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Subject: State Aid SA.36086 (2016/NN) (ex 2013/CP) – Romania
Potential aid to Oltchim SA

Sir,

The Commission wishes to inform Romania that, having examined the information supplied by your authorities on the aid referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

1. PROCEDURE

- 1) On 17 July 2009 the Romanian authorities notified to the Commission the planned conversion of a public debt of Oltchim S.A. ("Oltchim" or "the company") into equity. On 7 March 2012, the Commission approved the debt conversion of RON 1049 million (EUR 126.2 million) in view of the planned full privatisation of Oltchim (case *SA.29041 Support measures in favour of Oltchim SA Râmnicu Vâlcea*, "the 2012 Commission decision").
- 2) After the failed attempt to privatise Oltchim, the Romanian authorities initiated contacts with the Commission in October 2012 to prepare the formal notification of a rescue aid to Oltchim (case registered as SA.35558 (2012/PN)).
- 3) In November 2012 the press reported that the Romanian authorities had concluded an agreement with the creditor banks of Oltchim for the financing of the

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resumption of the production of the company¹. Against this background, the Commission decided to open an *ex officio* case registered as SA.36086 (2013/CP) and by letter of 18 January 2013 requested Romania to provide information. Romania replied to this request on 7 February 2013. The Commission requested additional information on 18 February 2013 to which Romania replied on 11 March 2013. Romania submitted additional information at a meeting in June 2013 and by letter of 25 September 2013.

- 4) By letters of 5 August 2014, 16 October 2014 and 3 March 2015 the Commission requested additional information to which Romania replied respectively on 15 September 2014, 26 November 2014, 26 March 2015 and 16 April 2015. On 11 May 2015 the Commission requested additional information. Romania provided additional information at a meeting on 26 May 2015 and by letters of 10 June 2015 and 25 June 2015. On 3 September 2015 the Commission requested additional information which Romania supplied on 10 September 2015. Romania also submitted spontaneous information on 22 October 2015 and requested meetings, which took place on 23 October 2015 and 22 January 2016.

2. DESCRIPTION

2.1. The beneficiary

- 5) Oltchim is one of the largest petrochemical companies in Romania and South-East Europe. The Romanian State (currently *via* the Ministry of Economy) maintains a controlling stake of 54.8% in the company.
- 6) Oltchim mainly produces liquid caustic soda, propylene oxide-polyols, plasticizers and oxo-alcohols. Oltchim is the biggest producer of liquid caustic soda on the European market (EU market share of 41% in 2015), the only producer of caustic soda beads in Central Europe, as well as the only producer of polyvinyl chloride and polyethers in Romania and third in Europe. The company exports over 74% of its production inside and outside of Europe.²
- 7) Oltchim is the main industrial employer in Vâlcea (a Romanian region assisted under Article 107(3)(a) of TFEU). In 2015 Oltchim employed 2 208 employees, of which, 1 982 employees at the Ramnicu Valcea site and 226 employees at the site of the Pitesti-Petrochemical Division Bradu.

2.2. Oltchim's continued economic difficulties and failed privatisations

2.2.1. *The public debt of Oltchim and failed privatisation attempts (1995-2011)*

- 8) Oltchim has a long history of economic difficulties. Over the period 1995-2000 Oltchim contracted a series of commercial loans, backed with State guarantees.

¹ See:http://www.bursa.ro/oltchim-a-incheiat-cu-pierderi-de-396-milioane-lei-195247&s=companii_afaceri&articol=195247.html; http://www.bursa.ro/memorandum-pentru-finantarea-oltchim-190490&s=piata_de_capital&articol=190490.html; <http://www.impactreal.ro/2012111813712/Ministrul-Economiei-va-aplica-un-program-de-restructurare-a-Oltchim-in-vederea-privatizarii.html>; <http://www.ziare.com/social/angajati/salariatii-de-la-oltchim-au-renuntat-la-pichetarea-ministerului-economiei-1201772>.

² Data from the latest submission of Romania on 23 October 2015.

Oltchim was not able to repay the loans and the banks called upon the State guarantees. In 2002 the Ministry of Finance transferred Oltchim's debt stemming from the State guarantees to the Romanian privatisation agency ("AAAS"³). The Ministry of Finance continued to make payments on account of the State guarantees until December 2006 and again transferred to AAAS all claims resulting from the subsequent payments made on the basis of the triggered guarantees.

- 9) Over the years 2007-2012 Oltchim financial situation deteriorated, its financial accounts systematically showed a growing operating loss, accumulated losses and negative own funds. On 31 December 2012 (before entering into insolvency) Oltchim's financial accounts showed an operating loss of EUR 62.9 million, a net loss of EUR 127.8 million and accumulated losses of EUR 383 million.
- 10) Several attempts were made in 2001, 2003, 2006, 2007 and 2008 to privatise Oltchim, but all failed.

2.2.2. The 2012 Commission decision

- 11) On 7 March 2012, the Commission approved the planned conversion into equity of debt towards AAAS of RON 1049 million⁴ (EUR 232 million) in view of the planned full privatisation of Oltchim. The Commission took this view based on Romania's firm commitment to privatise the entire public share resulting from the debt conversion by the end of May 2012 at the latest, as expressed in two letters from the respective Prime Ministers at that time.⁵
- 12) The Commission took this view after having analysed critically the reports prepared by independent consultants⁶ and submitted by the Romanian authorities in the course of proceedings. Those reports compared the proceeds from a liquidation of the company with those of a privatisation.
- 13) In the liquidation scenario, the value of Oltchim assets was estimated as RON 692 055 000 (EUR 152.2 million), including RON 264 119 000 for pledged assets and RON 427 936 000 for unpledged assets.⁷

³ At the time, the debt was transferred to the Romanian agency "AVAB" (Autoritatea pentru Valorificarea Activelor Bancare – the Authority for Bank Assets Recovery), which in May 2004 was merged with the privatisation agency APAPS (the Authority for Privatisation and Management of the State Ownerships) and renamed AVAS (Autoritatea pentru Valorificarea Activelor Statului - the Authority for Capitalizing State Assets) and then renamed AAAS (the Authority Administrating the State Assets) in December 2012.

⁴ RON 538 million of debt and RON 511 million of interests charged from 1 January 2007 to 31 December 2011.

⁵ By letter of 21 October 2011, Romanian Prime Minister Emil Boc conveyed the Romanian Government's firm commitment to privatise Oltchim in full, including the whole stake accruing to the public authorities after the debt conversion. The privatisation announcement was to be released at the end of March 2012, and the privatisation was to be concluded by the end of May 2012. The new Romanian Prime Minister Mihai-Răzvan Ungureanu re-affirmed these commitments by letter of 16 February 2012.

⁶ Raiffeisen liquidation report from February 2011 (updated in October 2011) ("the 2011 Raiffeisen report") and Romcontrol Bucharest SA evaluation report from March 2011.

⁷ The 2011 Raiffeisen report (February), table on pages 16 and 17.

- 14) According to the 2011 Raiffeisen report, in the liquidation scenario AAAS would have collected around RON 105.4 million (around EUR 23 million), representing 12% of its total claim.
- 15) This amount was compared to the value of AAAS' claim in a debt conversion plus privatisation scenario. In this scenario, depending on the method used for the estimation of the Enterprise Value, the market value of Oltchim was estimated between EUR 28 million and EUR 97 million. Following the conversion of its debt into equity and the subsequent privatisation, AAAS would obtain between EUR 22.9 million and EUR 79.5 million.⁸
- 16) In view of this comparison, the Commission concluded that: "if the company is fully privatised in the short-term after the debt conversion, the notified Measure (conversion of the debt followed by full privatisation) does not involve an advantage to Oltchim as that measure allows the public creditor AVAS [AAAS] to recover more than if it decided to place the company in liquidation. In that respect, the Commission takes note of the commitment taken by the Romanian authorities...to privatise the company in full by 31 May 2012."⁹
- 17) However, subsequently the debt-to-equity conversion of AAAS debt as approved by the 2012 Commission decision was not implemented and in September 2012 the privatisation process failed.

2.2.3. Oltchim's situation after the failed privatisation of September 2012

- 18) After the failed privatisation, Oltchim's financial situation further deteriorated and the production was suspended.
- 19) On 24 October 2012 Oltchim managed to restart its production thanks to a change in trading conditions granted to Oltchim by two public suppliers (CET Govora and National Salt Company Salrom)¹⁰:
 - a) CET Govora signed a new electricity contract with Oltchim on 15 September 2012 and then agreed to increase electricity supply (initially from 25 October 2012, then from 12 November 2012) and then to further continue supplies from 1 January 2013. These changes in the contractual relationship with Oltchim seem to have been taken in the implementation of several decisions¹¹ issued by the Valcea County Council to ensure electricity supply to Oltchim.
 - b) National Salt Company Salrom ("Salrom") accepted postponement of payments for its supplies.

⁸ See Table 7 in the 2012 Commission decision.

⁹ The 2012 Commission decision, point 153.

¹⁰ The Romanian submissions of 11 March 2013 and 7 February 2013.

¹¹ Decision No 27 of 31 August 2012, Decision no 58 of 31 October 2012, Decision No 61 of 16 November 2012, Decision No 86 of 28 December 2012.

- 20) On 23 November 2012, the Ministry of Finance, the Ministry of Economic Affairs, the Ministry of Transport and Infrastructure, AAAS and OPSPI¹² signed a Memorandum of Understanding with Oltchim's creditors (i.e. various private and State-owned banks, as well as State owned undertakings such as Electrica S.A. ("Electrica"), Salrom, CFR Marfa SA). The parties to the Memorandum agreed that the Ministry of Economy and OPSPI would register a special vehicle company free of debts with full state capital (Oltchim SPV), no later than 1 January 2013, so that the banks can securely provide the necessary financing support for the resumption of the production at Oltchim. In this regard, by Government Emergency Order No 59/2012, the Ministry of Economic Affairs was instructed to initiate legal procedures for setting up a SPV company.
- 21) However, these plans were abandoned because on 30 January 2013 Oltchim, at its own request, entered the insolvency proceedings governed by Law no. 85/2006 ("the insolvency law" or "the Law").

