

DECISION NO. 12
Of 31.01.2006

**regarding the guarantee granted by the Local Council of the city of Pitesti to the SC
APA CANAL 2000 SA Pitesti for contracting an external loan to
co-finance the Project „Rehabilitation of the wasted water treatment station, of the
sewerage system and of the drinking water supply network in the city of Pitesti,
county of Arges, Romania”**

The Competition Council

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 provisions of the Competition Law no. 21/1996, republished in the Official Gazette no 742, Part I , no. 73 on August the 16th, 2005;

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

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;

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

Based on the following,

1. PROCEDURE

- (1) By the note no. 109249/03.11.2005, registered at the Competition Council no. RS-AS 101/09.11.2005, the Ministry of Public Finances notified, based on art. 15 from the *Law no. 143/1999 regarding state aid, republished*, aid guarantee granted by the Local Council of the city of Pitesti to secure an external loan for SC APA CANAL 2000 SA Pitesti (hereinafter called APA CANAL).
- (2) By notes DAAS/1341/17.11.2005 and DAAS/1391/30.11.2005, additional information were requested, based on art. 15 para. (4) of *Law no.143/1999, republished*. The Ministry of Public Finances replied to the supplementary information requested by letters no. DAAS/1378/28.11.2005, DAAS/1398/02.12.2005 and DAAS/1430/14.12.2005 registered at the Competition Council.

- (3) The notification became effective as of the date when the information was accurate and complete, respectively on 14.12.2005.

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 APA CANAL, under the authority of Pitesti Local Council.
- (5) APA CANAL was established according to the provisions of E.G.O. no. 30/1997 *on the reorganization of autonomous state-owned companies* and of L.C.D. no. 28/17.02.2000, as a company with legal personality, functioning based on economic management and financial autonomy for the management of services in the public domain (i.e. the water supply and sewerage systems) required to discharge the public services of water supply and sewerage systems.
- (6) APA CANAL has its social headquarters in the city of Pitesti, 24a I.C. Brătianu Avenue, the county of Arges and its administrative headquarters in the city of Pitesti, 17 Victoriei Street, the county of Arges and it is registered at the Trade Register under no. J 03/185/2000, unique registration code no. R13009001.¹
- (7) Presently, the social capital of APA CANAL is RON 1,662,438.8, comprising 96,737 shares, of RON 10/share, held by the Pitesti Local Council.
- (8) The economic and financial results obtained by APA CANAL in 2003-2005 are presented in Table no.1.

Table no.1 - Economic and financial results of APA CANAL

- RON-

No.	INDICATOR	2003	2004	30.06.2005
1.	NET TURNOVER	20,846,776.7	29,886,511.1	16,583,105.6
2.	NET PROFIT	218,753.3	1,742,346.6	1,469,327.5

Source: Notification Form

Data in Table no. 1 show that the company has positive financial results for its entire activity.

- (9) According to its setting up deed, the main activity of APA CANAL is the provision of the following services of town management: the sourcing, treatment and distribution of drinking water and the collection and treatment of waste water, NACE (Nomenclature of Activities in the National Economy) code 4100. According to art. 2 of *Law on public services of town management no. 326/2001*, establishing the legal framework regarding the setting-up, organisation, 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 total activities and utility actions of local interest, carried out under the

¹ APA CANAL has been registered to the Trade Register Office in 2000, with an initial social capital of RON 1,070,000, constituted by cash contribution of RON 11,044.1 and in-kind contribution of RON 1,058,955.8, the Pitesti Local Council being the single shareholder.

authority of the local public administration, having as purpose the supply of public utility services.²

- (10) 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 provision of public services of water supply and sewerage.
- (11) APA CANAL directly administrates and operates the public systems for the supply of drinking water and sewerage in the city of Pitesti, based on the Decision of the Pitesti Local Council no. 24/2000.
- (12) The obligations of APA CANAL, 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 the 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.
- (13) 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).
- (14) The services for the supply of drinking water and sewerage services represent 96.1% of the total activity carried out by APA CANAL. Given the fact that there is only one sewerage network in the city of Pitesti, the company takes over the domestic meteoric waste water as well as industrial, the latter activity having a non significant contribution to the entire activity of APA CANAL. We mention that each undertaking has the legal obligation to ensure the pre-treatment of the waste industrial water resulted from its activity before discharging it in the sewerage network.

