which decrease drastically in case of low production;

d) the high level of the losses within the heating energy's transport and delivery system due to the physical usage of the networks, with a age over 20 years of exploiting, from which only 10% were rehabilitated and modernized.

2) External causes:

a) heating energy technological fuel, raw materials and materials are purchased at comparable or even higher prices than those operated with on international level. In turn, heating energy is sold on the local market at a price regulated by ANRE which is lower than the average price operated with on an international level;

b) the increase of the fuel price is not taken into consideration. As mentioned at point (45), the regulating authority adjusts the energy's price only if the its increase exceeds 5%, and the adjustment refers strictly to the fuel, but it is known that in a chain effect, the raw materials and materials' price also increases;

c) although all company technologies are old, the price structure approved by ANRE does not comprise the development quota for upgrading these technologies. Thus, the company makes investments, repairs and other upgrades in the energetic system which it operates but

these expenses are not always reflected in the local delivery price of heating energy. Due to the old technologies, the undertaking registers losses on the production and transport networks, losses leading to the costs' increase;

d) the population pays a national reference price, approved by Government Decision and established mainly according to the purchasing power of the population, the difference between this and the local delivery price being subsidized. This subsidy hardly reaches the producer, because the local budget which ensures a significant percentage of it does not have the liquidities required to pay in due time. As a result of the delays in actually receiving the subsidy's amounts, the real value of the subsidies which is strongly diminished by the inflation rate; this way, a part from the real costs remains uncovered.

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

(47) In table no. 6, presented in detail in the Annex, are presented the evolutions of the local delivery price under the form of hot water and the real cost of producing and delivering it, during 2002-2005.

Tableul nr. 6 – Evolution of the losses registered by the company during 2002- 2005 as a result of the difference between the local delivery price and the cost of the heating energy as hot water

PERIOD	TOTAL DELIVERED QUANTITIES (Gcal)	Total incomes (ROL thousand)	Total costs (ROL thousand)	Uncovered losses (thousand ROL)
Total 2002	163,280	129,839,859	199,546,679	69,706,821
Total 2003	428,987	401,349,607	528,073,252	126,723,644
Total 2004	442,577	532,349,156	728,700,377	196,351,221
Total 2005	587,568	817,082,261	891,697,474	74,615,212
TOTAL GENERAL	1,622,412	1,880,620,883	2,348,017,782	467,396,899

Source: Supplementary information

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

(48) Therefore, the difference between the real cost of the service of public general interest and the local delivery price of the heating energy leads to the registering of a loss in total amount of ROL 467,396,899 thousand, related to the activity of performing the public service. We mention that the calculation manner for these losses can be seen in Table no.8 in the Annex which presents in detail, for each month, the evolution of the difference between the local delivery price and the real production and delivery cost of the heating energy as hot water, separately for the population and for undertakings, total costs, total incomes and losses.

3. ASSESSMENT OF THE STATE MEASURE OF SUPPORT

(49) As mentioned at point 2.4. the company benefited from state support consisting in subsidies for covering the price difference for the heating energy delivered to the population, budgetary allowances for investments and 100% guarantees for the credits contracted for completing the financing for acquiring the energetical resources necessary for the winter 2002-2003, respectively 2004-2005

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

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

- a) the borrower person is not in a difficult financial situation;
- b) the borrower person is, in principle, capable to obtain a credit under market conditions, from the financial markets, without any intervention from the State;
- c) the guarantee is granted in relation to a precise financial operation, it refers to a maximum pre-established sum, it doesn't cover more than 80% from the loan to be reimbursed or from other financial obligation, excepting from the equities or other similar instruments, and is not unlimited in time;
- d) the guarantee implies the payment of a premium at the market price.

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

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

(54) Taking into account the difficult economical-financial situation of the undertaking and according to point. 3.2.2. from the *Guidelines on the state aid under the form of guarantees*, the Competition Council considers that the aid amount under the form of guarantee for the two credits contracted (in 2002 and 2004) is equal to the value of the credits, respectively ROL 425,520,000 thousand.

(55) Thus, in the analyzed period (2002-2005) has benefited of state aid amounting ROL 1,196,427,755 thousand, in the following way:

- subsidies, in total amount of ROL 730,532,755 thousand exclusively used for covering the difference between the national reference price and the local delivery price of the heating energy;
- budgetary allowances for investments in total amount of 40,375,000 thousand, exclusively used to finance investments required for the continuity and safety of the public service;

- the state guarantee granted for the contracted credits aimed to complete the financing of the acquisition of the energetical resources necessary for the winter 2002-2003, respectively 2004- 2005, in total amount of USD 15,000,000, respectively ROL 425,520,000 thousand.

