

D e c i s i o n n o . 253
as of 28.12.2006

**regarding the financial support measures to be granted to C.N. “Maritime
Ports Administration” S.A. Constanta in order to finance the Project
„Barges terminal in Constanta Port”**

THE COMPETITION COUNCIL,

Taking into consideration the provisions 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 Law no. 20/1993, published in the Official Gazette, Part I , no. 73/12.04.1993,

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

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

Taking into consideration the provisions of the Decree no. 57/2004 on the appointment of the Competition Council’s members,

Based on the following,

1. THE PROCEDURE

(1) By address no. 689413/20.09.2006, registered at the Competition Council with no. RS-AS 118/06.10.2006, the Ministry of Public Finance (hereinafter named MFP) notified, based on art. 15 of Law no. 143/1999 on State aid,

republished, the financial support to be granted to N.C. „Maritime Ports Administration” Constanta S.A. (hereinafter named CNAPM) with a view to realise the investment project „ Barges terminal in Constanta Port”.

(2) By addresses no. CC/781/21.10.2006, DAAS/1169/03.11.2006 and DAAS/1224/06.12.2006 additional information was requested. MFP submitted the requested information by addresses no. 68980/27.10.2006, 690014/08.11.2006, 690029/09.11.2006, 690092/14.11.2006 and 690.329/08.12.2006, registered at the Competition Council by no. DAAS/1153/30.10.2006, DAAS/1188/10.11.2006, DAAS/1189/10.11.2006, RG/7978/17.11.2006 and DAAS/1244/11.12.2006.

(3) The notification became effective as of the date the information was accurate and complete, namely 11.12.2006.

2. DETAILED DESCRIPTION OF THE NOTIFIED MEASURES

2.1. The financial support

(4) The financial support notified by MFP consists in:

- EBRD credit contracted by CNAPM under the terms of a Governmental Support Agreement, regulated by *G.D. no. 302/2005 on the approval of terms and conditions of the Governmental Support Agreement among the Ministry of Transport, Constructions and Tourism, Ministry of Public Finance and European Bank for Reconstruction and Development, signed in Constanta at 21 September 2004*, in amount of Euro 12,501,424;
- Budgetary allocations in amount of Euro 4,316,868, granted according to the State budget law no. 379/2005.

(5) The Governmental Support Agreement was signed by MFP, as Romania's budget administrator, Ministry of Transport, Constructions and Tourism (hereinafter named MTCT), as authority managing Romania's policy in the field of maritime and fluvial ports and EBRD, as lender. These ministries commit themselves to make all necessary efforts so as to allow the company to honour all obligations related to the loan. To this end, the ministries may authorise the undertaking to retain from the net profit as much as it is required in order to finance the project and reimburse the loan, to take actions to ensure the stability of the legislative framework, to allow the company to establish

tariffs for its services having as basis exclusively business considerations, without any state intervention, etc.

- (6) According to the information received, the reimbursement of the loan instalments, of the interests, of taxes, commissions and other related amounts, is carried out exclusively from CNAPM's own sources, without state's intervention.

2.1. Description of the Project „Barges terminal in Constanta Port”

- (7) Constanta port - maritime and fluvial port – has an important role in the European transit of goods, being connected to the Pan-European VII Transport Corridor– Danube, which ties Rotterdam of Constanta. This connection creates a navigable interior route from the Nordic Sea to the Black Sea and represents the shorter and less pollutant transportation alternative of goods transiting from the Suez Channel to Central Europe.
- (8) The financial support notified by MFP aims to finance Project „ Barges terminal in Constanta Port” (hereinafter named the *Project*). The investment objectives are the construction of quays walls for barges and the construction of quays walls for tugs and pushers. These objectives are part of the port infrastructure and belong to Romania's public field according to *Law no. 213/1998 on public property and its judicial regime*.
- (9) The barges terminal provides for a connection between the fluvial and the maritime transport of en-gross merchandise. Currently, this terminal lacks quay walls, which are essential for the safe mooring of the barges and the appropriate maneuver of the merchandises, in optimal safety and environmental protection conditions.
- (10) This investment aims to improve the navigation conditions, by means of ensuring the secure access of merchandise ships in Constanta Port, taking into consideration the future increase in the fluvial traffic and that the existent facilities for the ships mooring, the forming and separation of convoys are not appropriate.
- (11) The *Project's* execution works were assigned to Mochlos SA Greece, selected on the basis of an international tender, and are carried out during 01.07.2006 - 31.12.2007.

