

DECISION OF THE COMPETITION COUNCIL

No. 82 of 4 April 2006

**on the recovery of the unlawful state aid
granted to S.C. ROMNED COMPANY S.R.L.
over the maximum admissible limit**

THE COMPETITION COUNCIL,

Having regard to the provisions of the European Agreement establishing an association between Romania, on one side, and European Communities and their Member States, on the other side, ratified by the Law no.20/1993, published in the Official Gazette of Romania, Part I, no.73 of April 12th 1993,

Having regard to the provisions of the Law no.157/2005 for ratifying the Treaty between Belgium Kingdom, Czech Republic, Kingdom of Denmark, Federal Republic of Germany, Republic of Estonia, Republic of Greece, Kingdom of Spain, French Republic , Ireland, Republic of Italy, Republic of Cyprus, Republic of Latvia, Republic of Lithuania, Grand Duchy of Luxembourg, Republic of Hungary, Republic of Malta, Kingdom of Netherlands, Republic of Austria, Republic of Poland, Republic of Portugal, Republic of Slovenia, Republic of Slovakia, Republic of Finland, Kingdom of Sweden, United Kingdom of Great Britain and Northern Ireland (member states of European Union) and Republic of Bulgaria and Romania regarding the accession of Republic of Bulgaria and of Romania to European Union, signed by Romania at Luxembourg on 5 April 2005, published in the Official Gazette no 465 from 01.06.2005

Having regard to the provisions of the Law no.21/1996 on competition, republished in the Official Gazette of Romania, Part I, no.742 of August 16th, 2005,

Having regard to the provisions of the Law no.143/1999 on State aid, republished in the Official Gazette of Romania, Part I, no.744 of August 16th, 2005,

Having regard to the provisions of the Regulation on the investigation procedure in the state aid field, published in the Official Gazette of Romania, Part I, no.257 of March 28th, 2005,

Having regard to the provisions of the Regulation on regional State aid, published in the Official Gazette of Romania, Part I, no.340 of April 19th, 2004, as subsequently amended and completed,

Having regard to the provisions of the Regulation on State aid for small and medium-sized enterprises, published in the Official Gazette of Romania, Part I, no.340 of April 19th, 2004, as subsequently amended and completed,

Having regard to the provisions of the Guidelines on interest rate applicable to the recovery or the reimbursement of unlawful and prohibited state aid, put into force by the Order of the Competition Council's President no. 51/21.03.2005, published in the Official Gazette of Romania, Part I, no.253 of March 25th, 2005,

Having regard to the provisions of the Government Emergency Ordinance no.129/2005 amending and completing the Government Ordinance no.92/2003 on the Fiscal procedure code, published in the Official Gazette of Romania, Part I, no.887 of October 4th, 2005,

Having regard to the provisions of the Decree no.57/2004 on the appointment of the Competition Council's members, published in the Official Gazette of Romania, Part I, no.143 of February 17th, 2004,

Having regard to the Investigation Report drawn up as a result of the case handler and the investigation team's findings, within the investigation opened by the Order of the Competition Council's President no.308/21.11.2005,

Based on the following grounds,

I. PROCEDURE

(1) In accordance with the provisions of article art.38 (3) of the Law no.143/1999 on state aid, republished¹, in August 2005, the Competition Council, through its territorial bodies, controlled 35 companies operating in the free zones. The results were concluded in Control notes signed both by the representatives of the Competition Council and the representatives of the companies controlled.

(2) The Control notes were analysed and the Competition Council drew up a Report on monitoring the state aid granted to the undertakings located in the free zones, registered under no.1049/29.09.2005, which records the relevant issues detected during the examinations. Among the 35 companies verified, only S.C.

¹ Law no.143/1999 on state aid, republished in Official Gazette no.744/16.08.2005

ROMNED COMPANY S.R.L. exceeded the maximum admissible level of the state aid intensity.

(3) On 17.11.2005, based on the Note of the Reporting, Monitoring and Controlling State Aid Directorate, registered under no.1093/17.11.2005, the opening of an ex-officio investigation was proposed. For this purpose the Order of the Competition Council President no.308/21.11.2005 was issued. By the letters no.1098/22.11.2005 and no.1115/13.12.2005, the Competition Council informed the state aid grantor, respectively the Ministry of Public Finance (M.F.P.), the National Company “Administration of Maritime Ports” – S.A. Constanta (hereinafter named C.N.A.P.M. S.A. Constanta) and the Ministry of Transport, Constructions and Tourism (M.T.C.T.) on the opening of the investigation procedure of S.C. ROMNED COMPANY S.R.L., having the headquarter in Techirghiol, street Nicolae Titulescu no.1, Free zone Constanta South, Enclosure 1A, County of Constanta, registered in the Trade Register under no.J13/3747/1994, unique registration code R 6397474. The beneficiary of the state aid measure subject of the investigation, S.C ROMNED COMPANY S.R.L., was also informed by address no.865/14.12.2005.

(4) The order for opening the investigation and the Note that formed the basis of this order were entirely published on the website of the Competition Council, in accordance with the provisions of the Law no.143/1999 on state aid, republished and the Regulation on the investigation procedure in the state aid field², in order to allow the interested parties to submit their comments about the measure subject of the investigation within 7 days.

