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**Subject: State aid C 28/2009 (ex N 433/2009) – Romania**  
**Support measures in favour of Oltchim SA Râmnicu Vâlcea**

Dear Sir,

The Commission wishes to inform Romania that, having examined the information supplied by your authorities on the measures mentioned above, it has decided to initiate the investigation procedure laid down in Article 88(2) EC Treaty.

## **I PROCEDURE**

- (1) On 17 July 2009 Romania notified two support measures in favour of Oltchim SA Râmnicu Vâlcea (hereinafter: "Oltchim" or "the company"). The first measure involves the swap of public debt amounting to ca. EUR 135 million into equity. The second measure is a State guarantee covering 80% of a commercial loan amounting to EUR 424 million, to be used for refurbishing the company and further investments. Romania notified these State support measures as not constituting State aid within the meaning of Article 87(1) EC Treaty.
- (2) In 2006, within the interim consultation mechanism set in place before Romania's accession to the European Union, the Romanian Competition Council consulted the Commission on the Romanian authorities' intentions to perform a debt-to-equity swap in Oltchim. The same year, the Romanian Competition Council opened a formal investigation in relation to the planned swap, but did not adopt a decision before the date

of accession. After accession, the Commission opened an *ex officio* case concerning the situation at Oltchim.

- (3) On 10 April 2008, PCC SE (hereinafter: "PCC"), a German company based in Duisburg who owns a minority stake of ca. 12.15 % in Oltchim, submitted a formal complaint, alleging that the planned debt-to-equity swap involves incompatible State aid.
- (4) Following registration of the complaint, the Commission exchanged correspondence and information with the Romanian authorities, Oltchim and the complainant, and met on several occasions with the Romanian authorities and representatives of Oltchim, on the one side, and with representatives of the complainant on the other side.

## II BACKGROUND OF THE CASE

### II.1. The Company

- (5) Oltchim is one of the largest petrochemical companies in Romania and South-East Europe, manufacturing 78 assortments of 40 base chemical products. The company exports around 80% of its production inside and outside Europe.
- (6) The production of PVC (a material with multiple applications in the construction and heavy machinery manufacturing industries) represents about 32% of the company's activity. Oltchim declares an EU-wide market share for the production of PVC of 2.1%. A significant part of Oltchim's PVC production is exported outside the EU. Other main products of the company are: caustic soda, DOP and polyether polyols.
- (7) In 2008 the company employed approximately 4,200 people<sup>1</sup>. Oltchim is the main industrial employer in Râmnicu Vâlcea (a town of approximately 110,000 inhabitants, the administrative centre of an area in South-West Romania with assisted region status under Article 87(3)(a) EC).
- (8) The company started activity in 1966, was reorganised in 1990, and listed on the Romanian Stock Market in 1997. The Romanian State (currently *via* the Ministry of Economy) maintains a controlling stake of 54.8% in the company. The principal minority shareholder is PCC, a German-based holding company (who also owns Rokita SA, a Polish competitor of Oltchim), with a stake of ca. 12.15%. The rest of the company shares are held by SIF Oltenia (6.5%), Sorin Apostol (2.5%), Leo Overseas Ltd (1.7%) and various other small shareholders.

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<sup>1</sup> According to recent press reports (see e.g. article of 10 of August 2009 at <http://www.wall-street.ro/articol/Companii/69414/Oltchim-concediaza-1-200-de-angajati-pana-la-sfarsitul-anului.html>) the General Assembly at Oltchim approved on 6 August 2009 a restructuring plan which envisages *inter alia* the layoff by the end of 2009 of 1,206 employees. The same press article states that by end of 2009 the company shall incorporate another 600 employees, in relation to the purchase and restart of the supplier Arpechim.

## ***II.2. The Origin of the Public Debt***

- (9) Over the period 1992-2008, Oltchim invested a total of approximately EUR 371 million in the modernisation of its production line (of which EUR 118.8 million were invested in 2007/2008). In relation to certain of these investments, Oltchim contracted over the period 1995-2000 a series of 12 commercial loans, totalling approximately EUR 87 million. The loans were backed with State guarantees<sup>2</sup>, in relation to which the Romanian Ministry of Finance and Oltchim also concluded 5 so-called "Recovery Agreements", which stipulated Oltchim's obligations towards the Ministry of Finance for the eventuality that the guarantees would be triggered.
- (10) The Recovery Agreements stipulated a risk premium (varying from 0.50% to 4% of the guaranteed amount) and its payment conditions (e.g. 15% of the risk premium to be paid as advance, and the remaining 85% in 6 semi-annual instalments, etc). They did not stipulate, however, any conditions for the repayment by Oltchim of the sums paid by the Ministry of Finance as a consequence of the triggering of the guarantees. Nonetheless, the Recovery Agreements mentioned explicitly that these sums and the related interest were due from the moment of the payments made by the Ministry of Finance.
- (11) Furthermore, the two Recovery Agreements which were concluded in 1995 stipulated that: i) the Ministry of Finance committed to block and cash-in Oltchim's current accounts at the moment when the guarantees were called, in order to recover with priority the payments made on the company's behalf; ii) the Ministry of Finance would have priority rights over any asset of the company; iii) the company engaged to constitute a mortgage in favour of the Ministry of Finance on the goods purchased through the guaranteed loan. The first two of these provisions are also applicable to the 2000 Recovery Agreement. Similarly, the two Recovery Agreements concluded in 1998 stipulated that Oltchim should constitute a general pledge in favour of the Ministry of Finance over the assets purchased with the loans.
- (12) Given that Oltchim was not able to repay the loans, in November 1999 the banks called upon the State guarantees.
- (13) In 2000, the Ministry of Finance and Oltchim signed payment re-scheduling agreements for the amounts paid in relation to the 5 loans contracted in 1998 from the banks BHF and KfW, including interest and late payment interests. The payment re-scheduling agreements required quarterly payments to be made by Oltchim between 2001 and 2005. Oltchim did not fulfil these obligations.
- (14) By June 2002, Oltchim's debt towards the Ministry of Finance stemming from the State guarantees amounted to RON 303 million (approximately EUR 80 million at the exchange rate applicable at the time). At that date, this amount was transferred from the Ministry of Finance to the Romanian privatisation agency (hereinafter: "AVAS"<sup>3</sup>). Starting from this

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<sup>2</sup> Nos. 199 to 124 of 10 May 1995, No. 480 of 9 February 1998, Nos. 511 to 514 of 29 September 1998, and No. 603 of 2000.

