

DECISION NO. 104
as of 03.06.2005

**regarding the guarantee granted by the Local Council of Tg-Mures to the
Regie Autonome Aquaserv Tg-Mures for contracting a loan to
co-finance the Project „Improvement of water supply systems, collection
and treatment of waste water in the city of Tg-Mures”**

The Competition Council

Having regard to the Decree no. 57/2004 regarding the appointment of the Competition Council;

Taking into consideration the provisions of the Competition Law no. 21/1996, published in the Official Gazette no 88, with the subsequent modifications and completions;

Taking into consideration the provision of the Law no 143/1999 on State aid, published in the Official Gazette no 370/03.08.1999, Part I, with subsequent modifications and completions;

Taking into consideration the dispositions of the European Agreement establishing an association between Romania, on one hand, and the European Communities and their Member States on the other hand, ratified by the Law no.20/1993, published in the Official Gazette, Part I , no. 73 on April the 12th, 1993;

Taking into consideration the dispositions of the Regulation on state aid as compensations granted to undertakings entrusted with services of general economic interest, published in the Official Gazette Part I, no. 1048/12.11.2004.

Based on the following,

1. PROCEDURE

- (1) By the note no. 262/23.03.2005, filed at the Competition Council no. RS-AS 11/29.03.2005, Tirgu-Mures City Hall notified, based on art. 6 from the *Law no. 143/1999 regarding state aid with subsequent modifications and*

completions, the guarantee granted to secure an external loan by „Regia Autonoma AQUASERV Tg-Mures”.

- (2) By note DAAS/295/05.04.2005, additional information were requested, based on art. 6 para. (4) from *Law no.143/1999, with the subsequent modifications and completions*.
- (3) The notification became effective as of the date when the information was accurate and complete, respectively on 06.05.2005.

2. DESCRIPTION OF THE MEASURE OF FINANCIAL SUPPORT

2.1 The beneficiary of the support measure granted by the state

- (4) The beneficiary of the notified support measure is „Regia Autonoma AQUASERV Tg-Mures” (hereafter R.A. Aquaserv), under the authority of Tg-Mures Local Council.
- (5) R.A. Aquaserv Tg-Mures was established according to the provisions of Law no.15/1990, of the G.D. no.1330/1990 and L.C.D. no. 58/28.05.1998, as a company with legal person status, functioning based on economic management and financial autonomy for the management of goods in the public domain (the water supply and sewage systems) required to discharge the public services of water supply and sewage systems.
- (6) The private net worth of R.A. Aquaserv Tg-Mures amounts to ROL 25,420,978 thousand.
- (7) The company is headquartered in the city of Tg-Mures and registered with the Registry of Commerce under no. J 26/464/1998, and Fiscal registration code no. 10755074.
- (8) The economic and financial results obtained by R.A. Aquaserv Tg-Mures in 2002-2004 are presented in Table no.1.

Table no.1 - Economic and financial results of R.A. Aquaserv Tg-Mures
- ROL thou.-

No.	INDICATOR	2002	2003	2004
1.	TURNOVER	159,823,089	194,349,548	208,910,077
2.	NET PROFIT	9,763,668	17,313,718	43,736,049

Source: Notification Form

Data in Table no. 1 show that in each year of the analyzed period the company had positive financial results for its entire activity.

- (9) According to its setting up deed, the main object of activity of R.A. Aquaserv Tg-Mures represented by the discharge of the following services of public town management: the sourcing, treatment and distribution of drinking water and the collection, transport and treatment of waste water. According to art. 2 from the *Law on public services of town management no. 326/2001*, establishing the legal framework regarding the set-up, organization, monitoring and control of the functioning of public services of town management in counties, cities and villages, the public services of town management represent the entirety of activities and utility actions of local interest, carried out under the authority of the local public administration, having as purpose the supply of public utility services. By license granted by the National Agency of Regulation in the field of Services of Town Management (hereinafter called A.N.R.S.C.), the company is entrusted with the discharge of public services of water supply and sewage.
- (10) R.A. Aquaserv Tg-Mures directly administers and operates the public systems for the supply of drinking water and sewerage in the city of Tg-Mures, based on the Protocol no. 6/01.07.1998, concluded with the Local Council of the city of Tg-Mures.
- (11) The obligations of R.A. Aquaserv Tg-Mures, as a provider of public services of town management are, in principle, the following:
- a) to supply all consumers in the coverage area for which it was authorized/certified;
 - b) to observe the performance parameters set by local public administration authorities, or by the national regulating authority;
 - c) to provide the local public administration authority, respectively the national regulating authority the information required and to allow access to the utilities' documents, according to the clauses of the operating agreement.
- (12) Given the above, the public services of general economic interest entrusted to the company are:
- supply of drinking water (the public service of drinking water supply entails mainly the sourcing, treatment of water, transport and distribution of drinking water);
 - sewerage (the public service of sewerage entails the following: collection and transport of waste domestic water from users to the treatment facilities,

treatment of waste water and its disbursement, collection, evacuation and adequate treatment of the waste from drainage slots and the assurance of their functionality, the supervision of the evacuation of industrial waste water in the sewerage system, evacuation and treatment of sludge and other similar waste derived from the activities mentioned above, as well as their storage).

- (13) The services for the supply of drinking water and sewerage services represent 96% from the total activity carried out by R.A. Aquaserv Tg-Mures. Given the fact that there is only one sewerage network in the city of Tg-Mures, R.A. Aquaserv Tg-Mures takes over both the domestic and meteoric waste water as well as industrial, the latter activity having a non significant contribution to the entire activity of R.A. Aquaserv Tg-Mures. We mention that each undertaking has the obligation to ensure the pre-treatment of the waste industrial water resulted from its activity before discharging it in the sewerage network.
- (14) The weight of the public services of drinking water supply and sewerage for the population and public institutions represents 64% of the total public services discharged by R.A. Aquaserv Tg-Mures.
- (15) The ancillary activities carried out by R.A. Aquaserv Tg-Mures consist in drainage of inner and outer canals, checking and repairing of measurement and control equipment related to the main activities, related activity design, maintenance and repair of transport means, laboratory analysis of drinking and waste water.