- (12) The *Project's* total cost, established following an international tender and the signing of the execution contracts, is Euro 18,658,842 and is divided as follows:
- a. EBRD loan contracted by CNAPM under the terms of a Governmental Support Agreement: Euro 12,501,424;
 - b. CNAPM's own sources: Euro 1,840,550;
 - c. Budgetary allocations: Euro 4,316,868.

2.3. The beneficiary

- (13) The beneficiary of the support measures granted by the state is CNAPM, joint-stock company, with entirely state capital, operating on the basis of economic management and financial autonomy.
- (14) The undertaking has a specific line of business, being entrusted by MTCT to carry out national interest activities as port administration for maritime ports Constanta, Mangalia, Midia and tourist port Tomis, according to the provisions of its establishment act, G.D. no. 517/1998, modified and completed by G.D. no. 464/2003.
- (15) By means of a concession contract, CNAPM was entrusted the administration and exploitation of the public goods in the respective maritime ports. According to the concession contract, the newly created public goods or those resulted following the modernisation of the existent ones, financed from state budget, are leased to CNAPM, in accordance with the legal provisions, by additional acts to the contract.
- (16) By means of the concession contract, the company is obliged to ensure the efficient exploitation, on a permanent and continuous basis, of the goods subject to the concession, taking into consideration the public interest. The company has the obligation to ensure the maintenance and exploitation of the goods subject to the concession contract with maximum diligence, in order to preserve and develop their value throughout the period of the contract, according to MTCT's strategy.
- (17) CNAPM, as concessionaire, has the obligation to pay an annual fee calculated as a percentage from the gross incomes realised from the exploitation of the public field.
- (18) In order to carry out the responsibilities deriving from its status of port authority, CNAPM has, among others, the following specific obligations:

- to apply port politics drafted by the MTCY;
- to put the port infrastructures at the disposal of users on a non-discriminatory basis;
- to coordinate activities in the maritime ports;
- to implement the development programmes of the maritime ports infrastructures and to ensure the maintenance of their minimum technical characteristics;
- to ensure the functioning and administration of maritime ports;
- to supervise or to ensure the permanent supply of safety services in maritime ports;
- to supervise and take the necessary measures so as to ensure that the goods traffic in the maritime ports, as well as their storage, does not affect the safety of the port infrastructure and the operation of the ships.

3. ASSESSMENT OF THE NOTIFIED MEASURES

Existence of the state aid

- (19)** According to the Article 2 (1) of Law no.143/1999 on State aid, republished, state aid represents any support measure taken by the state or local administration authorities, from state sources or sources of the local administration, regardless of the form, which distorts or threatens to distort competition, by favouring certain undertakings, the production of certain services and which affects trade between Romania and Member States of the European Union, being considered incompatible with a normal competition environment.
- (20)** The notified measures under the form of budgetary allocations and the Governmental Support Agreement (see section 2.1.) involve state resources, as well as the exercise of its influence and authority through MTCT and MFP; the funds are granted to a certain undertaking, namely CNAPM, on a selective basis.
- (21)** The financial support measures are designed to the financing of certain port infrastructure objectives. The owner of these objectives is the state which, out of strategic, economic and safety considerations, granted to CNAPM the exploitation of the port infrastructure, by concession.