<sup>3</sup> At the time, the debt was transferred to the Romanian agency entitled "AVAB" (Autoritatea pentru Valorificarea Activelor Bancare – the Authority for Bank Assets Recovery), which in May 2004 was merged with the privatisation agency APAPS (the

date, no interest or penalties were charged in relation to this sum.<sup>4</sup> For the subsequent payments made by the Ministry of Finance over the period November 2003 to September 2006 in relation to the triggered guarantees, on one occasion interest and penalties amounting to RON 29.9 million were charged in 2007.<sup>5</sup>

### **II.3. The 2003 Swap**

- (15) A first attempt to privatise Oltchim was made in October 2003, when the Romanian privatisation agency published an announcement for the sale of the State's stake. Potential investors were informed that the public debt would be swapped to equity in the context of the privatisation agreement – a measure that, according to the Romanian authorities, was standard for all companies in the portfolio of the privatisation agency at the time, with a view to increasing their attractiveness for potential investors.
- (16) However, as a potential investor (Rompetrol) and minority shareholders challenged the swap, the privatisation offer was cancelled in early November 2003. Notwithstanding this, in November 2003 the public debt of RON 303 million was swapped into equity through decision of the Oltchim general assembly (in which the State representatives had majority votes). The stake of the State in Oltchim thus increased from 53.26% to 95.73%.
- (17) In November 2005, a commercial court in Vâlcea annulled Oltchim general assembly's decision on the swap, on grounds that the operation diluted the stake of the minority shareholders without respecting their preferential rights.
- (18) In February 2006, the principal minority shareholder at the time (Lindsell Entreprises Ltd.) also filed a complaint with the Romanian Competition Council, alleging that the swap involved incompatible State aid. The Romanian Competition Council opened an investigation into the case, but did not reach a conclusion by the date of accession (1 January 2007).
- (19) In June 2006 the Romanian government issued an Emergency Ordinance (GEO 45/2006) mandating the State representatives in the Oltchim general assembly to vote to renounce the appeal against the court ruling which had annulled the first swap, and to take the necessary steps for reversing the swap.<sup>6</sup> The court decision annulling the swap became definitive in August 2006. The share capital decrease effectively took place only in November 2007.

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Authority for Privatisation and Management of the State Ownership) and renamed AVAS (*Autoritatea pentru Valorificarea Activelor Statului*).

<sup>4</sup> According to Romania, AVAS was not empowered by Government Emergency Ordinance (GEO) 51/1998 to calculate interest and penalties on the sums undertaken in view of recovery.

<sup>5</sup> Based on Article 2(2) of GEO 45/2006.

<sup>6</sup> The Preamble to GEO 45/2006 mentions that one of the objectives of the act is "to eliminate the risk of finding illegal State aid to Oltchim as a result of the swap".

#### II.4. Further Accumulated Debt

- (20) Over the period June 2002 to December 2006, the Ministry of Finance continued to make payments on account of the State guarantees which had been triggered in November 1999, for an additional amount totalling RON 205 million, as illustrated below.

**Table 1: Oltchim's debt history owed to AVAS**

RON 000	Principal owed at the beginning of the year to AVAS	Payments made by the MoF resulting from the execution of the State guarantees	Interest or penalties accrued	Principal redeemed	Principal owed at the end of the year
28/06/2002-31/12/2002	303,232	40,494			343,726
01/01/2003-30/06/2003	343,726	31,462		0.43	375,188
30/06/2003-31/12/2003	375,188	29,193			404,381
Year 2004	404,380	44,435			448,815
Year 2005	448,815	32,507			481,322
Year 2006	481,322	27,345		182	508,485
year 2007	508,485	-	29,851*		538,336
<b>year 2008</b>	<b>538,336</b>	-			<b>538,336</b>

\* According to RO, this payment corresponds to the interest and penalties charged for the additional payments made by the Ministry of Finance under the guarantees, over the period November 2003 to September 2006.

- (21) The Ministry of Finance transferred to AVAS all receivables resulting from subsequent payments made on the basis of the triggered guarantees. At the end of 2007, Oltchim's total debt to AVAS amounted to RON 538 million (approximately EUR 135 million)<sup>7</sup>. This debt has not accrued any interest or penalty charges, apart from the one-time charge of RON 29.9 million mentioned above at paragraph 14. According to Romania, this sum represented, at the end of 2008, 47% of the value of Oltchim's net assets.

**Table 2: Breakdown of Oltchim's current debt owed to AVAS**

Amount of the 2003 reversed swap	303,232
Further payments by the Ministry of Finance 2002-2006	205,436
One time interest calculated in 2007 in relation to the further payments made by MoF	29,851
Principal redeemed between 2002-2008	(182.43)
<b>Total amount due in 2009</b>	<b>538,336</b>

- (22) Over the period 1999-2009 Oltchim had reimbursed to the Romanian State only the following sums.

**Table 3: Sums reimbursed by Oltchim to the Romanian State**

31 October 2001	USD 17,351 (equivalent of ca RON 30,000 RON)
26 April 2002	RON 430 – approx. EUR 120 (rectification of a sum related to a payment made by the Ministry of Finance on account of Oltchim)
12 December 2006	RON 182,000 (approx EUR 60,000 thousand at current value)

<sup>7</sup> RON 303 million of the debt was due to the reversed swap, while the remainder was due to the further RON 205 million payments and the RON 30 million penalties.

## II.5. *The Second Attempt to Perform the Swap*

- (23) In January 2007, the Romanian Parliament validated through Law 30/2007 the Government Emergency Ordinance No. 45/2006, which authorised AVAS to reverse the first swap and prepare a second one, this time respecting the priority rights of the minority shareholders. The draft of Law 30/2007, as proposed to the Parliament for approval, introduced an additional Article (no. 4), according to which: "The State aid measures foreseen by the present GEO shall be notified to the [Romanian] Competition Council by the granting authority, according to existent State aid regulation, and the aid shall be effectively implemented only after its approval by the [Romanian] Competition Council."<sup>8</sup>
- (24) This second attempt to swap the debt to equity was however opposed by the new principal minority shareholder, PCC, who refused to participate in the operation. In April 2008 PCC lodged a complaint at the Commission, alleging that the swap would involve incompatible State aid.
- (25) Table 4 summarises the legislation/legal acts concerning the planned debt-to-equity swap.