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

- (16) The relevant market affected by the granting of the financial support analyzed in the present decision is represented by the market of public services of water supply and sewerage.
- (17) The public services of water supply and sewerage function in a centralized system and are organized under the coordination and control of the local public administration authorities, based on the local autonomy principle. The relevant geographical market is represented only by the city of Tg-Mures, therefore it is a market of local interest. This is a regulated market because prices and tariffs of the services are not determined by supply and demand but approved by the local public administration – the Local Council of Tg-Mures - and adjusted and agreed by A.N.R.S.C. The service provider is bound to ensure the supply of services to all connected to the network, without discrimination. Also, all consumers connected to the drinking water and sewerage network of the city are captive consumers, because they do not have the possibility to choose their service supplier.

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

2.3. Ways of granting the financial support

- (19) The notified financial support consists in guaranteeing 100% by the Local Council of the city of Tg-Mures of an external loan contracted by R.A. Aquaserv Tg-Mures from the European Bank for Reconstruction and Development (hereafter EBRD). The value of the loan is of EUR 7,000 thousand to be reimbursed in 2006-2018, with an interest rate of 6-month Euribor + an average margin of 3% per annum.
- (20) The loan is earmarked to co-finance the Project „Improvement of water supply systems, collection and treatment of waste water in the city of Tg-Mures” (hereafter the Project) for which R.A. Aquaserv Tg-Mures benefits of non reimbursable financial assistance in value of EUR 20,932 thousand through the Instrument for Structural Policies for Pre-Accession (ISPA). The terms for realising the Project, its financing and implementation modalities are regulated by the *Financing Memorandum* agreed between the *Government of Romania and the European Commission, regarding the non-reimbursable financial assistance granted through Instrumentul for Structural Policies for Pre-Accession, for the measure „Improvement of water supply systems, collection and treatment of waste water in the city of Tg-Mures, Romania” signed in Brusells on 20th November 2001 and in Bucharest on 22nd February 2002, ratified by Law no. 473/2002.*
- (21) The legal basis for granting the notified financial support is the *L.C.D. no. 222/2003 regarding the approval by the Local Council of the city of Tg-Mures of the Guarantee and Project Assistance Agreement between the city of Tg-Mures and the European Bank for Reconstruction and Development.*

2.4. Description of the Project

- (22) Considering the age and the considerable worn out ratio of the public water and sewerage infrastructure in the city of Tg-Mures, the Local Council identified the necessity to realize investments to rehabilitate, develop and modernize it. Due to the fact that R.A. Aquaserv Tg-Mures is entrusted with the discharge of public services of water supply and sewerage in the city of

Tg-Mures, the obligation to realize the Project „Improvement of water supply systems, collection and treatment of waste water in the city of Tg-Mures” belongs to this undertaking.

(23) The value of the Project is of EURO 27,949.4 thousand being financed as follows:

- ISPA assistance – EURO 20,932 thousand (75% of the Project value);
- Co-finance portion (25% of the Project value), as follows:
 - EURO 7,000 thousand – EBRD loan guaranteed by the Local Council;
 - EURO 17.4 thousand – own funds of R.A. Aquaserv Tg-Mures.

(24) The Project consists in investments regarding treatment of drinking water, collection and treatment of waste water in the City of Tg-Mures. The financed components of the Project are the following:

- A. Rehabilitation of the drinking water treatment station from the city of Tg-Mures;
- B. Rehabilitation of the waste water treatment station from the city of Tg-Mures;
- C. Extension of the sewage network and enhancements to the management of the rain water within the combined sewage network;
- D. Technical assistance, supervision during implementation and publicity.

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

- rehabilitation of water collection;
- construction of a new water pumping station;
- construction of a new pre-decanting tank;
- construction of two new decanters;
- rehabilitation of the quick sand filters;
- construction of the water ozone installation;
- construction of a coal active filtering station;
- rehabilitation of the reactives preparation and dosage station;
- construction of a sludge treatment facility;
- rehabilitation of the drinking water pumping station.

The present treatment station was designed in the seventies for a different level of water consumption and a less polluted river water. The processes of conventional treatment of decays, pre- and post-chlorination as well as the quick gravitational filters are not capable to meet the standards of EU Directive 98/83/CE regarding quality of drinking water, with a high risk that

pollutants being directly pumped in the water supply system, posing a considerable hazard for the public health.

- (26) The B component contains the following investment objectives:
- rehabilitation of the mechanical stair;
 - rehabilitation of the primary decanters;
 - rehabilitation of the decanted water pumping station;
 - construction of a chemicals dosage station;
 - rehabilitation and upgrade of the air intake basin;
 - extension of the sludge thickening installation;
 - construction of the dehydrated sludge pumping station;
 - implementation of the automation systems;
 - rehabilitation of networks.
- (27) The C component includes the following activities:
- extension of the sewage network by 27.6 km, almost 100% of the city's sewerage system;
 - rehabilitation of the two existing pumping stations (Baraj and Insula);
 - enhancement of the rain water management by rehabilitating the evacuation system.
- (28) The D component includes the following activities:
- preparation of tender documents, assistance in the financial management of the company and launching a program to improve operational performance;
 - supervision during implementation;
 - assuring publicity for the Project.
- (29) The deadlines for the investment objectives financed within the Project are shown in Table no.2.

