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COMMISSION DECISION

of 17.12.2018

ON THE STATE AID
SA.36086 (2016/C) (ex 2016/NN)
implemented by Romania
for Oltchim SA

(Text with EEA relevance)

(Only the Romanian version is authentic)

TABLE OF CONTENTS

1. Procedure ... 3
2. Background ... 5
2.1. Beneficiary ... 5
2.2. Facts ... 5
2.2.1. The public debt of Oltchim and failed privatisation attempts (1995-2011) ... 5
2.2.2. The 2012 Commission decision ... 6
2.2.3. Oltchim's situation after the failed privatisation of 22 September 2012 ... 7
2.2.4. Oltchim's insolvency proceedings as from 30 January 2013 ... 9
2.2.4.1. The legal framework: the Romanian insolvency law ... 9
2.2.4.2. Preparation and approval of Oltchim's Reorganisation Plan ... 12
2.2.4.3. Implementation of the Reorganisation Plan ... 21
3. The Commission Decision to open the formal investigation procedure ... 22
4. Comments on the Opening Decision ... 24
4.1. Romania's submissions ... 24
4.1.1. Romania's comments regarding Measure 1: ... 24
4.1.2. Romania's comments regarding Measure 2: ... 25
4.1.3. Romania's comments regarding Measure 3: ... 25
4.2. Comments from interested third parties ... 27
4.2.1. Rominsolv and BDO ("R/BDO", the official receivers of Oltchim in the insolvency proceedings) ... 27
4.2.2. Electrica ... 29
4.2.3. Confidential [anonymous] interested third party ... 29
4.2.4. PCC ... 30
4.2.4.1. PCC's comments regarding Measure 1 ... 30
4.2.4.2. PCC's comments regarding Measure 2 ... 30
4.2.4.3. PCC's comments regarding Measure 3 ... 31
4.3. Comments from Romania on the observations from third parties ... 34
4.3.1. Romania's further comments regarding Measure 1: ... 34
4.3.2. Romania's further comments regarding Measure 2: ... 34
4.3.3. Romania's further comments regarding Measure 3: ... 34
5. Sale Process of Oltchim's assets ... 36
6. Assessment of the aid ... 38
6.1. Existence of State aid within the meaning of Article 107(1) TFEU ... 38
6.1.1. State origin (imputability and use of State resources) ... 38

6.1.1.1. Measure 1: AAAS – the non-enforcement and further accumulation of debts between September 2012 and January 2013 38
6.1.1.2. Measure 2: CET Govora and Salrom - support to the operations of Oltchim in the form of continued unpaid supplies since September 2012..... 39
6.1.1.3. Measure 3: AAAS and SoEs (in particular Electrica, Salrom, CET Govora, National Water Administration) – the 2015 debt cancellation under the Reorganisation Plan 41
6.1.2. Selective economic advantage 46
6.1.2.1. Measure 1: AAAS – the non-enforcement and further accumulation of debts since September 2012..... 47
6.1.2.2. Measure 2: CET Govora and Salrom - support to the operations of Oltchim in the form of continued unpaid supplies since September 2012..... 51
6.1.2.3. Measure 3: AAAS and SoEs (in particular Electrica, Salrom, CET Govora, National Water Administration) – the 2015 debt cancellation under the Reorganisation Plan 55
6.1.2.4. Overall assessment of economic advantage and State imputability of Measures 1, 2 and 3 65
6.1.3. Distortion of competition and effect on trade between Member States..... 66
6.1.4. Conclusion on the existence of the aid..... 67
6.1.5. Legality of the aid 67
6.2. Compatibility of the aid and legal basis for the assessment..... 67
6.3. Recovery 69
6.4. The issue of economic continuity in the sale of Oltchim..... 70
6.4.1. Scope of the assets sold under the revised Reorganisation Plan..... 71
6.4.2. The sale price 72
6.4.3. The identity of the buyer(s)..... 74
6.4.4. The moment of the sale..... 74
6.4.5. The economic logic of the operation..... 74
6.4.6. Conclusion on the economic (dis)continuity of Oltchim through the sale of assets to Chimcomplex, DSG and other potential buyers for the remaining unsold bundles... 75
7. Conclusion..... 76

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In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus […]		PUBLIC VERSION • This document is made available for information purposes only.

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

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

Having called on interested parties to submit their comments pursuant to the provision(s) cited above[1] and having regard to their comments,

Whereas:

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") into equity. On 7 March 2012, by decision in case SA.29041 – *Support measures in favour of Oltchim SA Râmnicu Vâlcea* ("the 2012 Commission decision")[2], the Commission concluded that the debt conversion of RON 1,049 million (EUR 231 million) did not entail State aid. That conclusion was based on the firm commitment of the Romanian Government to privatise Oltchim in full, including the whole stake resulting for the public authorities after the debt conversion.

[1] OJ C 284, 5.08.2016, p. 7.
[2] OJ L 148, 1.6.2013, p. 33.

(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 rescue aid to Oltchim (registered as SA.35558).

(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 resumption of Oltchim's production. Against this background, the Commission decided to open an *ex officio* case registered as SA.36086 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, which Romania provided 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.

(5) By letter dated 8 April 2016, the Commission informed Romania that it had decided to initiate the procedure laid down in Article 108(2) TFEU in case SA.36086.The Commission decision to initiate the procedure was published in the *Official Journal of the European Union.*[3] The Commission invited interested parties to submit their comments on the aid.

(6) The Commission received initial comments from Romania (15 June 2016) and from four interested parties. Third party comments were forwarded to Romania, which was given the opportunity to react; its comments were received by letter dated 28 November 2016.

(7) By letter of 29 July 2016, Romania proposed a modification to the sale process of Oltchim for the purpose of achieving economic discontinuity. The Romanian authorities supplied additional information (on 14 September 2016, 4 November 2016 and 5 December 2016), and modified the terms of the initial sale process.

(8) Following the above-mentioned exchanges, the consulting firm AT Kearney, in its quality of representative of Oltchim ("the Seller") provided successive reports on the progress of the asset sale of Oltchim on 27 January 2017, 4 April 2017, 25 July 2017, 15 September 2017, 21 November 2017, 18 January 2018, and 16 July 2018.[4]

(9) During the sale process, a number of third parties intervened and the Romanian authorities provided comments on each of these interventions.

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[3] Cf. footnote 1.

[4] There were a number of 7 Reports to DG Competition on Oltchim's Asset Sale Structure and Process, each covering a different period of the sale process as follows: "the 1st Report" (July 2016 – 23 January 2017) , "the 2nd Report" (23 January – 30 March 2017), "the 3rd Report" (30 March – 21 July 2017), the "4th Report" (21 July – 15 September 2017), "the 5th Report" (16 September – 17 November 2017), "the 6th Report" (17 November 2017 – 18 January 2018), and "the 7th Report" (18 January 2018 – 16 July 2018).

(10) An additional request for information was sent to Romania on 26 January 2018 to which Romania replied on 16 May 2018.

2. BACKGROUND

2.1. Beneficiary

(11) 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.

(12) 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. Oltchim exports over 74 % of its production inside and outside of Europe.[5]

(13) Oltchim is the main industrial employer in Vâlcea (a Romanian region assisted under Article 107(3)(a) TFEU). In 2015 Oltchim employed 2,208 employees, of which, 1,982 employees at the Râmnicu Vâlcea site and 226 employees at the site of the Piteşti – Petrochemical Division Bradu.

2.2. Facts

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

(14) Oltchim has a long history of economic difficulties. Over the period 1995-2000 it contracted a series of commercial loans, backed with State guarantees. 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"[6]). 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.

(15) Over the years 2007-2012 Oltchim's 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.

(16) Romania made several attempts to privatise Oltchim (in 2001, 2003, 2006, 2007 and 2008) but all failed.

(17) Specifically, in 2001, the State negotiated and signed with the Canadian mining company Exall Resources the sale of a 53.2 % stake. As the purchaser failed to pay

5 Data from Romania's submission of 23 October 2015.

6 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.

the value of the shares (USD 10 million, that is approximately EUR 8.9 million[7]) and failed to guarantee the technological and environmental investments promised, the deal was no longer pursued[8]. In 2002 the State decided to attempt a new call for privatisation, opting for the conversion of the AVAS (precursor of AAAS) debt into equity. However, the deadline for submitting bids was postponed twice and given the opposition of a potential investor and of minority shareholders including by action in Court, in 2003 the offer was revoked[9]. Subsequently, after the revocation in 2006 of a conversion of the debt originally approved in 2003, the Romanian authorities again tried to privatize Oltchim together with the debt in 2006 and 2008. However, according to the Romanian authorities, no investor was interested in buying Oltchim under such conditions.[10]

2.2.2. The 2012 Commission decision

(18) By the 2012 Commission decision, the Commission decided that the planned conversion into equity of debt towards AAAS of RON 1,049 million[11] (circa EUR 231 million) did not entail State aid. This decision was 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.[12]

(19) The Commission took this view after having analysed critically the reports prepared by independent consultants[13] and submitted by the Romanian authorities in the course of proceedings. Those reports compared the proceeds from a liquidation of Oltchim with those of a privatisation. In the liquidation scenario, the value of Oltchim's assets was estimated as RON 692,055,000 (EUR 152.2 million), comprising RON 264,119,000 for pledged assets and RON 427,936,000 for unpledged assets.[14]

(20) 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.

(21) 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

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7 Average exchange rate between EUR and USD in 2001 was 1 EUR=0.89 USD.

8 See Article available at: http://www.zf.ro/companii/inca-o-privatizare-esuata-2994230

9 See Article available at: http://www.zf.ro/companii/apaps-o-ia-de-la-capat-in-povestea-de-privatizare-a-oltchim-2969252 .

10 See recitals 28 et subseq. of the Commission's Decision of 15 September 2009 opening an investigation procedure with respect to support measures in favour of Oltchim SA Râmnicu Vâlcea available at: http://ec.europa.eu/competition/state_aid/cases/233028/233028_1337483_956_3.pdf .

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

12 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.

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

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

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.[15]

(22) 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 firm commitment taken by the Romanian authorities at the time, to privatise the company in full by 31 May 2012*."[16]

(23) However, Oltchim did not implement the debt-to-equity conversion of AAAS debt as approved by the 2012 Commission decision. Production had just been suspended in August 2012 following a refusal of Oltchim's main electricity supplier Electrica S.A. ("Electrica") to provide services without being paid.

(24) Immediately after Oltchim ceased operation the Romanian authorities started to send clear signals to the public about their readiness to do all possible efforts to save Oltchim. Only a few days before the privatisation date, the Romanian Minister of Economy at the time indicated between 2 to 4 weeks as a timespan for the re-starting of Oltchim's production. He was quoted as saying that he had "*discussed with the management of the complex who has a plan of re-launching of installations*". [17]

(25) On 22 September 2012 the privatisation process failed, with a few cases pending before the national courts in relation to the privatisation's process.[18]

2.2.3. Oltchim's situation after the failed privatisation of 22 September 2012

(26) After the failed privatisation, Oltchim's financial situation further deteriorated. During the immediate period following the failed privatisation, the Romanian authorities reiterated their readiness to do the necessary to save Oltchim.[19]

(27) On 1 October 2012, a new strategy for the preparation of Oltchim's activity including financial support in the form of rescue aid was envisaged. In a contemporaneous press article, the Romanian Prime-minister at that time explained that the privatisation procedure has failed and added that , "*[w]e have to explain today the reserve plan for resuming activities, saving jobs and preparing a new privatisation procedure, under very different, considerably improved conditions*." [20] In the same

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15 See Table 7 in the 2012 Commission decision.

16 The 2012 Commission decision, point 153.

17 See for instance press articles of 19 September 2012 available at http://economie.hotnews.ro/stiri-companii-13255610-ministrul-economiei-daniel-chitoiu-din-informatiile-noastre-deja-mai-multi-investitori-interesati-depuna-ofertele-pentru-combinat-firme-din-vest.htm?nomobile= .

18 See Romania's Answer to the Opening of the Investigation by the Commission, submission of 15 June 2016, paragraph 64.

19 See for instance: 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.sitevechi.impactreal.ro/2012111813712/Ministerul-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.

20 See press Article of 1 October 2012 available at: https://www1.agerpres.ro/politica/2012/10/01/victor-ponta-am-cerut-ca-abordarea-fata-de-oltchim-sa-fie-complet-schimbata-joi-vom-prezenta-planul-de-relansare-21-19-23

vein, the Prime-minister announced an upcoming agreement with various creditors for rescuing the company: "*Oltchim's restarting plan will be presented on Thursday and will provide for the next steps on the Vâlcea plant […] Minister of Economy, Commerce and Business Environment […] and the Finance Minister will start to officially discuss with all the main creditors, AVAS, Electrica and the three banks that are the main creditors of Oltchim: BCR, Banca Transilvania and CEC. Together with them, we will present on Thursday the plan to relaunch Oltchim, which clearly sets out the necessary steps for a new management at Oltchim, to finance the restarting of the production, the period of the activity, the payment of outstanding salaries and the preparation for the privatisation that will most likely occur during 2013, under conditions other than those in which it is currently taking place*". [21]

(28) On 17 October 2012, the State Secretary of the Ministry of Economy declared to the press that parts of Oltchim were to be re-opened in a matter of days and that the Government intended to grant a EUR 20 million rescue aid to Oltchim. [22]

(29) 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)[23]:

– 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 decisions[24] issued by the Vâlcea County Council to ensure electricity supply to Oltchim.

