



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 27.02.2008

C (2008) 700 final

PUBLIC VERSION

WORKING LANGUAGE

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COMMISSION DECISION

of 27.02.2008

ON THE STATE AID

n° C 46/07 (ex NN 59/07)

which Romania has implemented

for Automobile Craiova (former Daewoo Romania)

(Only the Romanian version is authentic)

(Text with EEA relevance)

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those provisions¹, and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) On 17 January 2007, the Commission requested information on several Romanian public undertakings, including SC Automobile Craiova SA (hereinafter Automobile Craiova), former Daewoo Romania*, in the context of the national privatisation process. Romania submitted information by letter dated 15 February 2007. The Commission requested further information on 8 March 2007 and 22 May 2007, which Romania submitted by letters dated 21 March 2007, 25 May 2007 and 31 May 2007. A meeting with the Romanian authorities was held on 3 May 2007.
- (2) By letter of 5 July 2007, the Commission urged the Romanian authorities to abolish the specific conditions attached to the privatisation contract of Automobile Craiova, indicating at the same time that the failure to suspend any unlawful aid might lead the

¹ OJ C 248, 23.10.2007, p. 25.

* [Clerical error: should read "and its subsidiary, Daewoo Romania"]

Commission to adopt a decision to open the formal investigation procedure on the basis of Article 88(2) EC Treaty and a suspension injunction on the basis of Article 11(1) of Council Regulation (EC) No 659/1999².

- (3) By letter of 18 July 2007, the Romanian authorities informed the Commission that the privatisation of Automobile Craiova would be notified to the Commission. By letter of 20 August 2007, the Commission reminded Romania that the privatisation of Automobile Craiova would have to be notified before any measure binding the public authorities is taken.
- (4) In September 2007, the Commission learnt from the press that on 12 September 2007 Romania had signed a sale-purchase contract with the only bidder, Ford.
- (5) By letter dated 10 October 2007, the Commission informed Romania that it had decided to initiate the procedure laid down in Article 88(2) EC in respect of unlawful aid and to issue a suspension injunction. The Commission decision to initiate the procedure with the suspension injunction was published in the *Official Journal of the European Union*³. The Commission invited interested parties to submit their comments on the aid.
- (6) Romania submitted its comments by letter of 24 October 2007. By letter of 23 November 2007, Ford submitted its comments, which were forwarded to Romania on 30 November 2007. Romania submitted its observations on Ford's comments by letter of 7 December 2007.
- (7) The Commission asked for additional information by letters of 12 October 2007, 17 October 2007, 19 October 2007, 14 November 2007 and 14 January 2008. Romania submitted the additional information by letters of 18 October 2007, 24 October 2007, 6 November 2007, 12 November 2007, 19 November 2007, 23 November 2007, 7 December 2007, 8 January 2008 and 23 January 2008.
- (8) The Commission met with the Romanian authorities and representatives of Ford on 5 October 2007, 12 October 2007, 7 November 2007, 15 November 2007, 17 December 2007 and 24 January 2008.

2. DESCRIPTION

2.1 The undertaking concerned

- (9) Automobile Craiova is a company active in the trade with automotive spare parts. It also produces exhaust boxes and PVC joinery. 72.4 % of its shares are held by the Romanian state through the Romanian privatisation agency, AVAS. The remaining 27.6 % of the shares are held by a private investment fund (SIF Oltenia) and private natural and legal persons. Its shares are listed on the Bucharest stock exchange. In 2005, Automobile Craiova made a profit of EUR 83 479 and in 2006 of EUR 51 125. In 2005, the turnover of the company was EUR 2.15 million and in 2006 EUR 2.14 million.

² Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83/1, 27.03.1999, p.1-9.

³ Cf. footnote 1.

- (10) The company has one subsidiary, Daewoo Romania (hereinafter DWAR), which is also the majority shareholder in Mecatim. The car producer DWAR was established in 1994 as a joint venture, the Romanian state holding 49 % of the shares and Daewoo Motors South Korea 51 %. After Daewoo Motors went bankrupt, DWAR acquired in 2006 51% of its own shares. In line with Romanian company legislation, the 51 % shares were annulled in November 2007 so that Automobile Craiova held full ownership of DWAR.
- (11) In 2007 DWAR employed 3 959 people. In 2006 it produced 24 898 cars that are mostly small models. In 2007 it was envisaged to produce about 19 000 cars. In January 2008, the car production stopped. In addition, DWAR is producing engines for different GM Daewoo subsidiaries. The Craiova plant has a production capacity of 100 000 cars/year.
- (12) In 2006 DWAR generated losses of around EUR 350 million and until 30 April 2007 of around EUR 3.4 million. In 2006, DWAR had total debts of around EUR 88 million, out of which EUR 56 million to the public budget and EUR 25 million to suppliers.
- (13) According to the financial statements, in 2006 the company had land and fixed assets at a value of EUR 193 million; raw materials and other materials at a value of EUR 55 million; cash available at a value of EUR 96 million; and receivables and settlements at the amount of 108 million. In conclusion, according to the balance sheet of end 2006, DWAR had net assets of EUR 419 million in 2006.
- (14) Mecatim is a subsidiary of DWAR, which owns 75 % of its shares; 20 % are held by AVAS and the remaining 5 % by minority private shareholders. The company is situated in Timișoara. Its core activity is the production of spare parts for vehicles and vehicles engines. However, the company stopped its production and is currently trading with vehicles.
- (15) Automobile Craiova is based in a region eligible for aid under Article 87(3)(a) EC Treaty.