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

No.	INVESTMENT OBJECTIVE	VALUE	FINANCING SOURCE	DEADLINE
1.	Rehabilitation of the drinking water treatment station	11,157.7	ISPA	February 2007
2.	Rehabilitation of the waste water treatment station	8,513.0	ISPA + EBRD loan	May 2007
3.	Extension of the sewerage system and	5,669.8	ISPA	December 2006

	enhancement of the rain water management			
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Source: Financing memorandum

3. ANALYZING THE SUPPORT MEASURE FROM THE STATE

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

(31) *Law 143/1999 on State aid, with further modifications and completions* lays down that, except where otherwise provided, aid which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods is, insofar as it significantly affects trade, incompatible with a normal competition environment.

3.1. The object of the decision

(32) Based on the notification received by the Competition Council from the Local Council of Tg-Mures, the object of the present decision is the financial support under the form of municipal guarantee granted to R.A. Aquaserv Tg-Mures. The guarantee has been granted for contracting a loan from EBRD for financing an investment objective regarding the infrastructure of water and sewerage of the city.

3.2. Analysis of the measure of financial support based on the *Guidelines regarding state aid granted under the form of guarantees*

(33) The financial measure in question is a guarantee. The *Guidelines regarding state aid granted under the form of guarantees* provide the criteria for the assessment of the state aids granted under the form of guarantees.

(34) According to point 4.2. of the *Guidelines on the state aid granted under the form of guarantees*, an individual state guarantee does not constitute state aid if the following conditions are simultaneously fulfilled:

- a) the debtor is not in a difficult situation;
- b) the debtor is, in principle, able to contract a loan under market conditions, without the State intervention;
- c) the granted guarantee is related to a certain financial operation, a certain maximum amount, does not cover more than 80% from the loan or other financial obligation, except for bonds or other similar instruments, not unlimited in time;

- d) the guarantee implies the payment of a prime at market price.

Presently, the above mentioned conditions are not cumulatively fulfilled.

- (35) Analyzing the overall economic and financial position of R.A. Aquaserv Tg-Mures it can be concluded that the company is not in difficulty. It results from the information sent by the beneficiary that R.A. Aquaserv Tg-Mures can obtain loans from a commercial bank, at market terms, without the state intervention. Thus, the Competition Council considers the conditions from paragraph 4.2 a) and b) from the *Guidelines on the state aid granted under the form of guarantees* to be met.
- (36) However, since the municipal guarantee is of 100% and R.A. Aquaserv Tg-Mures does not pay any premium to the Local Council in the account of the guarantee, the conditions provided at paragraph 4.2. c) and d) from the *Guidelines on the state aid granted under the form of guarantees* are not met. Consequently, the rules on guarantees do not exclude the applicability of the rules on state aids concerning the guarantee from which R.A. Aquaserv Tg-Mures benefits.

3.2.1 Assessment of the aid

- (37) As to the state aid element involved, point 3.2. of the *Guidelines on the state aid granted under the form of guarantees* provides, that the state aid under the form of guarantees can be calculated “in the same way as the net grant-equivalent of a loan granted in preferential conditions, the interest bonus representing the difference between the market interest rate and the interest rate obtained with State guarantee, after any premiums have been paid.”
- (38) Due to the fact that a commercial bank would have granted R.A. Aquaserv Tg-Mures a similar loan, without the state guarantee, with an annual interest rate of 11.25%, the Competition Council considers that this rate can be taken as reference when calculating the financial support under the form of guarantee.
- (39) In these circumstances, the financial support granted under the form of guarantee is equal to the net grant equivalent¹ of the loan guaranteed by the Local Council (in amount of EUR 7,000 thousand), calculated as the discounted difference between the market interest rate and the interest rate obtained due to the municipal guarantee, respectively: EUR 2,768,536, the equivalent of ROL 100,212,697.6 thousand².

¹ The grant equivalent has been calculated according to Annex 2 point 3 of the Regulation regarding regional state aid, considering the terms of the loan, the reimbursement schedule as well as the discount rate (inflation rate) for Euro of 2.1% between 2004-2018.

² The NBR exchange rate from 04.05.2005, respectively 1 Euro=ROL 36,197 was used for calculations.

3.3 Analysis of the guarantee of the Local Council of Tg-Mures in the context of the rules on regional aid for investments

- (40) Taking into account that the aid is designed to finance some investment objectives, the Competition Council assessed the aid under Art. 2 and Art. 14 of *Law 143/1999, with further modifications and completions*, and the *Regulation on Regional Aid* (hereinafter the Regulation). The sector concerned is not covered by any specific rules, however the adjacency to the rules on SGEI is visible.
- (41) R.A. Aquaserv Tg-Mures is located in the Center development region of Romania. As stated under par. (35) of this decision, R.A. Aquaserv Tg-Mures is not a company in difficulty, thus being eligible for regional aid in accordance with Art. 1 (4) of the *Regulation on Regional Aid*.
- (42) In accordance with Art. 5 of the *Regulation on Regional Aid*, the notified aid is aid for initial investment as it serves the expansion, rationalization and modernization of an existing unit.
- (43) The guarantee granted by the Local Council to contract the EBRD loan is granted individually to R.A. Aquaserv Tg-Mures in view of co-financing the Project. The Competition Council therefore notes that the aid in question is not granted in the framework of any regional scheme previously approved. Therefore, the aid is considered as ad hoc aid which has to be assessed on its own merits. An individual ad hoc aid payment made to a single firm, or aid confined to one area of activity, may have a major impact on competition in the relevant market, and its effects on regional development are likely to be too limited. Such aid generally comes within the ambit of specific or sectoral industrial policies and is often not in keeping with the spirit of regional aid policy as such. The latter must remain neutral towards the allocation of productive resources between the various economic sectors and activities. The Competition Council considers that, unless it can be shown otherwise, such aid does not fulfill the necessary requirements set out in the Regulation.
- (44) It has to be noted however, that the municipal authorities did not merely pursue a specific or sectoral policy in granting the aid. Nor did they primarily follow the goal to promote the region. The measure must rather be assessed in the context of the obligation to provide a service of general economic interest.
- (45) Regional aid measures differ from the other categories of government support in that they are reserved for particular regions and have as their specific aim