(5) C.N.A.P.M. S.A. Constanta replied to the Competition Council communication by two letters: no.SDT/1474/2.12.2005 and no.SDT/1480/05.12.2005, registered at the Competition Council under no.1103/ DRMCAS/ 2.12.2005 and no.1105/DRMCAS/5.12.2005, submitting information on the amount of the state aid in form of royalty reduction. M.T.C.T. replied by letter no.33/4155/19.12.2005, registered at the Competition Council under no.9908/21.12.2005, declaring that M.F.P. calculated the amount of the state aid granted according to the provisions of G.D. no.1900/2004³. The Competition Council did not receive any comments from M.F.P., S.C. ROMNED COMPANY S.R.L. or any other interested party.

(6) Within the investigation, the Competition Council requested additional information, by the letter no. 1101/DRMCAS/29.11.2005, from the General

² Regulation on the investigation procedure in the state aid field, published in the Official Gazette no.257/28.03.2005

³ G.D. no.1900/2004 on making compatible the existing state aid, granted in accordance with the Law no.84/1992 on the free zones regime, published in the Official Gazette no.1090/23.11.2004

Direction of Public Finance Constanta and C.N.A.P.M. – S.A. Constanta. By letters no.38.797/08.12.2005 and no.30.395/09.12.2005, registered at the Competition Council under no.1113/DRMCAS/9.12.2005 and no.1112/DRMCAS/9.12.2005, the General Direction of Public Finance Constanta and C.N.A.P.M. – S.A. Constanta replied the Competition Council' s request.

(7) Because the information submitted by the General Direction of Public Finance Constanta were incomplete in relation with the investigation team's request, the Competition Council reverted by the letter no.1114/DRMCAS/12.12.2005, in order to complete these information. The General Direction of Public Finance Constanta replied by letter no.22362/16.12.2005, registered at the Competition Council under no.9951/22.12.2005.

II. SCHEME' S DESCRIPTION

II.1. Scheme's objective

(8) The scheme' s objective is to sustain an efficient regional policy leading to economic growth by stimulating investments and commercial swaps in the free zones, thus favouring the enlargement, modernization and diversification of the activities undertaken by the operators in the free zones.

II.2. Legal basis

(9) The financial support is granted on the grounds of the Law no.84/1992 on free zones regime, as subsequently amended and completed, of the Law no.414/2002 on profit tax, abolished on 01.01.2004 by the Fiscal code, of the article 38 of the Law no.571/2003 on Fiscal code⁴ and of the G.D. no.1900/2004 on making compatible the existing state aid, granted in accordance with the Law no.84/1992 on the free zones regime.

(10) The Competition Council authorized by the Decision no.169/02.06.2004 "the state aid laid down at article 38 (3) and (4) of the Fiscal code, granted within the state aid scheme set out by the article 14 of the Law no.244/2004 for the amendment and completion of the Law no.84/1992 on free zones regime".

II.3. Scheme's duration

(11) In conformity with the provisions of the Treaty regarding the accession of the Republic of Bulgaria and Romania to the European Union⁵, Romania „may

⁴ Law no.571/2003 on Fiscal code, published in the Official Gazette nr.927/23.12.2003

⁵ Law no. 157/2005 for ratifying the Treaty between Belgium Kingdom, Czech Republic, Kingdom of Denmark, Federal Republic of Germany, Republic of Estonia, Republic of Greece, Kingdom of Spain, French Republic , Ireland, Republic of Italy, Republic of Cyprus, Republic of Latvia, Republic of Lithuania, Great Duchy of

continue to grant exemptions of the royalty payment according to the Law no.84/1992 on free zones regime, as amended, until 31 December 2011” with the observance of the conditions imposed by the Treaty.

II.4. Beneficiaries of supporting measures

(12) The beneficiaries of the supporting measures set out by the Law no.84/1992 on free zones regime, as subsequently amended and completed, by the provisions of the Law no.571/2003 on Fiscal code and of the G.D. no.1900/2004 on making compatible the existing state aid granted in accordance with the Law no.84/1992 on free zones regime, are the companies operating in free zones regime and which signed concession contracts with the free zones’ administrations until the 1st of July 2002.

(13) The state aid beneficiary that exceeded the maximum admissible level of the state aid intensity, respectively S.C. ROMNED COMPANY S.R.L., is forming part of the small and medium sized enterprises’ category and does not belong to a group of enterprises. The company is working in free zone regime according to the concession contract no.113/17.11.1999 signed with the Regie Autonome “Administration of Free Zone Constanta South and Free Zone Basarabi”, now National Company “ADMINISTRATION OF MARITIME PORTS” – S.A. CONSTANTA (C.N.A.P.M. – S.A Constanta), thus framing into the provisions of the G.D. no.1900/2004.

The company’s scope of activity in the free zone is “Whole sale trade with construction machines “- N.A.C.E. code 5162.

II.5. Scheme’s aim

(14) The aim of this scheme is to provide the companies operating in the free zones conditions to develop the economic activities and the commercial trade, without causing the increase of the production capacity in the sectors confronted with problems of over capacity, thus contributing to investments’ encouragement and jobs creation.