2.2 The privatisation process

- (16) On 19 and 21 May 2007, the Romanian privatisation agency, AVAS, announced the sale of its participation of 72 % in Automobile Craiova. Although several undertakings had previously submitted non-binding letters of interest, only two potential investors, Ford Motor Company (hereinafter Ford) and General Motors (hereinafter GM), bought the Information Memorandum (i.e. the presentation file) which gave them access to the information contained in the Data Room and allowed them to eventually submit a final and binding bid.
- (17) The presentation file contained certain conditions, related in particular to minimum production, employment and investment levels. The scoring grid determined that the price offered represented only 35 % of the total scoring, the total investments 25 %, the achievement of a production integration level of 60 % in the fourth year 20 %, and the commitment to a production level of 200 000 cars in the fourth year 20 %. If the offered integration level was lower than 60 % and/or this level would only be achieved after more than four years, the investor would receive 0 points in this scoring. The same applies to the production level, where if the offered production level was lower than 200 000 cars in the fourth year and/or a longer period would be needed to reach this production level, the investor would obtain 0 points.

- (18) The deadline for submission of final offers was 5 July 2007. Being the only party to submit a binding bid, Ford won the tender. Initially it offered a sales price of EUR 55 million and after the subsequent negotiations of EUR 57 million.
- (19) Within the negotiation phase following the bidding process, the parties agreed that Ford, the buyer, would obtain through a reorganisation ownership of the industrial assets of Automobile Craiova, DWAR and Mecatim, whereas the non-core assets (mostly real estate and net excess cash) will be carved out and remain in State ownership. Also, the State committed to use its best efforts to purchase the remaining 28 % from the private shareholders and sell them to Ford.
- (20) The sales purchase agreement was signed on 12 September 2007.

III. DECISION TO OPEN THE FORMAL INVESTIGATION AND TO ISSUE A SUPENSION INJUNCTION

- (21) The formal investigation procedure was opened due to doubts that the privatisation process entailed state aid.
- (22) First, the Commission had doubts whether the tender itself was open, transparent and non-discriminatory. According to the information available at that moment, which was mostly based on press articles, the Commission had grounds to assume that certain potential investors have been disadvantaged at an early stage and deterred from submitting a bid.
- (23) Second, the Commission suspected that the conditions attached to the privatisation did not lower the sales price, conferring thus an advantage to the undertaking to be privatised. According to the information available at the time of the opening decision, AVAS attached four conditions, which were liable to lower the sales price and might have deterred other potentially interested parties from even submitting a bid. The price offered represented only 35 % of the total scoring.
- (24) Further, the Commission questioned whether the Romanian authorities attached an employment guarantee to the privatisation. According to the presentation file, the potential bidders had to present a business plan, including their commitment to maintain the current number of employees. Also, the draft SPA attached to the presentation file stipulates the obligation for the buyer to maintain for the next five years the current number of employees; in the case the buyer breaches his obligation, the SPA will *de jure* become null and void, without any notification or additional formality. Finally, the Romanian authorities have informed potential buyers already before the publication of the privatisation that one of the main objectives of the privatisation was the maintenance of the current workforce.
- (25) Finally, the Commission had doubts whether within the negotiation phase following the tender the renegotiation of certain terms did not confer upon Ford, the buyer, an advantage. According to the information at that stage, it seemed that the Romanian state committed to take over actual and potential claims against Automobile Craiova, including a customs claim at the amount of EUR 800 million. Further, within the subsequent negotiations, the State and Ford reached an agreement to reorganise the company in such a way that the core activity (production of cars) would be separated

from the non-core assets, in particular real estate. As a result of this reorganisation, Ford would acquire and pay for the industrial activity only and the State would keep ownership of the land.

- (26) Since Romania went along with signing the privatisation contract despite the Commission's repeated warnings, the Commission issued at the same time a suspension injunction.

4. COMMENTS FROM ROMANIA

- (27) First, Romania underlines that the tender process was open, transparent, non-discriminatory and unconditioned. The first notice on the intention to privatise DWAR, published on 5 December 2006, as well as the announcement published on 9/12 March 2007 do not contain any pre-qualification or selection criteria, let alone any conditions which needed to be met by the bidders. Also, the advertisement on the privatisation, published on 18/21 May 2007 did not contain any mandatory conditions, but mere awarding criteria which would allow the scoring of the different bids. Further, Romania claims that the increase of the employment level was never made a criterion in the tender procedure. In conclusion, all potential bidders had access to all the information available, since the whole privatisation process was transparent. Therefore, no potential bidder was deterred from submitting an offer.
- (28) Second, Romania argues that neither the presentation file, nor the draft SPA imposed mandatory conditions without the possibility for the potential bidders to negotiate them. Romania explains that AVAS initially intended to privatise DWAR as a whole, however, in the process of the privatisation it decided to give the potential bidders the option to bid only for the industrial assets (i.e. excluding the real estate). Romania underlines that, from the outset, all potential bidders were aware that the real estate was not comprised in the privatisation offer, but would be sold separately.
- (29) Third, Romania underlines that the criteria comprised in the presentation file did not have any effect on the offers, in particular since all potentially interested parties were automotive undertakings. Even more, Romania submitted that these criteria had no influence on Ford's offered purchase price, since they were compatible with its business plan. According to Romania, the production level of 200 000 cars per year, as required by AVAS in the presentation file, needs to be achieved because of economical reasons: due to the size and the capacity of the car plant which is equipped to build small models, a production below 200 000 cars per year would not be economical.
- (30) Fourth, Romania substantiates that it acted as a market economy operator when selling its participation in Automobile Craiova. Romania argues that the price obtained represents the market value and provides the following arguments: DWAR purchased 51 % of its shares in 2006 from the former mother company Daewoo Motors Ltd. for a sales price of USD 50 million. Therefore, the value of 100 % of shares at that time was EUR 78 million. Ford offered for 72.4 % of the shares of Automobile Craiova EUR 57 million, which would correspond to EUR 78 million for the entire 100 %. Also, when taking the value per share traded on the stock exchange, the value of all the shares in Automobile Craiova was on 16 March 2007 about EUR 59 million. Therefore, the purchase price of EUR 57 million paid by Ford for 72 % of the shares is above the market price. In addition, according to the restructuring process, AVAS will also remain