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

(57) The guarantees granted by the Ministry of Public Finances for the contracted credits, represent ex-ante condition for entering into force of these credits. The guarantees were issued before using any money from this credit. The guarantees were not granted for an existing loan.

(58) The Government Decisions approving the state guarantees for external credits which are to be contracted by the company, are established the maximum credit values which are to be guaranteed (together with the interests and afferent commissions), the purpose of the credit and the guarantor (Ministry of Public Finances). Based on these G.D.s, the company established in advance with Ministry of Public Finances the credit parameters (the granting period/maturity, the grace period, withdrawal period and the way of reimbursement). Thereafter, standard offer requests were issued addressed to external first rank banks.

(59) The offer request contained the necessary information so that the interested banks could create a competitive price structure: the type of the loan, the beneficiary of the loan, the 100% state guarantee (by mentioning the GD's number), the credit value, the maturity of the loan, withdrawal period, the grace period, the way of reimbursement, the reply form, the deadline for the offers and any other data necessary to make a pertinent offer. As the offer is standard, all banks received the same information, being equally treated, in conditions of transparency and free access for transmitting the offers.

(60) After analyzing all offers received until the date mentioned in the offer request, the best offer was chosen. As all the banks are first rank banks and the criteria of the credit being the same, the main criterion for choosing was the cost of the credits (interest and the corresponding fees).

(61) Taking into account all the above, it is considered that the financing banks have not been favorite compared with the others. Consequently, the Competition Council comes to the conclusion that the state guarantees do not give any advantage to the lender but only to the borrower, SC CET BRASOV SA

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

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

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

4.1. Obligation of service of general economic interest

(64) The financial support granted to a company entrusted with a service of general economic interest is not considered state aid for the purposes of Art. 2 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;
- b) the parameters based on which the compensation is calculated must be established in advance, in an objective and transparent way, in order to avoid granting an economic advantage to the beneficiary;
- c) the compensation must not exceed the amount necessary to totally or partially cover the costs incurred through the service of general economic interest, taking in consideration the relevant incomes and a reasonable profit in performing these obligations;
- d) if the undertaking entrusted with the service of general economic interest was not selected through open public tender which would have allowed the selection of an bidder able to discharge this public service at the lowest costs, then the level of compensation must be set based on a comparative analysis of the company's costs and the costs of well-managed and profitable enterprise which meets all the conditions set for the performance of the particular public service, given the relevant incomes and a reasonable profit from the meeting of the service of general economic interest obligations.

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

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

(66) SC CET BRASOV SA is entrusted with the production, transport, distribution and supply of heating energy for the population, institutions and undertakings, under the ANRE licenses

no. 496/2002, 584/2003 and 585/2003. In these licenses are mentioned, among other things, the obligations specific for the undertakings performing a service of general economic interest, namely: continuity in supplying heating energy, ensuring access to heating networks for new customers, achieving performance standards. Also, by EGO no.162/1999, producers and suppliers of heating energy are under the obligation to sell heating energy to the population at a regulated price which regularly is lower than the costs incurred by the discharge of the service (national reference price).

(67) According to the *Law on town management no. 326/2001*, the supply of heating energy which is centralized produced is a public use service. 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 with population in order to protect the health of the population benefiting from the respective service.

(68) The supply of town heating energy for heating and preparing hot water for consumption is made through the heating energy system of the Municipality of Brasov and is part of the technical- municipal infrastructure of the town. The City Council of Brasov Municipality provides to the Company the heating system needed for accomplishing services of general economic interest through HCL no. 378/25.08.2003.

(69) S.C. CET BRASOV S.A. discharges a public interest service and must assure the supply and distribution of heating energy for all captive consumers in the Brasov city for which it is licensed, and also to assure the continuity and the security in supplying heating energy. The company is required to provide these services at a regulated price that is intended to ensure the affordability for the consumer

(70) Given all the above mentioned, the Competition Council concludes that the condition from point (64) letter a) regarding the fact that the obligation to discharge a public interest service must be entrusted through a normative/administrative act and must be clearly defined is fulfilled.

4.1.2. Predefined parameters based on which the compensation is calculated

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

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

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

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

(73) As it was also mentioned at point (25), at the beginning of each financial year, SC CET BRASOV SA funds a income-costs budget. This way, based on the previous year's data it is forecast that the quantities of heating energy (due to the number of consumers and the average yearly consumption per person- at hot water- and per apartment – at heating), the subsidies to be received as well as a volume of the credits necessary for performing the public service in safety conditions. Also, are forecast the expenses incurred by the performance of the public service (with raw materials, the personnel, financial costs).

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

4.1.3. There is no over-compensation

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

(76) Table no. 3 proves that during the analyzed period the incomes from the performance of the service of general economic interest represented by the delivery of heating energy at regulated prices to the consumers are lower than the costs involved by this activity, is registered loss from the performance of public service obligation.