II.6. Modalities of granting the financial support

(15) The provisions of article 14 of the Law no.84/1992 on free zones regime referring to the profit tax were abolished by the Law no.414/2002 on profit tax,

Luxemburg, Republic of Hungary, Republic of Malta, Kingdom of Netherlands, Republic of Austria, Republic of Poland, Republic of Portugal, Republic of Slovenia, Republic of Slovak, Republic of Finland, Kingdom of Suede, United Kingdom of Great Britain and Northern Ireland (member states of European Union) and Republic of Bulgaria and Romania regarding the accession of Republic of Bulgaria and of Romania to European Union, signed by Romania at Luxemburg on 5 April 2005, published in the Official Gazette no. 465 din 01.06.2005

law further abolished by the Law no.571/2003 on Fiscal code. Thus, beginning with 2 January 2003, the state aid is granted to the companies operating in the free trade areas by the following modalities:

- **reduction of the profit tax payment**, meaning that the undertakings were paying reduced quote of 5 % of the taxable profit corresponding to the incomes of the licensed activities (according to the provisions of art.2 (3) of the Law no.414/2002, abolished and replaced by the provisions of art.38 (4) of the Law no. 571/2003 on Fiscal Code); **the measure was valid until 31 December 2004;**
- **reduction of the royalty** that the undertakings pay to the free zones' administrations according to the concession contracts signed until the 1st of July 2002 (according to the provisions of art.5 (2) of the G.D. no.1900/2004 on making compatible the existing state aid granted in conformity with the Law no.84/1992 on free zones regime); **the measure is valid until 31 December 2011.**

(16) According to the provisions of article 14 of the Law no.84/1992 on free zones regime, amended by the Law no.244/2004, "the state aid may be granted for the investments made under the commercial contracts, **subject to the fulfilment of the criteria of regional aid and state aid for small and medium sized enterprises**".

III. PROCEDURE OF GRANTING THE STATE AID IN FORM OF ROYALTY REDUCTION

(17) The normative act that set out the state aid in form of royalty reduction for the companies operating in free zone regime is the G.D. no.1900/2004 *on making compatible the existing state aid granted in accordance with the Law no.84/1992 on free zones regime*, which stipulates "The procedure of granting regional aid" in Annex 2.

(18) In conformity with the provisions of point 3 of the Annex 2 of the G.D. no.1900/2004, „the regional state aid, granted in form of compensation of the royalty that the art.3 companies may benefit, is calculated by the Ministry of Public Finance, based on the information provided by the free zones' administrations and the examinations made at the companies' premises, within 30 days from the present decision' enforcement".

(19) The amount of the state aid in form of royalty reduction, calculated by the Ministry of Public Finance for each company eligible to receive state aid, was communicated to the free zones' administrations.

(20) According to the letter no.33/4217/22.12.2005 of the Ministry of Transport, Construction and Tourism – General Directorate Investments, Acquisitions and Concessions, „The Ministry of Public Finance, as state aid provider in conformity with the provisions of the Law no.244/2004 for the amendment and completion of the Law no.84/1992 on free zones regime and of the G.D. no. 1900/2004, calculated the amount of state aid and determined the companies in right to receive it, sending the results to C.N. A.P.M.C. – S.A. Constanta, by letter no. 109596/2004.”

(21) In order to benefit from state aid in form of royalty reduction, the companies renegotiated the concession contracts signed with the free zones' administrations, under the coordination of the central and local authority under which the free zones' administrations are subordinated.

(22) By the letter no.SDT/1480/5.12.2005, C.N. A.P.M. – S.A. Constanta communicated the actions undertaken as a result of the letter no.109596/2004 submitted by the Ministry of Public Finance.

(23) Being mandated by the Ministry of Transport, Construction and Tourism, C.N. A.P.M. S.A. Constanta „began to renegotiate the concession contracts and signed additional acts related to these contracts, including the Additional act no. 3/15.02.2004 with S.C. ROMNED COMPANY S.R.L.” which set out the **amount of the royalty reduction for this company to USD 6.390.**

IV. REASONS FOR OPENING THE INVESTIGATION

(24) As a result of analysing the control notes drawn up by the Competition inspectorates within the monitoring action of the state aid granted to the companies operating in the free zones, the Competition Council found out that S.C. ROMNED COMPANY S.R.L. from the Free Zone Constanta South exceeded the maximum admissible level of the state aid intensity. Because there were doubts regarding the compatibility with a normal competitive environment of the state aid granted over the maximum limit of intensity, the Competition Council decide to open an investigation.

The investigation was opened ex-officio, having as object the assessment of the compatibility of the facilities granted to S.C. ROMNED COMPANY S.R.L. over the maximum admissible limit of the state aid intensity, in order to take the

appropriate measures set out by the Law no. 143/1999 on state aid, republished, and by the G.O. no.92/2003 on Fiscal procedure code, as amended and completed by G.E.O.no.129/2005.

V. COMMENTS OF BENEFICIARY, GRANTOR OR OTHER INTERESTED PARTY

(25) The Competition Council, by the letter no.1098/DRMCAS/22.11.2005, communicated the opening of the investigation to the Ministry of Public Finance, as state aid initiator and provider and to C.N.A.P.M. S.A. Constanta (free trade area's administrator).

By the letters no.1115 / DRMCAS / 13.12.2005 and no.865/14.12.2005 the Ministry of Transport, Construction and Tourism (as state aid intermediary) and S.C. ROMNED COMPANY S.R.L. (as state aid beneficiary) were announced.

(26) C.N.A.P.M. S.A. Constanta communicated by the letter no.SDT/1480/5.12.2005, registered at the Competition Council under the no.DRMCAS1105/5.12.2005, that the Company received from the Ministry of Public Finance "the list of lessees in the Free Zone Constanta South which benefit from state aid (in accordance with G.D. no.1900/2004) as well as the amount granted to each lessee".

(27) C.N. A.P.M. S.A. Constanta does not have attributions to make examinations and evaluations of each lessee, but it was mandated by the Ministry of Transport, Construction and Tourism to renegotiate the concession contracts, based on the information sent by the Ministry of Public Finance.