2.3. The insolvency law

- 22) The purpose of the Law is to set out a collective procedure for covering liabilities of a debtor in insolvency condition.
- 23) Once a company enters a collective insolvency procedure the decisional power over operations of the debtor moves from the shareholders to the judicial administrator (a so-called Court-appointed receiver or a liquidator, depending on the option chosen), under a permanent monitoring by the syndic-judge.
- 24) Within the deadline established by the syndic-judge, the court-appointed receiver or the liquidator, shall prepare and submit to the syndic-judge a report on the reasons and circumstances that led to the debtor's insolvency¹³. The report shall specify whether there is an actual possibility for actual reorganization of the debtor's activity or the reasons that do not allow for his reorganization. In the latter case, the court-appointed receiver should propose the bankruptcy proceedings. If the court-appointed receiver indicates the possible recovery of the debtor's activity based on a judicial reorganization plan, it will specify who prepares the reorganization plan (the debtor, or the court-appointed receiver alone or together with one or several creditors).
- 25) Following the opening proceedings, all claims of creditors are suspended and the new ones cannot be initiated¹⁴. All service providers (electricity, gas, water, telephony) shall not be entitled to change, refuse or temporarily interrupt such a service to the debtor in case the latter has the capacity of captive consumer.¹⁵
- 26) Following the opening proceedings, the judicial administrator shall notify the creditors to file a statement of claims against debtor within a legal time limit established by the decision of the syndic-judge on the start of insolvency

¹² Office for State Participation in the Privatisation of Industry (*Oficiului Participatorilor Statului si Privatizării in Industrie*).

¹³ Art. 59 of the Law.

¹⁴ Art. 36 of the Law.

¹⁵ Art. 38 of the Law.

proceedings. On this basis the judicial administrator prepares a so called preliminary List of creditors. Such a list shall include creditors in two main categories: *secured creditors* (creditors with claims held by entities that benefit from collaterals over the goods from the debtor's estate, regardless whether this is the main debtor or a third party guarantor for the persons benefiting from the collaterals) and *unsecured creditors* (creditors with claims that do not benefit from any guarantees against the debtor's estate). Other categories of claims to be included in the list are: *salaries* and *budgetary creditors*.

- 27) The debtor, the creditors and any other interested party have a right to appeal to the syndic-judge the preliminary List of creditors¹⁶. After all appeals are settled, the judicial administrator prepares a Final list of creditors, showing the amount, the priority and condition (secured or unsecured) of each claim and sends it to the Court for approval. Once all appeals are settled, the list becomes final.
- 28) The insolvency law foresees two alternative procedures:
 - a) *judicial reorganisation* (art. 94-105 of the insolvency law governed by the rules on the general procedure) which aims at reorganizing the debtor's activity in order to pay the claims according to the payment plan of claims, or
 - b) *bankruptcy procedure* (art. 107-129 of the insolvency law governed by the rules on the simplified procedure) in which debtor's activity are reduced only to the necessary steps for liquidation in order to pay the debts by selling the assets and by recovering the receivables.

2.3.1. *Judicial reorganisation*

- 29) Judicial reorganisation is the procedure applied to the debtor to pay his debts following a reorganisation of its activities and according to a payment plan. This procedure implies the preparation, approval, implementation and observance of a reorganisation plan, which may provide, as a whole or separately, for: a) operational and/or financial restructuring of the debtor; b) corporate restructuring by amendment of the share capital structure; or c) limitation of activity by liquidation of certain assets.
- 30) The Court-appointed receiver prepares the reorganisation plan together with the List of Creditors and sends it to the Court for approval. The plan must be also discussed and approved by the creditors. The Law provides for the following distinct categories of claims, which vote separately: a) secured claims, b) salary claims, c) budgetary claims, d) unsecured claims established as per art. 96 (1), i.e. the so called captive suppliers, e) other unsecured claims.¹⁷
- 31) Pursuant to art. 101 of the insolvency law:

¹⁶ Art. 73 of the Law.

¹⁷ Art. 100(3) of the Law.

- a) The plan is deemed to be accepted if an absolute majority of the categories of creditors votes in favour of the plan, provided that at least one of the disadvantaged categories¹⁸ accepts the plan.
 - b) The plan is deemed to be accepted by a category of creditors if in that category the plan is accepted by an absolute majority of the value of the claims belonging to that category.
 - c) Each debt has a right to vote.
 - d) Each disadvantaged category of creditors that rejects the plan will be treated fairly and equitably under the plan.
- 32) Pursuant to the definition in art. 3(21) of the Law the term "disadvantaged category" means a claim category for which the reorganisation plan stipulates at least one of the following modifications for that category:
- a) decrease in the amount of the claim;
 - b) decrease in the securities or other accessories, such as rescheduling the payments to the disadvantage of the creditor;
 - c) the value updated with the reference interest of the National Bank of Romania, unless established otherwise in the contract concerning that claim, or in special laws, is lower than the value recorded in the consolidated list of claims.
- 33) When the decision confirming a plan becomes effective, the debtor's activity shall be reorganised accordingly, the claims and rights of the creditors and of the other parties concerned being amended as provided by the plan. If no plan is confirmed, the syndic-judge shall order the immediate initiation of the bankruptcy procedure.

2.3.2. Bankruptcy procedure

- 34) Bankruptcy procedure means a liquidation of the debtor's assets to cover liabilities, followed by the debtor's write-off from the registry.
- 35) Pursuant to art. 107 of the Law a debtor enters the bankruptcy procedure in the following cases:
- a) on its own request, by presenting to the syndic-judge a declaration to enter directly into bankruptcy, or
 - b) if it initially declared the intention to enter reorganisation but did not propose a reorganisation plan or the proposed plan has not been accepted and confirmed.
- 36) During the bankruptcy procedure, there are two categories of assets subject to sale (pledged/secured assets and unpledged/unsecured assets) and therefore two ways of distribution of amounts received from a sale amongst the creditors (art. 121 for pledged assets and art. 123 for unpledged assets and for any surplus left from the sale of pledged assets). Liquidation shall begin immediately after the completion of

¹⁸ Art. 3(21) of the Law.

the inventory of assets from the debtor's estate by the liquidator. The assets may be sold together – as an operational group – or individually. Depending on the circumstances of the case and if possible, the assets of debtor shall be valued individually and in bulk, as a functional group.

- 37) According to art. 121 of the Law, the following order of distribution of funds obtained from selling the debtor's pledged assets applies: 1) taxes, stamps and other expenses relating to the sale of such assets, including the expenses incurred for the preservation and administration of such assets, as well as remuneration of liquidators; and 2) claims of the secured creditors.
- 38) In the event the amounts obtained from the sale of pledged assets are insufficient for the full payment of secured creditors, the secured creditors shall have unsecured claims, for the difference. If after the payment of the amounts to the secured creditors, there is a surplus, it will be distributed amongst unsecured creditors.
- 39) According to art. 123 of the Law, the claims shall be paid as follows: 1) taxes, stamps and other expenses relating to the procedure, 2) salary claims, 3) credits granted by credit institutions and current debts, 4) budgetary claims, 5-7) other claims (such as allowances for children, family allowances, bank loans), 8) other unsecured claims.

2.4. Oltchim's reorganisation (since January 2013)

2.4.1. Preparation and approval of the Reorganisation Plan

- 40) At the Court hearing on 19 June 2013, Oltchim expressed its intention to enter a judicial reorganisation and to pay the claims by way of a reorganization plan. This request was based on a "Report on the causes of insolvency" prepared by the Consortium of trustees (B.D.O. – Business Restructuring S.p.r.l. and Rominsolv S.p.r.l, "the Consortium") pursuant to art. 59(1) to (3) of the Law. The Report on the causes of insolvency mentioned that there was a real possibility of effective reorganisation of activity of the debtor, under a court-supervised reorganisation plan, which it intended to prepare and submit to the Court.
- 41) On 3 June 2013 the Consortium appointed Winterhill S.r.l for the evaluation of the market value (MV) and the liquidation value (LV) of Oltchim's assets ("the Winterhill Report"), a step necessary for the preparation of the payment plan.
- 42) According to the agreed procedure, Winterhill S.r.l. determined the market value of Oltchim's assets and their liquidation value in accordance with the International Valuation Standards ("IVS") as follows:
 - a) the market value: "*The amount for which a property could be exchanged on assessment date between a willing buyer and a willing seller in the framework of a transaction with an objectively determined price, after a corresponding marketing period, in which both the seller and the buyer acted knowledgeably, prudently and without coercion*";
 - b) the liquidation value (or forced sale value): "*The amount that could be received reasonably by selling a property in a shorter period of time than the marketing period required to be consistent with the defined market value*".

- 43) The Winterhill Report evaluated the different Oltchim assets classes¹⁹ using different valuation methods depending on the type of asset evaluated (market comparison method or net replacement cost method).
- 44) As regards the valuation of fixed assets (plants, equipment and machinery), the Winterhill Report estimated a so called *in situ* market value and *ex situ* market value. According to the Winterhill Report, the *in situ* market value implies that the plant is fully operational for further use at its operation site. This value takes into account installation costs, i.e. electrical and mechanical, that are significant in the case of such plants. The *ex situ* market value implies that the plant is not operational and individual assets are evaluated in relation with their removal at the expense of the buyer. In Oltchim's case, the electrical and mechanical equipment were considered to have no significant value and, depending on their complexity, even to have a negative impact on the value of an asset. The LV of fixed assets was defined in Winterhill Report as the *ex situ* market value less the costs estimated for dismantling and removal from the industrial premises. This value included an estimation of the costs for clearing and preparation of the assets for sale, which was expected to be significant in case of Oltchim, because of the polluting and hazardous nature of many materials used within the plants. It also included allocations for marketing expenses, sale expenses, sellers' fees and costs of staff involved.
- 45) On 20 July 2013 Winterhill S.r.l. completed its valuation based on the company's data available on 30 April 2013. The Winterhill Report estimated the MV of Oltchim as EUR 293.7 million (approx. RON 1270 million) and the LV as EUR 141 million (RON 636 million), out of which EUR 108 million (RON 491 million) for secured assets and around EUR 32 million (RON 145 million) for unsecured assets.²⁰
- 46) The Winterhill Report was presented to the Meeting of Creditors on 2 December 2013 and approved on 4 December 2014. Initially, AAAS questioned the valuation price established therein and filed a complaint against the Creditors Meeting decision approving the Winterhill Report.²¹
- 47) Based on the Winterhill Report, in July 2013, the Consortium prepared the Reorganisation Plan of Oltchim ("the Plan"). The main purpose of the Plan is to find a new investor that will take over the assets/business of Oltchim. The sale may take place in any of the three options proposed:
- a) *Creation of a new entity (Oltchim SPV) and the transfer of all viable assets from Oltchim SA to the latter. Sale of Oltchim SPV shares:*

¹⁹ The report distinguishes between the following asset classes: i) fixed assets – land, ii) fixed assets – buildings and special constructions, iii) fixed assets – plants, equipment, machinery, iv) inventories, v) financial assets, vi) intangible assets – brand, notoriety, trademarks, patents, and vii) investments in progress.