owner of the non-core assets. Finally, according to the evaluation of DWAR after the bankruptcy of the mother company by an independent expert, KPMG, the company was evaluated in 2004 at an amount between USD 18 – 81 million, depending on the method of evaluation.

- (31) Fifth, as regards the alleged indemnification, Romania submitted detailed information on the debt arrangement included in the special law on the privatisation of Automobile Craiova. Romania argues that, according to normal business practice, AVAS takes over only debts which are not foreseeable and cannot be quantified. Romania underlines that Automobile Craiova and DWAR do not have any outstanding debts towards the state, except of those deriving from the normal course of business. Also, because of the settlement payment amounting to USD 10 million paid in 2006 to the mother company⁴, DWAR does not have any outstanding debts to former Daewoo subsidiaries.
- (32) Sixth, as regards the custom claim, Romania explains the origin of the customs claim at the amount of EUR 800 million. According to Law 71/1994 on attracting foreign investors, Romanian companies were exempted from customs duties and tax on profits if they fulfilled 4 conditions: the foreign subscribed capital is of at least USD 50 million; at least 50 % of the production is exported; a production integration level of at least 60 % is achieved; and the share capital does not decrease within 14 years as from the date of the foreign subscription so that the foreign participation falls below USD 50 million.
- (33) The local customs authority calculated in 2005 the production integration level of the company and came to the conclusion that the 60 % ceiling was not reached. Thus, it claimed the repayment of the tax exemptions, which amounted to EUR 800 million. DWAR challenged the decision before the National Customs Authority. Since the court of first instance upheld the repayment decision, DWAR filed again an appeal. The Court of Appeal, in a judgement of 27 June 2007, annulled the repayment order.
- (34) In conclusion, Romania underlines that DWAR did not benefit from any debt waiver.
- (35) Seventh, the Romanian authorities argue that the maintenance of the current workforce was never a condition in the privatisation since it was not an awarding criterion. Also, the draft SPA attached to the presentation file served only for guiding purposes, so that potential bidders could have understood that the individual contractual terms could be subject to bilateral negotiations. Therefore, potential bidders who did not plan to maintain the current workforce could have nevertheless submitted an offer with a diverging business plan.
- (36) Finally, as regards the subsequent negotiations on different other contractual terms, Romania claims that they were part of the normal negotiation process preceding the conclusion of the SPA.

⁴ In 2006, DWAR acquired 51% of the shares from Daewoo Motors Ltd. for a sales price of USD 50 million plus a settlement payment at the amount of USD 10 million for any outstanding liabilities to other Daewoo subsidiaries.

5. COMMENTS FROM THIRD PARTIES

- (37) By letter of 23 November 2007, Ford intervened in the Commission proceedings as interested party.
- (38) First, Ford argues that the privatisation process was open, transparent, non-discriminatory and unconditional. All the correspondence between Ford and AVAS within the privatisation process was disclosed in the Data Room.
- (39) Second, the awarding criteria were not mandatory conditions liable to deter potential bidders. To the contrary, Ford declared that it was its understanding that these criteria were negotiable. Further, the scoring criteria had no impact on Ford's offer, since Ford's business plan exceeded by far the requirements set in the presentation file.
- (40) Third, the purchase price paid by Ford to AVAS represents the market value of the shares tendered. Ford stated that it had considered to pay a maximum purchase price of USD 100 million (i.e. EUR 71.4 million) for the 100 % of the shares, which would equal to a price of EUR 51.7 million for 72.4 %⁵. It did not intend to offer a higher price, even in the absence of the awarding criteria. Initially Ford offered a purchase price of EUR 55 million and after negotiations with the Romanian authorities EUR 57 million. Further, Ford was the only bidder, so that its offer represents the market value.
- (41) Finally, Ford argues that indemnifications contained in the SPA were standard business practice for the acquisition of companies, thus market conform, and did not lead to a sale at a price lower than the highest possible bid. Ford highlights the fact that such indemnifications relate only to risks which go beyond the ordinary course of business and are impossible to assess by a new investor taking over a company. Ford has taken over all debts and liabilities of Automobile Craiova, including DWAR, that had arisen in the ordinary course of business and that were quantified and disclosed in the Data Room. However, Ford was not willing to take over potential risks which it could not assess and quantify on the basis of the due diligence.

6. ASSESSMENT

6.1. Existence of State aid within the meaning of Article 87(1) EC Treaty

- (42) Article 87(1) EC Treaty states that, save as otherwise provided in the Treaty, any aid granted by a Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the common market, insofar as it affects trade between Member States.

6.1.1 State resources

- (43) The conditions to the privatisation contract have been attached by the Romanian public privatisation agency, AVAS. By attaching such conditions, the Romanian state accepted not to obtain the highest possible price. The lower sales price for the 72.4 % stake is

⁵ Based on the exchange rate of 1 EUR = 1.4 USD.

paid by the foregone revenue of the State. Therefore, the measures involve State resources and are imputable to the State.