(28) The Ministry of Transport, Construction and Tourism replied by letter no.33/4155/19.12.2005, registered at the Competition Council under the no. 9908/21.12.2005, that the Ministry of Public Finance calculated the amount of state aid from which the companies in the free zones may benefit and sent the values to the free zones' administrations in order to renegotiate the concession contracts.

(29) The Competition Council did not receive any comment from the beneficiary, the provider or any other interested party within the legal term established by the Order of opening the investigation, except for C.N.A.P.M. S.A. and M.T.C.T.

VI. STATE AID NATURE OF THE SUPPORTING MEASURES GRANTED TO THE BENEFICIARY

The assessment covers the supporting measures in form of profit tax reduction and royalty reduction from which S.C. ROMNED COMPANY S.R.L. benefited.

Supporting measure granted by state or through state resources

(30) The supporting measures are fiscal nature, consisting of:

- reduction of the profit tax payment for the licence based activities in the free zone, measure valid until 31 December 2004;

- reduction of the royalty paid by the undertakings to the free zones' administrations according to the concession contracts signed until the 1st of July 2002, measure valid until 31 December 2011.

Thus, the supporting measures materialize in renouncements at some incomes which normally would belong to the state, which is without any doubts a financial support granted by the state, from state resources.

Selectivity

(31) The supporting measures comply obviously with the selectivity criterion because the reduction of the profit tax payment is granted only to the undertakings that obtain incomes from licence based activities in a free zone and the royalty reduction is granted only to the undertakings which concluded concession contracts with the free zones' administration until the 1st of July 2002.

Economic advantage

(32) The economic advantage consists of the exempting the undertakings from the payment of some expenditure, which normally must be covered by their own resources.

Distortion of competition and affectation of trade with the Member States of the European Union

(33) In order to be considered state aid, the financial support must distort competition or the trade between Romania and the Member States of the European Union. Because from this support benefit only certain undertakings, located in free trade areas, the measure of financial support granted to S.C. ROMNED COMPANY SRL over the maximum admissible intensity threatens to distort the competition on the markets on which the company operates.

(34) In relation to the above mentioned, we consider that the measures of financial support granted to the undertakings operating in the free zones is state aid and falls under the Law no.143/1999, republished.

VII. ANALYSING THE FULFILLMENT OF THE STATE AID GRANTING CONDITIONS

(35) The Annex VII of the Accession Treaty of Romania to the European Union establishes a transition period for the free trade areas, as follows: “[...] for undertakings which signed concession contracts with the Free Zones Administrations until 1 July 2002, Romania may continue granting royalty reductions on the basis of Law No 84/1992 on Free zones regime, as amended, until 31 December 2011, under the following conditions:

- the State aid is granted for regional investments;
- the net intensity of such regional aid shall not exceed the rate of 50% Net Grant Equivalent. This ceiling may be raised for small and medium-sized enterprises by 15 percentage points [...];
- if the undertaking is active in the motor vehicle sector ⁶ the total aid shall not exceed a maximum of 30% of the eligible investment costs;
- the period for calculating the aid to be included under the abovementioned ceilings shall start on 2 January 2003; all aid claimed and received on the basis of profits that precede this date shall be excluded from the calculation;
- for the purpose of calculating the total aid, account shall be taken of **all aid granted to the beneficiary** in relation to eligible costs, **including aid granted under other schemes and irrespective of whether the aid is granted by local, regional, national or Community sources**;
- eligible costs shall be defined on the basis of the Guidelines on national regional aid⁷;
- the eligible costs that may be taken into account shall be those incurred between 30 July 1992 (i.e. the date of entry into force of the scheme under Law No. 84/1992 on Free Trade Areas) and 1 November 2004.

(36) The normative act that set out the state aid in form of royalty reduction for the companies operating in free trade area regime is the G.D. no.1900/2004 *on making compatible the existing state aid granted in accordance with the Law no.84/1992 on free trade areas regime*.

⁶ Within the meaning of Annex C of Commission Communication – Multi sectoral framework on regional aid for large investment projects (OJ C 70, 19.3.2002, p. 8). Communication as last amended and published in OJ C 263, 1.11.2003, p. 3.

⁷ OJ C 74, 10.3.1998, p. 9. Guidelines as last amended and published in OJ C 258, 9.9.2000, p. 5.

(37) According to this normative act, the undertakings operating in free zones regime and which concluded concession contracts with the free zones' administrations until 1 July 2002, „benefit from regional state aid under the conditions set out by the Regulation on regional state aid, approved by the Order of the Competition Council President no.55/2004⁸ for the appliance of the Regulation on state aid for small and medium-sized enterprises and the Regulation on regional state aid, as subsequently amended and completed⁹”.

(38) According to Annex 1 to G.D. no.1900/2004, Chapter III, the regional state aid intensity can not exceed 50 % of the expenditure related to the initial investment or the wage costs with the personnel hired over a 2 years period, for the big enterprises. 15 percentage points may be added in case of small and medium – sized enterprises.

(39) According to the provisions of art.5 of the same normative act, this support is regional state aid granted for initial investment or for jobs creation realized during 30 July 1992 – 1 November 2004.

(40) Having regard to the above mentioned, any regional state aid granted in the free zones which do not fulfil the conditions set out by the Treaty of Accession of Romania to EU, by the Law no.84/1992 on free zones regime, as subsequently amended and completed, by the Competition Council's Decision no.169/2004 and by the G.D. no.1900/2004 on making compatible the existing state aid granted in accordance with the Law no.84/1992 on free zones regime, may affect the competitive environment or the trade between Romania and the Member States.