the development of those regions. In the Romanian context, this applies to all of the country. Regional aid is designed to develop the less favored regions by supporting investment and job creation in a sustainable context. It promotes the expansion, modernization and diversification of the activities of establishments located in those regions and encourages new firms to settle there. In order to foster this development and reduce the potential negative effects of any relocation, the granting of such aid is consequently made conditional on the maintenance of the investment and the jobs created during a minimum period in the less favored region.

- (46) In the present case however, these objectives are not the primary goals of the aid granters. The aim is rather, to provide a reliable water management system for the community of Tg-Mures. The maintenance of such a system has to be considered to be a public service obligation of the state. Following the nature of the investment project, the Competition Council concludes, that the rules on SGEI seem to be “closer” than those on regional aid. At the same time, the Competition Council acknowledges that the rules on services of general economic interest are derogatory provisions. They only potentially apply, if an approval according to the prevailing general rules is not possible.
- (47) In addition, the Competition Council underlines that all the investment objectives which will be achieved within the Project are not part of the private patrimony of the beneficiary, respectively R.A. Aquaserv Tg-Mures, but part of the water and sewage public infrastructure of the city of Tg-Mures, which is property of the Romanian state, namely public property of the Local Council of Tg-Mures (*Law 213/1998 on public property and legal status*).
- (48) Leaving these general considerations aside, the Competition Council concludes the following concerning the compatibility of the measure in the context of the regional aid regulation:
- (49) Art. 8 of the *Regulation on regional aid* provides, that in order to ensure that the productive investment benefiting from aid is viable and sound, the recipient’s contribution to its financing must be at least 25 %. This criterion is presently not fulfilled.
- (50) As shown under par. (23) of this decision, R.A. Aquaserv Tg-Mures contribution to the achievement of the project ensured from own resources, not touched by any financial support from the state is Euro 17.4 thousand (standing for 0.06% of the Project’s total costs). The Competition Council underlines that these costs are dedicated to cover non-eligible expenses, R.A. Aquaserv Tg-Mures having no contribution from its own sources to the

financing of the eligible costs (i.e. own sources not touched by state support)
Thus, the criterion regarding the beneficiary's contribution is not fulfilled.

- (51) Regarding the maintaining of investments for a period of minimum 5 years, given that they are part of the technical-urban infrastructure of the city, it may be deemed that they shall be maintained for the whole duration of their functioning.
- (52) Vis-à-vis the above arguments, the Competition Council concludes that the criteria to authorize a regional aid for investments are not met cumulatively.
- (53) Since the service in question has the character of a public-service-obligation, by derogation from the general state aid rules, the recent case law of the ECJ in the context of the definition of state aid in this field (*Altmark-Judgement*) and *the Regulation on state aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest* have to be taken into account.

3.4 Analysis of the guarantee based on the provisions of the *Regulation on state aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest*

3.4.1 General

- (54) The financial support granted to a company entrusted with the obligation to deliver a service of general economic interest is not considered State aid for the purposes of Art. 2 of *Law 143/1999 on state aid with subsequent amendments and completions*, if the following conditions are cumulatively met:
 - a) the obligation to discharge a service of general economic interest is entrusted through a normative/administrative act and is clearly defined;
 - b) the parameters based on which the compensation is calculated must be established in advance, in an objective and transparent way, in order to avoid granting an economic advantage to the beneficiary;
 - c) the compensation must not exceed the amount necessary to totally or partially cover the costs incurred through the service of general economic interest, taking in consideration the relevant incomes and a reasonable profit in performing these obligations;

- d) if the undertaking entrusted with the service of general economic interest was not selected through open public tender which would have allowed the selection of an bidder able to discharge this public service at the lowest costs, then the level of compensation must be set based on a comparative analysis of the company's costs and the costs of well-managed and profitable enterprise which meets all the conditions set for the performance of the particular public service, given the relevant revenues and a reasonable profit from meeting the service of general economic interest obligations.

3.4.2 The condition from par. 3.4.1. a):

- (55) R.A. Aquaserv Tg-Mures is entrusted to deliver public services of water supply and sewage by the license approved by A.N.R.S.C. Order no. 78/01.09.2003. In the license there are provided, among others, the specific obligations of the undertakings delivering services of general economic interest as follows: continuity in supplying water and sewage, ensuring access to networks for new customers, achieving performance standards. Also, by G.D. no. 1591/2002, the company is obliged to deliver these services at prices and tariffs approved by the Local Council and established by the ANRSC.
- (56) According to the *Law on town management no. 326/2001*, the water supply and sewage services are public utility services.
- (57) According to Law no. 326/2001, public services must fulfill the following main conditions:
 - a) Continuity both in quality and quantity, according to the conditions stipulated in the contract;
 - b) Adaptability to consumers' requests;
 - c) Equal access to the public service, in the conditions stipulated in the contract;
 - d) Ensuring the public health and life quality.
- (58) Organization, operation and functioning of public services must ensure:
 - a) Meeting the quantity and quality demands of users, according to the contract provisions;