2.2. The sector affected by the financial support granted to the Company

- (15) The sector affected by the granting of the financial support analyzed in the present decision is the provision of public services of drinking water supply and sewerage.
- (16) 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,

² The ancillary activities carried out by APA CANAL consist in workings related to metallic structures and component parts, metallic structures and carpentry workings, electric installations workings, installations and anticorrosive protection, carpentry and joinery workings, transportation through pipes, testing activities and technical analysis, others.

based on the local autonomy principle. The relevant geographic area is represented only by the city of Pitesti. I.e. prices and tariffs of the services are regulated and are not determined by supply and demand but approved by the local public administration – the Pitesti Local Council - 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.

- (17) APA CANAL is the only provider of public services for the supply of drinking water and sewerage in the area it provides the service, respectively the city of Pitesti.

2.3. The financial support

- (18) The notified financial support consists of a 100% guarantee by the Pitesti Local Council of an external loan contracted by APA CANAL from the European Investment Bank (hereafter EIB). The value of the external loan is of EUR 10,437,500 to be reimbursed in 2010-2029, with an interest rate of about 3.85%.
- (19) The loan is destined to co-finance the Project **„Rehabilitation of the wasted water treatment station, of the sewerage system and of the drinking water supply network in the city of Pitesti, county of Arges, Romania”** (hereafter the Project) for which APA CANAL benefits of non reimbursable financial assistance in value of EUR 31,312,500 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 the Instrument for Structural Policies for Pre-Accession, for the measure „Rehabilitation of the wasted water treatment station, of the sewerage system and of the drinking water supply network in the city of Pitesti, county of Arges, Romania” signed in Brussels on 15th December 2003 and in Bucharest on 21st May 2004, published in the Official Gazette, no. 344 bis / 22.04.2005.*
- (20) The legal basis for granting the notified financial support is *the Implementing Agreement concluded between the Ministry of Public Finances through the PHARE Payments and Contracts Office, the Pitesti Local Council and APA CANAL, signed at 18.05.2005 and G.D. no. 1469/2004 regarding the approval of the technical and economic indicators of the investment objective contained in the ISPA program „Rehabilitation of the wasted water treatment station, of the sewerage system and of the drinking water supply network in the city of Pitesti, county of Arges, Romania”.*

2.4. Description of the Project

- (21) The public water and sewerage infrastructure in the city of Pitesti is old and obsolete, the Local Council as consequently identified the necessity to realize investments to rehabilitate, develop and modernize it. Due to the fact that APA CANAL is entrusted with the provision of public services of water supply and sewerage in the city of Pitesti, the obligation to realize the Project belongs to this undertaking.
- (22) The value of the Project is of EURO 41,750,000 being financed as follows:
- ISPA assistance – EURO 31,312,500 (75% of the Project value);

- Co-finance portion of the beneficiary of the ISPA assistance (25% of the Project value) will be assured through a EIB loan guaranteed by the Pitesti Local Council in amount of EURO 10,437,500.

(23) The Project consists of investments regarding the improvement of drinking water supply systems, sewerage and treatment station in the city of Pitesti. The financed components of the Project are the following:

- A. Rehabilitation of the drinking water treatment station Budeasa, of the storage facilities and of the pumping stations
- B. Rehabilitation and extension of the water and sewerage networks
- C. Rehabilitation of the treatment station
- D. Technical assistance, supervision during implementation and publicity.

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

- rehabilitation of mixing rooms at the entry in the treatment station, including flow meters;
- rehabilitation and modernization of the reagents station (chlorine, chlorine dioxide, lime, aluminium sulphate, polymer);
- construction of new lamellar decanters with recirculation of technological water;
- fitting-out and modernization of analysis laboratory.

Besides the use of inadequate equipments, of low efficiency, the present deficiencies of the water treatment station concern the lack of prevention mechanisms for the wale blooming phenomenon and for accidental pollutions. At the time being, the drinking water in Pitesti is not fully compliant with the standards of Directive 98/83/EC regarding quality of drinking water with regard to the aluminium.

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

- rehabilitation of about 23 km of drinking water supply network;
- construction of about 3 km of new drinking water supply network;
- rehabilitation of about 8 hydrophore stations;
- rehabilitation of about 3 km of the existing sewerage network;
- construction of about 35 km of new sewerage network;
- construction of a meteoric water retention tank and of 2 wasted water repumping stations.