**Table 4: Summary of legal acts related to the swap**

Regulation	Published	Main provisions	Currently in force
GEO 51/1998 regarding the recovery of some of the bank assets	Republished in M.O. 948 of 24 December 2002	General framework for recovering AVAS' debts; different ways of recovery provided for	Yes
GEO 45/2006 of 21 June 2006 regarding some measures for the privatisation of Oltchim SA – Ramnicu Valcea	M.O. 565 of 29 June 2006	AVAS renounces to appeal the court decision annulling the swap AVAS retakes its position as creditor for Oltchim The purpose is the recovery of the debt including interests and the privatisation	No
Law 30/2007 of 18 January 2007 for the approval of the GEO 45/2006	M.O. 35 of 18 January 2007	Increasing of the share capital within 6 months by a swap respecting the preferential rights of the minority shareholders Maintains the privatisation objective Notification to the Competition council	No
Law 96/2008 of 14 April 2008 for the modification of the GEO 45/2006	M.O. 304 of 18 April 2008	Authorises AVAS for the debt-to-equity swap AVAS shall analyse the matter of State aid	No
GEO 163/2008 of 19 November for the repealing of the GEO 45/2006	M.O. 815 of 4 December 2008	Repeals GEO 45/2006 and stipulates the recovery by common law methods (GEO 51/1998); The debt includes the interests for the period 28 November 2003 – 28 September 2006	Yes

## II.6. *Failed Privatisation Attempts and Attempts to Enforce the Debt*

- (26) The Romanian authorities claim that four attempts have been made to privatise Oltchim since the triggering of the State guarantees (the origin of the public debt), namely in 2001, 2003, 2006 and 2008. The Romanian authorities also argue that any attempts to enforce the debt were suspended during the privatisation procedures – allegedly the standard treatment for all companies in the portfolio of the Romanian privatisation agency at the time.

<sup>8</sup> The original Romanian text, available online at [http://www.cdep.ro/pls/legis/legis\\_pck.http\\_act?ida=70059](http://www.cdep.ro/pls/legis/legis_pck.http_act?ida=70059) as "version proposed for approval", reads as follows: "Măsurile de natura ajutorului de stat prevăzute de prezenta ordonanță de urgență vor fi notificate Consiliului Concurenței de către inițiator/furnizor, conform reglementărilor în vigoare în domeniul ajutorului de stat, iar ajutorul de stat va fi efectiv acordat numai după autorizarea acestuia de către Consiliul Concurenței." The Law, together with GEO 45/2006, were eventually repealed through GEO 163/2008.

- (27) The first attempt to privatise the company took place in 2001, when AVAS negotiated and signed with Exall Resources a sale agreement for the State's stake in the company. The sale agreement was cancelled due to the buyer's inability to fulfil its payment obligations and its failure to guarantee the technological/environmental investments for the company.
- (28) Thereafter, in 2003 the Romanian authorities opted for the conversion of the AVAS debt into equity and a subsequent privatisation. The sale of the State's stake in the company was publicly announced on 28 October 2003, but the offer was revoked on 22 November 2003 due to the opposition of a potential investor and of minority shareholders (as explained above).
- (29) After the reversal of the first swap, the Romanian authorities indicated that they tried again to privatise the company with the debt, in 2006 and 2008. According to the Romanian authorities, in the meantime the overall situation of the company had deteriorated and no investor was found.

### **III OLTCHIM'S CURRENT SITUATION AND ITS BUSINESS PLAN**

- (30) According to the Romanian authorities, the challenges currently faced by the company are: (i) the stoppage of supplies of key raw materials from the main supplier Arpechim; (ii) the negative impact on the company's net asset value caused by the reinstatement of a significant debt after the reversal of the 2003 debt-to-equity swap in 2007; (iii) the undercapitalisation of the company, also due to the swap reversal; and, finally (iv) the effects of the global financial crisis.
- (31) The overall situation of Oltchim has deteriorated over the last year. At the end of 2008 Oltchim had made a net loss of RON 226 million, the accumulated losses reached RON 1.367 billion. After the closure of the main ethylene supplier Arpechim in November 2008, the company has functioned at 45% of the capacity and about 1/3 of the staff was temporarily laid off.
- (32) At the end of 2008, Oltchim's shares were transferred to the Ministry of Economy's portfolio, who decided to postpone the privatisation process until the company overcomes its current difficulties and becomes attractive for potential investors. To this end, the Romanian State intends to implement a package of State measures supporting a plan proposed by the company in order to restore its long-term viability – hereafter "the Business Plan".
- (33) The company's Business Plan assumes a so-called Complete Development Scenario (hereafter: "CDS") mainly consisting of the swap and undertaking further investments, for an estimated total amount of EUR 486 million, to modernise/expand the facility and adjust it to environmental standards. These investments concern in particular:
  - a) the acquisition from Petrom of the petrochemical assets of the supplier Arpechim-Pitesti (hereinafter: "Arpechim"), in order to resolve the key issue of securing supply of the company's raw materials, ethylene and propylene;
  - b) the modernisation and expansion of the pyrolysis unit at Arpechim;

- c) the de-bottlenecking of the PVC production chain;
  - d) the modernisation of the mercury electrolysis unit;
  - e) other environmental measures.
- (34) The Business Plan and the related investments were evaluated by several external consultants, as follows:
- “Business Review Of Oltchim SA”, prepared by Tecnon OrbiChem;
  - “Oltchim Integration Strategy Project” prepared by Nexant;
  - “Acquiring Arpechim, modernisation and integration with Oltchim - Business Plan Study”, prepared by Baran Engineering & Projects LTD;
  - “Technical Audit for Arpechim, Petrochemicals Plants in Pitesti”, prepared by Linde;
  - “Valuation Report”, prepared by ROMCONTROL SA București;
  - “[property, plant & equipment valuation report concerning Arpechim]”, prepared by [external consultant];
  - "Opinion" prepared by Raiffeisen Capital&Investment SA.
- (35) The Romanian authorities claim that, on the basis of the studies carried out by the external advisers (listed above), the combination of a debt-to-equity swap and a State guarantee for a commercial loan allowing the company to undertake the investments mentioned above are the best way for the State to recover the debt, allowing it even to make a profit following privatisation. Following implementation of these measures, the optimal time for the State to sell its stake in Oltchim would be when the envisaged investment projects are close to becoming operational, i.e. in 2012-2013.
- (36) The future value of the company has been calculated by the Romanian authorities as follows.
- (37) They assume that after the debt-to-equity swap, there would be participation rate of 11% in the capital increase by the minority shareholders, amounting to fresh capital of EUR 11 million. Thanks to the capital increase and to the commercial loans amounting to EUR 486 million, which are to be covered by State guarantees<sup>9</sup>, Oltchim will be able to carry out its development plant over the following four years, including the investment listed in paragraph (33) above.
- (38) The CDS scenario's financial projections, based on the Raiffeisen report dated March 2009, are shown in the table below.

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<sup>9</sup> The 80% State guarantee on EUR 424 million is the subject of the present notification. The 80% guarantee to cover the remaining EUR 62 million will be granted under a Temporary framework scheme.