²⁰ For the market value see Annex 1C of the Report. For the liquidation value see Annex 1D of the Report.

²¹ As mentioned in the Court judgment of 22 April 2015 approving the Reorganisation Plan of Oltchim, Case No 887/90/2013.

Oltchim SPV will be a company free of debts. Oltchim SPV will take over the functional part of Oltchim SA as a going concern²². Oltchim SPV shall be 100% held by Oltchim SA and aimed to be sold in 1-3 years to an investor. The price for the sale of Oltchim SPV shares is estimated at EUR 307 million. This starting price of the negotiation was estimated with a reference to the MV of EUR 293.7 million of the Winterhill Report.²³

Given that some assets transferred to Oltchim SPV are mortgaged to some Oltchim SA's creditors, the object of their security will be replaced with shares issued by Oltchim SPV in proportion to the amounts of their security. The secured creditors will be entitled to opt for the removal of the existing securities on the assets upon the full payment of the price of Oltchim SPV shares.

Oltchim's creditors will be paid in accordance to the amounts provided in the Payment Plan (see Table 3 below).

b) *Debt-to-equity swap:*

Oltchim's creditors could convert their debts to equity (Oltchim SA's shares) in proportion and in accordance to the amounts provided in the Payment Plan (see Table 3 below); and

c) *Debt- to-assets swap:*

Some of the debts towards the State would be paid by transfer of Oltchim's assets, i.e. land, buildings, free of charge.

- 48) The Plan provided for two scenarios for the continuation of Oltchim's activity, namely:
 - a) *Scenario A*: the company's business will continue with the oxo-alcohols plant restarted, for which no external funding sources are needed;
 - b) *Scenario B*: the company's business will be enhanced by restarting the phthalic Anhydride-DOF plant with the use of external financing sources.
- 49) The Plan specified the implementation period, i.e. three years after the confirmation of the Plan by the judge. During that period the judicial administrator shall ensure the company's administration.
- 50) On 8 April 2013, after having analysed the claims of Oltchim's creditors, the judicial administrator prepared a preliminary table containing all claims against Oltchim's patrimony.

²² The following will be transferred to Oltchim SPV: the assets of Oltchim SA located in the Ramnicu Valcea industrial platform and/or the Bradu Petrochemical Division, the intellectual property rights, the brand, the customers, the contracts signed with suppliers and customers, and all the employees of Oltchim SA existing at the time of transfer in each industrial site, as well as all the authorisations and permits required for the company's operation and business.

²³ According to the Romanian law, the starting price of the negotiation shall be higher than the estimated MV of the assets.

- 51) After all appeals were settled, on 9 January 2015 the judicial administrator completed and sent to the Court the final List of creditors of Oltchim, showing the amount, priority and the status – secured or unsecured – of each claim. The List included five categories of creditors: 1) secured creditors, 2) salary claims, 3) budgetary creditors, 4) unsecured creditors under art. 96 of Law no 85/2006 (so called "captive suppliers") and 5) other unsecured creditors, as presented in the Table 1 below:

Table 1: List of creditors

Categories of creditors	Total debt in RON	Total debt in EUR*	% within debt category
1) Secured creditors			
of which	890 222 871	195 849 032	
ALPHA Bank Romania	3 066 386	674 605	0.34%
Areleco Power SRL	15 000 000	3 300 000	1.68%
AAAS**	9 445 548	2 078 021	1.06%
Erste Group Bank AG	229 058 167	50 392 797	25.73%
Banca Transilvania SA	159 957 116	35 190 566	17.97%
Bancpost SA	2 494 327	548 752	0.28%
Bulrom Gas Impex SRL	23 776 278	5 230 781	2.67%
Calvi Trade Limited	23 724 237	5 219 332	2.66%
CEC Bank	56 321 014	12 390 623	6.33%
Chemimpex Ltd	26 012	5 723	0.003%
DGFP Craiova	5 709 799	1 256 156	0.64%
Electrica Furnizare SA	26 832 832	5 903 223	3.01%
Electrica S.A.	200 951 974	44 209 434	22.57%
Garanti Bank SA	1 382 676	304 189	0.16%
Honeywell Romania Srl	7 056 360	1 552 399	0.79%
ING bank N.V.	183 157	40 295	0.02%
MFC Commodities GmbH	13 155 900	2 894 298	1.48%
OMV Petrom S.A.	55 519 911	12 214 380	6.24%
Polchem Societe Anonyme	23 714 748	5 217 245	2.66%
National Salt Company and Rm Vâlcea Mining Company	15 750 820	3 465 180	1.77%
Unicredit Tiriac Bank SA	17 095 609	3 761 034	1.92%
2) Salaries	9 704 264	2 134 938	
3) Budgetary creditors	1 274 807 584	280 457 668	
AAAS	1 191 856 674	262 208 468	93.49%
Environmental Fund Administration	59 205 056	13 025 112	4.64%
Romanian National Water Administration	872 967	192 053	0.07%
DGFP Craiova	19 732 303	4 341 107	1.55%
Romanian Energy Regulatory Authority	18 484	4 066	0.001%
Bradu Town Hall	1 000 653	220 144	0.08%
Rm. Vâlcea City Hall	2 118 976	466 175	0.17%
Băbeni Town Hall	2 471	544	0.0002%
4) Unsecured creditors under art. 96 of Law 85/2006	150 384 370	33 084 561	
CET Govora	136 899 919	30 117 982	91.03%
Romanian National Water Administration	13 484 451	2 966 579	8.97%
5) Other unsecured creditors	1 129 340 017	248 454 804	
of which (examples)			
Electrica S.A.	457 583 381	100 668 344	40.52%
Electrica Furnizare S.A.	29 700 994	6 534 219	2.63%
Erste Group Bank	116 868 626	25 711 098	10.35%
ING bank N.V.	13 431 574	2 954 946	1.19%
CFR Marfa	115 293 055	25 364 472	10.21%
National Salt Company and Rm Valcea Mining Company	15 076 968	3 316 933	1.34%
MFC Commodities GmbH	149 703 788	32 934 833	13.26%
Kronos Worldwide Limited	51 660 368	11 365 281	4.57%
Total	3 454 458 105	759 980 783	

* Exchange rate used (1 RON=0.22 EUR)

** Public creditors or State Owned Enterprises (SoEs) marked in "bold"

- 52) Oltchim's outstanding debts towards the State and State owned enterprises ("SoEs") were around EUR 519 million, out of which around EUR 264 million to AAAS, around EUR 232 million to various SoEs (out of which around EUR 145 million to Electrica), around EUR 19 million to national and regional bodies (for example around EUR 13 million to the Environmental Fund Administration) and around EUR 12 million to the publicly owned CEC Bank.

Table 2 Public creditors of Oltchim

Creditor	Total debt in RON	Total debt in EUR	% within the total debt
Budgetary creditors			
AAAS	1 201 301 222	264 286 269	34,77%
DGFP Craiova	25 442 102	5 597 262	0,73%
Environment Fund Administration	59 205 056	13 025 112	1,71%
Romanian National Water Administration	14 357 418	3 158 632	0,41%
Romanian Energy Regulatory Authority	18 484	4 066	0,00054%
Bradu Town Hall	1 000 653	220 144	0,028%
Rm. Vâlcea City Hall	2 118 976	466 175	0,06%
Băbeni Town Hall	2 471	544	0,00007%
State owned enterprises (examples)			
CEC Bank	56 321 014	12 390 623	1,63%
National Salt Company	30 827 788	6 782 113	0,89%
CET Govora	136 899 919	30 117 982	3,96%
Electrica SA	658 535 355	144 877 778	19,06%
Electrica Furnizare	56 533 826	12 437 442	1,63%
CFR Marfa	115 293 055	25 364 472	3,33%
TOTAL	2 357 857 339	518 728 615	68,25%

- 53) The following creditors had the biggest claims towards Oltchim: AAAS (around 35% of the total debt), Electrica (19% of the total debt), Erste Group Bank AG (10% of the total debt), MFC Commodities Gmbh (4.71% of the total debt), Banca Transilvania S.A. (4.63% of the total debt), CET Govora (3.96% of the total debt), CFR Marfa (3.34% of the total debt) and CEC Bank (1.63% of the total debt).
- 54) The judicial administrators sent the Reorganisation Plan together with the List of Creditors to the Court on 4 February 2015. At the meeting on 9 March 2015 the Creditors discussed and then approved the Plan pursuant to art. 101 of the insolvency law.
- 55) More concretely, under the approved Plan:
- The price obtained from selling Oltchim SPV (estimated in the Plan as EUR 307 million) will be used with priority for paying various administrative expenditures related to the transfer of Oltchim's assets to Oltchim SPV, receivers' fees and tax on income obtained, as well as the current debts of Oltchim, incurred after the start of the insolvency procedure²⁴.

²⁴ After entering insolvency proceedings, as a result of continued operations, Oltchim accumulated further debts, mostly towards state owned enterprises such as CET Govora, National Water Company and DGFP Craiova. Data for 30 November 2014, submitted to the Court together with the Plan,

- b) After the payments under point a) are made, the remainder (*the net amount*) of around EUR 212 million to EUR 231 million will be used to partially pay the past debts of Oltchim, according to the approved Payment Plan (see Table 3 below):

Table 3: Payment Plan

Categories of creditors	Total debt (in EUR)	Distributed amounts (in EUR)		% coverage	
		min	max	min	max
1) Secured creditors	195 849 032	143 509 496	156 394 852		
ALPHA Bank Romania SA	674 605	494 321	538 705		
Areleco Power SRL	3 300 000	2 418 097	2 635 211		
AAAS	2 078 021	1 522 522	1 659 225		
Erste Group Bank AG	50 392 797	36 925 654	40 241 112		
Banca Transilvania SA	35 190 566	25 786 119	28 101 387		
Bancpost SA	548 752	402 102	438 205		
Bulrom Gas Impex SRL	5 230 781	3 832 889	4 177 035		
Calvi Trade Limited	5 219 332	3 824 500	4 167 892		
CEC Bank	12 390 623	9 079 311	9 894 518		
Chemimpex Ltd	5 723	4 193	4 570		
DGFP Craiova	1 256 156	920 456	1 003 102		
Electrica Furnizare SA	5 903 223	4 325 625	4 714 012		
Electrica SA	44 209 434	32 394 743	35 303 395		
Garanti Bank SA	304 189	222 896	242 909		
Honeywell Romania Srl	1 552 399	1 137 531	1 239 667		
ING Bank NV	40 295	29 526	32 177		
MFC Commodities GmbH	2 894 298	2 120 816	2 311 238		
OMV PETROM SA	12 214 380	8 950 168	9 753 780		
Polchem SA	5 217 245	3 822 970	4 166 225		
National Salt Company and Rm Vâlcea Mining Company	3 465 180	2 539 134	2 767 116		
Unicredit Tiriac Bank SA	3 761 034	2 755 922	3 003 370		
2) Salaries	2 134 938	2 134 938	2 134 938	100%	100%
3) Budgetary creditors	280 457 668	49 485 271	55 007 562		
AAAS	262 208 468	46 265 297	51 428 256		
Environment Fund Administration	13 025 112	2 298 212	2 554 680		
Romanian National Water Administration	192 053	33 887	37 668		
DGFP Craiova	4 341 107	765 965	851 443		
Romanian Energy Regulatory Authority	4 066	717	798		
Bradu Town Hall	220 144	38 843	43 178		
Rm. Vâlcea City Hall	466 175	82 254	91 433		
Băbeni Town Hall	544	96	107		
4) Unsecured creditors under art. 96 Law 85/2006	33 084 561	9 883 865	9 883 865		
CET Govora	30 117 982	8 997 613	8 997 613		
Romanian National Water	2 966 579	886 252	886 252		

indicate that current liabilities of Oltchim amounted to RON 221 495 571 (around EUR 50 million) of which public debts amounted to around EUR 8.8 million.