Eligibility of beneficiaries

(41) According to the provisions of art.10 of the Law no.84/1992 on free zones regime „the companies operating in the perimeter of the free zones can undertake the activities provided by the Nomenclature of activities of the national economy – N.A.C.E., approved by G.D. no.656/1997, as modified”.

(42) The article 11 of the same normative act further stipulates that “the activities in the free zones are undertaken by the operators only based on the licences issued by the free zones' administrations, in conformity with the principles of free competition”.

⁸ Order of the Competition Council President, published in the Official Gazette no.340/19.04.2004

⁹ Regulation for amending and completing the Regulation on regional state aid, published in the Official Gazette no.847/16.09.2004

(43) As regards the concession in the free zones, it is assigned by public bidding procedure and, according to the provisions of article 12¹ of the Law no.84/1992, „the concession is arrogated by a contract by which the free zone administration, as releaser, remits for a period of at most 49 years to the operator, as lessee, the right and the obligation to exploit a good, an activity or a public service, for a royalty that goes to the own incomes of the administration”.

(44) According to the provisions of art.2 (3) of the Law no.414/2002 on profit tax, abolished and replaced by the provisions of art.38 (4) of the Law no.571/2003 on Fiscal code, the taxpayers that obtained incomes from licence based activities in a free trade area were paying a reduced quote of profit tax, respectively 5 % for the taxable profit related to these activities, until 31 December 2004.

(45) In conformity with the provisions of art.3 of G.D. no.1900/2004 *on making compatible the existing state aid granted in accordance with the Law no.84/1992 on free zones regime*, the undertakings “functioning in free zone regime and which concluded concession contracts with the free zones’ administrations until 1 July 2002” may benefit from regional state aid in form of royalty reduction.

(46) The Control note drawn up by the competition inspectors on 9 February 2006 ascertains that the company subject to the investigation (S.C. ROMNED COMPANY S.R.L.) is carrying on its activity in the Free Zone Constanta South under the licence issued by the Free Zone Constanta’s Administration, concluded the concession contract with the Administration until 1 July 2002 (respectively on 17 November 1999) and has as scope of activity in the free zone «Whole sale trade with construction machines » - N.A.C.E. code 5162.

(47) The activity of S.C. ROMNED COMPANY S.R.L. in the free zone is also framing in the sectors of activities covered by the *Regulation on regional state aid*¹⁰, as subsequently amended and completed, thus being eligible to receive state aid in form of profit tax reduction, according to the provisions of the law no.414/2002 on profit tax, abolished and replaced by the Law no.571/2003 on Fiscal code, and in form of reduction of the royalty paid to the free trade area’s administration, according to the provisions G.D. no.1900/2004 *on making compatible the existing state aid granted in accordance with the Law no.84/1992 on free zones regime*.

State aid for initial investment

¹⁰ Regulation on regional state aid, published in the Official Gazette no.340 of 19 April 2004

(48) In conformity with the provisions of the Law no.84/1992 on free zones regime, as subsequently amended and completed, of the Competition Council's Decision no.169/2004, of G.D. no.1900/2004 and of the Treaty of Accession of Romania to the European Union, Annex VII, the state aid must be granted in line with the specific conditions of the regional state aid for investments.

(49) An initial investment was considered an investment in fixed capital, in order to create a new plant, to enlarge an existing one or to start an activity involving a fundamental change of the product or the making process of an existing plant, by rationalization, diversification and modernization.

(50) S.C. ROMNED COMPANY S.R.L. benefited from state aid for the initial investment made in the free zone, investment that consisted in building and equipments.

Eligible costs

(51) The eligible costs for investments in tangible assets, made in free zones, are the expenditure corresponding to each element of the investment, respectively buildings and equipments necessary to carry on the activity in the area.

(52) The eligible costs related to the investments in intangible assets are the expenditure for the technological transfer in form of patents, exploitation licences or patented knowledge, under the condition not to exceed 25 % of the expenditure for tangible assets defined at paragraph (51).

(53) According to the provisions of art.5 of G.D. no.1900/2004, the regional state aid is granted for the initial investment made between **30 July 1992 and 1 November 2004**.

(54) Annex 2 of the G.D. no.1900/2004 sets out that the regional state aid to be granted to the undertakings operating in the free trade areas in form of reduction of the royalty **“is calculated by the Ministry of Public Finance, based on the information provided by the free zones’ administrations and the examinations made at the companies’ premises”**.

(55) In order to establish the amount of state aid that might be granted in form of royalty reduction, the Ministry of Public Finance determined the eligible costs of the investments made until 1 November 2004 by the companies from the free trade areas, which fulfil the art.3 conditions of the G.D. no.1900/2004, meaning the companies that **concluded concession contracts with the free zones’ administration until 1 July 2002**.

(56) By the letter no.109117/3.11.2005, the Ministry of Public Finance submitted to the Competition Council „The situation on the eligible costs and the state aid granted in form of exemption/reduction of the profit tax payment during 2003 – 2004, that formed the basis of the determination of the state aid quantum from which the undertakings may benefit in accordance with G.D. no.1900/2004”. The same letter records that the eligible costs that formed the basis of the state aid quantum determination included „ values of buildings (including execution projects), equipments, machinery (including office equipments and IT licences). The eligible costs were established by justificatory documents included in the companies’ bookkeeping”.