**Table 5: Oltchim's financial projections\* according to the development plan\*\***

Million EUR	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Sales	339	398	491	524	529	[600-700]	[700-800]	[700-800]	[750-850]	[900-1000]	[900-1000]	[1000-1100]	[1000-1100]	[1050-1150]	[1100-1200]	[1150-1250]	[1250-1350]
Sales growth		17%	23%	7%	1%	[10-20]%	[10-20]%	[1-10]%	[1-10]%	[20-30]%	[1-10]%	[1-10]%	[1-10]%	[1-10]%	[1-10]%	[5-15]%	[5-15]%
EBIT <sup>10</sup>	21	14	5	2	-20	[30-45]	[50-65]	[65-80]	[85-100]	[150-165]	[140-155]	[160-175]	[180-195]	[170-185]	[170-185]	[190-205]	[220-235]
EBIT Growth		-33%	-64%	-60%	-1100%	NA***	[40-50]%	[20-30]%	[40-50]%	60-70%	-0-5]%	[5-15]%	[10-20]%	-[-5-10]%	[1-10]%	[5-15]%	[10-20]%
EBIT margin	6%	4%	1%	0,4%	-4%	[5-15]%	[5-15]%	[5-15]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%
EBITDA <sup>11</sup>	33	34	29	24	9	[60-70]	[70-80]	[90-100]	[110-120]	[190-200]	[190-200]	[200-210]	[220-230]	[220-230]	[220-230]	[230-240]	[270-280]
EBITDA Growth		3%	-15%	-17%	-63%	[600-610]%	[20-25]%	[10-20]%	[20-25]%	[70-80]%	-0-5]%	[5-10]%	[10-15]%	-0-5]%	[0-5]%	[5-10]%	[10-15]%
EBITDA margin	10%	9%	6%	5%	2%	[10-15]%	[10-15]%	[10-15]%	[10-15]%	[20-25]%	[20-25]%	[20-25]%	[20-25]%	[20-25]%	[20-25]%	[20-25]%	[20-25]%
EBT <sup>12</sup>	21	6	2	-29	-61	[0-10]	[10-20]	[10-20]	[20-30]	[90-100]	[90-100]	[110-120]	[130-140]	[130-140]	[130-140]	[150-160]	[180-190]
EBT growth		-71%	-67%	-1550%	-110%	NA***	[230-240]%	-0-5]%	[35-40]%	[260-270]%	[0-5]%	[20-25]%	[20-25]%	-[-5-10]%	[5-10]%	[10-15]%	[20-25]%
EBT margin	6%	2%	0%	-6%	-12%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[5-10]%	[10-15]%	[10-15]%	[10-15]%	[10-15]%	[10-15]%	[10-15]%

\*The grey fields represent forecasts.

\*\*The figures listed in the table are taken from the Raiffeisen report. Due to rounding, slight differences might occur.

\*\*\* Negative figure in the previous year, growth % not interpretable.

## IV DESCRIPTION OF THE MEASURES

### IV.1. The notified measures

(39) The two support measures in favour of Oltchim notified by Romanian in July 2009 as not involving State aid within the meaning of Article 87(1) EC Treaty are as follows:

- Measure 1: a debt-to-equity swap for the total value of RON 538 million (approximately EUR 135 million); and
- Measure 2: a State guarantee covering 80% of a commercial loan of EUR 424 million (i.e. EUR 339.2 million), at the initial premium price of 6.5% p.a.<sup>13</sup>, and collateralised with part of the assets that will be purchased with the loan.

(40) The Commission notes that the State has not charged any interest and/or late payment penalties on Oltchim's overdue public debt after Romania's accession to the EU on 1 January 2007. Therefore, in the Commission's view, it is necessary to assess this circumstance as "Measure 3".

## V THE COMPLAINT

(41) In April 2008, as mentioned above, PCC, the main minority shareholder of Oltchim, filed a complaint regarding the planned debt-to-equity swap. PCC argues in essence that the planned debt-to-equity would involve incompatible State aid.

(42) PCC is of the view that, since Oltchim is a firm in difficulty, the measures authorised by law 96/2008 (i.e. the debt-to-equity swap) contain State aid elements and therefore need to be notified to the Commission before going into action. According to PCC, without a

<sup>10</sup> Earning before interest and taxes (operating revenue – operating expenses + non-operating income).

<sup>11</sup> Earning before interest, taxes, depreciation and amortisation.

<sup>12</sup> Earnings before taxes (net profit, EBT-interest).

<sup>13</sup> Corresponding to the alleged current CCC rating of the company, and to be later reduced if the company's rating improves.

serious restructuring plan no private investor would provide funds equivalent to those involved in the debt-to-equity swap.

- (43) Moreover, PCC clearly opposed the take-over of Arpechim by Oltchim<sup>14</sup> and expressed its doubts about the economic viability of this solution.
- (44) In July 2009, PCC also forwarded to the Commission a copy of the Letter of Intent for Privatisation sent to the Romanian government, in which they express their interest to become majority shareholder in Oltchim and undertake the necessary investments in case the Romanian authorities decided to sell off the company.

## VI POSITION OF THE ROMANIAN AUTHORITIES

- (45) The Romanian authorities claim that the support measures do not contain State aid elements. They invoke the market economy investor principle and the market economy creditor principle as the applicable base for the assessment.
- (46) The existence of State aid under Article 87(1) EC Treaty can be excluded when the capital is placed directly or indirectly by the State at the disposal of an undertaking in circumstances which correspond to normal market conditions.<sup>15</sup> In this regard, case law confirms that State measures will not constitute State aid unless the recipient acquires a competitive advantage which it would not have acquired under normal market conditions.<sup>16</sup>
- (47) The Romanian authorities consider that the assessment of the way in which a private investor would behave in relation to the undertaking should take into consideration the three potential capacities of shareholder, creditor and/or investor. If the State's behaviour is comparable to that of the hypothetical private investor (shareholder, creditor and/or investor), no State aid is involved.
- (48) Based on the ECJ precedents, the Romanian authorities are of the view that the following aspects are relevant for the case at hand:
  - (i) an assessment of all relevant factors is required;
  - (ii) the fact that a private investor would be guided by prospects of an acceptable return within a reasonable period of time<sup>17</sup>;
  - (iii) the State must not be compared to an investor seeking purely short-term gains<sup>18</sup>;

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<sup>14</sup> This operation amounting to EUR 62 million would be financed by a commercial loan backed by an 80% EximBank guarantee, under an approved Romanian Temporary Framework scheme. This State guarantee is not subject to the notification of 17 July 2009.

<sup>15</sup> Case C-303/88 *Italy v Commission (Lanerossi)* [1991] ECR I-1433, para. 20; Case T-358/94 *Air France v Commission* [1996] ECR II-2109, para. 70; and Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871, para. 80.

<sup>16</sup> Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* [2003] ECR II-435, para 207.

<sup>17</sup> Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* [2003] ECR II-435, para. 314.