- (22) Only port infrastructure that is open to and accessible to all potential users on equal and non-discriminatory terms is being funded within the *Project* and no infrastructure dedicated to a particular user will receive financial contribution within the *Project*.
- (23) The public financing of port infrastructure may raise State aid issues at two different levels: at the level of the end-users and at the level of the administrator of the infrastructure in question.
- (24) In relation to possible State aid to users, according to the European jurisdiction in the field ¹, no State aid elements are present at the level of the users where the infrastructure financed from public sources functions based on the “multi-user” concept, respectively is open to all potential users on equal and non-discriminatory terms, as no particular undertaking is favoured over others in a way that distorts competition and affects trade with the Member States. However, where public financing is used to provide infrastructure for a particular user or for the transport of certain merchandises, giving it an advantage over its competitors the financing from the State falls within the State aid rules.
- (25) According to the notification information, the company concludes the same type of contracts (including the same clauses and tariffs terms) on using the public port infrastructure, and, in case of congestion, the ships are disciplined according to the „first come, first served” principle. The port tariffs collected by CNAPM for barges, tugs and pushers are established in a non-discriminatory way, based on the objective criteria and having in view the ships type. The calculation of tariffs are based on the economic considerations as maintaining and reparation expenditures, direct, de-pollution expenditures, ships tonnage, the capacity of engine, average period of trek, the ships length, etc. Thus, the equal and non-discriminatory access of users to the port infrastructure is ensured; consequently there is no state aid involved at the infrastructure users level.
- (26) The public port infrastructure objectives to be realized within the Project, namely quays walls for barges, tugs and pushers, shall not be rent or farmed out or given for the other operators use. These shall be directly exploited by CNAPM to accomplish the obligations resulted from its position of port authority, respectively to maintain the minimum technical

¹ See State aid N 503/2005- United Kingdom, Great Yarmouth Outer Harbour

specific characteristics, the security of the port infrastructure and the traffic safety.

- (27) Where the body managing port infrastructure carries out economic activities, any State support for the infrastructure in question has to be examined for state aid implications with regard to the administrator company. CNAPM carries out different activities of which several may be deemed economic in character. It can therefore not be excluded, *a priori*, that the notified support measures may confer an economic advantage to the company. In this context, it is necessary to be made a distinction between the activities of CNAPM, as port authority, being obliged by law to observe them, and other activities that carries out as undertaking.
- (28) According to the European policy and practice, the public investments in maritime access routes, public land transport facilities within the port area and other infrastructure that benefit the community as a whole, do not normally raise any State aid issues as such measures are considered as being expenditures incurred by the State in the framework of its attributions for planning and developing a maritime transport system in the general public interest and, does hence not confer an advantage to a particular undertaking².
- (29) The infrastructure financed within the *Project*, namely quays walls for barges, tugs and pushers, has a public character and is necessary for the proper functioning of the port, serving to the interest of the fluvial and maritime community as a whole.
- (30) The tariffs for using the port infrastructure are established on the non-discriminatory and open terms, based on the objective considerations, by the CNAPM as port authority, according to GO no. 517/1998 with subsequent modifications and completions. The tariffs are calculated by the Tariffs Office within CNAPM and are approved by the Administration Council of it.
- (31) According to the notification information, after finalization of the *Project*, CNAPM shall not collect any specific tariffs for exploiting the public infrastructure objectives in question; the technical and merchandise ships shall be charged the same tariffs as that charged before the Project

² See State aid N 520/2003 – Belgium, Financial support for infrastructure works in Flemish Ports

implementation; the depreciation of fixed assets resulted from the investment is not included in CNAPM tariffs.