– National Salt Company Salrom ("Salrom") accepted postponement of payments for its supplies.

(30) On 15 November 2012, the Minister of Economy made declarations to the press about the Government's commitment to keep Oltchim alive: "*The idea of insolvency goes out of hand as long as we would have concluded the deal with the main creditors. This is the reason why we have concluded a reorganisation agreement, a controlled restructuring, together with Oltchim's big creditors. That is, not to wake up tomorrow with the big creditors - banks, private creditors, traders, suppliers of raw materials – asking for Oltchim's insolvency. We are aiming with this agreement is to be able to restart, rescue, restructure Oltchim in a controlled manner, with the creditors' agreement.*"[25]

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21 See press article of 1 October 2012 available at: https://www1.agerpres.ro/politica/2012/10/01/victor-ponta-am-cerut-ca-abordarea-fata-de-oltchim-sa-fie-complet-schimbata-joi-vom-prezenta-planul-de-relansare-21-19-23 .

22 See for instance Article of 17 October 2012 available at: http://economie.hotnews.ro/stiri-companii-13431372-daniel-chitoiu-spune-luni-reporni-productia-una-dintre-sectiile-oltchim.htm .

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

24 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.

25 See press article available at: http://economie.hotnews.ro/stiri-companii-13622312-exclusiv-daniel-chitoiu-compania-oltchim-pregatita-pentru-noua-privatizare-urma-aplicarii-unui-plan-restructurare-care-presupune-externalizarea-unor-activitati-servicii-conexe.htm

(31) On 23 November 2012, the Ministry of Finance, the Ministry of Economic Affairs, the Ministry of Transport and Infrastructure, AAAS and OPSPI[26] signed a Memorandum of Understanding (the Memorandum") with Oltchim's creditors, i.e. various private and State-owned banks, as well as State owned undertakings such as Electrica, Salrom, CFR Marfă SA. The parties to the Memorandum agreed that the Ministry of Economy and OPSPI would register a special purpose vehicle (SPV) company free of debts with full state capital (Oltchim SPV), no later than 1 January 2013, so that the banks could 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 Government instructed the Ministry of Economic Affairs to initiate legal procedures for setting up a SPV company.

(32) However, while the Memorandum and its objectives were maintained, the Ministry of Economic Affairs temporarily abandoned the plans of setting up on a short-term basis the Oltchim SPV vehicle. Instead, Oltchim, at its own request, entered the insolvency proceedings governed by Law No. 85/2006 ("the insolvency law") on 30 January 2013.

2.2.4. Oltchim's insolvency proceedings as from 30 January 2013

2.2.4.1. The legal framework: the Romanian insolvency law

(33) The insolvency law sets out a collective procedure for covering liabilities of a debtor in insolvency condition.

(34) Once a company enters a collective insolvency procedure the decisional power over administration activities of that company moves from the shareholders to a special administrator who should act in the best interest of the company[27]. After withdrawal of the right to administrate, the company is then represented and run by a Court-appointed receiver/liquidator, depending on the option chosen. The mandate of the special administrator is then reduced to representing the best interests of the shareholders.

(35) The company's general shareholders' meeting appoints the special receiver who must be approved by the Court (a so called Court-appointed receiver). Within the deadline established by the syndic-judge (a judge with special powers in bankruptcy and insolvency proceedings) , 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 insolvency.[28] The report shall specify whether there is any possibility for reorganisation of the debtor's activity or any reasons that do not allow for his reorganisation. 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 reorganisation plan ("the Reorganisation Plan" or "the Plan"), it will specify who prepares the reorganisation plan (the debtor, or the Court-appointed receiver alone or together with one or several creditors).

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

[27] Article 18 of the insolvency law.

[28] Article 59 of the insolvency law.

(36) Following the opening proceedings, all claims of creditors are suspended and new ones cannot be initiated.[29] 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.[30]

(37) The Court-appointed receiver 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 proceedings. On this basis, the Court-appointed receiver 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.

(38) The debtor, the creditors and any other interested party have a right to appeal to the syndic-judge the preliminary list of creditors[31]. After all appeals are settled, the Court-appointed receiver 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.

(39) The insolvency law foresees two alternative procedures:

(a) *judicial reorganisation* (Articles 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* (Articles 107-129 of the insolvency law governed by the rules on the simplified procedure) in which the debtor's activity is reduced only to the necessary steps for liquidation in order to pay the debts by selling the assets and by recovering the receivables.

(40) 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.

(41) 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 insolvency 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 Article 96 (1), i.e. the so-called essential suppliers, e) other unsecured claims.[32]

(42) Pursuant to Articles 100 and 101 of the insolvency law:

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29 Article 36 of the insolvency law.

30 Article 38 of the insolvency law.

31 Article 73 of the insolvency law.

32 Article 100(3) of the insolvency 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 categories[33] 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 claim benefits from a voting right that the holder exerts for the category of claims that includes the respective claim

(d) Each disadvantaged category of creditors that rejects the plan will be treated fairly and equitably under the plan.

(43) Pursuant to the definition in Article 3(21) of the insolvency 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.

(44) 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.

(45) Bankruptcy procedure means a liquidation of the debtor's assets to cover liabilities, followed by the debtor's write-off from the registry.

(46) Pursuant to Article 107 of the insolvency 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.

(47) 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 (Article 121 for pledged assets and Article 123 for unpledged assets and for any surplus left from the sale of pledged assets). Liquidation shall begin immediately after the completion of 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.

(48) According to Article 121 of the insolvency law, the following order of distribution of funds obtained from selling the debtor's pledged assets applies: 1) taxes, stamps and

[33] Article 3(21) of the insolvency law.

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.

(49) 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.

(50) According to Article 123 of the insolvency 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 after the opening of proceedings , as well as the claims resulted from the preservation of the debtor's activity after the opening proceedings (current debts), 4) budgetary claims, 5-7) other claims (such as allowances for children, family allowances, bank loans), 8) other unsecured claims.

2.2.4.2. Preparation and approval of Oltchim's Reorganisation Plan

(51) By the decision of Creditors at the meeting of 15 April 2013, Rominsolv S.p.r.l and B.D.O. – Business Restructuring S.p.r.l. ("R/BDO") were appointed as official receivers of Oltchim ("the Consortium"). This appointment was confirmed by the Court on 13 May 2013.

(52) At the Court hearing of 19 June 2013, Oltchim expressed its intention to enter a judicial reorganisation and to pay the claims by way of a reorganisation plan. This request was based on a "Report on the causes of insolvency" prepared by the Consortium) pursuant to Article 59(1) to (3) of the insolvency 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.

(53) On 3 June 2013 the Court-appointed receivers appointed Winterhill S.r.l for the evaluation of the market value and the liquidation value of Oltchim's assets ("the Winterhill Report"), a necessary step for the preparation of the payment plan.

(54) Winterhill S.r.l. determined the market value of Oltchim's assets and their liquidation value in accordance with the International Valuation Standards 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".*

(55) The Winterhill Report evaluated the different Oltchim assets classes[34] using different valuation methods depending on the type of asset evaluated (market comparison method or net replacement cost method).

[34] 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)

(56) 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 liquidation value of fixed assets was defined in the 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 the 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.

(57) On 20 July 2013 Winterhill S.r.l. completed its valuation. The Winterhill Report estimated the market of Oltchim at EUR 293.7 million (approx. RON 1,270 million) and the liquidation value 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.[35]

(58) The Winterhill Report was presented to the Meeting of Creditors on 2 December 2013 and approved on 4 December 2013. Initially AAAS questioned the evaluation contained in the Winterhill Report and filed a complaint against the Creditors' Meeting decision approving it. Consequently, the Court approved a double check of the valuation report and finally dismissed AAAS' challenge, further noting that AAAS did not condition its vote on the Plan on the result of a re-examination of that report.[36]

(59) Based on the Winterhill Report, in July 2013, the Court-appointed receivers prepared the Reorganisation Plan of Oltchim. The main purpose of the Plan was 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:

> *1st option - 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:*

(60) Oltchim SPV was to be a company free of debts. Oltchim SPV would take over the functional part of Oltchim SA as a going concern.[37] Oltchim SPV shall be 100 % held by Oltchim SA and aimed to be sold in 1-3 years to an investor. The price for

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financial assets, vi) intangible assets – brand, notoriety, trademarks, patents, and vii) investments in progress.

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

36 As mentioned in the Court judgment of 22 April 2015 approving the Reorganisation Plan of Oltchim, Case No 887/90/2013, pages 21 and 32.

37 The following will be transferred to Oltchim SPV: the assets of Oltchim SA located in the Râmnicu Vâlcea 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.

the sale of Oltchim SPV shares was estimated at EUR 306 million and the minimum starting price to be set at a level above that particular amount. This price was estimated with a reference to the MV of EUR 293.7 million established in the Winterhill Report.[38]

(61) Given that some assets transferred to Oltchim SPV were mortgaged to some Oltchim SA's creditors, the object of their security would be replaced with shares issued by Oltchim SPV in proportion to the amounts of their security. The secured creditors would thus be entitled (within 10 days after confirmation of the reorganisation plan by the syndic judge) to opt for the removal of the existing securities on the assets upon the full payment of the price of Oltchim SPV shares.

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

2nd option - Debt-to-equity swap:

(63) 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); or

3rd option - Debt- to-assets swap:

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

(65) The Plan provided for two scenarios for the continuation of Oltchim's activity, namely:

(a) *Scenario A*: Oltchim's business will continue with the oxo-alcohols plant restarted, for which no external funding sources are needed;

(b) *Scenario B*: Oltchim's business will be enhanced by restarting the phthalic Anhydride-DOF plant with the use of external financing sources.

(66) The Plan specified the implementation period, i.e. three years after the confirmation of the Plan by the judge. During that period, the special administrator shall ensure Oltchim's administration, under the supervision of the Court-appointed receiver.

(67) After all appeals were settled, on 9 January 2015 the Court-appointed receiver 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 Article 96 of the insolvency law (so-called "essential suppliers") and 5) other unsecured creditors, as presented in the Table 1 below:

Table 1: List of creditors as presented in the table of claims

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 %

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

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 of which	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 Article 96 of the insolvency law	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 of which (examples)	1 129 340 017	248 454 804	
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 Vâlcea 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"***			

(68) 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 State 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 %**

(69) 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).

(70) The Court-appointed receiver 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 Article 101 of the insolvency law.

(71) More concretely, under the approved Plan:

(a) The price obtained from selling Oltchim SPV (estimated in the Plan as EUR 306 million) will be used with priority for paying various administrative expenditures related to the transfer of Oltchim SA's assets to Oltchim SPV, Court-appointed receivers' fees and tax on income obtained, as well as the current debts of Oltchim SA, incurred after the start of the insolvency procedure[39].

(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

[39] 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, 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.

past debts of Oltchim SA, 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	73 %	80 %
ALPHA Bank Romania SA	674 605	494 321	538 705		
Arelco 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	18 %	20 %
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 Article 96 of the insolvency law	33 084 561	9 883 865	9 883 865	30 %	30 %
CET Govora	**30 117 982**	**8 997 613**	**8 997 613**		
Romanian National Water Administration	**2 966 579**	**886 252**	**886 252**		
5) Other unsecured creditors, of which (examples)	248 454 804	0	0	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 Vâlcea 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**		

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

(a) salaries - 100 % debt coverage;

(b) secured creditors - 73-80 % debt coverage;

(c) essential suppliers (SoEs: CET Govora and Romanian National Water Administration) - 30 % debt coverage;

(d) budgetary creditors (for example AAAS, Environmental Fund Organisation) – 18-20 % debt coverage;

(e) other unsecured creditors (for instance Electrica and Electrica Furnizare) - 0 % debt coverage.

(73) This plan therefore leads to a substantial debt cancellation, notably on the part of the budgetary 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
Arelco 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 Article 96 of the insolvency law	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 Vâlcea 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 %**

(74) The creditors voted on this Plan. According to the Minutes from the Creditors Assembly meeting of 9 March 2015 (note that only the main public and private creditors and the employees are presented below):

(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")[40] 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 Article 96 of the insolvency law 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[41] 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 were sure to receive 100 % debt coverage.

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40 DGFP was not a signatory of the Memorandum and its claims were very small compared to those of AAAS or Electrica.

41 Electrica Furnizare is a private company since 2014 and it was not a signatory to the Memorandum in 2012 (see recital (235) below). Its claims towards Oltchim were very small compared to those owned by Electrica itself.

(75) 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 the 5 debt categories, all 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 categories[42] voted in favour of the Plan).

(76) At the Court hearing of 25 March 2015, the syndic judge asked to provide more clarifications on the Plan and postponed the hearing until 22 April 2015. At the hearing of 22 April 2015 the Court endorsed the Plan by approving only the first option, i.e. partial debt cancellations as agreed by creditors and the *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 Pitești dismissed the appeals brought by ANAF (Agenția Națională de Administrare Fiscală) and Electrica Furnizare against the judgment approving the Reorganisation Plan. By this judgement the Plan became final.

2.2.4.3. Implementation of the Reorganisation Plan

(77) During the insolvency proceedings, prior to the approval of the Reorganisation Plan, 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, Oltchim restarted the oxo-alcohols plant on 9 September 2014.

(78) The Romanian authorities informed[43] that Oltchim improved its economic and financial performance. Its turnover increased in 2015 by 31 % compared to 2014, and by 59 % compared to 2013, as a result of a 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.