- (iv) a private investor will be guided by the long-term viability of the undertaking.<sup>19</sup>
- (49) The Romanian authorities argue that the implementation of the proposed measures by the State corresponds to the behaviour of a private player in normal market conditions.
- (50) The Romanian authorities explain that the entire package of measures is indented to support Oltchim's Business Plan. On the one hand, the debt-to-equity swap is necessary to overcome the undercapitalisation of the company. On the other hand, the State guarantees are necessary to ensure the financing of the implementation of the company's Business Plan, in particular the CDS.
- (51) The total cost for all the investment projects to be implemented under the Business Plan amount to EUR 486 million. The Romanian authorities maintain that, given the company's current debt burden, undercapitalisation and the current economic and financial crisis, Oltchim will not be able to obtain the financing required for the performance of the investment programme from commercial banks without the support of the State.
- (52) The Romanian authorities also assert that, following the implementation of the above-mentioned measures, their medium-term intention is to privatise the company. The Romanian authorities consider that the sale of the State's stake in Oltchim following the implementation of these measures is considered the optimal solution for the State in terms of its ability to realise value from its investment in Oltchim.
- (53) The Romanian authorities underline that the State is both the majority shareholder of Oltchim and its main creditor, as it has a receivable against Oltchim amounting to EUR 135 million. Moreover, the State is not proposing to invest in Oltchim with a view to obtaining short-term profit, but is setting in place the necessary measures to profitably privatise the company in the medium-term.
- (54) The Romanian State has evaluated the options available in order to maximise its return on its existing shareholding in Oltchim. The Romanian authorities come to the conclusion that none of the other options (i.e.: executing the receivables, re-scheduling the debt, sale of receivable or partial debt-to-equity swap of the receivable) would ensure the same return for the State as the CDS.
- (55) In particular, the Romanian authorities argue that the State's return subsequent to the implementation of the swap and the capital increase would be at present in the range [above EUR 200 million]. By contrast, if the State executed its receivables, the maximum amount it would obtain could be [less than EUR 25 million], and the value of the shareholder's stake would be nil, since the execution of the debt would trigger the insolvency of the company. Re-scheduling of the debt is excluded as an option, given that, according to Romanian law, this would be only possible after recapitalisation of the

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<sup>18</sup> Case T-152/99 *Hamsa* [2002] ECR II-3049, para. 126. See also Case C-305/89 *Italy v Commission* [1991] ECR I-1603, para. 20; Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, para. 20 to 25; Joined Cases T-126/96 and T-127/96 *BFM and EFIM v Commission* [1998] ECR II-3437, para. 79; and Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871, para. 96.

<sup>19</sup> Case T-152/99 *Hamsa* [2002] ECR II-3049, para. 168.

company. According to the calculation of the Romanian authorities, sale of the entire receivables would bring the State a return of [less than EUR 35 million]. Partial sale of the receivables would not resolve the situation either.

- (56) In addition, the "AS IS" scenario (no further investments) is not a viable option either, since the losses would increase and the net worth of the company would be diminished. The Romanian authorities also add that privatisation is not a realistic option under the current economic circumstances.
- (57) Therefore, the Romanian authorities maintain that, from their perspective, the proposed debt-to-equity swap and the State guarantees form part of a single package to secure the long-term viability of Oltchim and allow the State to recover maximum value from its investment in Oltchim. The Romanian State is of the view that the proposed debt-to-equity swap and State guarantees do not fall within the scope of Article 87(1) EC Treaty, because they do not involve an advantage for the beneficiary and they satisfy both the market investor and the market creditor tests.
- (58) Concerning the issue of the failure to enforce the public debt and to charge interest, the Romanian authorities argue that AVAS is not entitled by Romanian law to charge interest on the debt amount, and that the State attempted to collect its claims by various means within the existing regulatory framework. The Romanian State also tried to recover its debt by the means of the swap. Finally, the Romanian authorities also claim that since this public debt has been reserved for the swap, it was not enforceable and did not bear interest.

## **VII ASSESSMENT OF THE STATE SUPPORT MEASURES IN FAVOUR OF OLTCHIM**

- (59) The Commission has decided to open the formal investigation procedure foreseen by Article 88(2) EC in relation to the three identified support measures in favour of Oltchim, for the reasons set out below.
- (60) The Commission doubts that the two State support measures in favour of Oltchim notified in July 2009, i.e. the debt-to-equity swap (Measure 1) and the State guarantee for a commercial loan of EUR 424 million (Measure 2), do not involve State aid within the meaning of Article 87(1) EC, as argued by Romania. The Commission also doubts whether, insofar these measures are to be found to involve State aid within the meaning of Article 87(1) EC Treaty, they could be declared as compatible with the Treaty under the provisions of Article 87(3) EC Treaty.
- (61) Finally, the Commission considers that an additional element of State aid could stem from the fact that apparently the State has not charged any interest and/or late payment penalties on Oltchim's overdue public debt after Romania's accession to the EU (Measure 3). In so far as this additional amount has apparently not been taken into account when calculating the total amount of public debt to be swapped to equity and the Romanian authorities do not intend to take any steps to recover it from the beneficiary, the mentioned amount could be qualified as operating aid, and therefore incompatible with the Treaty.

- (62) To sum up, the Commission considers that the package of State support measures described in section IV in favour of Oltchim should be assessed in its entirety in order to determine whether each of the measures therein involve State aid within the meaning of Article 87(1) EC, and if so, whether they are compatible with the Treaty. In what follows the Commission shall examine in turn each of the three measures.

### **VIII ASSESSMENT OF EXISTENCE OF STATE AID**

- (63) According to Article 87(1) EC, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, and affects trade between Member States is incompatible with the Common Market.

#### ***VIII.1. State Resources***

- (64) The outstanding debt to AVAS is the result of the transfer of the receivables against Oltchim from the Minister of Public Finances. As AVAS is a Romanian public authority, subordinated to the government, the non-enforcement of the debt and the interest foregone (i.e. renunciation of a capital gain) by AVAS burdens the State budget and involves State resources. Moreover, if the debt-to-equity swap were to be undertaken the State would lose its creditor role and consequently it would have no claim in a liquidation scenario.
- (65) The State guarantee is to be granted by the Minister of Public Finances. It involves State resources since if the Romanian authorities have to pay out money under the guarantee, the necessary funds would be drawn from the State budget, which is consequently burdened by the financial risk linked to the guarantees.
- (66) Therefore, Measures 1, 2 and 3 concern State resources.