- b) The optimal operation in safety, profitability and economic efficiency conditions of buildings, equipments, installations and all assets, according to the projected technological parameters and in compliance with the requested conditions, operation guidelines and organization and functioning regulations;
 - c) Protecting the public estate and environment by observing the legal provisions;
 - d) Informing and consultation the citizens with the purpose of protecting the health of the population benefiting from these services.
- (59) The supply of the public service of drinking water and sewerage is achieved through the public system for water and sewerage, part of the technical-municipal infrastructure of the town. The administration of the water and sewerage system, necessary for delivering the general economic interest service is entrusted to the autonomous regie by the Local Council of Tg-Mures through Protocol no. 06/01.07.1998.
- (60) Regarding the above presented facts, we underline that R.A. Aquaserv Tg-Mures is under the obligation to ensure the effective functioning of services relating to the production, transport, distribution and supply of drinking water that are essential for the population, institutions and undertakings of Tg-Mures as well as collection, transport and treatment of domestic and meteoric waste water. It is furthermore required to provide these services at a regulated price that is intended to ensure the affordability for the consumer. Consequently, one can conclude that R.A. Aquaserv Tg-Mures is entrusted, by license, with the discharging of a service of general economic interest.

3.4.3 The condition from par. 3.4.1. b):

- (61) According to this criterion the compensation for the discharge of the public service of general economic interest obligation must be calculated on pre-established objectives and transparent parameters and may not grant an economic advantage to the beneficiary.
- (62) According to the provisions of G.O. no. 32/2002 *on the management and functioning of public services of water supply and sewage*, establishing, adjusting, modifying the prices and tariffs for the public services of water and sewerage must be approved by ANRSC, irrespective the organizational or property form of the operators delivering such services. The level of prices and tariffs approved by ANRSC is mandatory for all operators and must assure a balance between the affordability of the users and the economical viability of the operators of public services.

- (63) The prices and tariffs for public services of water supply and sewage are justified in advance according to transparent parameters such as: production and operating costs, repairs and maintenance costs, the annual depreciation of tangible and intangible assets; when setting up prices and tariffs it is taken into consideration the interest and the credits that need to be repaid, for creating, developing and modernization sources of the technical-municipality systems, as well as a reasonable profit, provided that the structure and the level of tariffs represent the real cost of supplying/delivering the service, to discourage the excessive consumption, to encourage the efficient supply of services, to assure the environment protection, to encourage capital investments and to be correlated with the users' affordability degree.
- (64) The operators which demand the establishment, adjustment or amendment of prices and tariffs for water supply and sewage have the obligation to transmit A.N.R.S.C. the following documents:
- a request for establishing, adjustment or amendment which comprises: the present prices, the requested prices and the justification for the proposal of establishment, adjustment or amendment;
 - the justification fiche of requested prices and tariffs;
 - other data and information necessary for the justification of the proposed prices and tariffs.
- (65) The justification of prices for drinking water/sewerage is set up in advance, based on the following elements:
- I. Costs from the previous period:
1. material costs:
 - untreated water;
 - technological losses;
 - energy;
 - technological materials;
 - annual depreciation;
 - administration repairs;
 - repairs for third parties;
 - research and studies;
 - cooperation;
 - commissions and fees;
 - protocol, advertising;
 - post and telecommunications;
 - water quality protection costs;
 2. employment costs (salaries, employer's contribution to the social insurance fund and to the health insurance fund, unemployment fund);

3. financial expenses (interest, commissions, etc.).

II. Revenues from the previous period from production, transport, distribution of drinking water and revenues from sewage;

III. Previous period profit;

IV. Developing quota;

V. Drinking water quantity delivered, including own consumption;

VI. Quantity of domestic and meteoric waste water processed;

VII. Price/unitary tariff from the previous period.

(66) Starting from these entry data, the prices/tariffs adjusted for the next period are determined taking into consideration the following criteria:

- For expenses for untreated water, energy and materials representing an important part of costs, the amendment of purchasing prices compared with the previous period is done within the limit of market prices;
- Specific consumption of untreated water, energy, fuels and materials shall be considered to a level equal to the one from the previous amendment;
- For employment costs, the justification is made according to the legislation in force, correlated with the economical efficiency principle;
- Depreciation costs and/or royalty are taken into consideration, observing the legal regulations in force;
- In the delivery price of water shall be included the technological losses for the production system, transport and distribution, approved by the authorities of the local public administration;
- The supplied drinking water quantities and the domestic and meteoric waste water processed shall be taken into consideration at the level taken into consideration at the previous approval.

(67) In the case of the operators which are subject to development programs and rehabilitation of utilities (as the case of R.A. Aquaserv Tg-Mures, involved in the Project „Improvement the water supply systems, collection and treatment of waste water in the City of Tg.-Mures”), the prices and tariffs for the services of water supply and sewerage are agreed by ANRSC by observing the conditionality for the reimbursement of the loan and interest provided in the Financing Memorandum.

(68) Before the beginning of every financial exercise R.A. Aquaserv Tg- is justifying its revenues and expenditures budget, which is subject to the analysis and approval of the Tg-Mures Local Council. In the budget are distinctly presented the revenues and expenditures related to the operating activity, as well as the planned investments to be realized in the respective year. The projected investments are presented by programs and components, specifying the cost of each component, the financing sources, and related

deadlines. Thus, the costs related to investments required by the good functioning of the public system of water and sewerage are set in advance. At the same with the calculation for the prices and tariffs, the operator submits to ANRSC a Technical Memorandum with the main characteristics from the feasibility studies of the investments to be realized in the water and sewerage infrastructure.