(77) From the above presented information, it results that during 2002-2005, as also mentioned at point 2.4. the activity of performing the general public service is supported in the following way:

- subsidies, in total amount of ROL 730,532,755 thousand exclusively used for covering the difference between the national reference price and the local delivery price of the heating energy;
- budgetary allowances for investments in total amount of 40,375,000 thousand, exclusively used to finance investments required for the continuity and safety of the public service;

- the state guarantee granted for the contracted credits aimed to complete the financing of the acquisition of the energetical resources necessary for the winter 2002-2003, respectively 2004- 2005, in total amount of USD 15,000,000, respectively ROL 425,520,000 thousand.

(78) From the table no. 6 it results that during the assessed period S.C. CET BRASOV S.A registered losses caused by the difference between the local delivery price established by ANRE for the heating energy delivered as hot water and the real cost of production and delivery.

(79) Taking into account the losses of ROL 467,396,899 thousand registered by the undertaking due to the performance of the service of general economic interest, it can be seen that the facilities under the form of guarantees granted to the company and budgetary allowances for investments, in amount of ROL 465,895,000 thousand don't cover all the company's losses. This way, the compensation from State resources for the performance of public service is smaller than the costs related to this activity. Therefore, it can be concluded that this compensation doesn't exceed the necessary for performing the service of general economic interest of delivering and supplying heating energy.

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

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

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

(82)) As the four conditions mentioned at point (64) are not cumulatively met, respectively the condition provisioned at point (64) letter d) couldn't be proved, the support measures for S.C. CET BRASOV S.A., notified by the Ministry of Public Finance is state aid, within the meaning of art.2 in the *Law no.143/1999 on the state aid*, with the subsequent modifications and completions and those of the *Regulation on the state aid under the form of compensations granted to certain undertakings entrusted with the performance of a service of general economic interest*.

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

4.2. COMPATIBILITY OF THE AID

(84) According to the *Regulation on state aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest* compensations granted in view of discharging the service of general economic interest may constitute state aid compatible with a normal competition environment if the following conditions are met:

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

4.2.1. State aid necessary for discharging a service of general economic interest

(85) In order to be able to assess the necessity of the aid with respect to the discharging of the service the following conditions should be observed:

- the beneficiary needs to be officially entrusted with discharging a clearly defined service of general economic interest; and
- the compensation level should not exceed what is necessary to discharge the service of general economic interest, taking into account the revenues arising from its performance.

(86) As discussed under point 4.1.1. above, SC CET BRASOV SA is exercising a service of general economic essential for the population, institutions and undertakings within Brasov City and that obligation is clearly defined by license.

(87) SC CET BRASOV SA operates its service is under the public ANRE licenses no. 496/2002, no. 584/2003 and no. 585/2003. The licenses in conjunction with the relevant law clearly define the obligations of the service that the company is supposed to discharge. Therefore it can be concluded that S.C. CET BRASOV S.A has been officially entrusted with the public service that it discharges.

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

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

(90) Therefore, it can be considered that the state aid granted to SC CET BRASOV SA 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 Brasov city.

(91) Therefore, one can conclude that the state aid granted to SC CET BRASOV SA under the form of subsidies, budgetary allowances for investments and Governmental guarantees aren't an over-compensation, as they don't exceed the costs related to the obligation of public service of general interest.

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

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

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

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

(95) From the above mentioned facts it results that the state aid in amount of ROL 1,196,427,755 thousand, from which ROL 730,532,755 thousand represents subsidies, ROL 40,375,000 thousand represents budgetary allowances for investments and ROL 425,520,000 thousand represents state guarantees, is compatible with the normal competitive environment.

DECIDES

Art. 1. The measures of financial support granted during 2002-2005 to SC CET BRASOV SA constitute state aid for the purposes of Art. 2 of *Law 143/1999 on State aid, modified and completed by Law no 603/2003 and GO 94/2004 on regulation of financial measures*.

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

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

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

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

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

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

- The Ministry of Public Finance, Apolodor Street, no.17, sect. 5, Bucuresti;
- S.C. CET BRASOV S.A., Street Timis-Triaj no. 6, Brasov, Brasov county.

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

PRESIDENT

MIHAI BERINDE

ANEXA

Tabelul nr. 7 *The evolution of the local delivery price, the national reference price and of the subsidy granted for covering the difference between them during 2003-2005*
[...]⁶

Table no.8 - The evolution of the local delivery price, the heating energy's cost, the hot water sold quantities and of the uncovered losses of S.C. CET BRASOV S.A.
[...]⁷

⁶ Confidential data

⁷ Confidential data