#### ***VIII.2. Advantage***

##### **VIII.2.1 Measures 1 and 2**

- (67) In relation to Measures 1 and 2, the Romanian authorities argue in essence that one of the constitutive elements in the definition of State aid, namely the advantage conferred by the State measures to the beneficiary, is not met.<sup>20</sup>
- (68) To begin with, in relation to the State guarantee, according to the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of

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<sup>20</sup> It shall be noted that the Romanian authorities do not dispute that the other constitutive elements in the definition of State aid besides "advantage", i.e, the use of State resources, selectivity, and distortion of competition and intra-Community trade, are met.

guarantees (hereinafter: the Guarantee Notice)<sup>21</sup>, a guarantee measure fulfilling all four of the following<sup>22</sup> criteria rules out the presence of State aid:

- a) The borrower is not in financial difficulty;
- b) The extent of the guarantee can be properly measured when it is granted. This means that the guarantee must be linked to a specific financial transaction, for a fixed maximum amount and limited in time;
- c) The guarantee does not cover more than 80 % of the outstanding loan or other financial obligation;
- d) A market-oriented price is paid for the guarantee.

(69) The Commission is of the view that in the case the guarantee at stake, *prima facie* several of these criteria are not met.

(70) First of all, there are strong indications that Oltchim is indeed a company in difficulty. In particular, at the end of 2008 the company had a negative total equity of ca RON 250 million, with losses accumulated amounting to RON 1.367 billion. The 2008 profit and loss account shows an operating loss of RON 71 million and a net loss of RON 226 million. Moreover, the company had negative net cash of RON 79 million and a negative working capital of RON 715 million. As mentioned above, after the closure of the main ethylene supplier Arpechim in November 2008, the company has functioned at 45% of the capacity.

(71) Furthermore, as regards the price of the guarantee, the Guarantee Notice lays down that the fee paid for the guarantee should be at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets. The Romanian authorities intend to charge an annual fee of 6.5% for the guarantee. However, it is questionable whether this fee, given the current situation of the company, could be regarded as market price and whether the CCC rating assumed by the Romanian authorities is the adequate risk category of the company. Oltchim has no rating by a specialised rating agency; however, [a Romanian bank classified it in the highest category of risk available].

(72) It is also doubtful whether the transaction can be regarded as sufficiently collateralised. While land, buildings, installation and equipments which are purchased under the CDS will be offered as pledge, this does not appear to be adequate. Indeed, in the case at stake, the assets to be pledged would belong to a company which is already in the hands of the guarantor.

(73) Therefore, the Commission has doubts that the guarantee meets the criteria of the Guarantee Notice.

(74) However, it shall be underlined that the Romanian authorities do not intend to grant the guarantee under the Guarantee Notice. Rather, the Romanian authorities argue that Measures 1 and 2, as a package, do not confer an advantage to the beneficiary because the

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<sup>21</sup> OJ C 155, 20.06.2008, p.10.

<sup>22</sup> Point 3.2 of the Guarantee Notice.

support given by the State to Oltchim in its capacities respectively of investor (main shareholder) and of main creditor of the company, is comparable to that which a private investor which is also a private creditor, would choose to do in similar circumstances.

- (75) The Commission doubts that the Measures 1 and 2 would satisfy the market investor and market creditor tests.
- (76) In relation to the market investor test, as the Romanian authorities point out, the State's behaviour in its capacity of main shareholder at Oltchim should not be benchmarked against the conduct of a private investor motivated by short-term profit considerations, but rather against that of a private holding or private group of undertakings pursuing a structural policy and guided by longer-term profitability considerations.<sup>23</sup>
- (77) Regarding the market creditor test, the choices made by the State in its capacity of creditor should be assessed by reference to the situation of a hypothetical private creditor weighing all the available options, e.g. including debt re-scheduling or liquidation, for recovering the debt.
- (78) The Romanian authorities argue that Measures 1 and 2 must be assessed together, as neither the debt-to-equity swap nor the State guarantee for the commercial loan of EUR 424 million are likely to restore *per se* the viability of the company, in the absence of the other complementary support measure.
- (79) Irrespective of the relevant benchmarks referred to above, the essential aspect to be taken into account is the economic outlook of the company – in other words, the credibility of the Business Plan proposed by the company – and the company's past performance, at the moment when the support measures were decided. The Commission has doubts in relation to both these aspects.
- (80) Concerning the proposed Business Plan, the Commission has doubts whether, in light of the company's past history of undertaking large investments and non-reimbursement of the pending public debt, a plan that relies essentially on further substantial investments, without being accompanied by necessary restructuring measures, is likely to restore the long-term viability of the firm.
- (81) At this stage, the Commission wonders whether the submitted Business Plan will allow a return to viability and will be found credible by a private investor or a private creditor when the decision has to be made to invest further into the company. Furthermore, there is a risk that Business Plan entails further State aid as a new large commercial loan is backed by the State. This may confer an advantage on the beneficiary, in so far as it would not have been able to obtain the loan on the market in the absence of State support.
- (82) In relation to the market creditor test, the Commission has doubts as to whether the proposed debt-to-equity swap is comparable to what a private creditor would have chosen to do in similar circumstances.

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<sup>23</sup> See e.g. Case T-152/99 Hamsa, cited above.

- (83) It is doubtful whether a private creditor would have allowed itself to arrive to this degree of exposure in the first place. In this sense, it should be underlined that, even though the assessment of the proposed measures shall be done by reference to facts, actions undertaken and effects verified after the date of Romania's accession to the EU, the Commission must nevertheless consider the history of the public debt that is now proposed to be swapped for equity from the moment of that debt's origin. The Commission cannot disregard the origins and evolution of the public debt, and the behaviour of the State in relation to this debt.
- (84) Based on this premise, the Commission doubts that the Romanian State has pursued with all diligence the effective recovery of the sums owed to it on the basis of the State guarantees. It seems, for example, that the possibilities contained in the Recovery Agreements (e.g. blocking of bank accounts) or the generally available possibility of liquidation were not used at a time when the situation of the company could have been better than at present, especially considering that the State had pledged assets in exchange for the guarantee and this pledge has never been executed. The same reasoning can be applied in relation to the beneficiary's non-compliance with the debt re-scheduling agreements. The Romanian authorities argue that, at times when privatisation was attempted, the possible steps to recover the debt were suspended in order not to hamper the privatisation objectives. However, it should be noted that in the privatisation scenario the State was acting as an investor and not in its capacity of creditor. Those two roles should not be confused, although it is difficult to make such a separation in a case where the State is at the same time the main shareholder and the main creditor of the company.
- (85) Even if the behaviour of the State in its capacity of creditor were to be assessed only by reference to current circumstances (i.e. by ignoring the history of the public debt), it still remains doubtful whether a private creditor would have found the debt-to-equity swap more effective than liquidation if the company's perspectives of restoring viability were not certain. However, as the Romanian authorities admit, the decision to opt for the swap is linked to the issuing of a State guarantee for a commercial loan to support the business plan. In other words, the debt-to-equity swap is not sufficient in itself for the company to restore viability. The Commission doubts that the swap may be qualified as not involving State aid as long as it is intrinsically linked to another State support measure. The same reasoning applies in the opposite direction, i.e. with respect to the State guarantee, which would also be admittedly insufficient for the company to redress its situation.
- (86) The Romanian authorities argue that, when comparing all available options, the CDS ensures the highest return for the State as shareholder/debtor of the company. In particular, as exemplified in paragraph (55), the Romanian authorities expect a return on their investment in the range [above EUR 200 million] if all the technical developments are undertaken, backed by the support measures. As already explained, this expected return is mainly based on the financial projections of Table 5.
- (87) In the Commission's opinion, not all of the possibilities have been dully taken into account. For instance, the Romanian authorities constantly argue that privatisation in the current economic climate is not an option. On the contrary, PCC, the minority shareholder has communicated its interest in the privatisation of the company.