3.4.4 The condition from point 3.4.1. c):

- (69) Condition 3.4.1.c) provides that this compensation must not be higher than the costs imposed by the discharge of the service for general economic interest.
- (70) As pointed in para. (39) the financial support granted to R.A. Aquaserv Tg-Mures by the Local Council under the form of guarantee is in total amount of ROL 100,212,697.6 thousand.
- (71) The guarantee was granted to contract an EBRD loan in amount of EUR 7,000 thousand earmarked to co-finance the Project „Improvement the water supply systems, collection and treatment of waste water in the City of Tg.-Mures”. The project is financed 75% from ISPA funds. Contracting such a loan was necessary to ensure the co-financing of the beneficiary, respectively R.A. Aquaserv Tg-Mures, of 25% from the value of the Project (an indispensable condition for obtaining the non-reimbursable financing from ISPA Program).
- (72) Analyzing the economic and financial position of R.A. Aquaserv Tg-Mures at the moment of contracting the loan guaranteed by the Local Council, it can be observed that the company does not have sufficient resources to sustain by itself the co-financing of a project of this size. Thus, in 2002, the company had a net profit of ROL 9,763,668 thousand, the equivalent of EURO 312.6 thousand. According to *G.O. no. 64/2001 regarding the distribution of the profit at national companies, commercial companies entirely held by the state or with majority state equity, as well as the regies autonomes*, the net profit of the company is distributed as follows: 4.7% legal reserves, 67% previous years losses, 2.8% - employees' quota to profit, 13.6% state budget and 11.9% own financing sources.
- (73) In consequence, from the profit made in 2002, only EURO 37.2 thousand (representing 11.9%) could be used for investments. Out of this money, EURO 17.4 thousand have represented the own contribution of R.A. Aquaserv Tg-Mures to the financing of the non eligible costs of the Project, and the remainder of EURO 19.8 thousand have been used for other investments required in the public water and sewerage system. It is clear that, at the end of 2002, when the co-financing of the project was considered, R.A. Aquaserv Tg-Mures was not able to support it, being thus forced to resort to the EBRD loan.

In order to grant the loan in the agreed terms EBRD has requested the guarantee of the Local Council.

- (74) As pointed in para. (38), R.A. Aquaserv Tg-Mures, given the good economic and financial position (established based on liquidity, profitability, risk and activity ratios), could have obtained this loan from a commercial bank but at a higher interest rate, respectively 11.25% (as compared to a rate of only 5.2% related to the EBRD loan obtained with the guarantee of the municipality).
- (75) According to the feasibility study related to the investment and of the Financing Memorandum, in order to meet the expenses related to the EBRD loan (interest, fees, installments) R.A. Aquaserv Tg-Mures has to adjust its tariff as follows: by 25% in real terms starting with the first day of the calendar month following the signing of the Memorandum (7 March 2002), from the previous year's tariff; by 10% in real terms, between 23 October 2003 - 1 August 2005 and by 10% in real terms starting with 1 August 2005 from the previous period tariff. Also, other tariff increases are allowed due to inflation, when higher than 5%. In the Financing Memorandum it was indicated that, in real terms, tariffs would almost double in the first four years, in order to meet the conditionalities of the EBRD loan. According to studies of the regulatory authority, the above percentages represent ceilings by which the consolidated tariff can be adjusted for the public services of drinking water supply and sewerage, given Tg. Mures consumers' affordability (the Memorandum stipulates that the consumers' affordability level for Tg. Mures is much lower than the level for other cities from Romania).
- (76) In the hypothesis R.A. Aquaserv Tg-Mures would have taken a loan from a commercial bank at an interest of 11.25%, the costs related to the loan were higher than the expenses related to the EBRD loan that R.A. Aquaserv Tg-Mures had to pay. The difference between the total cost of the public services of water supply and sewage under the conditions of taking the EBRD credit guaranteed by the Local Council and their total costs under the conditions of contracting the loan from a commercial bank (without the municipal guarantee) results from the data presented in Table 3 and Table 4.

Table no. 3 – *Supplementary costs incurred by contracting a credit under normal market conditions, related to the discharge of the public service of drinking water supply, for 2004-2018*

Year	Unit cost of the service of general economic interest of drinking	Unit cost of the service of general economic interest of drinking	Difference between the unit cost of the service of general economic interest of drinking water	Total quantity of drinking water supplied	Difference between the total cost of the service of general economic interest of drinking water supply if taking the EBRD credit with
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	water supply if taking the EBRD credit with the municipal guarantee	water supply if taking the credit from a commercial bank under market conditions	supply if taking the EBRD credit with the guarantee and the unit cost if taking the credit without the municipal guarantee		the guarantee and the total of the service if taking the credit without the municipal guarantee
	ROL/cm	ROL/cm	ROL/cm	cm	ROL thousand
(1)	(2)	(3)	(4)=(3)-(2)	(5)	(6)=(4)*(5)/1000
2004	8,598	8,598	0	12,175,297	0
2005	8,598	8,598	0	11,909,000	0
2006 (estimated)	8,798	9,032	234	12,059,000	2,821,806
2007 (estimated)	9,033	9,539	506	12,059,000	6,101,854
2008 (estimated)	9,081	9,643	562	12,059,000	6,777,158
2009 (estimated)	9,037	9,548	511	12,059,000	6,162,149
2010 (estimated)	8,993	9,453	460	12,059,000	5,547,140
2011 (estimated)	8,949	9,358	409	12,059,000	4,932,131
2012 (estimated)	8,905	9,263	358	12,059,000	4,317,122
2013 (estimated)	8,861	9,168	307	12,059,000	3,702,113
2014 (estimated)	8,818	9,073	255	12,059,000	3,075,045
2015 (estimated)	8,774	8,978	204	12,059,000	2,460,036
2016 (estimated)	8,728	8,880	152	12,179,590	1,832,968
2017 (estimated)	8,685	8,786	101	12,179,590	1,217,959
2018 (estimated)	8,641	8,692	51	12,179,590	615,009
TOTAL					49,562,490

Source: Supplementary information

Table no. 4– *Supplementary costs incurred by contracting a credit under normal market conditions, related to the discharge of the public service of sewerage for 2004-2018*