Administration					
5) Other unsecured creditors, of which (examples)	248 454 804	0	0		
Electrica S.A.	100 668 344	0	0		
Electrica Furnizare S.A.	6 534 219	0	0		
Erste Group Bank	25 711 098	0	0		
ING bank N.V.	2 954 946	0	0		
CFR Marfa	25 364 472	0	0		
National Salt Company and Rm Valcea Mining Company	3 316 933	0	0		
MFC Commodities GmbH	32 934 833	0	0		
Kronos Worldwide Limited	11 365 281	0	0		
Total:	759 980 783	205 013 570	223 421 217		

56) According to the above Payment Plan, the following debt coverage will apply:

- (i) salaries - 100% debt coverage;
- (ii) secured creditors - 73-80% debt coverage;
- (iii) essential suppliers (SoEs: CET Govora and Romanian National Water Administration) - 30% debt coverage;
- (iv) budgetary creditors (for example AAAS, Environmental Fund Organisation) – 18-20% debt coverage;
- (v) other unsecured creditors (for instance Electrica and Electrica Furnizare) - 0% debt coverage

57) This plan therefore leads to a substantial debt cancellation, notably on the part of the public creditors as set out below in Tables 4 and 5.

Table 4: Debts to be cancelled

Category of creditors	Total debt (RON)	Total debt (EUR)	Debt to be cancelled under the Plan (EUR)	
			Min	Max
1) Secured creditors of which	890 222 871	195 849 032	39 453 960	52 339 316
ALPHA Bank Romania SA	3 066 386	674 605	135 900	180 284
Areco Power SRL	15 000 000	3 300 000	664 789	881 903
AAAS	9 445 548	2 078 021	418 575	555 278
Erste Group Bank AG	229 058 167	50 392 797	10 151 685	13 467 143
Banca Transilvania SA	159 957 116	35 190 566	7 089 178	9 404 447
Bancpost SA	2 494 327	548 752	110 547	146 650
Bulrom Gas Impex SRL	23 776 278	5 230 781	1 053 747	1 397 892
Calvi Trade Limited	23 724 237	5 219 332	1 051 440	1 394 832
CEC Bank	56 321 014	12 390 623	2 496 105	3 311 312
Chemimpex Ltd	26 012	5 723	1 153	1 529
DGFP Craiova	5 709 799	1 256 156	253 054	335 699
Electrica Furnizare SA	26 832 832	5 903 223	1 189 211	1 577 598
Electrica SA	200 951 974	44 209 434	8 906 039	11 814 691
Garanti Bank SA	1 382 676	304 189	61 279	81 292

Honeywell Romania Srl	7 056 360	1 552 399	312 733	414 869
ING Bank NV	183 157	40 295	8 117	10 769
MFC Commodities GmbH	13 155 900	2 894 298	583 060	773 482
OMV PETROM SA	55 519 911	12 214 380	2 460 600	3 264 213
Polchem SA	23 714 748	5 217 245	1 051 020	1 394 274
National Salt Company	15 750 820	3 465 180	698 064	926 047
Unicredit Tiriac Bank SA	17 095 609	3 761 034	757 664	1 005 112
2) Salaries	9 704 264	2 134 938	0	0
3) Budgetary creditors of which	1 274 807 584	280 457 668	225 450 106	230 972 397
AAAS	1 191 856 674	262 208 468	210 780 213	215 943 171
Environment Fund Administration	59 205 056	13 025 112	10 470 432	10 726 900
Romanian National Water Administration	872 967	192 053	154 385	158 166
DGFP Craiova	19 732 303	4 341 107	3 489 664	3 575 141
Romanian Energy Regulatory Authority	18 484	4 066	3 269	3 349
Bradu Town Hall	1 000 653	220 144	176 966	181 300
Rm. Vâlcea City Hall	2 118 976	466 175	374 742	383 921
Băbeni Town Hall	2 471	544	437	448
4) Unsecured creditors under art. 96 of Law 85/2006	150 384 370	33 084 561	23 200 696	23 200 696
CET Govora	136 899 919	30 117 982	21 120 370	21 120 370
Romanian National Water Administration	13 484 451	2 966 579	2 080 327	2 080 327
5) Other unsecured creditors of which (examples)	1 129 340 017	248 454 804	248 454 804	248 454 804
Electrica S.A.	457 583 381	100 668 344	100 668 344	100 668 344
Electrica Furnizare S.A.	29 700 994	6 534 219	6 534 219	6 534 219
Erste Group Bank	116 868 626	25 711 098	25 711 098	25 711 098
ING bank N.V.	13 431 574	2 954 946	2 954 946	2 954 946
CFR Marfa	115 293 055	25 364 472	25 364 472	25 364 472
National Salt Company and Rm Valcea Mining Company	15 076 968	3 316 933	3 316 933	3 316 933
MFC Commodities GmbH	149 703 788	32 934 833	32 934 833	32 934 833
Kronos Worldwide Limited	51 660 368	11 365 281	11 365 281	11 365 281
Total	3 454 458 105	759 980 783	536 559 566	554 967 213

Table 5 Public debts to be cancelled (in EUR)

Creditor	Total debt	Debts to be cancelled		% of debt to be cancelled	
		min	max	min	max
Budgetary creditors					
AAAS	264 286 269	211 198 788	216 498 450	79,91%	81,9%
DGFP Craiova	5 597 262	3 742 718	3 910 841	66,87%	69,8%
Environment Fund Administration	13 025 112	10 470 432	10 726 900	80,39%	82,3%
Romanian National Water Administration	3 158 632	2 234 711	2 238 493	70,75%	70,8%
Romanian Energy Regulatory Authority	4 066	3 269	3 349	80,39%	82,3%
Bradu Town Hall	220 144	176 966	181 300	80,39%	82,3%
Rm. Vâlcea City Hall	466 175	374 742	383 921	80,39%	82,3%

Băbeni Town Hall	544	437	448	80,37%	82,3%
State owned enterprises (examples)					
CEC Bank	12 390 623	2 496 105	3 311 312	20,15%	26,7%
National Salt Company	6 782 113	4 014 997	4 242 980	59,20%	62,5%
CET Govora	30 117 982	21 120 370	21 120 370	70,13%	70,1%
Electrica SA	144 877 778	109 574 383	112 483 035	75,63%	77,6%
Electrica Furnizare	12 437 442	7 723 430	8 111 816	62,10%	65,2%
CFR Marfa	25 364 472	25 364 472	25 364 472	100%	100%
TOTAL	518 728 615	398 495 819	408 577 686	77%	78,7%

58) The creditors voted on this Plan. According to the Minutes from the Creditors Assembly meeting of 9 March 2015:

- a) AAAS voted *in favour* of the Plan, both in the secured debts category (where its claim amounted to 1.061% of that category) and in the budgetary debts category (where its claim amounted to 98.04% of that category). As a result AAAS agreed to write off between 80% and 82% of its entire claim towards Oltchim.
- b) DGFP Craiova ("DGFP") voted *against* the Plan both in the secured debts category (where its claim amounted to 0.64% of that category) and in the budgetary debts category (where its claim amounted to 1.55% of that category). DGFP voted against a 67% to 70% write off of its claims towards Oltchim.
- c) CEC Bank voted *in favour* of the Plan in the secured debts category (where its claim amounted to 6.33% of that category). CEC Bank had no claims under other categories. As a result CEC Bank agreed to write off 20% to 27% of its entire claim towards Oltchim.
- d) Salrom voted *in favour* of the Plan, both in the secured debts category and in the unsecured debts category (where its claim amounted respectively to 1.77% and 1.34%). As a result Salrom agreed to write off between 59% and 62% of its entire claim towards Oltchim.
- e) CET Govora and Romanian National Water Administration voted *in favour* of the Plan in the unsecured debts under art. 96 of Law 85/2006 category. As a result CET Govora and Romanian National Water Administration agreed to write off respectively 70% to 71% of their claims towards Oltchim.
- f) Electrica voted *in favour* of the Plan, both in the secured debts category and in the unsecured debt category (where its claims amounted respectively to 22.5% and 40.5%). As a result Electrica agreed to write off 76% to 77% of its entire claim towards Oltchim.
- g) Electrica Furnizare voted *against* the Plan in the secured debts category and in the unsecured debt category (where its claims amounted respectively to 3.01% and 2.63%). Electrica Furnizare voted against a 62% to 65% write off of its claims towards Oltchim.
- h) Employees voted *in favour* of the Plan. Employees will receive 100% debt coverage.

- 59) The Plan was approved because it complied with the insolvency law conditions, namely:
- a) an absolute majority of the categories of creditors voted in favour of the Plan (out of 5 debt categories, 5 voted in favour);
 - b) within each category the Plan was accepted by an absolute majority of the value of the claims belonging to that category;
 - c) at least one disadvantaged category accepted the Plan (in fact all disadvantaged categories²⁵ voted in favour of the Plan).
- 60) At the Court hearing on 25 March 2015, the insolvency judge asked to provide more clarifications on the Plan and postponed the hearing until 22 April 2015. At the hearing on 22 April 2015 the Court endorsed the Plan by approving only the first option, i.e. *Creation of a new entity (Oltchim SPV) and the transfer of all viable assets from Oltchim SA to the latter*. On 24 September 2015 the Court of Appeal Pitesti dismissed the appeals brought by ANAF (National Antifraud Agency) and Electrica Furnizare against the judgment approving the Reorganisational Plan. By this judgement the Plan became final.