(79) New attempts to privatise company took place starting with June 2013 however failed again later that year.

(80) According to the Plan as agreed by the creditors and endorsed by the Court (see *Table 5* above), budgetary creditors and SoEs have to cancel up to a 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).

(81) The so-called essential suppliers (i.e. CET Govora SA and the National Water Administration) had to cancel EUR 21.2 million and EUR 2.2 million respectively, representing 70 % to 71 % of their total claims. Electrica had to cancel EUR 112 million, representing 77.6 % of its total claim.

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[42] The Consortium considered all categories of debts to be disadvantaged within the meaning of the insolvency 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).

[43] Romania's submission of 22 October 2015.

(82) Further to the amounts corresponding to the debt cancellation for various public creditors contained in Table 5, Table 6 below reflects the corresponding amounts of debts to be recovered in the scenario of a one-block sale of Oltchim SPV foreseen in the Reorganisation plan as resulting from the approved maximum write-off.

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

Creditor	**Total debt in EUR**	**Debts to be cancelled in EUR** *(approved maximum write-off)*	**Minimum debts foreseen 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**

(83) Following the approval of the Reorganisation Plan, significant debt write offs already took place. Romania informed in its submission of October 2015 that around RON 2,358 billion (EUR 518 million) of debts were cancelled in the period April-October 2015)[44].

(84) 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 purchasers took place in September/October 2015.

3. THE COMMISSION DECISION TO OPEN THE FORMAL INVESTIGATION PROCEDURE

(85) On 8 April 2016, the Commission decided to open the formal investigation procedure. The Commission raised doubts as to three support measures:

(1) **Measure 1:** the non-enforcement and further accumulation of debts by AAAS since September 2012. Despite the firm commitment given to the Commission in 2012, the Romanian authorities did not convert the accumulated debt towards AAAS (RON 1,049 million, i.e. circa EUR 231 million at that time)

[44] Romania's submission of 22 October 2015, page 2.

into equity and did not privatise Oltchim. Instead, Oltchim continued its business activities and accumulated more public debts, including towards AAAS (the debt towards AAAS rose from RON 1,049 million to RON 1,201 million i.e. from circa EUR 231 million to circa EUR 264 million). AAAS did not enforce its claims against 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) Measure 2[45]: the support of CET Govora and Salrom to the operations of Oltchim in the form of continued supplies between September 2012 and January 2013. 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. 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.

- *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 seemed to have been taken in the implementation of several decisions issued by the Vâlcea County Council to ensure electricity supply to Oltchim.
- *Salrom* accepted postponement of payments for its supplies and therefore accepted a further increase of Oltchim's debts towards it.

(3) **Measure 3[46]:** the approval of AAAS and SoEs[47] of debt cancellation under the Reorganisation Plan in 2015; AAAS, Salrom, CET Govora, the National Water Administration, and 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. In return, those SoEs expect the following debt coverage in case the sale 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 Tables 4 and 5).

(86) In the opening decision, the Commission took the preliminary view that the above described measures entailed State resources and were imputable to the State.

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45 This measure was originally presented as Measure number 3 in the Opening Decision. However, as it is chronologically simultaneous to Measure 1, both of them preceding a third measure (originally numbered 2 in the Opening decision) for the purpose of the present Decision it will be referred to as Measure 2.

46 As explained in the footnote above, this measure was originally presented as Measure 2 in the Opening Decision.

47 In particular Electrica, Salrom, CET Govora and National Water Administration.

Additionally, given the unlikelihood that any rational private operator would have provided Oltchim with these measures, the Commission also took the preliminary view that the measures provided Oltchim with an undue advantage; such advantage would be selective, given that Oltchim was its sole beneficiary.

(87) The Commission also noted that the measures were likely to affect trade between Member States as Oltchim was in competition with other chemical producers from other Member States as well as from the rest of the world. The measures enabled Oltchim to continue operating so that it did not have to face, as other competitors, the consequences that would normally follow from its poor financial results.

(88) The Commission also expressed doubts on the compatibility of the measures, in particular since the Romanian authorities did not provide any possible compatibility grounds. The Commission's preliminary view was that Oltchim could be considered a firm in difficulty in the sense of the 2014 Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty ("2014 R&R Guidelines")[48], in particular in view of insolvency proceedings initiated on 30 January 2013. However, the criteria for compatible rescue or restructuring aid laid down in the R&R Guidelines seemed not 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 could not evaluate the components of the 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.

(89) On the basis of the above, the Commission's preliminary view was that the measures seemed to constitute State aid within the meaning of Article 107(1) TFEU. Also, since the measures would have been granted in breach of the notification and stand-still obligations laid down in Article 108(3) TFEU, the Commission noted that they appeared to constitute unlawful State aid. In the absence of notification of the restructuring plan to the Commission, such measures could not be declared compatible with the internal market.

4. COMMENTS ON THE OPENING DECISION

4.1. Romania's submissions

(90) In its comments on the Commission's opening decision, Romania submits a number of observations pertaining to each of the three Measures described above.

4.1.1. Romania's comments regarding Measure 1:

(91) Romania claims that in the period September 2012 – January 2013 AAAS behaved like a private creditor and that AAAS non-enforcement of claims was fully justified in this short period of 5 months due to both *legal* and *de facto* limitations:

(92) The *legal* limitations relate to the effects of the so-called special administration procedure (Article 16 paragraph (5) (c) of the Romanian law No. 137/2002) under which the tax-and-contributions creditors cannot execute their debts as long as the

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

company is prepared for privatisation. This allegedly prevented AAAS from asking the immediate execution of its debt within the context of the privatisation process kept in place by the Ministry of Economy, Trade and Business Environment, even after the privatisation failure in September 2012. Romania also argues that the lack of sellable assets not used as collateral for secured creditors *de facto* limited AAAS's ability to enforce its claims and would also explain why private creditors did not execute their claims either. In that respect, Romania brings forward the example of private bank Banca Comercială Română which did not activate the forced execution process and even granted additional funding amounting in total to approximately EUR 1 million in favour of the re-commissioning of the polyols-polyether section and of a consultancy study on the opportunity of restarting Oltchim's activities.

(93) Furthermore, Romania submits that AAAS' absence of request for the immediate execution of its debt was also motivated by the initiation of a pre-notification process to the European Commission from Romania in relation with a rescue aid (aid that subsequently turned out not to be compatible with the "*one time last time principle"* of the 2014 R&R Guidelines).

(94) Romania notes that, based on the Raiffeisen study, notwithstanding deductions to be done in relation with environmental liabilities, AAAS would have recovered 10 % rather than 12 % of its debt in the liquidation scenario because AAAS claim towards Oltchim was almost 1.2 as high as the one considered by Raiffeisen in 2011 when it had to compare the market and liquidation values of Oltchim. In its submission of May 2018, Romania goes even further, claiming that in case of bankruptcy the environmental liabilities to be paid with priority in Oltchim's case would have exceeded the total receipts expected from a forced sale corresponding to a liquidation scenario, and concludes that the degree of recuperation of AAAS' debt would have been zero.

(95) Romania submits that AAAS concentrated on obtaining detailed information on Oltchim's situation at that time in order to be able to take a well-documented decision and that the few months between the privatisation failure and entering into insolvency was acceptable as a period of reflection.

(96) Lastly, Romania notes AAAS had been charging Oltchim interests at the market level until the insolvency proceedings. According to Romania, this proves the non-immediate execution of its claims does not constitute State aid, which Romania claims is in line with the approach followed in the 2012 Commission decision in paragraphs 98 et subseq. Romania further submits that the only further accumulated debt stems from interest to an already existing debt, which is of minor importance in case the recuperation of the main debt is totally unrealistic in the first place.

4.1.2. Romania's comments regarding Measure 2:

(97) In Romania's view, when deciding to continue supplies and to favourably modify trading conditions, CET Govora and Salrom "*behaved like private creditors as long as they guaranteed (secured) the newly created debt"* and because their decisions to deliver raw materials required for the restarting of Oltchim's activity were similar to the ones made by certain privately-owned companies. This decision allegedly follows from the likelihood of recovering a larger amount of the debt in case the activity is started. Furthermore, Romania states that, due to their technological interdependence regarding the supply of industrial and respectively demineralized water to Oltchim, Salrom (albeit less distinct) and CET Govora acted as rational essential suppliers. As Oltchim amounted to 14 % of Salrom's turnover in 2015 and

to 39 % in CET Govora's revenue, there was no practical solution to substitute Oltchim's purchases of industrial steam for CET Govora.

(98) Regarding Salrom, Romania also states that it received total payments of more than RON 33 million after Oltchim's going insolvent, conditioning any further supplies to Oltchim after Oltchim's entry into insolvency on advance payments, a condition that was agreed and complied with by Oltchim following negotiations.

(99) Regarding CET Govora's supply, Romania claims that the electricity and steam selling price to Oltchim is market conform and has been paid in full from 01 February 2013 to 31 March 2016 (RON 476 million).

4.1.3. Romania's comments regarding Measure 3:

(100) Romania claims that the positive vote of AAAS and SoEs complied with the Market Economy Creditor Principle (MECP) as summarised below.

(101) First, Romania supports that the value of the Oltchim bankruptcy scenario is negative. To support its view, Romania quotes the values provided in the evaluation reports by Romcontrol of February 2009 (EUR -281 million) and, respectively, December 2010 (EUR -407 million). In addition, it quotes Winterhill's estimate of recovery under the liquidation scenario amounting to circa EUR 108 million for secured assets and EUR 32 million for the assets free of encumbrance (from the latter, EUR 22.2 million would had been deducted as severance payments for laid-off employees).

(102) With reference to recital 120 of the Opening Decision, Romania adds that the environmental liabilities encompassed in the Winterhill report only relate to the cleaning and preparation of the assets for sale and do not include the closure of non-hazardous waste repository and hazardous waste pit as well as the decommissioning and demolition of the equipment and building, and restoration of the ground and environment to the initial state. Environmental liabilities estimated by Oltchim amount to c.a. EUR 464 million and would thus exceed the proceeds estimated by Winterhill for unsecured creditors in the liquidation procedure.

(103) Thus the likelihood of obtaining any payment by AAAS and SoEs from Oltchim was considerably higher in the reorganisation procedure.

(104) Second, Romania submits that a debt recovery by the initiation, by AAAS and Electrica, of the Oltchim bankruptcy procedure was not possible, because the requirements of Article 1 (2) of the insolvency law in this sense were not fulfilled.

(105) Third, Romania submits that even though the AAAS MECP study was prepared before the reorganisation plan was approved at the creditors meeting on 9 March 2015, the study conducted by AAAS is adequate and sufficient to consider the decision of AAAS to approve the reorganisation plan as similar to a private creditor. The dismissal of the plan would have led the bankruptcy, which would have implied no recovery of debts, considering the low portion of AAAS's debt that was secured and the large value of the environment obligations in the case of land ecological works for greening of land. Thus, the study conducted by AAAS in this regard demonstrated that AAAS would have recovered more in case of the approval of the reorganisation plan than in the liquidation of Oltchim where the environmental liabilities apply with priority on the basis of the Ordinance No.195/2005.

(106) Romania considers that the recovery of 20 % of AAAS debt following the implementation of the reorganisation plan was a credible estimate at the time of the vote.

(107) Fourth, Romania underlined that the request for dismissal of the reorganisation plan of three creditors was rejected by the national court through the decision n°892 of 22 April 2015. This judgment confirmed that the reorganisation plan better served the creditor's interest than the bankruptcy scenario, notably based on the estimate of an amount of senior environmental liabilities of 464 million EUR, which significantly exceed Winterhill's estimate of recovery under the liquidation scenario of about EUR 108 million for secured assets and EUR 32 million for the assets free of encumbrance.

(108) Romania submits that the tax and unsecured creditors and the other State-owned enterprises such AAAS, Electrica acted as market operators in opting for the reorganisation plan rather than the liquidation of Oltchim: they acted like private companies, such as Erste Group Bank AG and Bulrom Gas Impex SRL, having both secured and unsecured debt, and which also approved the plan. Romania also submits that before the beginning of the insolvency proceedings, Salrom raised the condition of establishing a real estate security to become a secured creditor.

(109) Fifth, in its submission, Romania indicated that Electrica took all the actions allowed by the law in order to recover its debt in the insolvency proceedings, so as to avoid dependence on a reorganisation plan. These actions were however dismissed by the Romanian courts. Therefore, the vote for the Plan was the last available resort, which shows that Electrica acted like a MEO. The affirmative vote expressed on the reorganisation plan was the only option of debt recovery available to the creditors for Electrica who was registered both as secured and unsecured creditors.

(110) Romania claims that a market economy operator/creditor would have opted for the reorganisation plan as it is the modality that, usually, in the Romanian insolvencies and in those known by Electrica, offers higher chances for debt recovery: Romania stresses that the official receivers in charge of elaborating the plan have a legal obligation to maximize the debtor's assets and may be held personally liable in case they do not obtain the best result for the creditors.

(111) Romania also explained that the report corroborated with the Plan indicated in a plausible manner that the only potential chance of Electrica to recover some of the debt owed to it was through the reorganisation. In Romania's view, it is unreasonable to claim that Electrica should have undertaken the high expenses of a separate study in order to confirm the aspects stated by well-known professionals, confirmed by the national courts and indicated by economic experience: the costs with the fulfilment of Oltchim’s environment obligations in the bankruptcy proceedings would have made less likely, if not even impossible, the recovery of any amount by Electrica of its claims against Oltchim.