- (32) The construction and exploitation of public infrastructure objectives financed by the *Project* are related to the position of CNAPM as public authority, no economic advantage being conferred to the company. The investment is in the benefit of all undertakings that enter in port and, eventually, in the benefit of all community. The target is to ensure the navigation and merchandises security. The expected effects are increasing the merchandises traffic security, ensuring the port capacity to face the high traffic and improvement of the link between fluvial, maritime and land merchandises transport.
- (33) However, having in view that CNAPM also carries out economic activities, it has to be analyzed whether public financing to be granted for *Project* is limited to the minimum necessary amount and shall not be used to support other activities of the company.
- (34) Competition Council notes that the *Project*' value was determined on the basis of an international public tender procedure, ensuring that the public financing does not exceed the amount necessary for effective implementation of the *Project*. The public financing cover only 23% of the *Project* value.
- (35) According to the additional information received for completing the notification, all incomes and expenditures related to the *Project* implementation, are distinct highlighted within Development Service-External Financing Office; this obligation was also imposed by the EBRD loan agreement. In order to ensure that public financing shall be used exclusively for realization of public infrastructure investments within the *Project*, DG Naval Transport and DG Economic Relations and Budget within the MTCT shall monthly monitor the way the sums allocated from the budget would be spent.
- (36) Having in view the above, it is considered that the financial support measures granted to CNAPM for *Project* implementation are designed to co-finance an activity related to the State responsibility to implement port policies and development programme of maritime port infrastructure. Such a support measure does not represent State aid in the sense of art. 87(1) of the EC Treaty and art. 2(1) of the Law no. 143/1999 on State aid, republished, since the construction and exploitation of the public

infrastructure objective results from the attributions that the company has as port authority and the access to the infrastructure is ensured for all users on equal and non-discriminatory terms, in the best environment conditions and security.

- (37) The Competition Council notes the public infrastructure in question is absolutely necessary for the proper functioning of the port and is serving to the fluvial and maritime community interest. Even if considered that this infrastructure might be served some commercial purposes, conferring through the notified financial support a likely economic advantage to CNAPM, such aid would be deemed compatible with the normal competitive environment based on art. 87(3) c of the EC Treaty.
- (38) Having in view that such infrastructure (quay walls) requires very large capital investments that could normally not be made by an undertaking since it can be only partially and in the long term recovered, the Competition Council considers that the State intervention for financing this infrastructure is justified since it serves to ensure the proper functioning of the port in safe conditions in the general economic interest. Constanta Port has a very important role at national and European level, since ensures the transit between maritime, fluvial and land transport contributing to a balanced, sustainable inter-modal transport. Encouraging the inter-modal transport is a priority for European Communities, representing a competitive alternative to road transport that become more and more polluting and heavy. It is therefore in the Community general interest to promote investments in port infrastructure in order to facilitate, in safe and efficient conditions, the inter-modal transport of merchandises.
- (39) In addition, CNAPM contributes with 77% to the *Project* financing and the public financing is limited to the minimum necessary, the investment costs being established based on a public tender.
- (40) The Competition Council considers that since the public financing is used for public port infrastructure which is open and accessible to all users, without involving a preferential treatment in the favour of particular undertaking, the support measures notified are not liable to distort competition and trade with the Member States to an extent that is contrary to the common interest.

4. CONCLUSIONS

- (41)** The implementation of the Project „Barges terminal in Constanta Port” contributes to the alignment of the port to international standards on port security and merchandise traffic safety, having in view that it has an important role in ensuring the inter-modal merchandises transport in Europe. The financial support measures shall be used exclusively for the co-financing of public infrastructure of which all users benefit equally and non-discriminatory.

DECIDES

Art. 1. According to Article 21(2)(a) of the Law no. 143/1999 on State aid, republished, the financial support measures granted to National Company „National Administration of Maritime Port” SA Constanta for implementation of the Project “Barges terminal in Constanta Port” do not represent State aid.

Art. 2. In accordance with Article 46 of the Law no. 143/1999 on State aid, republished, the present decision can be appealed by interested parties at the Appeals Court, the Administrative Litigation Section within 30 days from its communication.

Art. 3. The present decision shall be communicated by the General Secretary of the Competition Council to:

- Ministry of Public Finance, Apolodor Street, no. 17, sector 1, Bucharest;
- Ministry of Transport, Constructions and Tourism, Dinicu Golescu Boulevard, no. 38, sector 1, Bucharest;
- National Company” Maritime Port Administration” SA Constanta, Incinta Port, Gara Maritima Constanta, 8700, Constanta.

PRESIDENT

MIHAI BERINDE