6.1.2 Conferral of an advantage

- (44) An undertaking benefits from an advantage if it obtains something from the State which it would not have obtained under normal market conditions. To this end, it is first to be assessed whether the State acted in the role of a market economy operator or in its role as State authority who sold a company at conditions not corresponding to normal market conditions.
- (45) When initiating the procedure under Article 88(2) EC Treaty, the Commission had doubts that the conditions attached to the privatisation were liable of lowering the sales price and possibly deterring other potentially interested investors, so that the sales price obtained was lower than the market value of the company. The Commission considered that the conditions attached to the privatisation grant the privatised economic activity an advantage, by ensuring that Automobile Craiova, including DWAR, would continue to produce a certain level of cars per year (and even increase the production level), which potentially they would not have under normal market conditions. Such advantage would be paid by the foregone revenue of the State in the sale.

Privatisation of State owned companies

- (46) Article 295 EC Treaty is neutral as regards public and private ownership. Further, according to Article 86(1) EC Treaty, public companies are equally subject to State aid rules.
- (47) The EC rules on state aid in the context of privatisations⁶, which are constantly confirmed by the jurisprudence of the European Courts⁷, determine general principles which the Commission applies within state aid control to privatisations. According to these principles, when the privatisation takes place by sale of shares on the stock exchange, it is generally assumed to be on market conditions and not to involve aid. When the privatisation is carried out through a trade sale, it can be assumed that no aid is involved only if the following conditions are fulfilled: first, the company is sold by a competitive tender that is open to all comers, transparent and non-discriminatory; second, no conditions are attached which are not customary in comparable transactions between private parties and which are capable of potentially reducing the sales price; third, the company is sold to the highest bidder; and fourth, bidders must be given enough time and information to carry out a proper valuation of the assets at the basis of their bid.⁸

⁶ XXIIIrd Report on Competition Policy, 1993, p. 255.

⁷ See for example: Case T-296/97 Rec, *Alitalia*, Cases T-228/99 and T-233/99, *WestLB v Commission*; Case T-366/00, *Scott SA*, Cases C-328/99 and C-399/00, *Italy and SIM 2 Multimedia v Commission*; Case T-358/94, *Air France v Commission*.

⁸ Points 402 et seq. of XXIIIrd Report on Competition Policy (1993).

- (48) In other words, when the privatisation is carried out by trade sale, the benchmark for assessing whether a transaction concerning State's assets involves an aid is whether a market economy operator placed in a similar situation would have behaved in the same way, i.e. would have sold the company at the same price. Non-economical considerations, such as for example industrial policy reasons, employment considerations or regional development objectives, which would not be acceptable to a market economy operator, cannot be taken into account as reasons for accepting a lower price and, on the contrary, point at the existence of aid. This principle has been repeatedly explained by the Commission and constantly confirmed by the Court.⁹
- (49) Therefore, if any of the requirements mentioned further above are not fulfilled, the Commission considers that the privatisation entails State aid and, thus, must be notified. Consequently, by respecting these requirements, it would be ensured that the State obtains the highest price, i.e. the market price, for its shares and, thus, no State aid is involved.

Conditions attached are liable to lower the sales price

- (50) By imposing certain conditions on the buyer in the privatisation, the State potentially lowers the sales price and thus forgoes additional revenues. Also, conditions can deter potentially interested investors from submitting a bid in the first place, so that the competitive environment of the tender is disturbed and even the highest of the offers eventually submitted does not necessarily represent the actual market value.
- (51) By imposing such conditions and thus accepting that it will not receive the best price for the owned shares or assets, the State does not act like a market economy operator, who would try to obtain the highest possible price. Instead the State chooses to sell the undertaking at a price below the market value. A market economy operator would not have an economic interest in attaching comparable conditions (in particular such as maintenance of the level of employment, conditions beneficial for the geographical region concerned or ensuring a certain investment level) but would sell the company to the highest bidder, who would then be free to determine the future of the acquired company or assets.¹⁰

⁹ See for example: Cases T-228/99 and T-233/99, *WestLB v Commission*; Case T-366/00, *Scott SA*, Cases C-328/99 and C-399/00, *Italy and SIM 2 Multimedia v Commission*; Case T-358/94, *Air France v Commission*. In Case T-296/97 Rec, *Alitalia* the Court states that "*It must be emphasised that the conduct of a private investor in a market economy is guided by prospects of profitability. The measure was motivated by the desire to keep the jobs and therefore, above all, by considerations pertaining to the applicant's viability and survival rather than by prospects of profitability.*"

¹⁰ See for example the Commission Decision 97/81/EC of 30 July 1996 *Head Tyrolia Mares* where the Commission states that "*It is not in the interest of a market economy investor to ensure, without clear economic reasons, a certain employment level when taking his divesting decisions. Without the condition in question, a potential buyer would gain entrepreneurial independence and HTM's value would increase, which could result in a higher sale price or reduced funding by AT.*"; Commission Decision 2000/628/EC of 11 April 2000 on the aid granted by Italy to *Centrale del Latte di Roma*, in which the Commission spells out the criteria when a privatisation of a publicly-owned company does not involve State aid (see recital 32 et seq., in particular recital 36): "*The Commission believes that the market value of the company would have been the price a private investor would have paid had the sale been subject to no conditions, particularly those relating to the maintenance of a certain number of jobs and the supply of raw materials from local producers.*"

- (52) The privatisation through a tender to which conditions are attached will therefore result in a lower sales price than in case of an unconditional tender. The conditions attached normally benefit the privatised undertaking, by ensuring that it remains on the market, maintains or even increases production and/or employment and/or achieves an investment level it could not have achieved in the absence of the conditions. Furthermore, such conditions incite to the disposal of resources in a certain Member State or region, to the detriment of competing locations. The aim of the State aid control is to ensure a level playing field preventing an unfair competition between undertakings and distortion of trade between Member States or regions.
- (53) Therefore, conditions attached to a privatisation which would not be attached by a market economy operator and which are capable of potentially lowering the sales price involve State aid.