(112) By comparison, the potential recovery of RON 160 million for Electrica offered by the Reorganisation plan, even if associated with a longer time interval and some risks, was definitely the preferable solution, as also demonstrated by the actions of other private creditors, like Erste Group Bank AG.

(113) Romania states that Salrom and CET Govora's vote against the reorganisation plan would have led to the absence of recovery for them for their unsecured portion of debt; thus, it was the best choice for them to approve the restructuring plan in which

secured creditors accepted debt write-offs in exchange for a partial recovery for their unsecured debts.

4.2. Comments from interested third parties

(114) Four interested parties commented on the opening decision – PCC (a minority shareholder in Oltchim), Electrica, the consortium of judicial administrators Rominsolv and BDO (in charge of the judicial administration of Oltchim) and another interested party that wished to remain anonymous.

4.2.1. Rominsolv and BDO ("R/BDO", the official receivers of Oltchim in the insolvency proceedings)

(115) Rominsolv and BDO are the official receivers of Oltchim that drafted the Reorganisation Plan, which was later on approved by Oltchim's creditors. They submit a number of arguments in favour of the reorganisation plan.

(116) As regards **Measure 1**, R/BDO claim that:

– The Commission was wrong to rely on the liquidation value from the Raiffeisen report, as this report relies upon the hypothesis of ongoing business and does not take into account the environmental obligations associated to the liquidation scenario. Therefore, the Commission's assessment that in 2012 AAAS would have recovered 12 % of its debt through Oltchim's liquidation is wrong.

– Other means to recover debts (i.e. through enforcement procedures) were not possible for AAAS, as AAAS did not have an enforceable title and could not obtain one in such a short timeframe (September 2012-January 2013).

– Furthermore, in September 2012, Oltchim's patrimony no longer included assets that could be pledged in exchange for the debt value.

– Lastly, R/BDO name a number of private parties[49] who in that period, despite deteriorating financial position of Oltchim, continued cooperation and gave support to Oltchim. Only two[50], out of a total of 205 parties registered on Oltchim's creditors' list initiated enforcement measures against the debtor.

(117) As regards **Measure 2**, R/BDO claim that:

– CET Govora's level of involvement in the resumption of Oltchim's business was relatively limited, with the accrued debt for electricity and steam supply reaching the amount of approx. RON 25 million (compared to the total debt of RON 84.2 million on 31 August 2012). Furthermore, CET Govora calculated delay penalties according to the agreements with Oltchim stemming from the past debts, which should not be considered as a part of a support for the resumption of production.

– Salrom's level of involvement in the resumption of Oltchim's business was also relatively limited, with the accrued debt for product delivery invoices of only RON 1.8 million. The remainder of RON 13.2 million represents delay penalties calculated according to the agreements with Oltchim stemming from

[49] Transilvania Bank, the Romanian Commercial Bank, MFC Commodities GmbH Austria, Chemimpex LTD Turkey, Tricon DRY LTD – USA, Alum SA – Romania, Arelco Power SRL – Romania, SC Bulrom Gas SA, Uzinele Sodice Govora – Ciech Chemical Group SA.

[50] Polcheme Societe Anonime and Bulrom Gas Impex SRL.

the past debt, which should not be considered as a part of a support for the resumption of production.

(118) Finally, BDO contends that the Commission ignored the importance of technological interdependence of 4 large players (Oltchim, CET Govora, Uzinele Sodice Govora and Salrom), whose activities is technologically dependent, each of them being a supplier and a utility client of the other, at the same time.

(119) As regards **Measure 3**, R/BDO claim that:

– The Commission has not met the requisite standard of proof for demonstrating the imputability to the State of the decisions of a number of SoEs (i.e. CET Govora, Romanian Waters, Salrom, Electrica) and AAAS to vote in favour of the Reorganisation Plan.

– The official receivers who prepared the Reorganisation Plan are bound by the principles of independence, with a view to ensure an efficient procedure, the equal treatment of creditors, a high degree of transparency and the maximisation of the degree of recovery claims. The Plan prepared by them met all standards provided in the Romanian law and was approved by the judge. Therefore, it is unreasonable to expect that all creditors would invest separately their time and resources in preparing separate assessments for the recovery of their claims as the Commission seems to imply.

– The Commission was wrong to assume that Winterhill Report in its estimations of LV of Oltchim took into account all environmental obligations of Oltchim. The Report took into account only the normal costs of dismantling equipment, but not the costs stemming from environmental liabilities. Therefore, the Reorganisation Plan was correct to assume that in case of bankruptcy (liquidation) the value of recoverable claims was *zero* for all the creditors.

– Finally, based on the number of economic indicators showing the improving economic situation of Oltchim in the insolvency proceedings it was not unreasonable to believe that Oltchim SPV can be successfully sold on the market for the estimated price of EUR 306 million.

– Lastly, R/BDO submit that the EUR 306 million calculated by Winterhill in 2013 is erroneous but had been rectified in the report submitted with the creditors in view of their meeting on 4 December 2014 that showed an expected sale price of EUR 295 million.

4.2.2. Electrica

(120) Electrica claims the lack of imputability of its decision to vote in favour of the plan to the State. It says that the decision to vote on the Plan was delegated by the Shareholders Meeting to the General Manager of Electrica SA who was the only responsible person for the positive vote on the Plan. Therefore, according to Electrica, Measure 3 cannot be imputable to the State.

(121) Furthermore, Electrica claims, that even if the decision could have been considered as stemming from State powers, it was a sound business decision in line with the MECP. In essence, Electrica believes that its decision to support the Plan did not confer any advantage to Oltchim; in their opinion this is confirmed by similar behaviour by other private creditors in a situation comparable to that of Electrica who also voted in favour of the Plan.

(122) Electrica also submits that it did not carry out a market economy creditor study because R/BDO had a legal obligation to advise the creditors how to maximize their proceeds.

4.2.3. Confidential [anonymous] interested third party

(123) The anonymous party supports the Commission's doubts. It further outlines the distortive effects of the support measures, in particular in the market for chlor-alkali products (caustic soda). Anonymous party believes that the proposed solution to sell Oltchim is a dead-end: the multiple failed attempts to sell Oltchim show the market's lack of interest in Oltchim; the contemporaneous financial reports of Oltchim show a level of profitability that is far too low to make the business sustainable in the long term. In this context, the only viable solution for Oltchim would be a full restructuring of the business in the form of plant closures, capacity reduction and possibly market exit.

(124) The anonymous party also points out that a significant part of the profits achieved by Oltchim in 2015 and those anticipated for 2016 were generated through sales of caustic soda whose selling price is cyclical and in 2015 reached "top of cycles" levels. Furthermore, Oltchim's operating rates are exceptionally low (30 % of overall capacity utilization which compared to average levels of 80 % in the EU chlor-alkali industry is very low). Therefore any potential buyer would need to undertake very significant further investments, which is at odds with Oltchim's low EBITDA.

4.2.4. PCC

4.2.4.1. PCC's comments regarding Measure 1

(125) According to PCC, if AAAS had acted as a private creditor, he would have favoured the execution of its claim towards Oltchim following the failure of the privatisation process in September 2012: this would have led AAAS to recover 12 % of its claim rather than opting to wait for an uncertain recovery during the whole reorganisation procedure.

(126) PCC claims that after the privatisation failed in September 2012, it was even clearer that there is no market interest to buy Oltchim. Waiting few more years for the elaboration of some restructuring plan and then few more years for its implementation put at high risk the market value of Oltchim's assets. With the passage of time Oltchim's assets were becoming more outdated and useless.

(127) PCC submits that AAAS should have used the specific Romanian legislation on the recovery of public debts accrued towards the Ministry of Finance stemming from the state guarantees (Ordinance 29/2002) which provides that the recovery agreements transferring the state guarantees from the Ministry of Finance to AAAS are recognised by the virtue of the law as enforcement titles. Therefore, in PCC's view, any execution of those enforcement titles could have been carried out by AAAS without any additional formalities. AAAS had at its disposal various enforcement methods for those receivables as provided by the Government Emergency Ordinance No 51/1998 on the realization of State assets.

(128) Moreover AAAS within the secured State creditors did not seem to require the lifting-up of the suspension of its enforcement rights within the insolvency procedure, in opposition to a failed attempt to do so from Electrica. As such, AAAS did not use all the legal instruments available to it to deal with the undertaking's failure to make a payment.

4.2.4.2. PCC's comments regarding Measure 2

(129) PCC considers that CET Govora and Salrom did not act as market economy operators in continuing supplies to Oltchim despite non-payment of outstanding debts and that their decisions were imputable to the State.

(130) Contrary to Electrica and Electrica Furnizare, CET Govora indeed decided to continue Oltchim's electricity and industrial steam supply, even though Oltchim did not pay its debt towards it and against the opposition of its own banks; such a decision led to CET Govora's own insolvency on 6th May 2016: PCC indicates that according to the judicial administrator of CET Govora CET Govora has been subsidizing Oltchim.

(131) PCC argues that CET Govora's decision to restart their supply to Oltchim following the failure of the privatisation in September 2012 is imputable to the State. In PCC's view, CET Govora's decision to continue Oltchim's supply occurred following the related decisions of its owner - the Vâlcea County Council, while Oltchim's incapacity to pay was widely known. PCC also quotes CET Govora's trustee underlying that "*the decision to deliver electric power to Oltchim had no economic rationale and was politically motivated and is an excellent example of the political interference in the management of the debtor […]*"

(132) While recognizing that Oltchim was an important client for Salrom, PCC argues that a market economy operator would not have continued supplies to Oltchim considering Oltchim's financial situation; the potential liquidation of Oltchim would impact only one branch of Salrom with only 60 working places being affected. Therefore, any private creditor in a similar situation as Salrom, would not have accepted the accumulation of debts, but would have rather accepted the decrease of its turnover to keep its company healthy.

(133) PCC argues that Salrom's decision to restart its supply to Oltchim following the failure of the privatisation in September 2012 is imputable to the State who controls Salrom; the board of director of Salrom is indeed nominated by the general meeting of shareholders in a context where the Romanian State holds a majority (51 %) of Salrom's shares and name State representatives within the board of directors.

4.2.4.3. PCC's comments regarding Measure 3

(134) PCC argues that by accepting the debt write-off instead of enforcing their claims, AAAS, CET Govora and Electrica did not behave as market economy creditors.

(135) PCC claims that the Reorganisation Plan approved by the creditors lacks the elements of real restructuring[51] and is basically limited to a sole debt restructuring and liquidation. PCC claims that a reorganisation plan prepared by the shareholders may have been a better option but was not implemented despite its proposals, as it was not approved by the Romanian authorities.

(136) Without long-term restructuring measures of the core business of Oltchim there are no chances that Oltchim remains viable and profitable.

[51] The Romanian insolvency law requires for the reorganisation plan to provide for the operational and/or restructuring of the debtor, the corporate restructuring (through the modification of the shareholding structure), and the limitation of the activity of the debtor through the liquidation of some of debtor's assets. The plan should also include the perspectives for the returning to viability of the debtor. The above conditions are not observed by the Reorganisation Plan approved by the creditors.

Market value

(137) On the one hand, PCC underlines that the market value established in 2013 by Winterhill Romania was very uncertain and that a careful market economy operator would not had considered it as correct when determining its position on the Reorganisation Plan two years later in April 2015.

(138) Past numerous failed attempts for Oltchim's privatisation in 2001, 2003, 2006, 2007, 2008 and 2012 were clear indications according to PCC that no investor would be interested in acquiring shares in the privatisation through the creation of a SPV put forward by the judicial administrators. PCC adds that the price set for the privatisation is not substantiated and cannot be considered as a reliable ground for approving the plan. In PCC's view, the plan is just a way of keeping unprofitable business alive and postponing in time an effective bankruptcy of Oltchim.

(139) PCC also argues that the price for Oltchim would most probably have declined between 2013 and 2015 as facilities not having worked for 2 years would be impossible to restart. Thus, Bradu's site only value could be their land, notwithstanding attached environmental liabilities.

(140) In its support, PCC quotes the price offered in the unsuccessful privatisation process in 2012 by an individual (Mr Diaconescu) of approximately EUR 45 million, that is six times less than the price estimated for Oltchim by Winterhill. Similarly, a representative of Chimcomplex that lodged an offer in 2016 for the acquisition of the functional assets of Oltchim - stressed in 2016 that Oltchim's value is significantly lower than the price requested through the Reorganisation Plan.

(141) PCC underlined that the decisions of the public creditors took place in a context where Oltchim remained non profitable in the absence of a real restructuring plan; besides, the profits recorded by Oltchim were artificially generated by the debt write-offs and did not testify of an improvement of Oltchim's financial situation. The positive results in the financial statements would be a mere result of various accounting methods. According to an independent report commissioned by the […] company on PCC's behalf, Oltchim has been continuously recording losses between 1 January 2013 and 30 June 2016 after neutralizing exceptional elements (such as the 2015 debt write-off) due to unproductive assets such as Bradu petrochemical unit, VCM and PVC. This reports also concludes that the value of tangible non-current assets at 31 December 2015 representing more than 84 % of Oltchim assets should be between EUR 14 million and EUR 128 million depending on the expected sale of Oltchim SPV between December 2013 and December 2014 as well as on the scenario (A or B) foreseen in the Reorganisation Plan prepared by the Court-appointed receivers[52], which is below the liquidation value estimated by Winterhill (EUR 141 million).