(57) According to the provisions of article 5 of the G.D. no.1998/2004¹¹, the payment of the royalty owed to the free trade area’s administration, related to the concession contract signed with the administration, is made in free convertible currency accepted by the National Bank of Romania. In order to calculate the state aid granted in form of royalty reduction, the Ministry of Public Finance determined the eligible costs of the investments in USD “using the monthly or annual average exchange rate ROL/USD afferent to the month or the year when the investment was made” (as mentioned in letter no.109117/3.11.2005).

(58) According to the same letter of the Ministry of Public Finance, the value of the eligible costs of the investments made by S.C. ROMNED COMPANY S.R.L. in the free trade area until 1 November 2004, is **USD 111,837.67**, being determined in conformity with the above mentioned procedure.

Beneficiary’s contribution

(59) On the data obtained from the Ministry of Public Finance and C.N.A.P.M. – S.A. Constanta, the Competition Council ascertained that S.C. ROMNED COMPANY S.R.L. did not observe the obligation regarding the beneficiary’s contribution, its contribution level being of 12%, which is situated under the minimum level provided by the legislation in force.

State aid intensity

¹¹ G.D. no.1998/2004 on the approval of the Methodological norms regarding the concession of the public or private state estate or the estate of the administrative – territorial bodies, as well as the concession of public activities/services of national or local interest, held in administration by the free trade areas, published in the Official Gazette no.1166 of 9 December 2004.

(60) According to the provisions of the *Regulation on regional state aid*, the state aid intensity for the initial investment is calculated as percentage points of the investment's value.

(61) As mentioned also in the Treaty of Accession by Romania to the European Union, Annex VII, the state aid intensity can not exceed the following limits:

- 50% for big enterprises;
- 65% for small and medium – sized enterprises;
- if the enterprise is operating in the auto vehicles sector, the total aid can not exceed 30 % of the eligible costs of the investment.

(62) At the same time, according to the provisions of the Treaty, the period taken into account when calculating the “state aid to be included in the above mentioned ceilings starts on 2 January 2003; all the aids claimed and received on the basis of the profits previous to this date are excluded from the calculation”.

(63) In order to determine the quantum of the state aid granted to S.C. ROMNED COMPANY S.R.L. beginning with 2 January 2003, **both in form of reduction of the profit tax payment and royalty reduction**, the Competition Council requested information from the Ministry of Public Finance – Directorate General of Public Finance of Constanta County (by letters no.1101/29.11.2005 and no.1114/12.12.2005) and from the C.N.A.P.M. – S.A. Constanta – Subsidiary of Free Trade Areas Constanta South and Basarabi (by letter no.1101/29.11.2005).

(64) As a result of the reiteration letter of the Competition Council no.1114/DRMCAS/12.12.2005, Directorate General of Public Finance of Constanta County submitted, by letter no.22362/16.12.2005, data on the **quantum of the state aid granted in form of reduction of the profit tax payment** to S.C. ROMNED COMPANY S.R.L. during 2003-2004.

Values:

- year 2003: 66,906.94 RON (669,069,362 ROL)
- year 2004: 252,832.87 RON (2,528,328,680 ROL)

Results a **total of: 319,739.81 RON (3,197,398,042 ROL)**

(65) Taking into account the **annual average exchange rate communicated by the National Bank of Romania** (for 2003: 33,200.07 ROL/USD; for 2004: 32,636.57 ROL/USD) the following values of the state aid resulted:

- year 2003: 20,152.65 USD
- year 2004: 77,469.19 USD

Total: 97,621.84 USD

(66) By the letter no.30395/9.12.2005, C.N.A.P.M. – S.A. Constanta – Subsidiary of Free Trade Areas Constanta South and Basarabi communicated **the value of the state aid in form of royalty reduction** from which S.C. ROMNED COMPANY S.R.L. benefited beginning with 18 March 2005 and until 17 December 2005, respectively the value of USD 710.04 (21,997,088ROL/ 2,199.71RON).

(67) In conformity with the invoices issued by C.N.A.P.M. S.A. Constanta during 18 December 2005 – 17 March 2006, S.C. ROMNED COMPANY S.R.L. benefited from the royalty reduction in amount of USD 236.64 (7,112,373 ROL / 711.24 RON).

(68) Thus, during **18 March 2005 – 17 March 2006** and according to the Control note concluded on 9 February 2006, S.C. ROMNED COMPANY S.R.L. benefited from **state aid in form of royalty reduction in a total amount of USD 946.68 which is the equivalent of ROL 29,109,461** (RON 2,910.94), calculated at the exchange rate written on each invoice (Annex 1 to the present report).

(69) **The total value of the state aid** granted in form of reduction of the profit tax payment and royalty reduction, from which S.C. ROMNED COMPANY S.A. benefited during **2 January 2003 – 17 March 2006** is of **ROL 3,226,507,503** (RON 322,650.75), the equivalent in national currency of the amount of **USD 98,568.52**.

(70) Taking into account **the value of the newly created investments in the free trade area of USD 111,837.67 and the total value of USD 98,568.52 of the state aid received by S.C. ROMNED COMPANY S.A.** (reduction of the profit tax payment and reduction of royalty), **a state aid intensity level of 88% results**, which exceeds the maximum admissible level of 65%. In the case of the companies operating in the free trade areas the gross intensity is the same with the net intensity because the measures consist of profit tax reduction and royalty reduction paid to free trade area's administrations.