(26) The C component includes the following activities:

- rehabilitation of the access room for wasted water in the treatment station;
- rehabilitation of the retention tanks;
- rehabilitation of the pumping station for the water stored in the retention tanks;
- rehabilitation of the sparse and thick grills;
- rehabilitation of the sand traps and of the grease separators;
- installation of a monitoring system for flows and influential charging in the treatment station;
- rehabilitation of the primary decanters;
- rehabilitation of the pumping station for water and sludge;
- rehabilitation of the air intake basin;
- rehabilitation of the secondary decanters;
- modernization of the sludge line;
- rehabilitation and extension of the dehydrated sludge storage spaces.

(27) The D component includes the following activities:

- technical assistance for the supporting of acquirement process and for the assistance in the implementation of the project, preparation of tender documents, support for specific issues of the project;
- supervision during implementation;
- assuring publicity for the Project.

(28) The deadlines for the components 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 water treatment station Budeasa, of storage facilities and pumping stations	7,187,000	EUR 1,974,309 – EIB loan EUR 5,123,621 - ISPA	31 December 2008
2.	Rehabilitation and extension of water and sewerage networks	14,910,770	EUR 4,095,541 – EIB loan EUR 10,815,229 - ISPA	31 December 2008
3.	Rehabilitation of the water treatment station	15,901,300	EUR 4,367,650 – EIB loan EUR 11,533,650 -ISPA	31 December 2008
4.	Technical assistance, supervision during implementation and publicity	3,750,000	ISPA	31 December 2008

Source: Financing memorandum, supplementary data

3. ASSESSEMENT OF THE MEASURE

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

3.1. The object of the decision

(30) The object of the present decision is the financial support under the form of a municipal guarantee granted to APA CANAL. The guarantee has been granted for contracting a loan from EIB for financing an investment objective regarding the water and sewerage infrastructure of the city.

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

(31) 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.

(32) 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. (see below)

- (33) Analyzing the overall economic and financial position of APA CANAL it can be concluded that the company is not in difficulty. It results from the information sent by the beneficiary that APA CANAL 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) of the above *Guidelines* are met.
- (34) However, since the municipal guarantee is of 100% and APA CANAL does not pay any premium to the Pitesti Local Council in the account of the guarantee, the conditions provided at paragraph 4.2. c) and d) of the same *Guidelines* are not met. Consequently, the state aid rules apply to the guarantees from which APA CANAL benefits.

3.2.1 Assessment of the aid

- (35) As to the state aid element involved, point 3.2. of the *Guidelines on state aid granted in 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.”
- (36) Due to the fact that a commercial bank would have granted APA CANAL a similar loan, without the state guarantee, with an annual interest rate of 8.112%, the Competition Council considers that this rate can be taken as reference when calculating the financial support under the form of guarantee.
- (37) In these circumstances, the financial support granted in the form of guarantee is equal to the gross grant equivalent³ of the loan guaranteed by the State (in amount of EUR 10,437,500), calculated as the discounted difference between the market interest rate and the interest rate obtained due to the municipal guarantee, respectively: EUR 5,810,816.84, the equivalent of RON 21,315,819.4⁴.

3.3 Analysis of the guarantee in the context of the rules on regional aid for investments

- (38) Taking into account that the aid is designed to finance some investment objectives, the Competition Council assessed the aid under Art. 2 and Art. 23 of *Law 143/1999, republished*, and the *Regulation on Regional Aid*.

³ 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 2006-2029.

⁴ The NBR exchange rate from 09.11.2005, respectively 1 Euro=RON 3.6683 was used for calculations.

- (39) APA CANAL is located in the development region 3 South - Muntenia of Romania. As stated under par. (8) of this decision, APA CANAL is not a company in difficulty, thus being eligible for regional aid in accordance with Art. 1 (4) of the *Regulation on Regional Aid*.
- (40) 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.
- (41) The guarantee granted by the Local Council to contract the EIB loan is granted individually to APA CANAL in the context of co-financing the Project (see par. 19). 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. It has to be noted however, that the municipal authorities did not merely pursue a specific or sectorial policy in granting the aid. Nor did they primarily follow the goal to promote the region.
- (42) 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 Pitesti. 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.
- (43) 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 APA CANAL, but part of the water and sewerage public infrastructure of the city of Pitesti, which is property of the Romanian state, namely public property of the Pitesti Local Council (*Law 213/1998 on public property and legal status*).
- (44) 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:
- (45) 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, as APA CANAL has no contribution from own resources to the financing of eligible costs (own resources, not touched by any financial support from the state).
- (46) 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.
- (47) Vis-à-vis the above arguments, the Competition Council conclude that the criteria to authorize a regional aid for investments are not met cumulatively.
- (48) Since the water supply and sewerage services provided by APA CANAL have 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 background

(49) 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, republished*, 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 provision 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):

(50) APA CANAL is entrusted to deliver public services of water supply and sewerage by the license approved by A.N.R.S.C. Order no. 209/17.03.2005. 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 sewerage, ensuring access to networks for new customers, equal treatment applied to all 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.