Liquidation value

(142) According to PCC, the comparison of the market value of Oltchim estimated with its liquidation value was flawed for the following reasons.

(143) Firstly, other alternatives existed, such as the ongoing sale of Oltchim in asset bundles.

[52] PCC submitted a separate study by […] questioning the expected sale price of Oltchim. This is in contrast to the estimated sale value in the Plan of EUR 306 million.

(144) Second, the amount of environmental liabilities calculated by Oltchim (EUR 463.7 million) in the liquidation scenario seems exaggerated to support the Reorganisation Plan instead of the liquidation of Oltchim, as they do not rely on external, independent reports. There is no information relating to the reason why the judicial administrators did not request a new study. Such environmental liabilities estimated by Oltchim in the liquidation scenario would also have to be taken into account by the potential purchaser of Oltchim SPV in his offer. Lastly, PCC supports the view of the Commission that in the liquidation scenario, a large part of the assets may be bought by a purchaser pursuing industrial activities at Oltchim's site, thus avoiding the integral demolition of the site assumed by this estimate. By contrast, PCC underlines the uncertainty attached to the amount of environmental liabilities left in Oltchim in the 2015 Reorganisation Plan.

Comparison between market and liquidation value

(145) Third, in a context where new claims after Oltchim's entry into insolvency procedure get a senior status compared to pre-existing debt, certain creditors could have had the interest to request the entry into liquidation phase of Oltchim rather than wait for the accumulation of such new debt which would have reduced their recovery chances. PCC also claims that the debt incurred by Oltchim after it has entered into insolvency procedure may have been underestimated. If this were true, this would have led thus leading to diminished recovery perspectives and therefore increased debt write-offs for the creditors in the Reorganisation Plan scenario.

Other observations on measure 3

(146) Furthermore, PCC claims that State creditors should have also taken into account the duration of the reorganisation phase versus the duration of the bankruptcy proceedings. Preparation of a viable restructuring plan and its implementation takes much longer than the liquidation of Oltchim via an immediate sale of assets.

(147) Besides, State creditors should have taken advantage of their situation.

– According to the Romanian insolvency law (Article 94(c)), one or more creditors holding at least 20 % of all claims can propose a reorganisation plan. Given that AAAS alone held 34.7 % of all claims, it could have had proposed a different plan with a better outcome for AAAS and other State creditors.

– While it represented 91 % of the unsecured creditors category under Article 96 of the insolvency law, CET Govora had a privileged situation to impact the Reorganisation Plan that it did not seem to have used.

– Salrom and Romanian National Water Administration did also approve the plan in the two categories of debt they each detained, whereas their status could have led them to enforce their claims as a secure creditor and respectively a state budget creditor.

(148) Lastly, PCC indicated that although there were some private creditors in a similar situation as the State who voted in favour of the Reorganisation Plan, it would be wrong to infer that State creditors including AAAS were in a situation similar to a prudent market operators because of the positive vote of some private creditors on the Plan: in opposition to the latter ones holding both secure and unsecured debt, almost all AAAS debt was indeed unsecured; moreover those private creditors knew that the Romanian State would take all necessary measures and steps to ensure at all costs the survival of Oltchim and therefore they decided to "join" the State in those efforts.

(149) It is the opinion of PCC that Measure 3 is imputable to the State as the restructuring plan could not have been approved without the consent of the State creditors which had the majority of votes (higher than 50 %) in the majority of categories of creditors: the State did indeed control the decision in all categories of creditors except the secured claims and the employee category. As such, the private creditors that approved the Reorganisation Plan were more acting like followers of the State decision rather than the promoters of such a Reorganisation Plan. PCC further states it is "*aware there are private creditors that apparently adopted the same approach as the State (i.e. also voted in favour of the plan although apparently it was not in their favour, as they had large write-off).*" However, PCC is of the opinion that *"it is the State that created this "market practice" and not the other way around (the State following the trend). This is because it controlled Oltchim before insolvency, it controlled the vote on the [R]eorganisation [P]lan, and because it was obvious to the other creditors the State would take all measures to ensure at all costs the survival of Oltchim.*"

4.3. Comments from Romania on the observations from third parties[53]

4.3.1. Romania's further comments regarding Measure 1:

(150) Romania considers that AAAS acted as a private creditor "legally limited", by calculating interests until Oltchim entered the insolvency procedure and rejects PCC's allegation regarding the lack of action from AAAS towards the execution of its claims. Romania indeed states that the Memorandum was proposed by the Ministries of Public Finance and Economy, Commerce and Environment as well as OPSPI. As to the *de facto* limitations, Romania explains that AAAS was unable to garnish bank accounts (i.e. perform a seizure on them) as the latter were already garnished by Electrica before.

(151) Romania criticises the logic of PCC's argument that AAAS should have asked for the execution of its claim: in such circumstances, Oltchim would then have been led to start an insolvency procedure. That very situation would have precluded AAAS from any recovery under such a procedure as claimed by PCC.

(152) Romania qualifies PCC's opinion where it claimed that AAAS should have seized Oltchim's goods and assets as unrealistic based on the fact that private creditors did not apply it.

4.3.2. Romania's further comments regarding Measure 2:

(153) As far as CET Govora and Salrom are concerned, Romania states that post insolvency current liabilities were being paid without any delay by Oltchim.

(154) In Romania's view, public companies did act as private companies, such as Bulrom Gas Impex (a local supplier of Oltchim) and thus their behaviour was compliant with the private creditor and private purchaser test.

4.3.3. Romania's further comments regarding Measure 3:

(155) Firstly, Romania states that the solution evoked by PCC in its submission to design a reorganisation plan managed by shareholders could no longer be applied under insolvency law, following the triggering of judicial reorganisation procedure; according to Romania, PCC's proposed reorganisation process would favour

[53] See Romania's submission of 28 November 2016.

shareholders to the detriment of creditors and thus not receive approval from the latter ones.

(156) Romania contests PCC's vision of Oltchim's financial situation as "below acceptable standards […] still generating losses" and underlines Oltchim has been ranked 63rd out of 100 in the ranking of the most profitable companies in the South-Eastern Europe performed by SeeNews[54].

(157) Regarding Oltchim's asset valuation performed by […] and communicated by PCC, Romania does not contradict […]'s normalisation adjustment related to the debt write-off, but notably rejects the use of discounted cash-flow (DCF) methodology with the purpose of valuing Oltchim's assets. Romania refers to training materials from Harvard and Stern universities to support the fact that DCF are targeted at company valuation and as such not appropriate for assets valuation.

(158) Romania also rejects the idea supported by PCC that the conduct of private creditors would have been influenced by AAAS as at least two of the signatory bank (namely Erste Bank AG and Banca Transilvania) are well-established, independent, worldwide institutions.

(159) Romania underlines that private creditors are essentially the ones that had the key decision regarding Oltchim's Reorganisation Plan, in particular, as they represented 61,5 % of the secured creditors that had a decisive role by approving a partial write-off, indispensable for the approval of the plan by each category

(160) Romania submits that the expectations of recovery for the public entities under the Reorganisation Plan proposed by the judicial administrator amounted to RON 500 million, i.e. 7 times higher than a potential recovery of 72 RON under the bankruptcy procedure.

(161) Furthermore according to Romania AAAS was notably able to recover more than 18 % of the total of its receivable in the restructuring plan compared to only up to 12 % in the liquidation based on Raiffeisen study.

(162) Romania also states that according to Oltchim's judicial administrators' opinion that, in case of bankruptcy, the avoidance or underestimation of environmental costs would be a criminal liability according to Romanian law.

(163) Romania argues[55], that the vote rules imply that the Reorganisation Plan could not be adopted without the approval of the secured creditors as a disadvantaged category based on the law. Therefore, these are the private creditors, who held a majority under the secured lenders' category, that initiated and allowed the adoption of the plan; as such, they did not act as simple followers of the State creditors as stated by PCC Romania specified[56] that secured creditors were a disadvantaged category. As such, in the event that they would have rejected the plan, the condition set out in Article 101 (2) (c) of the insolvency law would not have been met, preventing other categories from achieving an adoption of the Plan.

(164) Romania also underlines the difference between the past failed privatisation attempts and the process led in 2012 that relied on the sale of Oltchim's asset transferred to a

54 https://top100.seenews.com/wp-content/uploads/2012/07/SEE_top_100_2016_1.pdf

55 See paragraph 35 of Romania's reply to the third-party observations on the Opening Decision.

56 See Romania's Reply of 16 May 2018 – annex I point R7.

SPV, meaning that the buyer would not have purchased Oltchim's entire balance-sheet including liabilities but only its assets.

(165) Romania states that the value of current debts is decreasing due to the generation by Oltchim of a positive EBITDA.

(166) Besides, Romania contests the view from the [anonymous party] stating that Oltchim would be "structurally unprofitable": Oltchim's difficulties would rather mainly be caused by bad management decisions.

(167) In its submission dated on 16 May 2018, the Romanian authorities emphasized the following elements, in addition to the above.

(168) First, there was no advantaged granted by State creditors to Oltchim because they could be considered as acting *pari passu* along with private creditors in all the secured creditors, budgetary creditors, essential suppliers and unsecured creditors categories.

(169) In particular, a majority of secured creditors voted for the Plan because they were convinced that they would not obtain an amount fully covering their own claims in the liquidation scenario. The mere fact that AAAS had claims both in secured and budgetary categories would not affect this *pari passu* observation as AAAS could only expect to receive more in the Plan than in the liquidation scenario.

(170) The fact that the secured creditors voted in favour of the Plan accepted a write off in the Plan implied that the claims of the budgetary creditors were worthless in the liquidation scenario. In particular, so as to ensure a positive vote of the latter on the Plan, the secured creditors accepted to limit their part of the proceeds (by agreeing to a de facto cancellation of their claims of 20 % to 27 %) in favour of the inferior categories that would have received nothing in case of liquidation .

(171) The positive vote of a majority of unsecured creditors (40.5 % of the claims of whom were hold by Electrica) also proves their confidence in the plan, although their vote was of limited significance as they could not expect any claim in the liquidation nor in the Reorganisation Plan scenario.

(172) Second, the Romanian authorities who were given the opportunity by the Commission to comment on a draft MEO test prepared by the Commission from the viewpoint of secured, budgetary, essential suppliers and unsecured creditors based on available contemporaneous evidence (the final version of which is in Annex I to this decision) submitted different observations in that respect. In particular, the Romanian authorities relativize the difference between the sale of Oltchim SPV foreseen in the Reorganisation Plan and the *in situ* sale considered by the Commission as one of three possible liquidation scenarios. Romania stresses that the liquidation scenario could not be expected to get to higher proceeds than the Reorganisation Plan. Lastly, Romania submitted different technical comments on the way a market economy creditor would have estimated proceeds and costs in both Reorganisation Plan and liquidation scenario, save the environmental liabilities for which Romanian contests the neutralization thereof.

(173) Third, on the whole, the option chosen by creditors, namely to vote in favour of the Plan was to their obvious benefit as the proceeds obtained from the sale through asset bundles of the operational assets – even if they represented only 57 % - brought a lot more advantages than the average scenario in case of bankruptcy. In addition to the above-stated, additional amounts were to be obtained from the sale of the remainder 43 % of the assets and, as a result thereof, their benefit would be superior in the

reorganization proceedings. Furthermore, it is forecasted that Oltchim would pay around 8 million euro from its current debt during the first half of 2018, which would mean a lower current debt and higher distribution to creditors as part of the reorganizations proceedings.

5. SALE PROCESS OF OLTCHIM'S ASSETS

(174) In its Opening Decision (see recital (85), the Commission found that the sale process as set out in the initially approved Restructuring Plan could lead to economic continuity between Oltchim SA and a possible acquirer of Oltchim SPV. In order to prevent any transfer of possible incompatible State aid to the buyers of Oltchim's assets, the Romanian authorities decided to restructure the sale process so as to ensure economic discontinuity between Oltchim and its potential buyers.

(175) Specifically, in July and August 2016, with support from advisers, Oltchim conducted an analysis of its assets and identified options for a granular offer of assets in view of maximizing the potential accumulated sales price. This led to the identification of 9 asset bundles.[57] Following the public announcement of Oltchim's sale during August 2016, an Information Memorandum was distributed to 23 bidders and the deadline for submission of Binding Offers was several times prolonged, with further due diligence (including site visits and technical due diligence).

(176) The revised Plan relying on a sale through asset bundles (and no longer through a SPV) was formally accepted by the General Meeting of the Creditors on 6 March 2017. The syndic judge confirmed the amended Reorganisation Plan on 28 June 2017 and its decision became final on 16 October 2017 (when an appeal introduced by a third party was rejected by the superior court).

(177) Following the receipt of binding offers, the Seller (AT Kearney on behalf of Oltchim) identified the following potential combinations of binding offers with the highest aggregate value for the Creditors:

– White Tiger Wealth Management for all asset bundles except for 2 and 6 for a total price offer of EUR [...] million.