Year	Unit cost of the service of general economic interest of sewerage supply if taking the	Unit cost of the service of general economic interest of sewerage supply if taking the	Difference between the unit cost of the service of general economic interest of sewerage supply if taking the EBRD credit with the	Total quantity of waste water, collected and treated	Difference between the total cost of the service of general economic interest of sewerage supply if taking the EBRD credit with the
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	EBRD credit with the municipal guarantee	credit from BCR under market conditions	guarantee and the unit cost if taking the credit without the municipal guarantee		guarantee and the total of the service if taking the credit without the municipal guarantee
	ROL/cm	ROL/cm	ROL/cm	cm	ROL thousand
(1)	(2)	(3)	(4)=(3)-(2)	(5)	(6)=(4)*(5)/1000
2004	4,663	4,663	0	10,481,821	0
2005	4,663	4,663	0	10,940,800	0
2006 (estimated)	4,957	5,299	342	10,370,740	3,546,793
2007 (estimated)	5,301	6,043	742	10,370,740	7,695,089
2008 (estimated)	5,372	6,197	825	10,370,740	8,555,860
2009 (estimated)	5,308	6,058	750	10,370,740	7,778,055
2010 (estimated)	5,243	5,918	675	10,370,740	7,000,249
2011 (estimated)	5,179	5,779	600	10,370,740	6,222,444
2012 (estimated)	5,114	5,639	525	10,370,740	5,444,639
2013 (estimated)	5,050	5,500	450	10,370,740	4,666,833
2014 (estimated)	4,985	5,360	375	10,370,740	3,889,028
2015 (estimated)	4,921	5,221	300	10,370,740	3,111,222
2016 (estimated)	4,854	5,077	223	10,474,447	2,335,802
2017 (estimated)	4,791	4,939	148	10,474,447	1,550,218
2018 (estimated)	4,727	4,801	74	10,474,447	775,109
Total					62,571,341

Source: Supplementary information

As resulting from the data presented above, the contracting of a loan by R.A. Aquaserv Tg-Mures in normal market terms would lead to supplementary costs for the public services of drinking water and sewerage supply of ROL 112,133,831 thousand (ROL 49,562,490 thousand + ROL 62,571,341 thousand) which would be reflected in a tariff increase of 10% by 2008, as compared to the increases provided in the Financing Memorandum and the EBRD loan agreement. Having in view those presented in para. (75), this tariff increase would have been unaffordable for the consumers.

(77) From the comparison analysis of the supplementary costs incurred by taking a loan under normal market conditions, in amount of ROL 112,133,831 thousand and of the financial support under the form of guarantee, amounting

ROL 100,212,697.6 thousand, results that the latter is just a compensation granted to R.A. Aquaserv Tg-Mures for performing the obligation of service of general economic interest of supplying drinking water and sewage. Without the guarantee of the Local Council, R.A. Aquaserv Tg-Mures would have had to take a loan and for its reimbursement it would have had to increase the tariff at a level which would not have been affordable to the beneficiaries of public services.

3.4.5 Condition in 3.4.1. d):

- (78) R.A. Aquaserv Tg-Mures was not entrusted with the service of general economic interest to supply drinking water and sewage following a public tender procedure.
- (79) The public service to supply drinking water and sewage was entrusted to R.A. Aquaserv Tg-Mures by license from A.N.R.S.C. and a comparative analysis of its costs with those of a well-run undertaking providing the same service could not be realized by the grantor.
- (80) Considering the above, the Competition Council concludes that the four conditions under point 3.4.1 are not met cumulatively, mainly the condition under par. 3.4.1 (d) was not proved. Therefore, the measures of support for RAGC Bacau, notified by the Local Council of Tg-Mures of which R.A. Aquaserv Tg-Mures benefits, constitute state aid for the purposes of *art. 2 of Law 143/1999 on State aid, with subsequent modifications and completions* and of the *Regulation on state aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest*.
- (81) The value of the state aid granted to R.A. Aquaserv Tg-Mures is of ROL 100,212,697.6 thousand.

3.4.6 Assessment of the compatibility of the state aid in form of guarantee of the Local Council in the context of the *Regulation on state aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest*

3.4.6.1 General

- (82) The ECJ has consistently held that Article 86 EC may provide for an exemption from the ban on state aid for undertakings entrusted with a service of general economic interest (SGEI). It has been implicitly confirmed in the Judgment of the ECJ in the Altmark Case, that state aid which compensates for the costs incurred by an undertaking in providing an SGEI can be regarded

as compatible with the common market if it meets the conditions of Article 86(2) of the EC Treaty³. The ECJ has made it clear that, for a measure to benefit from such exemption, the principles of definition, entrustment and proportionality must all be fulfilled. The Competition Council considers that, where these principles are fulfilled, the development of trade is not affected to an extent contrary to the interests of the Community.

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

(a) the state aid is necessary for operating a service of general economic interest;

(b) the state aid does not unduly affect the trade between Romania and the EU Member States.

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

(84) In order to appreciate the necessity of granting the state aid for operating the service of general economic interest, the following conditions must be considered:

- the beneficiary must be officially entrusted the obligation to discharge a public service of general economic interest, clearly defined;
- the compensation level must not exceed what is necessary for the supply of the respective public service, taking into account the relevant revenues and a reasonable profit resulting from discharging these obligations.

(85) As discussed under point 3.4.2 above, R.A. Aquaserv Tg-Mures is exercising a service of general economic essential for the population, institutions and undertakings and this obligation is clearly defined by license.