Conditions attached to the privatisation of Automobile Craiova

- (54) When privatising Automobile Craiova, the privatisation agency set 4 conditions in the form of awarding criteria in order to establish the winning bidder: the price offered represented 35 % of the total scoring, the total investments 25 %, the achievement of a production integration level of 60 % in the fourth year 20 %, and the commitment to a production level of 200 000 cars in the fourth year 20 % respectively. If the last two requirements were not fulfilled by the potential investor, the offer would receive 0 points on those particular scorings. Thus, it was practically impossible for a potential investor following a different industrial use of the car plant to win only with a higher sales price but without meeting the production and integration levels required (assuming that the investment level was equal).
- (55) Assuming that a competitive investor might have proposed a similar level of investments, but would not have been able to fulfil the requirement of the production level, this competitive bidder would have to (in order to win the bid) propose a price of 230 % of the price proposed by Ford.¹¹ In concrete terms, in order to overbid Ford's offer of EUR 57 million a potential investor would need to propose a sales price of above EUR 133 (i.e. EUR 76 million higher) in order to compensate for the non-fulfilment of the condition related to the production level. These factors must have been taken into account by both Ford and its potential competitors and, thus, have influenced their decision to bid at all and the price offered.
- (56) The Commission notes that although the formal announcement of the privatisation of Automobile Craiova did not contain any reference to conditions and the precise conditions were only laid down within the later Information Memorandum, the general objective of the Romanian authorities as regards the maintenance of a certain level of employment and a certain level of car production at the site was publicly known even

¹¹ In the above calculations, the Commission assumed that the impact of the condition referring to the integration level may be ignored. As rightfully pointed out by Ford and in line with the Commission's practice, this requirement is in breach of the Internal Market rules regarding the free movement of goods. In view of this, Ford committed to reach a 60% integration level within four years from the privatisation "subject to consistency with EU law". Since Ford highlighted this issue in its correspondence with AVAS which was also available to GM, it is assumed that also GM understood that this particular requirement could be accepted conditionally without any practical consequences for its offer. However, if the price would also have to compensate for not meeting this criterion, the price differential would be even higher than explained above.

before. Therefore, the Commission considers that certain potential investors who might have considered a different industrial strategy might have been deterred from showing a concrete interest in the company already at this initial stage.

- (57) As regards the conditions attached, the Commission considers that the scoring of the production and integration level amounts to actual conditions attached to the privatisation which have reduced the sales price. The Commission cannot accept the argument that the sales price obtained reflects the market value of the company. Potential investors with a different production strategy or industrial activity, who did not envisage producing 200 000 cars per year and achieving a 60 % integration level, might have been deterred from the start from submitting an offer and certainly their competitive position in the tender was significantly impaired.
- (58) As regards the employment guarantee, the Commission notes that, according to the presentation file, the potential bidders had to present a business plan, including the targeted number of employees proposed, whereas at least the maintenance of the current number of employees was required. Further, the draft sales purchase agreement annexed to the presentation file provides the obligation for the buyer to maintain for the next five years the current number of employees; in case the buyer breaches this obligation, the sales purchase agreement will *de jure* become null and void, without any notification or additional formality. In the view of the above, the Commission concludes that the employment guarantee was a mandatory condition to the privatisation which also has influenced the sales price.
- (59) As regards the negotiability of the conditions attached, the Commission cannot accept Romania's argument that the negotiability of the conditions was publicly known by all potential investors and could be easily deduced from the tender documents. It is true that AVAS, in response to Ford's questions, confirmed that the draft SPA serves for guiding purposes only, as a basis for further negotiations. However, this statement refers only to those contractual negotiations which are inherent within a share sale by way of negotiations based on final, improved and irrevocable bids and did not generally confirm that further negotiations of the mandatory terms as required in the public announcement, and in particular the elements of the scoring grid, were in fact possible. Romania did not provide any evidence which would show that the criteria of the scoring grid could have been considered negotiable. In fact, if the scoring criteria were negotiable, the scoring model would lose any practical relevance.
- (60) The Commission does not agree with the argument put forward by Romania which relates to the possibility confirmed by AVAS to change its position in the course of negotiations. This answer refers exclusively to Ford's question on the planned requirement for the purchaser to renounce to the right to claim protection and reimbursement from the State in case Automobile Craiova's assets are successfully claimed by third parties. It is the Commission's opinion that a reader will not be able to deduce from this statement that all conditions in general would be negotiable.
- (61) The Commission cannot accept the calculations put forward by Romania, which aim at demonstrating that the price paid by Ford represents the market value of Automobile Craiova. First, the sales price paid by Ford for 72 % of Automobile Craiova, including DWAR and Mecatim, cannot be compared to the price DWAR paid in 2006 for 51 % of its own shares. Also, the general economic context at the time of the latter sale has to be taken into account: when the bankrupt Daewoo Motors agreed to sell its 51 % in 2006,

DWAR was confronted with high liabilities (the pending customs claim, debts towards other Daewoo subsidiaries, etc.).