– Chimcomplex for assets bundles 1,2,3,4, 5, and partially 7 for a total price offer of EUR 127 million, Dynamic Selling Group ("DSG") for asset bundle 6 for a total price offer of EUR [...] million (later revised), and International

[57] This 9 asset bundles were: (1) Chlor-alkali asset bundle, mainly consisting of Oltchim's membrane electrolysis and caustic processing facilities; (2) Oxo-alcohol asset bundle, mainly consisting of Oltchim's installations for the production of oxo-alcohols and the former DOP plant, which could be converted to producing DOTP, an accepted plasticizer in the European market; (3) PO/polyol asset bundle, mainly with Oltchim's lime processing, propylene oxide and polyol installations at its core; (4) Site services asset bundle, mainly containing key industrial infrastructure and land plots at Vâlcea site and positioned as an industrial facility manager for other asset bundles at the site; (5) Railcar asset bundle, mainly including a significant fleet of various specialized rail tank cars for the transportation of supplies and products produced at Vâlcea site and/or at similar production sites elsewhere; (6) PVC processing facility of Ramplast for the production of PVC profiles for windows and doors. (7) VCM/PVC asset bundle, which mainly includes idle installations for the production of vinyl chloride monomer and synthesis of PVC; (8) Bradu asset bundle, mainly consisting of the former petrochemical site and facilities located in Pitesti-Bradu, including a cracker, hydrogenation and polymer production (PE/PP) installations; and (9) Phthalic anhydride asset bundle, mainly consisting of the Phthalic Anhydride plant at Vâlcea Site.

Process Plants and Equipment (IPP) for bundles 8 and 9 for a price of EUR [...] million.

(178) The Creditors Assembly Meeting took place on 18 December 2017 and approved the Assets Sale Agreement with Chimcomplex while rejecting all other offers.[58] Given that the decision of the Creditors Assembly was challenged in court, the new the initial long-stop date was postponed until 17 October 2018.

(179) As regards bundle 6, the sale price was renegotiated with DSG and increased from EUR 1.9 million to EUR 2.6 million. On this basis, an asset purchase agreement was signed on 1 February 2018. The sale was approved by the Creditors Assembly on 26 February 2018 and completed on 12 June 2018.

(180) With respect to the remaining unsold assets (bundle 7 – PVC processing, bundle 8 – petrochemical plan Bradu, bundle 9 – phthalic anhydride and certain individual assets of asset bundle 7 – VCM/PVC) the Creditors Assembly tried to get improved offers in terms of price but negotiations failed.

(181) A new tender was launched in May 2018 for the remaining (non-functional) asset bundles 8, 9 as well as the unsold part of asset bundle 7.[59] The foreseen deadline for the liquidation of the remaining assets is April 2019.

6. ASSESSMENT OF THE AID

(182) The Commission will first examine whether Measures 1 to 3 in favour of Oltchim involve State aid within the meaning of Article 107(1) TFEU (see section 5.1 below). The Commission will then assess whether Oltchim was an undertaking in difficulty, (see section 5.2 below). Lastly, the Commission will examine whether the aid was already implemented (see section 5.3 below), and consequently, whether such aid is compatible with the internal market (see section 5.4 below).

6.1. Existence of State aid within the meaning of Article 107(1) TFEU

(183) 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".

(184) The criteria laid down in Article 107(1) TFEU are cumulative. The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met:

(1) the measure must be imputable to the State and financed through State resources;

(2) the measure must confer an advantage on its recipient;

(3) that advantage must be selective; and

(4) the measure must distort or threaten to distort competition and affect trade between Member States.

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58 As explained by the Seller, White Tiger Wealth Management could not provide sufficient proof of transaction certainty and in the end it unilaterally decided to withdraw on 23 October 2017 from the transaction.

59 As per Romania's Reply of 16 May 2018, all these being non-functional assets.

6.1.1. State origin (imputability and use of State resources)

(185) As has been stated by the Court[60] for measures to be qualified as State aid within the meaning of Article 107(1) TFEU, (a) they have to derive from the State's resources, either indirectly or directly by any intermediary body acting by virtue of powers conferred on it and (b) they have to be imputable to the State. The notion of Member State includes all levels of public authorities, regardless of whether it is a national, regional or local authority.[61]

6.1.1.1. Measure 1: AAAS – the non-enforcement and further accumulation of debts between September 2012 and January 2013

(186) As noted in recital (14) above, AAAS is a part of the public administration, subordinated to the Government. Therefore, the non-enforcement of the overdue debt (capital and interest) by this body, the further accumulation of debt as well as the cancelation of debts that should have been normally paid to AAAS, burdens the State budget and involves State resources.

(187) In light of the above, Measure 1 is imputable to the State and involves a transfer of State resources.

6.1.1.2. Measure 2: CET Govora and Salrom - support to the operations of Oltchim in the form of continued unpaid supplies since September 2012

(188) In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State, even if the authority in question enjoys legal autonomy from other public authorities.

(189) However, imputability is less evident, if the advantage is granted through public undertakings.[62] In such cases, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure.[63]

(190) As such, the imputability to the State of a measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken.[64] Among others, possible indicators to establish whether a measure is imputable include the following:

(a) the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law);

(b) the undertaking's integration into the structures of the public administration;

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60 See Case C-482/99 *France v Commission (Stardust Marine)*, ECLI:EU:C:2002:294.

61 Case C-248/84 *Germany v Commission*, ECLI:EU:C:1987:437, paragraph 17.

62 The concept of public undertakings can be defined by reference to Commission Directive 2006/111/EC, of 16 November 2006, on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17). Article 2(b) of this Directive states that 'public undertakings' means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it'.

63 Judgment of the Court of Justice of 16 May 2002, France v Commission (Stardust Marine), C-482/99, ECLI:EU:C:2002:294, paragraph 52.

64 Judgment of the Court of Justice of 16 May 2002, France v Commission (Stardust Marine), C-482/99, ECLI:EU:C:2002:294. See also Judgment of the General Court of 26 June 2008, SIC v Commission, T-442/03, ECLI:EU:T:2008:228, paragraphs 93 to 100.

(c) the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators;

(d) the fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities;

(e) the fact that the undertaking through which aid was granted had to take account of directives issued by governmental bodies;[65]

(f) the degree of supervision that the public authorities exercise over the management of the undertaking.

(191) Regarding Salrom, the Commission notes that the board of directors of the company is nominated by the general meeting of shareholders, in a context in which the Romanian State holds a majority (51 %) of Salrom's shares and names State representatives within the board of directors.

(192) Furthermore, given that Salrom is considered a State-owned enterprise, its annual budget is subject to approval by the State. This ex-ante approval concerns, amongst others, the amounts corresponding to trade receivables from clients (such as Oltchim).

(193) In any case, it is not necessary to conclude that Salrom's actions are imputable to the State with respect to Measure 2 given that the Commission finds that Measure 2 does not constitute aid for Salrom (see below recital (263)).

(194) Regarding CET Govora, the Commission notes that the company is registered as a fully State-owned company having as sole shareholder the Vâlcea County and that, before entering into insolvency, it has been administered by the Vâlcea County Council[66].

(195) Furthermore, the Commission notes that the decisions to sign a new electricity contract with Oltchim and then to increase supplies were taken in the implementation of several decisions[67] issued by the Vâlcea County Council, to ensure supply to Oltchim.

(196) Also, it would be implausible to consider CET Govora was free from any influence by the state when considering the behaviour of the company in a wider context; for instance, immediately after the failed privatisation, the CEO of CET Govora was immediately appointed CEO of Oltchim in October 2012 and subsequently returned to CET Govora in February 2013, right after Oltchim's entry into insolvency.[68]

(197) Despite Romania's claim that the CEO of CET Govora advised the Vâlcea Council to take decisions in the best interest of the company during the assessed period, other elements brought into light by the high-level corruption scandals in which the CEO of CET Govora was involved (and eventually convicted by the national criminal

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65 Judgment of the Court of Justice of 23 October 2014, Commerz Nederland, C-242/13, ECLI:EU:C:2014:2224, paragraph 35.

66 See Governmental Ordinance No. 1005/2002, as mentioned on the company's website: www.cetgovora.ro .

67 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.

68 https://romanialibera.ro/actualitate/eveniment/directorul-oltchim-a-demisionat-la-presiunea-angajatilor-combinatului-292711

courts together with a member of the government) contradict this claim[69]. More specifically, in June 2018, the national criminal courts convicted the Minister of Transport at the time under charges of *traffic of real influence* which he had over the CEO of CET Govora, in order to determine the latter to conclude several disadvantageous and unnecessary contracts in the name of CET Govora, with the ultimate purpose of siphoning off company resources. For their joint criminal activity of *misuse of office* and *traffic of influence* in continued form committed between October 2011 and July 2014, the national criminal courts convicted both the Minister and the CEO of CET Govora.

(198) Consequently, and irrespective of CET Govora's subjective position as to the merits of continuing supplies to Oltchim, the Commission notes that CET Govora could not take the contested decision without taking into account the requirements of the public authorities and that directives issued by governmental bodies (i.e. the Vâlcea County Council`s decisions) were ultimately the basis on which CET Govora acted. As such, the Commission concludes that the measure is imputable to the State in the case of CET Govora.

(199) Since CET Govora is State-owned, the Commission concludes that its decision to postpone the deadline for payments and to continue supplies to Oltchim, burdens State resources.

(200) In the light of the above, Measure 2 is imputable to the State as regards CET Govora and involves a transfer of State resources.

6.1.1.3. Measure 3: AAAS and SoEs (in particular Electrica, Salrom, CET Govora, National Water Administration) – the 2015 debt cancellation under the Reorganisation Plan

(201) First, the Commission notes that, based on the insolvency law, the Plan could not be approved without the consent of AAAS (holding the majority of claims value in the budgetary creditors' category) or CET Govora (holding the majority of claim value in the captive suppliers' category, i.e. unsecured creditors under Article 96 of the insolvency law), the actions of which were imputable to the State (see recital (187) and (200).

(202) Second, the Commission also notes that the Restructuring Plan was produced by the receiver appointed by the Court, part of the State. The Restructuring Plan was then endorsed thanks to the approval of public and private creditors that had previously signed in November 2012 the State-initiated Memorandum.

(203) This Memorandum (signed by 12 parties out of which 10 belonged to the public administration or were publicly owned[70] and only 2 privately owned financing institutions[71] - see recitals (31)), was prepared by three ministries and approved by the Prime Minister. Thus, the Memorandum was the very channel used by the State at its highest level to maintain Oltchim on the market.

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69 https://www.digi24.ro/stiri/actualitate/justitie/dan-sova-condamnat-la-3-ani-de-inchisoare-cu-executare-950309

70 Three ministries, AAAS, Office for State Participation in the Privatisation of Industry, Electrica, CFR Marfa, Salrom SA, Oltchim, CEC Bank. Since July 2014, the majority of Electrica's shareholdings is privately owned.

71 Banca Transilvania SA and Banca Comercială Română.

(204) Third, the Commission notes that this intention of the State to keep Oltchim alive was signalled and then repeatedly confirmed before and during the insolvency period.

(a) As the various press declarations from high representatives of the Romanian government show (see recitals (27), (28), (30), and (31), above concerning the period between September 2012 and January 2013), there was full political commitment to rescue Oltchim and re-launch its activities even before any restructuring plan was designed and before the entry into insolvency.

(b) As it is apparent from the press, the Government has been under strong and steady pressure from the Oltchim's trade union, in particular after the failed privatisation as well as throughout 2013.[72] In particular, after the entry of Oltchim into insolvency, February, March and August 2013 were marked by ample protests at Râmnicu Vâlcea and Pitesti, the two sites of Oltchim.

(c) In January 2013, the ex-Minister of Economy acknowledged that the previous privatisation had costed Oltchim the accumulation of additional debts of almost EUR 100 million since the failed privatisation until [January 2013] and said that liquidation by pieces would be an easier solution. However, the Minister added that he considered "*entry into insolvency of Oltchim […] as a chance of restructuring and valorisation of the viable parts. The Monetary Fund has a more pessimistic view.*" [73] Throughout the first part of the insolvency period the Romanian government continued to send strong messages to the public on its intentions regarding Oltchim's rescue.

(d) For instance, immediately after entry into insolvency, at the beginning of March 2013 the Romanian Prime-Minister at the time indicated that *"unfortunately, the European Commission's response to the idea of a loan is negative, in the European Commission's view Oltchim has already benefited from State aid in the 2010-2011 period, I think, therefore, we are not allowed to grant money from the budget, and the only solution is to restructure and finance both from banks and from traders who buy production*". The Prime-minister added that the Government had "*an interest that jobs are preserved*."[74]

(e) In the same month of March 2013, during a presentation in front of the Romanian Parliament[75] the Minister of Economy at the time stated that "*we*

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72 The leaders of Syndicate urged the Prime Minister Ponta to appoint an commission for the assessment and decision making, complaining that the judicial administrators would "*lead Oltchim to bankruptcy via collective severances, technical unemployment and keeping installations non-operated*" and asked for a "*political decision to establish the strategy of functioning and privatising Oltchim and its capitalisation*" as well as other measures in order to save the company. See press articles of 26 July 2013 available at: http://romanialibera.ro/economie/finante-banci/ce-ii-cer-sindicalistii-oltchim-lui-ponta-308646 and of 4 December 2013 available at: https://www.voceavalcii.ro/18598-francu-il-cheama-pe-ponta-in-mijlocul-sindicalistilor-de-la-oltchim.html.

73 See article of 26 January 2013 available at: https://www1.agerpres.ro/economie/2013/01/26/vosganian-fmi-are-o-viziune-pesimista-privind-oltchim-19-59-47 .