- (88) In addition, the Commission observes that some of the projections seem to a certain extent optimistic given the current economic climate and the company's present challenges.
- (89) Firstly, the series from Table 5 shows a growth in sales of [10]-[20]% and [10]-[20]% for the next two years (2009 and 2010). With regard to the company's situation at present and to the fact that the investments deemed necessary (with the exception of the Arpechim acquisition) would produce an effect only as from 2012-2013, this projected sales growth seems to be unlikely to be realised.
- (90) Secondly, as regards the sales growth, the Commission remarks that the market report submitted by Romania shows a rather limited growth for Oltchim's markets for the period 2008-2020, with stagnating worldwide capacities at the same time. This can directly effect the growth in sales, even if Oltchim tried to position itself on markets with rather high growth rates (such as Turkey).
- (91) Thirdly, as regards the company's profitability projections these show a sharp improvement already in 2009, without sufficient substantiation<sup>24</sup>.
- (92) Fourthly, the Commission also would like to emphasise that the calculation does not reflect the entirety of the proposed financing cost of the EUR 486 million investments.<sup>25</sup>
- (93) Fifthly, the Commission also notes that the prices (i.e. raw materials, energy, sales prices) underlying the assumptions have been forecast by an external consultant. However, given the high volatility of those markets, the Commission is of the opinion that the Business Plan, given that it lacks any sensitivity analysis, represents a "best case scenario".
- (94) Finally, the Commission wishes to add that even if the planned swap amounting to RON 548 million were carried out this would not directly solve the undercapitalisation problem of the company: subsequent to the swap the registered capital would amount to ca. RON 1.564 million, while the current accumulated losses are at RON 1.367 million. Thus, even if minority shareholders participated in the operation with some RON 40 million (according to Romania's expectations), undercapitalisation would be still an issue.
- (95) The Commission also takes note of the magnitude of the total investments envisaged (EUR 486 million) compared to the total investments previously carried in the company, amounting to EUR 371 million for the period 1992-2008. Thus, the total amount of new investments for the next five years exceeds this latter figure by more than EUR 100 million. The new exposure of the State seems to be disproportionately high, especially

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<sup>24</sup> As opposed to the last five years' accelerating negative tendency, it is apparent from Table 5 that the EBITDA and EBT figures would turn sharply into positive from negative. Moreover, both the EBIT and EBITDA would be higher than ever achieved in the past 5 years, i.e. prior to the reversal of the debt-to equity swap and the economic downturn, at the time when allegedly the company was in good shape and the business environment healthy.

<sup>25</sup> According to the Raiffeisen report, the total cost of borrowed funds with State guarantees will be situated around 12%, provided that the guarantee premium is 3.8% which would result in an effective guarantee payments amounting to some EUR 92.2 during the 2009-2019 period. In their notification, however, the Romanian authorities propose a much higher fee, namely an initial 6.5% p.a. for the EUR 339.2 million State guarantee. Taking into account the magnitude of the total loan, the difference between the assumed 3.8% and the actual 6.5% would have a significant impact on the company's interest charges and its net profit/net cash flow

given the company's current value, its performance so far<sup>26</sup> and the fact that, according to the Romanian authorities, none of the past investments has fulfilled the projections and has been paid back so far.<sup>27</sup> In addition, the exposure of the State outweighs the possible return and thus it is questionable whether a prudent market investor would undertake such a risk, especially having in mind that Oltchim has previously (i) called up State guarantees and (ii) failed to reimburse the sums owed to the State.

- (96) On the basis of the above, at this stage the Commission has doubts whether Oltchim's Business Plan is a sufficient basis to determine that the Complete Development Scenario is the most advantageous option for the State and that a market participant would act in the same manner.
- (97) Finally, the Commission doubts whether the State's role as a creditor and a shareholder with respect to the swap is not mixed with the position that the State held (as a public authority) when granting several State guarantees over the period 1995 - 2000. This possible confusion of roles can be seen in the origin of the debt itself, which is linked to previous State guarantees which Romanian authorities have never claimed were given on the basis of market principles (whether as a shareholder or creditor). The considerations underlying the risks undertaken in issuing the State guarantee are thus different from those of an investor motivated by longer-term profitability, or those of a creditor seeking to ensure recovery of the highest possible amount of the debt owed to it.
- (98) Consequently, at this stage the Commission is of the opinion that Measures 1 and 2 confer an advantage to Oltchim.

#### VIII.2.2 Measure 3

- (99) As regards the failure to accrue interest or enforce the public debt, the Commission is of the view that it conferred an advantage to Oltchim, given that the company enjoyed capital free of charge. Thus the company has been favoured vis-à-vis competitors, not being subject to such a measure. Consequently, Measure 3 implies an advantage to the company.

#### ***VIII.3. Selectivity, Distortion of Competition and Affectation of Trade***

- (100) All the measures at stake are selective as they are limited to the company. These selective measures are likely to distort competition, by providing an advantage to an undertaking whereas other competitors do not receive these benefits. Finally, there is extensive trade

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<sup>26</sup> Oltchim has been listed at the Bucharest Stock Exchange.

<http://www.bvb.ro/ListedCompanies/SecurityDetail.aspx?s=OLT&t=2>

It shall be noted that the company has not paid out dividends since 2000, thus not even during the years when the original swap was in place and allegedly the company did not have difficulties.

<sup>27</sup> For instance: investment in 1994 (Modernisation of the Ion Changing Membranes Electrolysis installation), Petrodesign SA Bucharest forecast a payback period 6 years and 8 months, only 77.25% paid back until 30 June 2008; for an other project (Modernization of the OXO-alcohols installation), Petrodesign SA Bucharest also forecast a payback period 6 years and 8 months, only 43.32% paid back until 30 June 2008; for another investment realised in 2004 (Phthalic and dio-phthalate anhydride installation), IPROCHIM Bucharest forecast a payback period of 4 years and 11 months. Only 45.61 % has been recouped by 30 June 2008.

between Member States in chemical products, in which Oltchim operates and the company exports a large part of its product to other Member States. Thus, intra-Community trade is affected.