(51) According to the *Law on town management no. 326/2001*, the water supply and sewerage services are public utility services.

(52) According to Law no. 326/2001, public services must fulfil 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.

(53) 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.

(54) 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 undertaking by the Pitesti Local Council through Protocol no. 24/10.08.2000.

(55) Regarding the above presented facts, we underline that APA CANAL 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 Pitesti 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 APA CANAL 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):

(56) According to this criterion the compensation for the provision 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.

(57) According to the provisions of G.O. no. 32/2002 *on the management and functioning of public services of water supply and sewerage*, 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.

(58) The prices and tariffs for public services of water supply and sewerage 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.

(59) The operators which demand the establishment, adjustment or amendment of prices and tariffs for water supply and sewerage 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.

(60) 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; repairs for third parties; 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.

(61) 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.

- (62) In the case of the operators which are subject to development programs and rehabilitation of utilities (as the case of APA CANAL, involved in the Project „Rehabilitation of the wasted water treatment station, of the sewerage system and of the drinking water supply network in the city of Pitesti, county of Arges, Romania”), 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.
- (63) Before the beginning of every financial exercise APA CANAL is justifying its revenues and expenditures budget, which is subject to the analysis and approval of the Pitesti 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 time 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):

- (64) Condition 3.4.1.c) provides that this compensation must not be higher than necessary to cover the costs incurred through the provision of the service for general economic interest.
- (65) As pointed in para. (37) the financial support granted to APA CANAL by the Pitesti Local Council under the form of guarantee is in total amount of EUR 5,810,816.84, equivalent of RON 21,315,819.4.⁵
- (66) The guarantee was granted to contract an EIB loan in amount of EUR 10,437,500 earmarked to co-finance the Project „Rehabilitation of the wasted water treatment station, of the sewerage system and of the drinking water supply network in the city of Pitesti, county of Arges, Romania”. The project is financed 75% from ISPA funds. Contracting such a loan was necessary to ensure the co-financing of the beneficiary, respectively APA CANAL, of 25% from the value of the Project (an indispensable condition for obtaining the non-reimbursable financing from ISPA Program).
- (67) Analyzing the economic and financial position of APA CANAL at the moment of contracting the loan guaranteed by the Pitesti 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. It is clear that, at the end of 2004, when the issue of the co financing of this program aroused, APA CANAL had no resources to sustain it (the company obtained a net profit of RON 1,742,346.6, respectively EUR 475,000), being obliged to appeal to EIB loan. In order to grant the loan under the given conditions, EIB requested a guarantee from the Pitesti Local Council.
- (68) As pointed in para. (36), given APA CANAL economic and financial position (established based on liquidity, profitableness, risk and activity ratios), it could have obtained this loan, from a commercial bank, but at a higher interest rate, respectively 8.112% (as compared to

⁵ The NBR exchange rate from 09.11.2005, respectively 1 Euro=RON 3.6683 was used for calculations

a rate of only 3.85% related to the EIB loan obtained with the guarantee of the Pitesti Local Council).

(69) According to the feasibility study related to the investment and Financing Memorandum, in order to meet the expenses related to the EIB loan (interest, fees, instalments) APA CANAL has to adjust its tariff as follows:

- by 15% in real terms of tariffs for drinking water and sewerage by 31.12.2005, in comparison with the tariff at 01.01.2005;
- by 10% in real terms of tariffs for drinking water and sewerage by 31.12.2006, in comparison with the tariff at 01.01.2006.

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 Pitesti consumers' affordability.

(70) In the hypothesis APA CANAL would have taken a loan from a commercial bank at an interest of 8.112%, the costs related to the loan were higher than the expenses related to the EIB loan that APA CANAL had to pay. The difference between the total cost of the public services of water supply and sewerage under the conditions of taking the EIB credit guaranteed by the Pitesti 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.