74 See article of 29 March 2013 available at: http://www.mediafax.ro/social/ponta-comisia-europeana-nu-permite-ajutor-de-stat-la-oltchim-si-nu-avem-cumparatori-sunt-necesare-disponibilizari-10700467, and article of 30 March 2013 available at: https://revista22.ro/24001/.html.

75 See article of 17 December 2013 available at: https://www1.agerpres.ro/economie/2013/12/17/retrospective-2013-oltchim-ramnicu-valcea-tinut-pe-

intend to change the privatisation philosophy, in so far that we are interested in those [investors] that want to invest and we are more interested in the actual level of the subsequent investment [after privatisation] rather than the selling price".[76]

(f) In another context, the same Minister of Economy said that "beyond its brand, Oltchim detains an important number of patents that is worth millions of euros" and that "the destruction of this company was equivalent to the destruction of a treasury of intellectual property". [77]

(g) During a meeting with local authorities in Oltchim's sites region, the Minister of Economy said that "4 months after the insolvency was declared, there are arguments that lead to the conclusion that solutions to save the society can be found". The Minister was quoted saying that "Oltchim's problem is one of pride and national dignity, because Oltchim is one of the first 5 companies in the sector in Europe, a reason for which it is worth saving it".[78]

(h) In September 2013, the Minister of Economy declared Oltchim as being a priority for his Ministry and indicated that "this week the creditors should approve a financing that we would announce within a matter of days, and if this will be implemented, it will be an extraordinary performance for Oltchim, which was on the edge of extinction at the beginning of the year, which now becomes bankable and gets credit from private banks. Then, at the end of September, the evaluation report will be presented and "Oltchim No. 2" will be clean from creditors' debt, so that October will be the month of starting negotiations with potential clients." More generally, during these discussions with senators of the leading party, the Ministry of Economy expressed himself against the liquidation of large SOEs.[79]

(i) In early 2014, the Prime Minister was urging the newly appointed interim Minister of Economy to take over the "Oltchim problem", adding that he "*would not want the situation to explode […] out of lack of political capacity*".[80]

(j) Later that year, the Minister of Economy reiterated, during a visit at Oltchim's sites that Oltchim "*is a company of national and strategic interest*" and that he excluded a bankruptcy scenario. Rather, he explained that postponing privatisation was based on the "*investors' interest in taking over*

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aparatele-insolventei--12-13-21 ; http://economie.hotnews.ro/stiri-finante_banci-16227528-oltchim-ramnicu-valcea-tinut-aparatele-insolventei-retrospectiva.htm .

76 See article of 10 April, updated 13 April 2013 available at: http://stirileprotv.ro/stiri/financiar/vosganian-mari-companii-au-exprimat-in-scris-interesul-pentru-oltchim-ponta-atentie-la-escroci.html .

77 See article of 30 May 2013 available at: http://romanialibera.ro/economie/companii/vosganian--despre-oltchim--vorbim-despre-distrugerea-unui-tezaur-de-proprietate-industriala-303367 .

78 See article of 9 July 2013 available at: https://www1.agerpres.ro/economie/2013/9/17/Varujan-Vosganian-Oltchim-va-deveni-bancabil17-09-2013-17-14-49 .

79 See article of 17 September 2013 downloaded at: https://www.agerpres.ro/economie/2013/9/17/Varujan-Vosganian-Oltchim-va-deveni-bancabil17-09-2013-17-14-49 .

80 See article of 19 February 2014 available at: http://www.economica.net/ponta-despre-situatia-de-la-oltchim-n-as-vrea-sa-explodeze-din-lipsa-noastra-de-capacitate-politica_73937.html#n .

Arpechim refinery as well".[81] In the same vein, the Minister of Economy and Prime Minister reiterated on various occasions that "*Oltchim will never be closed*"[82].

(205) Moreover, as it is apparent from the Table of claims (see Table 1), the signatories of the Memorandum held claims amounting to an aggregate amount of EUR 539 million. The claims of these signatories, together with the claims of CET Govora (the actions of whom regarding Measure 3 were imputable to the State (see recitals (200) and (201)), amount to an aggregate amount of EUR 569 million out of a total of EUR 759 million overall claims. Thus, the signatories to the Memorandum together with CET Govora also had the necessary majority in all four categories of creditors other than the employees – a category that also naturally preferred the Plan (fact recognized by the Romanian authorities[83]) – so as to approve the Plan[84]. The high level of the public signatories of the Memorandum makes it highly unlikely that even privately-owned banks and other private actors would decide to disregard the objectives of the Memorandum at the time of voting in favour or against the Plan: neither the private banks part of the Memorandum nor Electrica could reasonably refuse to take into consideration the repeated statements (see recitals (27), (28), (30)) of Oltchim SA's shareholder implying that the Romanian State would not let Oltchim fail, nor could they disregard the Memorandum that they signed, which was approved by the Prime Minister. Based on the explanations of Romania , the Court would have considered at that time that the following condition foreseen in Article 101(2) of the insolvency law would have also be fulfilled, even if a creditor not part of the Memorandum would have opposed the Plan: in particular, based on Romania's submission, the Court would have considered that "*none of the categories which reject the plan and none of the claims which reject the plan receives less than it would have received in case of bankruptcy*", irrespective of the comparison that a MEO would have made between the proceeds in the Reorganisation plan and liquidation scenario (see section 5.1.2.3 in that respect). Therefore, the Memorandum made it possible for the State to secure the adoption of the Reorganisation Plan by creditors.

(206) In light of the above, the Commission notes that the Memorandum which was initiated by the State and the objective thereof – i.e. saving Oltchim at all costs, as regularly and publicly reiterated by the State between the failure of the privatisation in September 2012 and the vote of the creditors on the Plan in 2015 – ensured the required majority within the Creditors' Assembly so as to secure the adoption of the Reorganisation Plan. As shown in recitals (31), (203), and (235) et subseq., this Memorandum was imputable to the State.

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81 See press article of 1 April 2014 available at: http://www.economica.net/constantin-nita-exclude-varianta-falimentului-in-cazul-oltchim_76820.html

82 See article of 3 June 2014 available at: http://adevarul.ro/economie/afaceri/constantin-nita-guvernul-nu-inchide-oltchim-niciodata-1_538d9c800d133766a84153d9/index.html , and article of 6 June 2014 available at: https://www.wall-street.ro/articol/Companii/167170/ponta-oltchim-nu-mai-are-pierderi-si-este-eligibil-pentru-credite.html .

83 Point 82 of Romania's submission dated 16 May 2018

84 CFR Marfa, part of the Memorandum, voted against the Plan, but its vote did not impact the majority hold by the Memorandum's signatories in each category of creditor. The value of the claims of the different

(207) Specifically, with the Memorandum, the Government set up the framework for the signatories to it to "*work together to identify and implement solutions that protect the rights of employees, shareholders and creditors*."

(208) Furthermore, "[t*]he draft Agreement ensures the provision of working capital by the signatory banks [in order for Oltchim] to continue production at the relaunched capacities, as well as to gradually reopen other production capacities, too, in order to attract more potential applicants interested in the privatisation of the company*." It is highly unlikely that, in the context of the public statement of the authorities, any of the actors invited to sign the Memorandum would have refused to adhere to it. Additionally, the standard set by the Memorandum for collaboration between the signatories – that is "*with the assistance of the Restructuring Experts – to develop a strategy that ensures long-term viability in order to bring Oltchim to a sustainable level of profitability, solvency, liquidity and cash ("Sustainable Relaunch Strategy")*" was relatively low and vague, as it rested only on "*obtaining **some positive results** following the Viability Analysis*" (emphasis added).

(209) With the Memorandum, the Government reiterated its determination to do all necessary to keep Oltchim running and to restructure it. In the same vein, both private entities and public entities that signed it committed to do their part in a long term strategy to restructure Oltchim, long before any vote on a potential Reorganisation Plan in the Creditors' Assembly. All of the signatories to the Memorandum also positively voted for the Reorganisation Plan in 2015, with the single exception of CFR Marfa, which was relatively less important compared to the financing partners and the other state creditors as regards Oltchim's survival, and given that Oltchim also used Ermewa for its transports needs.

(210) The Memorandum contains clause No. 8 which foresees the "*protection and maintenance of rights*" and interests of the signatories. However, this clause, and in particular the second part of it, does not go any further than stating the obvious, i.e. that the Memorandum itself, at the moment of signing, did not already represent an upfront waiver of the banks, Electrica or AVAS' rights as creditors. Thus, in the Commission's view, the sole participation at that very moment in time and engagement for the future co-operation as set up via the Memorandum, is in itself evidence of the signatory creditors (both public and private) embarking on the clear direction of restructuring Oltchim.

(211) This direction towards keeping Oltchim afloat is even more obvious when one takes into account the additional time and financial effort put into supporting Oltchim's relaunching by the three banks (whose liability claims towards Oltchim increased considerably during this period) and by AAAS (and other signatory parties) which, in the same spirit, refrained from taking steps towards the immediate enforcement of its claims.

(212) With regard to the National Water Administration, based on the provisions of its publicly available statute of functioning and organisation[85], the Commission notes the following:

[85] According to the latest information on its website (available at http://www.rowater.ro/default.aspx), the Romanian National Water Administration was established by Government Decision No. 107/2002, amended and completed by Government Emergency Ordinance No.73 / 2005 (available at http://legislatie.just.ro/Public/DetaliiDocumentAfis/153726). Its statute of functioning and organization

(213) First, regarding its legal status and its integration into the structures of public administration, the National Water Administration is a public institution of national interest having legal capacity and co-ordinated by the central public water authority (i.e. of the Ministry of Waters and Forests)[86].

(214) Second, concerning the nature of its activities, the object of the undertaking is to apply the national strategy and policy in the field of quantitative and qualitative management of water resources and to ensure observance of the regulations in the field; in this context, it administrates and operates the infrastructure of the national water management system. Also, the company ensures the fulfillment of a number of activities of national and social interest, such as e.g. the fulfillment of the commitments made by the Romanian State through international agreements and conventions[87].

(215) Third, as regards the intensity of the supervision exercised by the public authorities over its management, the National Water Administration is run by a board of administration made up of 11 members, all of whom are appointed for a four years mandate by order of the head of the central public water authority. According to the same article, it is mandatory that a representative of the Ministry of Public Finances and one of the central public water authority are members of the board of administration. Additionally, the general director of the National Water Administration is appointed, suspended and released from office by order of the head of the same central public water authority[88].

(216) Fourth, concerning the financing of its activity, the income and expense budget of the company is approved by the board of administration with the consent of the head of the central public water authority[89].

(217) Consequently, in view of the factors mentioned at recital (190) above, the Commission considers that: (i) its legal status, (ii) its integration in the public administration, (iii) the nature of its activities and tasks -not normally exercised on the market in conditions of competition with private operators-, (iv) the supervision exercised by public authorities over its management and (v) the approval procedure for the income and expenses budget, all indicate that the actions of the National Water Administration are imputable to the State.

(218) In the light of the above elements (i.e., notably, majority of voting ensured for the adoption of the Reorganisation Plan, but also by ensuring co-operation in the contemporary and subsequent efforts from major creditors through the Memorandum), the Commission concludes that the granting of Measure 3 by AAAS, Electrica, Salrom, CET Govora and National Water Administration is imputable to the State.

6.1.2. Selective economic advantage

(219) The measures under assessment are clearly selective since they are provided exclusively to Oltchim. Other undertakings in a comparable legal and factual

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has been approved by Government Decision No. 1176 of 29 September 2005 (available at http://legislatie.just.ro/Public/DetaliiDocument/31843).

86 See Article 1 of the National Water Administration statute.

87 See Articles 3 and 6 of the National Water Administration statute.

88 See Articles 19 and 24 of the National Water Administration statute.

89 See Article 16 of the National Water Administration statute.

situation, in the light of the objective pursued by the measures, within the petrochemical sector or other sectors, did not receive the same advantage. According to the case law of the Court of Justice, the mere fact that the competitive position of an undertaking is strengthened compared to other competing undertakings, by giving it an economic benefit which it would not otherwise have received in the normal course of its business, points to a possible distortion of competition.[90]

(220) However, Romania submits that "the measures did not confer any economic advantage to Oltchim, because they respected the MEO test, given that the public authorities and the public companies acted in the same way as the private creditors, investors or suppliers would have acted, in order to minimize their losses and maximize their profits"[91].

(221) However, in the case of hand the MEO test does not appear to be applicable. First, the Commission recalls that the Court previously considered that the applicability of the *'market economy investor principle'* ultimately depends on the State having conferred, in its capacity as shareholder and not in its capacity as public authority, an economic advantage to an undertaking belonging to it.[92] In the same vein, the MEO test could have not been applicable for the State in its capacity of creditor of Oltchim via AAAS and other public creditors, because the *'private creditor test'* does not apply for the measures the State undertook in its capacity as public authority when signing the Memorandum.

(222) As explained in recitals (204) et subseq., (274) and (276) , the State acted steadily and clearly in its capacity as public authority to save Oltchim from bankruptcy, including by public statements and by way of a Memorandum with the main private and public creditors involved, and not as a shareholder investing in a company or as creditor. Therefore, the Commission considers that the MEO test is not applicable in the case at hand.[93]

(223) However, for sake of completeness, the Commission has also performed the MEO test in the form of a market economy creditor principle for each of the three Measures at hand, by requesting the Romanian authorities for additional contemporaneous information on the various actors involved and their decisions, by collecting information from all available public sources itself, and by performing its own estimation scenarios based on available evidence at the time of the measures assessed.