(71) In conformity with the legal provisions in force and taking into consideration the value of the eligible investment created by S.C. ROMNED COMPANY S.A., this company had the right to benefit from state aid in quantum of USD 72,694.49. The difference of **USD 25,874.03 is state aid received by S.C. ROMNED COMPANY S.R.L. without observing the rules on the maximum admissible level of the state aid intensity and on the investments realization.**

(72) **The state aid granted over the maximum admissible level of the state aid intensity, in amount of USD 25,874.03**, consists of USD 24,927.35, as state aid in form of reduction of the profit tax payment and USD 946.68, as state aid in form of royalty reduction.

(73) Hereby, **the equivalent in ROL of the state aid exceeding the maximum admissible level of the intensity** (determined in relation with the average exchange rate of 2004 for the reduction of the profit tax payment and in relation with the exchange rate written on each invoice monthly issued for the royalty reduction) is:

As reduction of the profit tax payment: ROL 813,543,200 (RON 81,354.32)

As royalty reduction: ROL 29,109,461 (RON 2,910.95)

Total aid over the maximum limit: ROL 842,652,661 (RON 84,265.27)

(74) Taking into consideration that **the measure of profit tax reduction functioned until 31 December 2004, being replaced with the royalty reduction beginning with 18 March 2005** and that the state aid exceeding the maximum admissible level of intensity consists of both reduction of the profit tax payment and royalty reduction, it follows that the intensity exceeding occurred when the company was benefiting of reduction of the profit tax payment.

(75) As mentioned also in the Control note concluded on 9 February 2006 at S.C. ROMNED COMPANY S.R.L. premises, the exceeding of the maximum admissible level of the state aid intensity was due to the profit made along December 2004, fact that determined a reduction profit tax reduction higher than the average of the previous periods, estimated and taken into account by the Ministry of Public Finance when applying the provisions of G.D. no.1900/2004.

(76) Hereby, on **25 January 2005, when the company had the legal obligation to pay the profit tax, the state aid intensity reached the level of 87% (USD 97,621.84 / USD 111,837.67 * 100) as a result of the profit tax reduction. The royalty reduction was afterwards granted, beginning with 18 March 2005.**

(77) Following that, **the moment when the state aid made available for the beneficiary exceeded the maximum admissible limit is on 25 January 2005.** At this moment S.C. ROMNED COMPANY S.R.L. had the obligation to pay the profit tax in conformity with the provisions of art.34 (1) of the Law no.571/2003 on Fiscal code, as subsequently amended and completed.

Amount's determination of the interest related to the unlawful state aid

(78) In conformity with the provisions of article 194² (3) included in the Fiscal procedure code by the GEO no. 129/2005, “for the amounts consisting of state aid to be recovered, interest is due from the moment the state aid has been made available for the beneficiary until its recovery”.

(79) In conformity with the provisions of article 4 of the Guidelines¹² on interest rate in case of recovery/repayment of unlawful and prohibited aid, issued by the Competition Council, „the interest rate that shall be taken into account in case of recovery/repayment of an unlawful or prohibited aid is determined in accordance with the National Bank of Romania (NBR) reference interest rate from the first working day of the year, for the interest to be applied in the first part of the year and the NBR reference interest rate from the first day of July, for the second part of the year”.

(80) According to the same Guidelines, the reference interest rate shall be modified “in case that the NBR reference interest rate differs by more than 5 percents from the State aid recovery interest in force”.

(81) **The period to calculate the amount of the interest related to the unlawful state aid** granted to S.C. ROMNED COMPANY S.R.L. between 25 January 2005 (when the unlawful state aid was made available for the beneficiary) and 31 December 2005.

(82) Beginning with 1 January 2006 and until the moment of effective recovery the interest amount shall be calculated by the Ministry of Public Finance – National Agency for Fiscal Administration, as the institution responsible for the recovery of unlawful aid, in conformity with the provisions of art.194² (2) of G.O. no.92/2003 on Fiscal procedure code¹³, republished, as subsequently modified and completed. Until the Government decision that sets out the annual interest rate applicable to the amounts to be recovered as unlawful or prohibited state aid appears (art.194² (4) included in the G.O. no.92/2003 on Fiscal procedure code by G.E.O. no.129/2005), the interest amount shall be determined in conformity with the Guidelines on interest rate in case of recovery/repayment of unlawful and prohibited aid, issued by the Competition Council.

¹² Order no. 51/21.03.2005 issued by the President of the Competition Council for the adoption of the Guidelines on interests rate in case of recovery/repayment of unlawful and prohibited aid, published in the Official Gazette of Romania no. 253/25.03.2005

¹³ Government Ordinance no.92/2003 on Fiscal procedure code, republished in the Official Gazette no.863/26.09.2005

(83) In order to determine the amount of the interest related to the unlawful state aid for the period between 25 January 2005 and 31 December 2005, the Competition Council took into account the reference interest rate communicated by NBR, as follows:

25 January 2005 - 28 February 2005.....	17.31%
1 March 2005 - 30 June 2005	10.75%
1 July 2005 - 31 December 2005	8.00%

(84) The interest amount was determined beginning with the value of the unlawful state aid registered on 25 January 2005, corresponding to the reduction of profit tax payment mentioned at paragraph (73), and then the royalty reduction was monthly added, as it was registered in each invoice until 31 December 2005.

(85) **The interest related to the unlawful state aid** calculated for the period between **25 January 2005 and 31 December 2005** in conformity with the procedure forenamed is in amount of **ROL 76,394,601 (RON 7,639.46)**.