2.4.2. Implementation of the Reorganisation Plan

- 61) During the insolvency proceedings, Oltchim implemented a series of measures to reduce its costs, such as dismissing 918 employees in June 2013 (a further 225 employees were supposed to be dismissed by November 2015). In June 2014, Oltchim changed an electrolyser in the main production facilities (for a total value of EUR 800 000). To further improve its EBITDA, the company restarted the oxo-alcohols plant on 9 September 2014.
- 62) The Romanian authorities informed²⁶ that the company improved its economic and financial performance. Its turnover increased in 2015 by 31% compared to 2014, and by 59% compared to 2013. Increased turnover was driven by growth in sales of main products manufactured (33% increase for polyether polyols, 7% increase for chlor-alkali products). EBITDA improved by RON 109 million compared to 2013. Total net result for 9 months of 2015 was RON 2.31 billion with the following structure:
- a) +RON 2.35 billion gross result due to the cancellation of debts, mainly unsecured debts, following the confirmation of the Reorganization Plan by the judge;
 - b) -RON 32 million tax on profit following the income resulted from the cancellation of some debts;
 - c) -RON 16 million resulted from the current business of the company.

²⁵ The Consortium considered all categories of debts to be disadvantaged within the meaning of the Law, since all the debts under the Reorganisation Plan will be paid either in a less than 100% proportion or within more than 30 days after the confirmation of the Plan by the insolvency judge (see Reorganisation Plan, section 1.2.1 and section 5.1.1).

²⁶ Romania's submission of 22 October 2015.

- 63) New attempts to privatise company took place. On 03 June 2013, the Ministry of Economy published a notice for the selection of eligible investors. Discussions started with several investors. Five of them signed confidentiality agreements and requested information to initiate their own procedures of due diligence. The privatisation of Oltchim, however, failed again.
- 64) According to the Plan (see Table 5 above), budgetary creditors and SoEs have to cancel in total EUR 408.5 million of debt (for AAAS around EUR 216 million, representing 81.9% of its total claim and EUR 174.3 million for SoEs).
- 65) The so called captive suppliers (CET Govora SA and National Water Administration) have to cancel EUR 21.2million and EUR 2.2 million respectively, representing 70% to 71% of their total claims. State owned Electrica have to cancel EUR 112 million, representing 77.6% of its total claim.

Table 6 Public creditors (debt cancellation and debt recovery under the Plan)

Creditor	Total debt in EUR	Debts to be cancelled in EUR	Debts to be recovered following the future sale of Oltchim SPV in EUR
Budgetary creditors			
AAAS	264 286 269	216 498 450	47 787 819
DGFP Craiova	5 597 262	3 910 841	1 686 422
Environment Fund Administration	13 025 112	10 726 900	2 298 212
Romanian National Water Administration	3 158 632	2 238 493	920 139
Romanian Energy Regulatory Authority	4 066	3 349	717
Bradu Town Hall	220 144	181 300	38 843
Rm.Vâlcea City Hall	466 175	383 921	82 254
Băbeni Town Hall	544	448	96
State owned enterprises (examples)			
CEC Bank	12 390 623	3 311 312	9 079 311
National Salt Company	6 782 113	4 242 980	2 539 134
CET Govora	30 117 982	21 120 370	8 997 613
Electrica SA	144 877 778	112 483 035	32 394 743
Electrica Furnizare	12 437 442	8 111 816	4 325 625
CFR Marfa	25 364 472	25 364 472	0
TOTAL	518 728 615	408 577 686	110 150 928

- 66) Following the approval of the Reorganisation Plan, significant debt write offs already took place. Romania informed that around RON 2.35 billion (EUR 518 million) of debts were cancelled in the period April-October 2015)²⁷.
- 67) The Romanian authorities informed also that an offer to sell Oltchim SPV was sent to all bilateral Chambers of Commerce in Romania (July 2015) and to other 30 Chambers of Commerce worldwide (in September 2015). First meetings with potential acquires took place in September-October 2015. The Commission was not informed about any progress made since then.

²⁷ Romania's submission of 22 October 2015.

2.5. The measures under assessment

- 68) The present decision concerns the following support measures taken by the Romanian authorities after the 2012 Commission decision with regard to Oltchim:
- a) **Measure no 1:** AAAS – the non-enforcement and further accumulation of debts since September 2012;
 - b) **Measure no 2:** AAAS and SoEs (in particular Electrica, Salrom, CET Govora and National Water Administration) – the 2015 debt cancellation under the Reorganisation Plan;
 - c) **Measure no 3:** CET Govora and Salrom - support to the operations of Oltchim in the form of continued supplies since September 2012.
- 69) Insofar as these measures are to be found to involve State aid within the meaning of Article 107(1) of the Treaty, the Commission has also doubts whether they could be declared compatible under the provisions of Article 107(3) of the Treaty. It is the Commission's preliminary view that all the above measures may amount to rescue and restructuring aid. In the absence of notification of the restructuring plan to the Commission, such measures cannot be deemed compatible with the Commission Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty ("2014 R&R Guidelines").²⁸

2.5.1. Measure no 1: AAAS – the non-enforcement and further accumulation of debts since September 2012

- 70) Despite the firm commitment given to the Commission in 2012, the Romanian authorities did not convert the accumulated debt AAAS (of RON 1049 million) into equity and did not privatise the company. Instead, Oltchim continued its business activities and accumulated more public debts, including to AAAS (the debt towards AAAS rose from RON 1049 million to RON 1201 million).
- 71) AAAS did not enforce its claims towards Oltchim after the privatisation failed in September 2012. It did not ask for the reimbursement of its claims by means of an immediate liquidation of Oltchim but instead waited for the debt to equity conversion to take place, even though Oltchim's privatisation process failed again.

2.5.2. Measure no. 2: AAAS and SoEs (in particular Electrica, Salrom, CET Govora, National Water Administration) – the 2015 debt cancellation under the Reorganisation Plan

- 72) As indicated in recital 55) above in March 2015 AAAS, Salrom, CET Govora, National Water Administration, Electrica all voted in favour of the Reorganisation Plan. As a result, AAAS agreed to cancel EUR 216 million of its claims towards Oltchim in view of the future (uncertain) recovery of EUR 47 million. Salrom agreed to cancel EUR 4.2 million of debt, CET Govora SA agreed to cancel EUR 21.1 million of debt, National Water Administration agreed to cancel EUR 2.2 million of debt, and Electrica agreed to cancel EUR 112 million of debt.

²⁸ Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty OJ C249, 31.7.2014.

In return, those SOEs expect the following debt coverage in case the privatisation succeeds: EUR 2.5 million for Salrom, EUR 8.9 million for CET Govora SA, EUR 0.9 million for National Water Administration and EUR 32 million for Electrica (see Table 6).

2.5.3. Measure no. 3: CET Govora and Salrom - support to the operations of Oltchim in the form of continued supplies since September 2012

- 73) As indicated in recital 17) after the failed privatisation in September 2012, Oltchim's financial situation deteriorated and the production was suspended. The Romanian authorities took various support measures to allow Oltchim to restart its production.
- 74) This restart of the production would not have been possible without the decision of the publicly owned suppliers of Oltchim – CET Govora and Salrom to continue supplies to Oltchim despite its non-payment of debts.
- 75) CET Govora signed a new electricity contract with Oltchim on 15 September 2012 and then agreed to increase electricity supply first as from 25 October 2012, then as from 12 November 2012 and then to further continue supplies as from 1 January 2013. These changes in the contractual relationship with Oltchim seem to have been taken in the implementation of several decisions²⁹ issued by the Valcea County Council to ensure electricity supply to Oltchim.
- 76) Salrom accepted postponement of payments for its supplies and therefore accepted a further increase of Oltchim's debts towards the company.

2.6. Observations provided by the Romanian authorities

2.6.1. On measure no. 1: AAAS – the non-enforcement and further accumulation of debts since September 2012

- 77) According to Romania, the measure is no aid because it is in line with Market Economy Creditor Principle.
- 78) The Romanian authorities claim that after the privatisation failed in 2012, on 31 October 2012 AAAS sent a letter to Oltchim to investigate options for debt recovery but received inconclusive answers. Following that, AAAS examined the available options for the recovery of debt and concluded that it would obtain very little in the liquidation process. Given Oltchim's difficult financial situation and the fact that most of AAAS' debts were unsecured, AAAS judged that the best option for the recovery of its claims would be to pursue the privatisation of Oltchim under the scenario of a debt-to-equity conversion as approved by the 2012 Commission's decision.
- 79) The Romanian authorities also explained that Oltchim entered into insolvency proceedings in January 2013, i.e. very shortly after the privatisation process failed in September 2012. Therefore, AAAS had a very limited time to effectively pursue

²⁹ Decision No 27 of 31 August 2012, Decision no 58 of 31 October 2012, Decision No 61 of 16 November 2012, Decision No 86 of 28 December 2012.

its claims. As explained in recital 25) above, with the entry into insolvency, all claims of Oltchim's creditors were suspended and new ones could not be initiated.

2.6.2. *On measure no. 2: AAAS and SoEs (in particular Electrica, Salrom, CET Govora, National Water Administration) – the 2015 debt cancellation under the Reorganisation Plan;*

- 80) According to Romania, the debt waivers proposed in the Reorganisation Plan were the best option available for the public and private creditors to recover their debts.
- 81) This is mostly because in the liquidation scenario the environmental liabilities (estimated by Oltchim as EUR 463.7 million³⁰) largely exceed the creditors' claims. The Romanian authorities submit that in case of liquidation, environmental liabilities have priority over other claims.³¹ Therefore, under the liquidation scenario, due to high environmental liabilities, all creditors would recover nothing. In contrast, the Romanian authorities submit that in the case of continuing the activity and successfully implementing the Reorganization Plan, Oltchim's environmental liabilities to achieve some specific objectives of the environmental permits of the two platforms are much lower (estimated as EUR 37.8 million). Furthermore, these amounts are to be paid gradually.
- 82) To support its view Romania submitted analyses prepared by AAAS and Electrica which allegedly indicate that the Reorganisation Plan was the best available option for recovery of debts owed to them compared to the liquidation scenario. Romania has not submitted any studies for other public creditors (i.e. Salrom, CET Govora or National Water Administration).
- 83) Romania claims also that due to the Reorganisation Plan Oltchim's financial situation improved significantly (see recital 62) above). This was possible due to a better use of the company's own resources, the proper management of its working capital and reduction of Oltchim's outstanding debt. The Romanian authorities submitted also that the company has not contracted any loans to finance its production.