#### ***VIII.4. Conclusion on the Existence of State Aid***

(101) On the basis of the arguments set out above, the Commission considers at this stage that all the measures described above have to be considered as State aid within the meaning of Article 87(1) EC.

### **IX ASSESSMENT OF COMPATIBILITY**

(102) Since the measures in favour of Oltchim seem to constitute State aid, their compatibility must be evaluated in the light of the exceptions provided for in Articles 87(2) and 87(3) EC.

(103) It should be noted that the Romanian authorities are of the view that Measures 1, 2 and 3 do not constitute State aid; hence they did not bring forward any arguments supporting their compatibility.

(104) At present, the Commission considers that the following guidelines might be applicable to the support measures:

- Guidelines on national regional aid for 2007-2013<sup>28</sup> (hereinafter: "regional aid guidelines");
- Community guidelines on State aid for rescuing and restructuring firms in difficulty<sup>29</sup> (hereinafter: "R&R guidelines");
- Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis<sup>30</sup> (hereinafter: "Temporary Framework").

#### ***IX.1. Compatibility under the Regional Aid guidelines***

(105) The exception in Article 87(3)(a) EC provides for the authorisation of aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. Although the company is located in a region which is eligible for regional aid pursuant to Romania's Regional aid map 2007-2013<sup>31</sup>, since the beneficiary is considered as a company in difficulty, as described in paragraph (70), it is excluded from its scope.

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<sup>28</sup> OJ C 54, 04.03.2006, p. 13.

<sup>29</sup> Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 244, 01.10.2004, p. 2.

<sup>30</sup> Communication from the commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis, OJ C 83 of 7.04.2009, p. 1.

<sup>31</sup> OJ C 73, 30.03.2007, p. 17.

(106) In any case, even if Oltchim were a healthy and viable company, the measures do not seem to be covered by its scope. As regards Measure 1, it does not appear to be linked with initial investment within the meaning of point 34 of the regional aid guidelines, given that the swap only seeks to reduce the existing debt of the company. As regards Measure 2, the State guarantee for investment loans is in principle eligible under the regional aid guidelines. Nevertheless, the Commission has strong doubts that the related investment would be eligible under the regional aid guidelines. Romania did not provide sufficient information on the eligible costs. Measure 3 appears to constitute operating aid, relieving Oltchim from the cost it would have normally have to bear. According to the regional aid guidelines, operating aid is allowed only in specific circumstances foreseen in section 5 of the regional aid guidelines which are manifestly not met in the present case, given that Oltchim is situated neither in an outermost region nor in a region with a low density of population.

### ***IX.2. Compatibility under the R&R guidelines***

(107) As set out in paragraph (70), the Commission considers that Oltchim should be regarded as a company in difficulty according to the definition in the R&R guidelines.

(108) The Commission considers that rescue or restructuring aid to a company in difficulty is compatible with the common market pursuant to Article 87(3)(c) EC Treaty if it complies with the criteria under the R&R guidelines.

(109) As a company in difficulty, Oltchim would in principle be eligible for rescue or restructuring aid. Measure 1, the debt-to-equity swap, could be potentially eligible for restructuring aid. As regards the State guarantee, Measure 2 could be in principle eligible under both rescue and restructuring aid. As regards the specific measures, however, it seems that Measure 3 would fall outside the scope of the R&R guidelines at all because, on the one hand, rescue aid must be a reversible liquidity support in the form of loan guarantees or loans and, on the other hand, a restructuring aid should include restructuring operations.

(110) However, at this stage the criteria for compatible rescue or restructuring aid laid down in the R&R guidelines do not seem to be complied with by either Measure 1 or Measure 2. In particular:

a) Rescue aid: it is doubtful whether the measures when considered as rescue aid would be restricted to the minimum necessary, would be warranted on the grounds of serious social difficulties and have no unduly adverse spill-over effects on other Member States. Moreover, the guarantees go beyond 6 months.

b) Restructuring aid: in the absence of a notified restructuring plan (the Romanian authorities do not claim the eligibility of the measures as restructuring aid), the Commission cannot evaluate the components of the Business Plan, including investment and modernisation measures, nor evaluate whether the measures would restore long-term viability and would

be kept to a minimum, so that undue distortions of competition would be avoided.

### ***IX.3. Compatibility under the Temporary Framework***

- (111) The Temporary Framework sets out the criteria under which certain measures intended to remedy a serious disturbance in the economy of a Member State, can be compatible under Article 87(3)(b) EC.
- (112) Measure 1 and 3 are not eligible under the Temporary Framework. As regards Measure 2, State guarantees can be in principle granted as a Temporary Framework measure pursuant to point 4.3.2. thereof.
- (113) Point 4.3.2.d of the Temporary framework provides that the Commission will consider aid in the form of guarantees compatible with the common market if, *inter alia*, "the maximum loan does not exceed the total annual wage bill of the beneficiary (including social charges as well as the cost of personnel working on the company site but formally in the payroll of subcontractors) for 2008." The Commission is aware of the fact that the Romanian authorities intend to grant to Oltchim an 80% EximBank guarantee for an underlying commercial loan of EUR 62 million under an existing scheme<sup>32</sup>. Given that this amount seems to exhaust the company's wage bill for 2008, no further guarantee can be granted under the Temporary Framework and therefore it seems that Measure 2 can not be considered compatible under the Temporary Framework.

### ***IX.4. Conclusion on Compatibility***

- (114) On the basis of the above, and with the information available at this stage, the Commission has doubts that the disputed measures in favour of Oltchim are compatible with the common market as rescue or restructuring aid. In addition, the Commission does not consider that the measures are compatible under the Temporary Framework or under the regional aid guidelines.
- (115) Given that the Commission assumes that the recipient is a company in difficulty, no other derogation as laid down in the EC Treaty seems to be applicable.
- (116) At this stage of the procedure the Commission concludes that the measures appear to be incompatible with the common market.
- (117) Therefore, the Commission has decided to open the formal investigation procedure provided for in Article 88(2) of the EC Treaty in relation to the measures described.

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<sup>32</sup> State aid N 286/2009 – Romania, Temporary aid scheme for granting aid in form of guarantees, Commission decision of 5.06.2009, not yet available.

## **X DECISION**

- (118) In the light of the foregoing considerations, the Commission has decided to initiate the procedure laid down in Article 88(2) of the EC Treaty and requires Romania, within one month of receipt of this letter, to provide all documents, information and data needed for the assessment of the measures.
- (119) The Commission reminds Romania that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Communities. It will also inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter 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 this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission  
Directorate-General for Competition  
State Aid Greffe  
B-1049 Brussels

Fax No: +32-2-296.1242

Yours faithfully,  
For the Commission

Neelie Kroes  
Member of the Commission