- (62) Second, the comparison between the sales price and the stock exchange value of the shares in Automobile Craiova, which was about EUR 50 million, can not be accepted. This comparison does not take into consideration that, for the acquisition of a majority, the value of the shares is significantly higher than the sum of the price for single shares. Also, since only a very small part of the shares actually float on the market, the stock exchange price might not reflect the actual value of the company.
- (63) In view of the above, the Commission concludes that the conditions attached to the privatisation were designed in a way to achieve the best possible outcome from a regional development perspective (to ensure a certain production, investment and employment level) rather than obtaining the highest price in the sale. The conditions have lowered the sales price and deterred other potential bidders from submitting a bid. Without conditions, competition for the purchase of Automobile Craiova would have been stronger and the State would have obtained a higher sales price.

Open, transparent, non-discriminatory tender

- (64) When initiating the procedure under Article 88(2) of the Treaty, the Commission had doubts whether the tender was transparent and non-discriminatory, and in particular whether all potentially interested parties had equal access to information as regards the company to be privatised, the awarding criteria and the possibility to negotiate certain contractual terms with the privatisation agency. According to the information at that time, the Romanian authorities conducted pre-discussion with certain car producers even before the official privatisation announcement was published.
- (65) Romania argues that all potential investors had equal access to information, none of them being favoured. The preliminary contacts the government had with the potential interested parties did not affect the privatisation strategy and procedure.
- (66) On the basis of the information supplied by the Romanian authorities, the Commission observes that the Romanian authorities conducted informal pre-discussions with several potential investors, which addressed similar concerns as regards the company to be privatised: full ownership of the industrial assets, the company's debts and liabilities and a swift privatisation process. It is presumed that the State as a seller would engage in those discussions with the aim of obtaining preliminary information such as the demand on the market, minimum sales price, etc. Unless such discussions are conducted with the aim or result of designing conditions to be attached to the tender, the Commission agrees that it can be considered usual for the government to engage in consultations and pre-discussions with potential investors before publishing a privatisation announcement.
- (67) After the publication of the privatisation announcement only two potential bidders, Ford and GM, bought the presentation file and, thus, qualified to obtain access to the Data Room and eventually submit a final and binding offer. It is true that after the publication of the privatisation announcement all correspondence between AVAS on the one side and Ford and GM on the other side was available to them in the Data Room. Therefore, the Commission concludes that within this particular stage of the privatisation both potential investors had equal access to information.

- (68) In conclusion, on the basis of the information provided by Romania, the doubts of the Commission as regards the open, transparent and non-discriminatory nature of the tender for the privatisation of Automobile Craiova have been allayed.

Waiving of debts

- (69) When initiating the procedure under Article 88(2) EC Treaty, the Commission expressed doubts that AVAS might waive within the privatisation certain debts of the company (in particular the customs claim amounting to EUR 800 million) and offer a guarantee concerning the payment of debts towards the other former Daewoo subsidiaries.
- (70) As regards the customs claim, Romania provided conclusive information showing that the customs claim was declared unfounded by a national court: the claim originated from the wrongful interpretation and application of national legislation. Thus, the customs claim was annulled. According to the jurisprudence of the Court of Justice, national courts must give full effect to community law provisions regarding state aid. Further, national courts can refuse, if necessary, to apply any provision of national law that is contrary to community law provisions.¹² The Commission assessed the grounds for the annulment of the customs claim through the court judgement and concluded that it did not lead to the granting of new aid.
- (71) As regards current liabilities deriving from the normal course of business, Romania substantiated that these will not be taken over by AVAS, but will be paid by DWAR.
- (72) As regards the guarantee offered by AVAS against contingent liabilities, the Romanian authorities explained that the State guarantee applies only to unknown claims related to DWAR's past activity, which any new investor could not have assessed and quantified within the due diligence. Further, Romania argues that taking over such liabilities is normal business practice occurred within the usual contractual negotiations.
- (73) In conclusion, the doubts of the Commission as regards the potential debt waiver expressed in the opening decision have been allayed.

Negotiation phase

- (74) When initiating the procedure under Article 88(2) EC Treaty, the Commission had doubts whether within the negotiation phase AVAS changed the terms of the tender to such an extent as to favour Ford's business plan. Romania argues that the changes of other contractual terms which occurred within the negotiation phase are current business practice and are allowed under the privatisation strategy chosen for this company (i.e. negotiations based on final, improved and irrevocable bids). Also, Romania underlined that Ford's offer envisaged the acquisition of the production unit (currently DWAR); in exchange, Ford offered a package comprising the sales price of EUR 57 million plus the non-core assets which will remain in State ownership.

¹² See for example the case C-119/05 *Italy v Lucchini*.

- (75) Within this negotiation phase, AVAS and Ford agreed on a corporate restructuring process, which was also laid down in the SPA. According to this corporate restructuring, Automobile Craiova and Mecatim will merge into DWAR. The core assets (i.e. industrial assets) of all three companies will stay with DWAR. The remaining non-core assets (in particular real estate) will de-merge in a new company (Newco). The net excess cash available to DWAR will also move to the Newco. Further, AVAS committed to use its best efforts to acquire the remaining shares of the new DWAR (i.e. core assets) from the minority shareholders and sell them to Ford at the same price per share paid by Ford for the 72.4 %.
- (76) The arguments put forward by Romania allayed the Commission's doubts as regards the negotiation phase.