VIII. CONCLUSIONS

(86) As a result of the state aid investigation of S.C. ROMNED COMPANY S.R.L., having the headquarter in Techirghiol, street Nicolae Titulescu no.1, Free trade area Constanta South, Enclosure 1A, County of Constanta, registered in the Trade Register under no.J13/3747/1994, unique registration code R 6397474, the Competition Council ascertained the exceeding of the maximum admissible level of the state aid intensity.

(87) **The intensity of the state aid received** by S.C. ROMNED COMPANY S.A. as reduction of the profit tax payment and royalty reduction is **88%**, which exceeds the maximum admissible level of 65%.

(88) The state aid in amount of **ROL 842,652,661 (RON 84,265.27)**, corresponding to **USD 25,874.03, granted over the maximum limit of intensity** between 25 January 2005 and 17 March 2006 is incompatible both with the provisions of the Treaty of Accession by Romania to the European Union and with the provisions of the Law no.84/1992 on free zones regime, as subsequently amended and completed.

(89) In relation to the facts forenamed, the Competition Council ascertains that the state aid granted over the maximum admissible level of the intensity is **unlawful state aid**.

(90) The **moment when the unlawful state aid was made available** for the beneficiary is on **25 January 2005**, when S.C. ROMNED COMPANY S.R.L. had the obligation to pay the profit tax in conformity with the provisions of article 34 (1) of the Law no.571/2003 on Fiscal code, as subsequently amended and completed.

(91) For **the period between 25 January 2005** (when the unlawful state aid was made available for the beneficiary) **and 31 December 2005, the amount of the interest related to the unlawful state aid** from which S.C. ROMNED COMPANY S.R.L benefited is ROL 76,394,601 (RON 7,639.46).

DECIDES

Art.1. In accordance with the provisions of the article 25 (3) of the Law no.143/199 on state aid, republished, and taking into consideration the lack of observance of the condition set out by article 2 letter d of the Competition Council Decision no.169/02.06.2004, the Competition Council decides that the state aid in form of profit tax reduction for the activities undertaken in the free zone and in form of royalty reduction paid to the free zone administration, granted to **S.C. ROMNED COMPANY S.R.L.**, having the headquarter in Techirghiol, street Nicolae Titulescu no.1, Free trade Area Constanta South, Incinta 1A, county of Constanta, CUI R 6397474, J13/3747/1994, over the maximum admissible level of the state aid intensity, is unlawful and incompatible with a normal competitive environment.

Art.2. The amounts representing unlawful and incompatible state aid from which S.C. ROMNED COMPANY S.R.L. benefited beginning with 25 January 2005 until 17 March 2006, in amount of **ROL 842,652,661** (RON 84,265.27) corresponding to the amount of **USD 25,874.03** and the interest afferent to the unlawful state aid for the period between 25 January 2005 and 31 December 2005, in amount of **ROL 76,394,601 (RON 7,639.46)**, shall be recovered in conformity with the provisions of article 26 of the Law no.143/199 on state aid, republished.

Art.3. Having regard to the provisions of article 194² included in the Fiscal procedure code by the GEO no.129/2005, the Ministry of Public Finance, as state aid supplier, shall take all the measures for the recovery of the unlawful and incompatible state aid from S.C. ROMNED COMPANY S.R.L., together with the afferent interest, calculated in accordance with the *Guidelines on*

interest rate in case of recovery/repayment of unlawful and prohibited aid, until the moment of effective recovery.

Art.4. Beginning with 1 January 2006 until the moment of effective recovery, the interest amount shall be calculated by the Ministry of Public Finance – National Agency for Fiscal Administration, as the institution responsible for the recovery of unlawful aid, in conformity with the provisions of art.194² (2) included in the G.O. no.92/2003 on Fiscal procedure code by the GEO no. 129/2005.

Art.5. Within the procedure of the unlawful state aid recovery for S.C. ROMNED COMPANY S.R.L., the Ministry of Public Finance shall consider any further state aid granted to the company in form of royalty reduction after 17 March 2006, taking the appropriate measures to stop granting the aid, according to art.194¹ and art.194² included in the G.O. no.92/2003 on Fiscal procedure code by the GEO no. 129/2005

Art.6. The present decision is executory title.

Art.7. Within 3 months since this decision issuing, the Ministry of Public Finance shall inform the Competition Council on the action undertaken as regards the enforcement of the measures imposed by the present decision.

Art.8. According to the provisions of art.46 of the Law no.143/199 on state aid, republished, the present decision may be appealed by the interested parties at the Court of Appeal of Bucharest, Administrative Section, within 30 days since its communication.

Art.9. The present decision becomes applicable as of the date of its communication.

Art.10. The present Decision shall be communicated by the Secretariat-General of the Competition Council to:

- **Ministry of Public Finance**, str.Apolodor nr.17, sector 1 Bucuresti;
- **Ministry of Transport, Construction and Tourism**, B-dul Dinicu Golescu nr.38, et.1 aripa Cameliei, camera 97;
- **National Company „Administratia Porturilor Maritime” – S.A. Constanta**, Incinta Port, Gara Maritima, 900900 Constanta;

- **S.C. ROMNED COMPANY S.R.L.**, localitatea Techirghiol, str. Nicolae Titulescu nr.1, Zona Libera Constanta Sud, Incinta 1A, judetul Constanta.

Art. 11. The Secretariat-General, Reporting, Monitoring and Controlling State Aid Directorate and the Legal Directorate of the Competition Council shall follow the enforcement of the present decision.

PRESIDENT

MIHAI BERINDE