2.6.3. *On measure no. 3: CET Govora and Salrom - support to the operations of Oltchim in the form of continued supplies since September 2012*

- 84) As regards CET Govora, the Romanian authorities explained that it was necessary to continue electricity supplies to Oltchim to avoid the collapse of the entire network of industrial firms connected to Oltchim. Romania submitted information stating that, for historical reasons, Oltchim acted as a supplier of energy to other companies on the industrial platform Ramnicu Valcea Sud – a conglomerate of companies in this region. Thus, discontinuing the supply of energy to Oltchim

³⁰ Document "Estimation of greening costs for Rm. Valcea chemical platform and Bradu petrochemical platform further to closure of SC Oltchim SA Rm. Valcea plants" prepared by Oltchim's Production Department, date unknown. Romania claims that this estimation takes into account only costs of turning the contaminated area into an "industrial zone" (as turning it into an "agricultural area" would be at least twice as high).

³¹ Based on art. 10 para 4 of GEO 195/2005 on environmental protection, according to which: "*Achieving environmental obligations is a priority in cases of: dissolution followed by liquidation, liquidation, bankruptcy, cessation of activities*" in conjunction with art. 121(1) pt 1 of the insolvency law.

would have also meant discontinuing the electricity supply to other companies, for which Oltchim could have been held liable.

- 85) As regards, Salrom, the Romanian authorities explained that there were sufficient grounds to believe that Oltchim would repay its debts towards the company. Salrom therefore accepted postponing the dates of payment of the debt because of Oltchim's liquidity problems.

3. ASSESSMENT OF THE AID

3.1. Existence of State aid in the meaning of Article 107(1) of the Treaty

- 86) According to Article 107(1) TFEU, "*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 provision of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*".
- 87) Accordingly, for a support measure to be considered State aid within the meaning of Article 107(1) TFEU, it must cumulatively fulfil all the following conditions:
- a) it must be granted by the State or through State resources;
 - b) it must confer a selective advantage by favouring certain undertakings or the production of certain goods; An advantage, within the meaning of Article 107(1) TFEU, is any economic benefit which an undertaking would not have obtained under normal market conditions, *i.e.* in the absence of State intervention;
 - c) it must distort or threaten to distort competition and affect trade between Member States.

3.1.1. *State origin (imputability and use of State resources)*

Measure no 1

- 88) The notion of Member State includes all levels of public authorities, regardless of whether it is a national, regional or local authority³².
- 89) As noted in recital 8), AAAS is a part of the public administration, subordinated to the Government. Therefore the non-enforcement of the debt (capital and interest) by AAAS, the further accumulation of debt as well as the cancelation of sums that should have been normally paid to AAAS burdens the State budget and involves State resources.
- 90) At this stage, in the light of the above, measure no 1 is imputable to the State and involves a transfer of State resources.

³² Case C-248/84 *Germany v Commission*, EU:C:1987:437, para. 17.

Measure no 2

- 91) The Reorganisation Plan was approved by Oltchim's creditors at the Creditors Meeting in March 2015. As indicated in recital 55), several public creditors (AAAS and SoEs, in particular Electrica, CET Govora, National Water Administration, Salrom) voted in favour of the Plan thereby accepting a complete waiver or very substantial reduction of the amounts owed to them by Oltchim. It is the Commission view that public creditors had a real possibility to influence the voting which could have resulted in the rejection of the Plan. As indicated in the recital 31) above, for the Plan to be approved 3 out of 5 categories had to vote in favour. To reject the Plan, it would have been sufficient that the 3 categories where the public creditors prevailed (i.e. budgetary debts, captive suppliers and unsecured debts) vote against it. However AAAS, CET Govora, National Water Administration, Salrom and Electrica voted in favour:
- a) The positive vote of AAAS in the budgetary debts category was the decisive factor in approving the Plan by this category, as AAAS held 93,49% of the debts in this category;
 - b) The positive vote of Electrica in the category of unsecured debts (the holder of the biggest proportion of the debt in that category (i.e. 40.52%)), was the decisive factor in approving the Plan by this category. Had Electrica voted against the Plan, this category would have rejected the Plan. The Commission notes that in the category of unsecured debts, most private creditors voted against the Plan, whereas Electrica voted in favour.
 - c) The captive suppliers (CET Govora and National Water Administration) voted in favour of the Plan which was the decisive factor in approving the Plan by this category.
- 92) In order to constitute State aid, the measures in question have to be financed from State resources and the decision to grant the measure must be imputable to the State. The concept of State aid applies to any advantage granted through State resources by the State itself or by any intermediary body acting by virtue of powers conferred on it³³.
- 93) As noted in recital 89) AAAS is a part of the public administration and its decisions are therefore imputable to the State. The decision to write off sums that should have been normally paid to the State burdens the State budget and thus involves state resources.
- 94) As regard the decisions of the State owned companies (Electrica, CET Govora, Salrom and National Water Administration), the Commission notes that resources of public undertakings constitute State resources within the meaning of Article 107(1) TFEU because the State is capable of directing the use of these resources.³⁴

³³ Case C-482/99 France v Commission ("Stardust Marine") [2002] ECR I-4397

³⁴ Case C-482/99 *France v Commission (Stardust)* EU:C:2002:294, paragraph 38. See also C-278/00 *Greece v Commission* EU:C:2004:239, paragraphs 53 and 54, and Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia S.p.A. v Commission* EU:C:2003:252, paragraphs 33 and 34.

- 95) As regards imputability to the State of an aid measure taken by a public undertaking, according to the case law³⁵, the mere fact that a measure is taken by a public undertaking is not per se sufficient to consider it imputable to the State. The imputability may be inferred from a set of indicators, for example: (i) the integration of an undertaking into the structures of the public administration; (ii) the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators; (iii) the legal status of the undertaking (whether it is subject to public law or ordinary company law); (iv) whether an undertaking could autonomously take a decision in question; (v) the degree of the supervision that the public authorities exercise over the management of the undertaking and (vi) any other indicator showing the involvement of the public authorities in adopting the measure in question or the unlikelihood of their not being involved, taking account of the scope of the measure, its content or the conditions it contains.
- 96) CET Govora is owned 100% by the Valcea County council, and thus the Romanian State. CET Govora, therefore, constitutes a public undertaking within the meaning of Article 2 (b) of Directive 2006/111/EC³⁶. The State, as the sole shareholder of CET Govora, has appointed the supervisory board of this company, which, in turn, has appointed its management. The State therefore fully supervises the management of the undertaking and could have impeded the adoption of the measure at stake. The Commission, therefore, at this stage considers that this decision is imputable to the State.
- 97) The same applies to the National Water Administration which is a national public institution with legal personality, financed from its own funds coordinated by the Ministry of Environment, Waters and Forests. The company has been established through public law - the Government Decision nr. 981 of 29 December 1998 and its Organisational Statute has been approved by the Government Decision nr. 1176 of 29 September 2005. Given the legal status of the National Water Administration and the fact that it is supervised directly by the Ministry of Environment, Waters and Forests, the Commission at this stage considers that its decisions are imputable to the State.
- 98) Electrica is 48, 78% owned by the Romanian State. The rest of Electrica's shareholders are extremely scattered. The EBRD is the next biggest shareholder with 8, 65% of the shares. The State therefore exercises *de facto* control of the company. Important decisions about the business of Electrica, its debts and contracts, are taken at the Shareholders Meeting. Any loan or investment to be contracted by Electrica of an amount higher than 50 mln EUR needs to be approved by the Shareholders Meeting³⁷. The decision to approve the 2015 Reorganisation

³⁵ Case C-482/99 *France v Commission (Stardust)* EU:C:2002:294, paragraphs 55 and 56. See also the Opinion of Advocate General Jacobs, Case C-482/99 *France v Commission (Stardust)* EU:C:2001:685, paragraphs 65 to 68.

³⁶ Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as financial transparency within certain undertakings (OJ L 318, 17.11.2006, page 17).

³⁷ Electrica Constitutive Act, Articles of Association, Annex 1: <http://www.electrica.ro/wp-content/uploads/2015/07/var-www-clients-client64-web364-web-wp-content-uploads-2015-12-Statut-Electrica-18-12-2014.pdf>

Plan and thereby to cancel EUR 112.5 million of Electrica's claims thus required the approval of the State as the biggest shareholder. The Commission, therefore, at this stage considers that this decision is imputable to the State.

- 99) The Commission also considers that there are indications that the decisions of Salrom are imputable to the State, as 51% of its shares are held by the Ministry of Economy of Romania and the Ministry of Economy proposes the candidate for the General Director position to the Administrative Board.
- 100) The Commission invites Romania to submit more information to confirm or reject the Commission's preliminary view on the imputability of the decisions of Salrom, CET Govora, National Water Administration and Electrica to the State.
- 101) At this stage, in the light of the above, measure no 2 appears to be imputable to the State and to involve a transfer of State resources.

Measure no 3

- 102) For the reasons set out above (recitals 95) and 99), the Commission considers at this stage that the decisions of CET Govora and Salrom are imputable to the State. As regards CET Govora, the Commission notes in addition, as explained in point 19, that the decisions to sign a new electricity contract with Oltchim and then to increase the supplies were taken in the implementation of several decisions issued by the Valcea County Council to ensure electricity supply to Oltchim.
- 103) Since both companies are State owned, the Commission also considers that their decision to postpone the deadline for payments and to continue supplies, burdens State resources.
- 104) At this stage, in the light of the above, measure no 3 appears to be imputable to the State and to involve a transfer of State resources.

3.1.2. Selective economic advantage

Measure no 1

- 105) The treatment of Oltchim's debt held by AAAS was already analysed in the 2012 Commission decision. The Commission therefore considers it appropriate to analyse the behaviour of AAAS following this decision.
- 106) In this respect, the Commission has doubts whether AAAS acted as a market economy operator after Oltchim's privatisation had failed in 2012. A private creditor is normally seeking to obtain the maximum payment of sums owed to it by a debtor in financial difficulties.³⁸
- 107) In this regard, the Romanian authorities claim that AAAS carefully examined the available options for debt recovery in 2012 and concluded that, given the low degree of recovery in case of liquidation and the alleged lack of interest in buying the AAAS debt, the debt-to-equity conversion followed by privatisation, as approved by the 2012 Commission decision, was still the best option.

³⁸ See, to that effect, Case C-342/96 *Spain v Commission* [1999] ECR I-2459, paragraph 46, and C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 24.