6.1.3 *Selectivity*

- (77) The measure is selective as it favours only Automobile Craiova, including the car producer DWAR.

6.1.4 *Distortion of competition and affectation of trade between Member States*

- (78) Automobile Craiova is a car and spare parts producer and DWAR a car producer, these products being widely traded across the European Union. Thus, the measure threatens to distort competition and to affect trade between Member States.

6.1.5 *Conclusion*

- (79) In view of the above, the Commission concludes that the conditions attached entailed State aid because they lead to a reduction of the sales price for the 72.4 % stake of Automobile Craiova and provide an advantage to the privatised economic entity. The present decision applies only to this sale of the 72.4 % stake by AVAS to Ford. It does not prejudice any future assessment of a potential sale of the remaining 27.6 % of shares.
- (80) The Commission notes that the economic activity benefits from the advantage granted (i.e. maintenance of a certain production, investment and employment level), and is the beneficiary of the state aid.

6.2. *Quantification of the aid*

- (81) The State aid amount granted is the difference between the market value of the company (i.e. the highest possible price which AVAS would have obtained for the 72.4 % participation in Automobile Craiova without attaching the conditions) and the price actually received. This difference was forgone by the State.
- (82) Naturally, it is difficult to simulate what price would be achieved in an open, transparent, non-discriminatory and unconditional tender. The best possible solution would be to annul the result of the tender and re-organise the privatisation once again, without conditions attached, thus ensuring that no State aid is granted. This solution was proposed to the Romanian authorities. However, Romania did not accept to do so.

- (83) In order to assess the aid element to the privatised economic activity resulting from the privatisation the market value of the company needs to be assessed. Following discussions with the Romanian authorities and Ford, and considering the particular circumstances of the case, the Commission considers it appropriate in the case at hand to base the analysis of the market value on the net asset value of the company sold.
- (84) When looking at the book value of the company at the time of the tender, according to the balance sheet as of 31 March 2007 (i.e. the latest data available to the potential bidders for determining their bids), the total value of company's assets minus the total debts amounted to EUR -465 million. This value does not include the real estate, which ultimately was not purchased by Ford. In addition, as explained above, within the SPA agreement both parties decided that the sale would be followed by a corporate restructuring process. First, Ford would not acquire valuable non-core assets, which were planned to be carved out and should remain with AVAS. Second, AVAS would also retain the net excess cash in the amount of RON 310 million (around EUR 92 million) with the corresponding liabilities of the company (it was assessed that the cash would be sufficient to pay the liabilities). Finally, the balance sheet of March 2007 included the provisions for the potential repayment of the customs claim (described in recitals (25) and (70)), which significantly lowered the net asset value of the company, while following the court's judgment this claim disappeared and the provision could be released.
- (85) In addition to these elements, the Romanian authorities submitted arguments for certain adjustments of the values in the balance sheet in order to adequately reflect the actual value of the assets. In particular, the value of land and building, machinery and equipment, other tangibles and inventories have been adjusted accordingly in order to reflect their actual market value.
- (86) If all those factors are taken into account, i.e. the net excess cash is deducted, the liabilities and the provisions for the customs claim are disregarded, and finally the above adjustments are applied, the resulting net assets value of 100 % of DWAR would amount to EUR 115 923 000, meaning that the net assets value of 72.4 % of DWAR amounts to EUR 83 928 000.
- (87) The difference between the net asset value determined and the price actually paid by Ford (EUR 57 million) amounts to EUR 26 928 000. In conclusion, the State aid amounts to EUR 26 928 000 million.

6. 3. Qualification of the State measure as unlawful aid

- (88) According to Article 1(f) of the Council Regulation No 659/1999 "unlawful aid" shall mean new aid put into effect in contravention of Article 88(3) EC Treaty.
- (89) The Romanian authorities did not notify the measure before its implementation and put it into effect in contravention of Article 88(3) EC Treaty. Consequently, the measure constitutes unlawful aid.

6. 4. Compatibility of the unlawful aid

- (90) Having established that the State measure is aid within the meaning of Article 87(1) EC Treaty, it is necessary to consider whether the measure could be found compatible with the common market.
- (91) The exemptions in Article 87(2) EC Treaty do not apply in the present case because the aid measure neither has a social character nor is granted to individual consumers; moreover, the measure does not make good the damage caused by natural disasters or exceptional occurrences and is not granted to the economy of certain areas of the Federal Republic of Germany affected by its division.
- (92) The exemptions provided for in Article 87(3)(b) and (d) EC Treaty do not apply either. They refer to aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, and aid to promote culture and heritage conservation.
- (93) This leaves the exemptions provided for in Article 87(3)(a) and (c) EC Treaty and in the relevant Community guidelines.

Rescue and Restructuring Guidelines

- (94) The Commission does not possess any information which would show that the aid can be considered to be compatible with the EC Treaty on the basis of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty.¹³
- (95) Under these Guidelines, the company receiving restructuring aid must be in difficulty, i.e. it is unable, whether through its own resources or with funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to go out of business in the short or medium term. It is true that DWAR made in 2006 losses of EUR 350 million and had debts of EUR 88 million; however, the company had assets valued at EUR 419 million (mainly real estate). Even more, following the privatisation and the sale to Ford, DWAR would become part of a larger business group in the sense of the Guidelines, which most likely could financially support it to overcome its difficulties. In conclusion, DWAR does not qualify under the Guidelines as company in difficulties.
- (96) Also, the granting of restructuring aid is conditional on the existence of a sound restructuring plan the duration of which must be as short as possible and which restores the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to the future operating conditions. Romania did not provide such a restructuring plan.
- (97) Further, undue distortions of competition must be avoided. This usually takes the form of a limitation on the presence which the company can enjoy on its market or markets after the end of the restructuring period (i.e. compensatory measures). As regards Automobile Craiova, the conditions attached to the privatisation ensure a significant capacity increase and, thus, an increased presence on the relevant market.