Table no. 3 – *Supplementary costs incurred by contracting a credit under normal market conditions, related to the provision of the public service of drinking water supplied and treated, for 2006-2029*

Year	Unit cost of the service of general economic interest of sewerage supply if taking the EIB loan with the municipal guarantee	Unit cost of the service of general economic interest of sewerage supply if taking the loan from a commercial bank under market conditions	Difference between the unit cost of the service of general economic interest of sewerage supply if taking the EIB loan with the municipal guarantee and the unit cost if taking the loan under market conditions	Total quantity of wasted water, supplied and treated	Difference between the total cost of the service of general economic interest of sewerage supply if taking the EIB loan with the municipal guarantee and the total of the service if taking the loan under market conditions
	RON/mc	RON/mc	RON/mc	mc	RON
(1)	(2)	(3)	(4)=(3)-(2)	(5)	(6)=(4)*(5)
2006	2.73	2.74	0.01	29,160,000	291,600
2007	2.73	2.77	0.04	29,160,000	1,166,400
2008	2.74	2.80	0.06	29,160,000	1,749,600
2009	2.72	2.76	0.04	29,160,000	1,166,400
2010	2.71	2.75	0.04	29,160,000	1,166,400
2011	2.69	2.73	0.04	29,160,000	1,166,400
2012	2.68	2.73	0.05	29,160,000	1,458,000
2013	2.68	2.72	0.04	29,160,000	1,166,400
2014	2.67	2.71	0.04	29,160,000	1,166,400
2015	2.67	2.71	0.04	29,160,000	1,166,400
2016	2.67	2.71	0.04	29,160,000	1,166,400
2017	2.67	2.71	0.04	29,160,000	1,166,400
2018	2.66	2.70	0.04	29,160,000	1,166,400
2019	2.66	2.69	0.03	29,160,000	874,800
2020	2.66	2.69	0.03	29,160,000	874,800
2021	2.65	2.68	0.03	29,160,000	874,800

2022	2.65	2.67	0.02	29,160,000	583,200
2023	2.65	2.67	0.02	29,160,000	583,200
2024	2.65	2.67	0.02	29,160,000	583,200
2025	2.64	2.66	0.02	29,160,000	583,200
2026	2.64	2.66	0.02	29,160,000	583,200
2027	2.64	2.66	0.02	29,160,000	583,200
2028	2.64	2.65	0.01	29,160,000	291,600
2029	2.63	2.64	0.01	29,160,000	291,600
TOTAL					21,870,000

Source: Supplementary information

From the data presented above, the contracting of a loan by APA CANAL in normal market terms would lead to supplementary costs for the public services of drinking water and sewerage supply of RON 21,870,000; this tariff increase would have been unaffordable for consumers.

- (71) From the comparison analysis of the supplementary costs incurred by taking a loan under normal market conditions, in amount of RON 21,870,000 and of the financial support under the form of guarantee, amounting RON 21,315,819.4, results that the latter is just a compensation granted to APA CANAL for performing the public service obligation of general economic interest of supplying drinking water and sewerage. Without the guarantee of the Pitesti Local Council, APA CANAL 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):

- (72) APA CANAL was not entrusted with the service of general economic interest to supply drinking water and sewerage following a public tender procedure.
- (73) The public service to supply drinking water and sewerage was entrusted to APA CANAL 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.
- (74) 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 of which APA CANAL benefits constitute state aid for the purposes of *art. 2 of Law 143/1999 on State aid, republished* and of the *Regulation on state aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest*.
- (75) The value of the state aid granted to APA CANAL is of RON 21,315,819.4.

3.4.6. Assessment of the compatibility of the state aid in form of guarantee of the Pitesti 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 background

- (76) 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 Treaty⁶. 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.
- (77) 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

- (78) 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 provision 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.
- (79) As discussed under point 3.4.2 above, APA CANAL is exercising a service of general economic essential for the population, institutions and undertakings and this obligation is clearly defined by license.
- (80) APA CANAL provides its services based on the license granted by A.N.R.S.C. This license, as well as the relevant law, defines clearly the obligation of public services that the company must provide. Therefore, it can be concluded that APA CANAL has been officially entrusted with the public service that it provisions.
- (81) 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 on consumers, prices that could cover the

⁶ 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.

real operating costs (including the supplementary financial costs related to the loan taken under normal market conditions, without the guarantee from the Ministry of Public Finances); in establishing the prices and tariffs must be taken into consideration the consumers' affordability degree. This is the main reason for which APA CANAL receives the Local Council's guarantee to contract the EIB loan. The compensation granted to APA CANAL 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.