- 108) In this respect the Commission notes that the conclusion in its 2012 decision was predicated on the condition that the company was fully privatised in the short-term after the debt conversion. However, because of decisions taken by Oltchim's shareholders (notably the State (via the Ministry of Economy) as the majority shareholder) both the debt-to equity conversion and the privatisation failed.
- 109) It is the Commission's preliminary view that, following this failure, AAAS should have asked for the immediate repayment of its debts. In September 2012 it was clear that Oltchim would not be privatised in the short-term. Furthermore, AAAS could not reasonably assume that by postponing the decision to call for repayment of its claims, it would be better off. In fact, Oltchim's situation was deteriorating every day to the point that it entered the insolvency proceedings.
- 110) Instead, AAAS did not enforce the recovery of debts owed to it and in November 2012 even signed the Memorandum of Understanding with public and private creditors of Oltchim (see recital 20). The Memorandum in practice allowed for a further accumulation of debts and a preferential financing of Oltchim's activities. It was not based on any analysis showing that Oltchim would be able to restart its production and improve its financial situation.
- 111) The Commission considers that it is not acceptable for public authorities to allow debts to run up over long periods without the slightest prospect of improvement.³⁹ In the case at hand, AAAS would have obtained a 12% recovery of its claim (see recital 14) above) if it had pursued its claims in 2012 by way of Oltchim's liquidation. In addition, it would have ensured that no further debts accumulate.
- 112) The Commission therefore invites the Romanian authorities to provide comments and information, available after the privatization had failed, that led AAAS to refrain from an immediate recovery of its claims through the liquidation procedure.

Measure no 2

- 113) The Commission has doubts whether AAAS, Electrica, CET Govora, National Water Administration and Salrom acted as a market economy creditors by approving the Reorganisation Plan in March 2015 leading to significant debt waivers.⁴⁰
- 114) In practice, when a firm faced with a substantial deterioration of its financial situation proposes an agreement for debt arrangements to its creditors with a view to remedying the situation and avoiding liquidation, each creditor must make a decision having regard to the amount offered to it under the proposed agreement, on the one hand, and the amount it expects to be able to recover following possible liquidation of the firm, on the other. Its choice is influenced by a number of factors, including the creditor's status as the holder of a secured, preferential or ordinary claim, the nature and extent of any security it may hold, its assessment of the chances of the firm being restored to viability, as well as the amount it would

³⁹ Case C-480/98, AG Mischio opinion in *Magefesa*, ECLI:EU:C:2000:305, para 37.

⁴⁰ Case C-342/96 *Tubacex*, ECLI:EU:C:1999:210, para. 46, case C-256/97 *DMT* ECLI:EU:C:1999:332, para. 21, case C-480/98 *Magefesa*, ECLI:EU:C:2000:559, case T-152/99 *HAMSA*, ECLI:EU:T:2002:188, para 167.

receive in the event of liquidation.⁴¹ An agreement by a public body to reduce an undertaking's debt will constitute an economic advantage where the reduction is greater than would have been granted by a private creditor in a comparable position.⁴²

- 115) As regards AAAS, having regard *inter alia* to the abovementioned factors, the Commission has doubts whether the debt remission granted by AAAS was the best of the available options for the recovery of sums owned to it. As explained above, it is the Commission's preliminary view that out of the scenarios available, AAAS should have used enforcement proceedings to seize and enforce the sale of the debtor's assets immediately after the failure of the privatisation in 2012 instead of engaging in a long process of reorganisation.
- 116) In the liquidation scenario, having regard to data available at the time of the 2012 Commission decision, AAAS would have recovered around RON 105.4 million (around EUR 23 million), representing 12% of the total claim (see recital 14) above). This outcome can be qualified as rather certain, given that the success of a liquidation procedure does not depend on the availability of one single buyer and in view of the restrictive assumptions concerning the sales price for the individual assets.
- 117) In the approved reorganization scenario AAAS may potentially collect RON 241 million (EUR 53 million), representing 20% of the total claim. This recovery amount is, however, completely uncertain, as it relies on the success of the planned privatisation. The main source of the repayment of the debts is the future price to be achieved from the sale of Oltchim SPV shares, estimated at EUR 307 million. The Commission's view is that due to the failure of the previous privatisations, any private creditor would carefully scrutinise the privatisation prospects of its debtor.
- 118) In this regard, the Commission has doubts whether AAAS carefully evaluated the likelihood of a successful privatisation, as well as the expected sales price. Romania claims in this respect that AAAS based its decision on a "Market Economy Creditor Principle study" ("AAAS MECP study"). The Commission has doubts whether this study provides for a suitable basis that a private investor would have used in these circumstances for the following reasons:
 - a) The AAAS MECP study has no date. Therefore, the Commission wonders whether the study was actually prepared before the Reorganisation Plan was approved at the Creditors Meeting on 9 March 2015.
 - b) The AAAS MECP study does not rely on any independent reports, except occasionally referring to data from the studies that were commissioned by Oltchim during the insolvency proceedings (i.e. the Winterhill report and the Reorganisation Plan).
- 119) Even if the AAAS MECP study was produced at the time of making the decision to approve the Reorganisation Plan, the Commission doubts that it was a sufficient basis for AAAS decision, in particular in view of the following facts:

⁴¹ Case T-152/99 *HAMSA*, para 168.

⁴² Case T-1/08 *Buczek Automotive*, ECLI:EU:T:2011:216, para 84.

- a) Numerous previous attempts to privatise Oltchim have already failed (see recital 10) above). Yet, the AAAS MECP study does not analyse the probability of a successful privatisation.
 - b) At the time when the Plan was proposed and agreed, there was no investor and no reliable information on the price that could be obtained. The authors of the Plan themselves note this weakness (page 96): "*there is no reliable information on the date of the sale of Oltchim SA's assets and business or the price to be obtained. Consequently, the hypothesis below may suffer changes that will materialise in proposals to amend the Plan*".
 - c) In the period 30 January 2013 (start of the insolvency proceedings) and 9 March 2015 (when the Creditors approved the Plan), there were several unsuccessful attempts to sell Oltchim SPV shares (see recital 63) above), which further underline that the main assumption of the Plan is highly questionable. Yet, in March 2015 AAAS voted in favour of this Plan.
 - d) The Reorganisation Plan and the AAAS MECP study do not explain how the future value of Oltchim SPV shares was estimated (EUR 307 million), but merely state that the price is higher than the MV established by the Winterhill Report. Although Romania claims that the Court approved the estimated sale value of EUR 307 million, it must be pointed out that the Court verified only the compliance with legal provisions (i.e. whether the starting negotiation price is higher than the estimated market value of the assets). The Court did not assess whether it was reasonable to expect that a price from the sale of Oltchim SPV assets would amount to EUR 307 million and the AAAS MECP study also makes no assessment of this assumptions.
 - e) Initially, AAAS had questioned the valuation price established in the Winterhill Report and had filed a complaint against the Creditor Meeting decision approving the Winterhill Report (see recital 46) above). It is therefore surprising that later on in March 2015, AAAS agreed to the Reorganisation Plan which was largely based on the estimations of the Winterhill Report.
 - f) AAAS initial doubts about the expected sales price of EUR 307 million were particularly pertinent in view of the fact that this amount is a multiple of the market value of equity that Raiffeisen had established in 2011 as ranging between EUR 28 million and EUR 97 million and which was the basis of the 2012 Commission decision.
 - g) Finally, the Plan favours the reorganisation scenario against the liquidation by taking into account a number of factors that a private market operator normally does not take into account while making its business decisions, such as: (i) continuity of an important player on the European petrochemical market; (ii) significant positive social and economic implications at a local level due to partial or full jobs maintenance; (iii) an important local tax payer will remain active.
- 120) Romania claims that AAAS decided to approve the Reorganisation Plan instead of the liquidation because of the environmental liabilities (EUR 463.7 million) which in the liquidation scenario would largely exceed the creditors' claims. According to

Romania, due to the priority treatment of those environmental liabilities, the creditors would not recover anything in the liquidation scenario. The Commission considers this analysis doubtful, in particular in view of the following facts:

- a) The environmental liabilities are based only on internal estimates of Oltchim which are not supported by any external valuations.
 - b) The environmental liabilities seem to be predicated on the assumption that in liquidation all activities at Oltchim's site cease and the site needs to be decontaminated and turned into an "industrial zone". This assumption seems unfounded as a liquidation scenario could also lead to a situation where a large part of the assets is bought by a purchaser that wants to continue similar industrial activities at the site of Oltchim. In contrast, in the case of continuing the activity and successfully implementing the Reorganization Plan, Oltchim's environmental liabilities stemming from the environmental permits would be much lower (around EUR 37.8 million).
 - c) The environmental liabilities seemed exaggerated to AAAS which in its MECP study points out: "*The environmental costs estimated by the company based on the Integrated Environmental Permit No 14 revised on 18 June 2012, which were expected to amount to approximately EUR 464 million as compared to those specified in ROMCONTROL's report, i.e. EUR 91.4 million, seem to be exaggerated.*"
 - d) The environmental costs should normally already have been included in the liquidation price estimated by the independent evaluator. Indeed, the Winterhill Report seems to have taken such costs into account (see recital 44) above). It is unclear why Romania counts those costs twice.
 - e) In the analysis that Romania presented to the Commission as a basis for the 2012 Commission decision, the environmental costs were not taken into account as a priority in the distribution of amounts between creditors. Accordingly, in the liquidation scenario analysed in the 2012 Commission decision, there were funds to cover not only AAAS' secured debts but also partially unsecured budgetary debts. The Commission wonders about this change in approach and the alleged priority treatment of environmental costs under the liquidation scenario.
- 121) The Commission's doubts about the behavior of AAAS are further strengthened by the fact that DGFP Craiova ("DGFP"), another public creditor which was in a comparable position to AAAS, came to the opposite conclusion and voted against the Plan. DGFP can be compared to AAAS because, like AAAS, it was part of both the group of budgetary creditors and the group of secured creditors and its budgetary claims exceeded the secured claims. Under the proposal, DGFP would need to accept a write-off of 67% of its claims towards Oltchim. It would thus have obtained more than AAAS which agreed to a 80% write-off. Still, DGFP voted against the Plan. Romania has provided no explanation for the reasons for such radically different opinions between those two public creditors in a similar position.
- 122) Therefore, the Commission preliminarily concludes that by approving the debt cancellation under the Reorganisation Plan, AAAS acted in a different way than a market economy operator and therefore granted a selective advantage to Oltchim.