¹³ OJ L 244 of 1.10.2004, p.2.

- (98) Despite the doubts raised by the Commission when initiating the formal investigation procedure, Romania did not establish that these conditions had been met. The Commission concludes therefore that the conditions of the Guidelines have not been met.

Regional Aid Guidelines

- (99) The Commission notes that Automobile Craiova is located in an assisted area under Article 87(3)(a) EC Treaty that is eligible for regional aid. Nevertheless, Romania did not provide any information to show that the conditions for the granting of regional aid as laid down in the Guidelines on national regional aid were met.
- (100) The Commission notes that indeed the conditions attached to the privatisation agreement related to the planned investments and maintenance of employment, which could be compared to the objectives of regional aid. However it is noted that the reduced price achieved by Ford was not made conditional upon compliance with the rules included in the Guidelines on national regional aid, such as maintenance of the project in the region for certain period of time, verification of eligible costs or rules concerning cumulation of aid, transparency and monitoring.
- (101) In addition, the Commission notes that Romania separately notified regional aid.¹⁴ This aid will be assessed in a new decision on its own merits.

Other Guidelines and Frameworks

- (102) Furthermore, the Commission notes that the aid is not compatible under any other Community Guidelines or Frameworks. In any event, the Romanian authorities did not refer to any of these provisions.

Conclusion

- (103) Since the aid measure does not qualify for any of the exceptions provided for in the Treaty, the Commission concludes that the aid is incompatible with the common market.

7. RECOVERY

- (104) According to the Article 14(1) of the Council Regulation (EC) No 659/1999, where negative decisions are taken in cases of unlawful aid, the Commission shall decide that Member State concerned shall take all necessary measures to recover the aid from the beneficiary.
- (105) Only incompatible aid can be recovered. The Commission established that the aid amount of EUR 26 928 000 was unlawfully granted. It is not compatible under any of the EC state aid provisions. Therefore, it needs to be recovered.
- (106) The Commission concludes that the beneficiary of the aid is the economic entity which has been privatised, i.e. the core industrial assets held by Automobile Craiova and DWAR or any subsequent entity. The Commission notes that according to the

¹⁴ State aid N 767/2007 Large Investment Project – Romania – Ford Craiova.

provisions of the sales and purchase agreement, following the corporate restructuring process, this economic entity will be the owner of only the core industrial assets, which benefited from the conditions attached to the privatisation, and not of the non-core assets.

- (107) Due to specific suspending clauses in the sales purchase agreement as well as the suspension injunction issued by the Commission, the sales purchase agreement between AVAS and Ford has not entered into force so far. Consequently, the Commission concludes that the aid has not been put at the disposal of the beneficiary, and, thus, no recovery interest needs to be paid.
- (108) The Commission notes that the net excess cash of Automobile Craiova and DWAR (as well as other non-core assets) is not part of the transaction between AVAS and Ford and thus, is not taken over by the latter. Thus, when calculating the net asset value of the company for the quantification of the aid, the Commission did not take into account this net excess cash. In conclusion, following the present decision, the aid shall not be repaid from this net excess cash. The Commission therefore, requests to be kept informed about the corporate restructuring and in particular evidence on the level of the net excess cash at the date of the SPA and at the date of the repayment, and information on any differences occurred in between.

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Romania has implemented within the privatisation process of Automobile Craiova at the amount of EUR 26 928 000 is incompatible with the common market.

Article 2

1. Romania shall take all necessary measures to recover from the beneficiary the aid referred to in Article 1 and unlawfully granted to the beneficiary.
2. The sums to be recovered shall bear interest from the date on which they are put at the disposal of the beneficiary until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.
4. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. Romania shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 4

1. Within two months following notification of this Decision, Romania shall submit the following information to the Commission:
 - (a) the total amount to be recovered from the beneficiary;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) documents demonstrating that the beneficiary has been ordered to repay the aid;
 - (d) documents demonstrating that the aid has been repaid;
 - (e) documents demonstrating that the aid has not been repaid from the non-core industrial assets which are envisaged to be transferred to the newly created company owned by AVAS and the minority shareholders (in particular net excess cash and real estate) as defined in the sale purchase agreement;
 - (f) a detailed description of the implementation of the corporate restructuring process as defined in the sales purchase agreement.
2. Romania shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 5

This Decision is addressed to Romania.

Done at Brussels, 27.02.2008

For the Commission

Neelie Kroes

Member of the Commission

Notice

If the decision contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the decision. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Director-General for Competition
Directorate State Aid II
State Aid Greffe
B-1049 Brussels
Fax No: +322 296 95 80

Annex I

Information regarding the implementation of the Commission decision n° C 46/2007 (ex NN 59/2007), implemented by Romania, Automobile Craiova

Information about the amounts of aid received, to be recovered and already recovered

| Identity of the beneficiary | Total amount of aid received (°) | Total amount of aid to be recovered (°) (Principal) | Total amount already reimbursed (°) | |
|-----------------------------|----------------------------------|--------------------------------------------------------|-------------------------------------|-------------------|
| | | | Principal | Recovery interest |
| | | | | |
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(°) Million of national currency