(86) R.A. Aquaserv Tg-Mures is exercising a service of general economic essential for the population, institutions and undertakings and this is clearly defined by

³ Judgment of 24 July 2003 in Case C-280/00 *Altmark Trans*, paragraphs 101 to 109. In those paragraphs the Court examined the question of whether some state payments to transport undertakings classified as state aid could be found to be compatible with the common market under Article 77 of the EC Treaty as reimbursement for the discharge of public service obligations. It did not rule out this possibility, provided that the binding conditions laid down by the secondary legislation for the transport sector were met. This reasoning must apply *mutatis mutandis* to undertaking entrusted with an SGEI outside the transport sector and in relation to Article 86(2) EC.

license. R.A. Aquaserv Tg-Mures has been officially entrusted with the public service that it discharges.

(87) Also, from the assessment made at point 3.4.4, it results that, under the conditions of a regulated market from the point of view of prices and tariffs, in order to perform this service the company cannot impose its own prices to the consumers, prices that could cover the real operating costs (including the supplementary financial costs related to the loan taken under normal market conditions, without the municipality guarantee); in establishing the prices and tariffs it must be taken into account the consumers' affordability degree. This is the main cause for which R.A. Aquaserv Tg-Mures receives the Local Council's guarantee to contract the EBRD loan. The compensation granted to R.A. Aquaserv Tg-Mures under the form of a guarantee does not exceed the costs incurred by the performance of the above-mentioned public service of general economic interest, in the scenario of financing the investments from sources obtained under normal market terms.

(88) Therefore, one can conclude that the state aid granted to R.A. Aquaserv Tg-Mures does not exceed what is necessary to discharge under normal conditions of continuity, safety and comfort the public services of drinking water and sewerage supply within the city of Tg-Mures.

(89) By implementing this Project it is aimed the significant improvement of the performance indicators of the public services of water and sewage supply in Tg-Mures, as follows:

- supply of drinking water supply shall fulfill the standards provisioned in the Directive on drinking water no. 98/83/CE for 185,000 inhabitants from the city and the suburbs;
- inclusion of 13,000 inhabitants in the sewerage network connected to the waste water treatment station;
- eliminating river water pollution from inhabitants not connected to the sewerage network, from disfunctionalities of evacuators and other systems of combined sewerage and the waste treatment station according to standards of Directive no. 91/271/CEE on cleaning the town waste water and their drainage into non-sensitive water sources;
- improving flowing control of the waste water treatment station;
- improving the biological performance of water treatment;
- reducing the risks regarding the health of the population;
- safe storage of the sludge in accordance with the Directive no. 86/278/CEE.

3.4.6.3 No undue affect of the trade between Romania and the EU Member States

- (90) It needs to be noted that the activity of the company is restricted to a limited geographical area represented by the area of the city of Tg-Mures. R.A. Aquaserv is the only operator on this market. The company is not involved in export operations. Under these circumstances it is considered that granting this state aid does not unduly affect the trade between Romania and the Member States.

3.4.6.4 There is no over-compensation

- (91) The state aid granted to R.A. Aquaserv Tg-Mures under the form of guarantee for obtaining an EBRD loan does not represent an over-compensation because it does not exceed the costs which are absolutely necessary in order to perform the service of general economic interest under safety, continuity and comfort conditions for the citizens of the city of Tg-Mures.
- (92) Thus, the two conditions provided at point (83), 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 cummulatively met.

3.4.6.5 Transparency

- (93) R.A. Aquaserv Tg-Mures keeps a separate management accounting in which the company's activities are separately registered. This way, the operating activities of the services for supply with drinking and waste water which are public services are registered distinctly from the other services. According to the provisions of art. 20 par. 5 of Law nr. 326/2001 on public services of town management, the undertakings discharging public services have to keep separate records of the performed activities, with separate accounting for each type of service, so that their activities are easy to assess, monitor and control.
- (94) In order to maximize the transparency, in the Financing Memorandum of the Project it is provisioned that the body involved in the management and implementation of the Project must have a separate accounting system, or an adequate accounting coding system for all the involved transactions, therefore facilitating the checking, by the national control authorities and by the Commission, of the incurred costs, to make sure that these were correctly allocated for the subjected Project. It shall be insured the availability of all justifying documents on the costs made for the Project's accomplishment, on a 5 year period from the date of last payment.

- (95) The exemption provided for in the *Regulation on state aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest* is applicable to the ad hoc measure in question. As stated above, the state aid has been granted for the compensation of a clearly defined general obligation of public services of general economic interest. As stated earlier, the ad hoc measure is proportionate to the net public service costs discharged by R.A. Aquaserv Tg-Mures; thus, it does not distort competition in such a manner to impede on the common interest.
- (96) The state aid under the form of guarantee, notified by the Local Council of Tg-Mures of ROL 100,212,697.6 thousand, is compatible with a normal competitive environment.

DECIDE

Art.1. The municipal guarantee granted to R.A. Aquaserv Tg-Mures by the Local Council of Tg-Mures represents state aid in the sense of art. 2 of *Law 143/1999 on State aid, with the subsequent modifications and completions*.

Art.2. The notified state aid represents a compensation necessary to accomplish in normal safety and continuity conditions for the services of general economic interest of supply with drinking water and sewerage, compensation which does not unduly affect the trade between Romania and the Member States of the European Union.

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

Art.4. Pursuant to Art. 24 of Law 143/1999 with subsequent modifications and completions, the grantor shall annually submit to the Competition Council information regarding the state aid granted to R.A. Aquaserv Tg-Mures, in view of monitoring the aid.

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

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

Art.7. The present decision shall be communicated by the Secretariat General of the Competition Council to:

- Consiliul Local al Municipiului Tg-Mures, Piata Victoriei nr. 3, cod 540026, oras Tg-Mures;
- Regia Autonoma AQUASERV Tg-Mures, Str. Kos Karoly nr. 1, oras Tg-Mures.

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

PRESIDENT

MIHAI BERINDE