- (82) Therefore, one can conclude that the state aid granted to APA CANAL does not exceed what is necessary to provision under normal conditions of continuity, safety and comfort the public services of drinking water and sewerage supply within the city of Pitesti.
- (83) By implementing this Project it is aimed the significant improvement of the performance indicators of the public services of water and sewerage supply in Pitesti, as follows:
- compliance with the provisions of the Directive 98/83/EC on the quality of water intended for human consumption;
 - compliance with the treatment standards provided by the Directive 91/271/EC concerning urban waste-water treatment;
 - reducing the risks regarding the health of the population of Pitesti by extending the sewerage network in order to supply the entire population of the city and by eliminating the risk of inundation in the inferior terrace of the city;
 - obtaining substantial savings concerning the operational costs for the administration of drinking and wasted water services, as a result of electric equipments and mechanic for water and sewerage.

Table no. 4 - *Performance indicators for the public services of water supply and sewage in the city of Pitesti*

Performance indicators	Before ISPA	After ISPA
Drinking water		
Population connected to the supply network/total population	97%	99%
Total water consumption in the supplied area	98,000 m3/day	65,000 m3/day
Number of water meters consumers/number of registered consumers	85%	99%
Average value of payments of consumers for direct consumption (prices for 2003)	EUR 0.29/m3	EUR 0.45/m3
Compliance of the drinking water quality with the provisions of the Directive 98/83/EC on the quality of water intended for human consumption	Non-compliance for several parameters	Total compliance with the provisions of the Directive
Collecting and treatment of wasted water		
Connected population benefiting of sewage services/total population	83%	98%
Collected wasted water volume that is treated	91,400 m3/day	56,160 m3/day
Infiltrations in the sewage network	4.8 mil. m3/day	1 mil. m3/day
Performance of the treatment Station Directive 91/271/EEC concerning urban waste-water treatment	Non-compliance with the Directive 99/271/EEC	Compliance with the Directive 99/271/EEC (sensitive areas)

Source: *phesability study*

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

- (84) 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 Pitesti. APA CANAL 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

- (85) The state aid granted to APA CANAL under the form of guarantee for obtaining an EIB 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 Pitesti.
- (86) Thus, the two conditions provided at point (77), conditions provided in the *Regulation on state aid in the form of compensations granted to certain undertakings entrusted with services of general economic interest* are cumulatively met.

3.4.6.5. Transparency

- (87) APA CANAL 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 (and to ensure no cross-subsidising of APA CANAL's commercial activities).
- (88) 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.
- (89) As pointed, the state aid was granted for the compensation of public service obligations of general economic interest clearly defined. The state aid ad-hoc measure is proportional to the net costs of the public services provided by APA CANAL; thus, it does not distort competition in such a manner to impede on the common interest.
- (90) The state aid under the form of guarantee, notified by the Ministry of Public Finances of RON 21,315,819.4, is compatible with a normal competitive environment.

DECIDES

- Art.1.** The municipal guarantee granted to SC APA CANAL 2000 SA Pitesti by the Pitesti Local Council represents state aid in the sense of art. 2 align. (1) of *Law 143/1999 on State aid, republished*.
- 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. 21 align. 2 (b) corroborated with Art. 23 align. 1 (j) of *Law 143/1999 regarding state aid, republished*, the state aid for SC APA CANAL 2000 SA Pitesti, is authorized as aid to achieve under conditions of safety and continuity the service of general economic interest.
- Art.4.** The value of the state aid, calculated in compliance with the Guide lines on the state aid in the form of guarantees, is EUR 5,810,816.84, the equivalent of RON 21,315,819.4.
- Art.5.** Pursuant to Art. 32 of *Law 143/1999 regarding state aid, republished*, the grantor shall annually submit to the Competition Council information regarding the state aid granted to SC APA CANAL 2000 SA Pitesti, in view of monitoring the aid.
- Art.6.** The present Decision shall become effective upon its communication date.
- Art.7.** Pursuant to Art. 46 of *Law 143/1999 regarding state aid, republished*, 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.8.** The present decision shall be communicated by the Secretariat General of the Competition Council to:
- the Ministry of Public Finances, Str. Apolodor no. 17, sector 5, Bucharest;
 - SC APA CANAL 2000 SA Pitesti, Str. Victoriei no. 17, postal code 1100016, Pitesti, county of Arges.

PRESIDENT

MIHAI BERINDE