- 123) At this stage of the procedure, the Commission does not rule out the possibility that the aid amount is equal to the total amount of the approved debt reduction.
- 124) The Commission therefore invites the Romanian authorities to explain the analyses and information obtained after the privatization had failed, that led AAAS to approve the Reorganisation Plan.
- 125) In addition to AAAS, a number of SoEs, mostly suppliers of Oltchim, also approved the Reorganisation Plan. The most important of these is the electricity supplier Electrica to which Oltchim owed RON 658.8 million (EUR 144.9 million).
- 126) Also for Electrica, the Commission doubts whether it behaved as a market economy operator when accepting the Plan. It is the Commission's preliminary view that Electrica would have been better off by pursuing a liquidation of Oltchim and a more certain recovery of sums owned to it than the uncertain scenario of debt recovery through a future privatisation. Electrica should have pursued an immediate liquidation after the failed privatisation of September 2012, in particular since Oltchim's total debt towards Electrica further increased from EUR 99.5 million (as of June 2011) to EUR 144.9 million (as of January 2013). By approving the 2015 Reorganisation Plan Electrica agreed to cancel EUR 112.5 million of its claims in view of the uncertain recovery of only 24% (around EUR 35 million) of its total claim.
- 127) Similarly as in case of AAAS (see recital 119) above), the Commission has doubts whether Electrica carefully analysed the viability of a privatisation, as well as the expected sales price.
- 128) The Commission has also reasonable doubts whether the Market Economy Creditor Principle study of Electrica ("Electrica MECP study") was actually prepared before the Reorganisation Plan was approved at the Creditors Meeting on 9 March 2015. Electrica's study suggests that it was prepared *ex post*, as it states: "in light of the above, we specify that Electrica voted [*sic*] for the approval of the reorganizational plan".
- 129) Furthermore, the Electrica MECP study does not rely on any independent reports, except occasionally referring to data from the studies that were commissioned by Oltchim during the insolvency proceedings (i.e. the Winterhill Report and the Reorganisation Plan). All Commission remarks as to the weaknesses of the Reorganisation Plan as pointed out in recital 119) above concerning AAAS, apply to Electrica's decision *mutatis mutandis*.
- 130) The Commission also expresses the same doubts as in case of AAAS as regards the treatment of environmental liabilities under the liquidation scenario (see recital 120) above).
- 131) The Commission's doubts about the behavior of Electrica are further strengthened by the fact that Electrica Furnizare, another public creditor which was in a comparable position to Electrica, came to the opposite conclusion and voted against the Plan. Electrica Furnizare can be compared to Electrica, as both companies had claims in the secured and the unsecured category and for both companies the amount of unsecured claims exceeded the amount of secured ones. Under the proposal, Electrica Furnizare would need to accept a write-off of 62% of its claims towards Oltchim. It would thus have obtained more than Electrica which agreed to

a 76% write-off. Still, Electrica Furnizare voted against the Plan. Romania has provided no explanation for the reasons for such radically different opinions between those two public creditors in a similar position.

- 132) Therefore, the Commission preliminarily concludes that by approving the debt cancellation under the Reorganisation Plan, Electrica acted in a different way than a market economy operator and therefore granted a selective advantage to Oltchim.
- 133) At this stage of the procedure, the Commission does not rule out the possibility that the aid amount is equal to the total amount of the approved debt reduction.
- 134) Finally as regards the debt cancellations approved by other SoEs (CET Govora, Salrom, National Water Administration) Romania has not submitted any study or analysis which would show that their decisions to approve the Reorganisation Plan complies with the private market creditor test.
- 135) The Commission therefore invites the Romanian authorities to provide comments and information, available after the privatization has failed that led Electrica and the other SoEs to refrain from a recovery of their debts through the liquidation procedure and to approve the Reorganisation Plan.
- 136) Finally, the Commission invites Romania to provide information on the debt write offs actually implemented after the Plan was approved, indicating the name of the creditor, the exact sum of debts cancelled and the date of the debt cancellation.

Measure no. 3

- 137) As explained by the Romanian authorities (see recital 19)), Oltchim was able to restart production in 2012 thanks to the decision of CET Govora and Salrom to continue supplies to Oltchim despite its non-payment of outstanding debts.
- 138) The Commission doubts that a market economy operator would have taken the same decisions as these two publicly owned companies in view of Oltchim's economic difficulties.
- 139) As regards Salrom, the Romanian authorities have not provided any evidence that could justify the claim that the company believed that Oltchim would repay its debts towards the company.
- 140) As regards CET Govora, it appears that the decision to continue supplies to Oltchim was not taken voluntarily by the company, but that it was forced to do so through several decisions⁴³ issued by the Valcea County Council to ensure electricity supply to Oltchim.
- 141) By allowing Oltchim to meet its supply needs in a situation of enormous debt, non-payment of liabilities and halt of production, the measure seems to have granted a selective advantage to Oltchim that it would not have been able to obtain under normal market conditions.

⁴³ Decision No 27 of 31 August 2012, Decision no 58 of 31 October 2012, Decision No 61 of 16 November 2012, Decision No 86 of 28 December 2012.

3.1.3. Distortion of competition and effect on trade between Member States

- 142) The Commission has also analysed whether the measures distort or threaten to distort competition and affect intra-EU trade. If aid granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid.⁴⁴
- 143) By granting Oltchim the possibility to continue its activities, to reorganise its activities and to write-off public debts, the measures are liable to improve Oltchim's competitive position compared to its competitors on the internal market. Oltchim is active in the production of basic chemicals, which are highly competitive markets in Europe and worldwide (see recital 5) above). Therefore, at this stage, Commission concludes that the measures have the potential to distort or threaten to distort competition and affect trade between Member States.

3.1.4. Legality of the aid

- 144) The Commission notes that measures no. 1, 2 and 3 were granted in years 2012-2015 in breach of stand-still obligations laid down in Article 108(3) TFEU.
- 145) Therefore, the Commission comes to the conclusion that, should the measures be found to be State aid within the meaning of Article 107(1) TFEU, they would constitute unlawful State aid.

3.1.5. Conclusion

- 146) At this stage, the Commission considers that the measures no. 1, 2 and 3 are likely to constitute State aid within the meaning of Article 107(1) TFEU, but invites observations from interested parties on its preliminary conclusions.

3.2. Compatibility of the aid and legal basis for the assessment

- 147) It is settled case-law that a Member State which seeks to be allowed to grant aid by way of derogation from the Treaty rules has a duty to collaborate with the Commission. In pursuance of that duty, it must in particular provide all the information to enable the Commission to verify that the conditions for the derogation sought are fulfilled.⁴⁵ In this case, the Romanian authorities do not claim any legal basis for the compatibility assessment.
- 148) Given that Oltchim qualifies as an undertaking in difficulty, the only ground for compatibility could be rescue and restructuring aid based on the 2014 R&R Guidelines. 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 any of the measures. In particular, 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

⁴⁴ See e.g. judgment in *Philip Morris v. Commission*, Case 730/79, EU:C:1980:209, paragraph 11, and judgment in *Italy v. Commission*, C-372/97, EU:C:2004:234, paragraph 44.

⁴⁵ See Case C-364/90, *Italian Republic v Commission of the European Communities*, EU:C:1993:157, paragraph 20.

Reorganisation 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.

3.3. Possible economic continuity due to the sales procedure of Oltchim as set out in the Reorganisation Plan

- 149) The Commission decision-making practice upheld by the Union Courts indicates that, in certain circumstances, the buyer of the assets and business of an undertaking having received State aid which is declared to be incompatible with the internal market may be called to repay such aid to the extent that the attempts to recover it from the initial beneficiary are unsuccessful. In such instances, the economic continuity between the initial beneficiary of the incompatible aid and the acquired undertaking need to be established.
- 150) The assessment of economic continuity between two entities is based on a set of indicators, such as: the scope of the sold assets (assets and liabilities, maintenance of workforce, bundle of assets), the sale price (such as a market price determined via open, public, unconditional and non-discriminatory tender, offering the bidders the choice as to how the assets are sold, e.g. either individually, by clusters or *en bloc*), the identity of the buyer(s), the moment of the sale and the economic logic of the operation.⁴⁶
- 151) The above indicators would in principle determine whether there is economic continuity, and therefore whether a possible undue advantage of Oltchim would be passed-on to the undertaking owned by a future buyer.
- 152) As indicated in recital 47)a), the approved Reorganisation Plan led to the creation of a new entity (Oltchim SPV) and the transfer of all viable assets from Oltchim SA to the latter. Oltchim SPV has taken over the functional part of Oltchim SA as a going concern. The following assets have been transferred to Oltchim SPV: the assets of Oltchim SA located in Ramnicu Valcea industrial platform and the Bradu Petrochemical Division, the intellectual property rights, the brand, the customers, the contracts signed with suppliers and customers, and all the employees of Oltchim SA existing at the time of transfer in each industrial site, all the authorisations and permits required for the company's operation and business. Oltchim SPV is a company free of debts (i.e. all debts remain with Oltchim SA) which is 100% owned by Oltchim SA.
- 153) Oltchim SA's shares in Oltchim SPV shall then be sold in 1-3 years to an investor. There is no requirement as to the use of open, public and non-discriminatory tender, but merely a reference to a direct negotiation method.
- 154) Taking into account the above, the Commission at this stage considers that the sale process as set out in the approved Reorganisation Plan will lead to economic continuity between Oltchim SA and a possible acquirer of Oltchim SPV. The acquisition will take place via the acquisition of shares of the whole company, rather than individual assets, which is already a strong indicator of economic

⁴⁶ This set of indicators was confirmed by the Union Courts, which confirmed the Commission's Alitalia decision (judgment of the General Court in case T-123/09 *Ryanair v. Commission* EU:T:2012:164; and judgment of the Court in case C-287/12 P *Ryanair v. Commission* EU:C:2013:395).

continuity. In addition, the Plan includes a set of other conditions that indicate economic continuity, in particular transfer of all employees, brand, existing contracts and suppliers, as well as environmental permits.

- 155) Moreover, the Commission notes that the Plan does not provide for the achievement of the highest possible market price for Oltchim SPV by means of an open, public, unconditional and non-discriminatory tender.
- 156) The Commission therefore considers at this stage that an entity acquiring Oltchim SPV would be liable for the recovery of possible incompatible aid previously granted to Oltchim SA (prior to the acquisition of the assets).
- 157) In the light of the above, the Commission invites comments on the application to Oltchim of the sale procedure set out in the approved Reorganisation Plan.

4. CONCLUSIONS

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Romania to submit its comments and to provide all such information as may help to assess the aid/measure, within one month of the date of receipt of this letter. It invites your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind Romania that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Romania that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will 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:

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Yours faithfully
For the Commission

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