6.1.2.1. Measure 1: AAAS – the non-enforcement and further accumulation of debts since September 2012

(224) The treatment of Oltchim's debt held by AAAS was already assessed in the 2012 Commission decision in view of the then imminently expected privatisation. The Commission therefore considers it appropriate to analyse the behaviour of AAAS following this decision as of the moment that privatisation failed.

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90 Judgment of the Court of 17 September 1980 in Case 730/79 *Philip Morris Holland BV v Commission*, EU:C:1980:209.

91 See points A.2.b) and section B of Romania's Reply of 16 May 2018 to Commission's Request for Information.

92 See Judgment of the Court of 5 June 2012 *European Commission v Électricité de France (EDF)* ECLI:EU:C:2012:318, paragraphs 79-82 and 87.

93 See Judgement of 16 January 2018 in Case T-747/15, *EDF v Commission*, EU:T:2018:6.

(225) A private creditor is normally seeking to obtain the maximum payment of sums owed to it by a debtor in financial difficulties.[94]

(226) Contrary to Romania's claim that, according to the 2012 Commission Decision, the delayed execution of the claims would be aid-free (provided AAAS charged interest on the basis of the 2008 Reference Rate Communication until Oltchim's entry into insolvency), the Commission notes that the situation in March 2012 when the Commission issued its Decision differed fundamentally from the period under investigation given that, in the latter scenario, there was no longer any imminent privatisation project forthcoming. In this respect the Commission notes that the conclusion in the 2012 Commission decision was predicated on the condition that Oltchim was fully privatised in the short-term after the debt conversion. However, the State (via the Ministry of Economy) as the majority shareholder did not account for the possibility that certain minority shareholders could block the envisaged debt-to-equity conversion. This blockage eventually happened, and the envisaged debt-to equity conversion no longer took place. As a result, at the end of the tender, with a winner of the bid that was unable to meet his obligations as a buyer, the privatisation itself failed too.

(227) The Commission notes that the difficult and steadily deteriorating financial situation of Oltchim was known to all creditors, and in particular to AAAS. Therefore, AAAS had enough time to prepare, internally assess, and implement steps to recover its claims in case of yet another failed privatisation in September 2012. Thus, the investigated five-months period between September 2012 and 31 January 2013 was long enough for AAAS to take the necessary steps and attempt the recovery of debts (99 % of AAAS' claim was unsecured as per Table 1). In this respect, the Commission notes that undertakings such as Electrica did take such steps, albeit unsuccessfully.

(228) First, the special laws governing the recovery of State debts[95] foresee special rights to AAAS comprising the direct enforcement of its claims without a Court decision. Specifically, Article 50 (1) and (2) of Government Emergency Ordinance No. 51/ 1998 provides that : "*(1) AVAB (the current AAAS) may organize its own corps of bailiffs or may use other bailiffs in order to enforce execution writs*", and *"(2) [e]nforcement proceedings for the realization of bank assets by AVAB shall be enforced by either its own corps of bailiffs or other bailiffs."*

(229) Romania failed to provide any evidence, despite reiterated requests by the Commission, showing that AAAS tried all actions that a market economy creditor would have reasonably triggered to recover its claims. Besides, Romania claims that AAAS would have been prevented to ask for the enforcement of its claims towards Oltchim by the privatisation law[96] which foresees that, as of the date of the establishment of the special administration procedure, tax-and-contributions (i.e. budgetary) creditors cannot execute their debts and will not take any steps towards such execution measures as long as the company is prepared for privatisation[97]. Nevertheless, while this supports the presence of a selective

94 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 1-3913, paragraph 24.

95 See Ordinance No. 29/2002 and Government Emergency Ordinance No. 54/1998 and Government Emergency Ordinance No. 51/ 1998 (which regulates the realization of state assets - the 2012 version).

96 See Article 16 of Law 137/2002.

97 See Article 16 paragraph (5) (c) of Law 137/2002 as applicable in September 2012.

advantage granted to Oltchim imputable to the State, AAAS's lack of action takes place in a context where the Ministry of Economy had, for unexplained reasons, maintained Oltchim under the special regime for privatisation procedure even after the failed privatisation in September 2012. AAAS could have tried to challenge the Ministry's decision to prolong without explanation this special status.

(230) Second, Romania failed to provide any study, report or internal document demonstrating that AAAS acted as an MEO in its decision to refrain from the recovery of its claims after the failed privatisation in September 2012. According to the latest available study at that time assessing AAAS claims' recovery (the 2011 Raiffeisen study) AAAS would have obtained a 12 % recovery ratio in a liquidation scenario.[98]

(231) Other creditors including public entities took immediate actions in that period to recover their dues. In particular, Electrica – which according to the 2011 Raiffeisen study had the same recovery ratio as AAAS – did initiate execution of its debts on 1 November 2012 and successfully garnished the bank accounts of Oltchim. In addition, two non-State-owned companies – Polcheme S.A. and Bulrom Gas which accounted for the 8th and 10th most important claims within the 21 secured creditors in 2013 also initiated enforcement measures. AAAS was indeed the most important creditor of Oltchim and could have used its position to obtain better negotiation terms as to the recovery of its debt but failed to do so. Threatening Oltchim with liquidation could have provided AAAS with better terms of debt recovery.

(232) Despite Romania's claim, entering into the Memorandum is not equivalent to - or a substitute for - best efforts to get informed, given that the so-called *Viability Analysis* mentioned in the Memorandum was subsequently commissioned and used by three financial creditors and not by AAAS itself. Romania failed to document any such internal analysis by AAAS.

(233) Consequently, AAAS' overall behaviour (despite its historic knowledge of Oltchim's structural difficulties) was passive concerning best efforts to recover its claims or at least to obtain a better creditor position and appeared more directed towards rescuing and keeping Oltchim afloat.

(234) Therefore, the Commission considers that by taking action, AAAS would have had higher chances to recover its claims, also given that Oltchim had suspended production and thus had no prospective operating revenues in the near future.

(235) Third, instead of trying to enforce its debts, AAAS initiated, together with the Ministers of Finance, Economy and Transport, as well as the Office of State Ownership and Privatisation in Industry, the Memorandum (see *in extenso* recitals (31) and (203) et subseq. above) that was approved on 13 November 2012 by Romania's Prime Minister and signed by the State as well as seven creditors out of which five were public – AAAS, Salrom, CFR Marfa, CEC Bank, Electrica (still fully State-owned at that time) – and two were private – Romanian Commercial Bank (later on renamed "Erste Bank") and Transilvania Bank. Contrary to Romania's claim, the Memorandum cannot be considered as a *pari passu* transaction, given the significant prevalence of public creditors and State authorities co-signatory to it.[99]

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98 See Raiffeisen Report of October 2011.

99 See recitals 86 to 88 of the Communication of the Commission on the notion of aid 2016/C 262/01.

(236) Specifically, out of twelve signing parties, ten belong to the public administration or are publicly owned[100] and only two are privately owned financing institutions[101.] The Memorandum was initiated by the State (the Ministry of Finance, the Ministry of Economic Affairs, the Ministry of Transport and Infrastructure, AAAS and OPSPI) and approved by the Prime minister. Furthermore, the percentage of claims held by private creditors represented only around 20 % of the total claims of the signatories of the Memorandum. The magnitude of the public involvement was therefore considerable and the intervention of the private operators limited. Lastly, the terms and conditions of the transactions are not comparable as 77 % of the claims of the two private creditors having signed the Memorandum was secured, in contrast to only 14 % of the claims on average for the public creditors.

(237) The Memorandum proves that public creditors agreed to a non-recovery scenario without proper assessment of other alternatives. Notably, paragraph 2.3. of the Memorandum mentions that the parties to it agree to a list of measures, in order to "*endeavour to implement [a] sustainable relaunch strategy under the reserve of a positive result of the Viability Assessment*". Romania never presented the Viability Assessment, but mentioned that such a study was undertaken by the banks. According to the R/BDO, Transilvania Bank, Erste Bank (private creditors) together with CEC Bank (public) commissioned the study to Alvarez&Marsal who delivered a report that "*contained restructuring measures and confirmed as possible the reorganisation of Oltchim's activities following the implementation of the proposed measures*". According to the Romanian press[102], the Romanian authorities have shown that the report by Alvarez&Marsal, as commissioned by the creditor banks to evaluate Oltchim's situation, confirmed "*the hypothesis of the authorities and the need to grant rescue aid in the proposed structure*".

(238) Romania failed to document such assessment being undertaken for or on behalf of AAAS, let alone actually having been used by AAAS. Romania also failed to prove that the Alvarez&Marsal report was actually used by AAAS and, even more, as it is transparent from the public sources mentioned in the recital (237) above, the report only confirmed the need for granting aid and not necessarily a confirmation of the long term viability of reorganisation.

(239) In this respect, the Commission reiterates, as per recital (22) above that its conclusion on the conversion of the debt (and hence the AAAS' debt write off in favour of Oltchim) followed by full privatisation was found not to involve an advantage on the premises that *"[…] the company is fully privatised in the short-term after the debt conversion"*. The Memorandum confirms AAAS' will to prolong the state of non-recovery of claims and accumulation of further debts.

(240) Romania also claims that AAAS had analysed the possibility of requesting a seizure of the accounts of Oltchim, but was unable to do so as Oltchim's accounts were already garnished by other creditors. However, Romania has not provided any evidence supporting this statement. In any case, AAAS failed to behave as a prudent

100 Three ministries, AAAS, Office of State Participation in the Privatisation of Industry, Electrica, CFR Marfa, Salrom SA, Oltchim, CEC Bank. Note that only since July 2014 is the majority of Electrica's shareholding privately owned, with the State owning 48.78 % and the shares.

101 Banca Transilvania SA and Banca Comercială Română (later on turned into "Erste Bank").

102 See Article from Criterii Nationale of 23 December 2013 with the title Combinatul Oltchim în agonie. Pagini pentru o istorie neagră available at: http://www.criterii.ro/index.php/en/valcea/8291-combinatul-oltchim-in-agonie-pagini-pentru-o-istorie-neagra .

private creditor, as it did not take any action towards protecting its claims. Had AAAS intervened earlier in the process, it would not have deprived itself of the opportunity to have garnished Oltchim's accounts first (that is before other creditors, such as Electrica in November 2012) or getting pledges on real estate (as Salrom did).

(241) Romania submits that, should AAAS have asked for the execution of its claim, Oltchim would then have been led to start an insolvency procedure. The Commission considers that the very threat of triggering insolvency could have given AAAS more leverage over Oltchim to recover its claims. Even in an insolvency scenario triggered by AAAS, AAAS would have gained the actual power to propose a reorganisation of Oltchim capable of maximizing the recovery of its claims, notably by way of a sale by bundles (see recital (265)). Having such a possibility would have considerably changed AAAS' position.

(242) At the very time of the Creditors' Assembly vote in March 2015, AAAS's choice was restricted between liquidation and the Reorganisation Plan, a result of AAAS's previous inaction. Accordingly, had AAAS behaved as a prudent creditor, it would have taken advantage of the provisions of the insolvency law allowing any creditor representing more than 20 % of the claims to propose a reorganisation plan[103]. By doing so, AAAS would have taken action allowing it the choice for another kind of reorganisation plan (sale through asset bundles), a revenue maximising scenario (as further explained in recital (265)) that should have taken place already as from September 2012, immediately after the failed privatisation.

(243) Based on the considerations above, the Commission considers that Measure 1 gives Oltchim a selective advantage by way of non-enforcement and, corresponding increased claims towards Oltchim, in the period September 2012 – January 2013 amounting to RON 152 million[104] (EUR 33 million), the time-value attached to the deferral of the request for enforcement of AAAS's claims implying a higher exposure to Oltchim.

6.1.2.2. Measure 2: CET Govora and Salrom - support to the operations of Oltchim in the form of continued unpaid supplies since September 2012

(244) As explained above (see recital (29)) 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.

(245) The Commission expressed 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.

(246) During the investigation phase, Romania provided valid arguments regarding the technological interdependence existing between Salrom and CET Govora on the one hand, and Oltchim, on the other hand. These arguments have also been supported by third parties such as Oltchim`s and CET Govora`s insolvency trustees, and can be summarised as follows.

(a) The Vâlcea industrial platform hosts 4 large players: Oltchim, CET Govora, Uzinele Sodice Govora and Salrom. Their activity is technologically

[103] Article 33(4) of the insolvency law.

[104] Difference between AAAS' claim at the end of the period investigated for Measure 1 (RON 1,201 million) and at the beginning (RON 1,049 million).

independent, each of them being a supplier and a utility client of the other, at the same time.

(b) Salrom delivers saline solution and chalk to Oltchim, and Oltchim delivers to Salrom industrial water required as part of the dissolution of salt in the bedding. Salrom's other Saline solution client is Uzinele Sodice Govora. Salt and industrial water deliveries between Salrom and Oltchim are achieved through pipes connecting the two suppliers/consumers.

(c) CET Govora delivers electricity and steam to Oltchim and receives from Oltchim raw water required in the production process. Uzinele Sodice Govora is also CET Govora's client for electricity and steam, and steam is also delivered to the Râmnicu Vâlcea Municipality for town heating purposes. Uzinele Sodice Govora and Oltchim are captive customers in terms of the steam supplied by CET Govora and the salt supplied by Salrom. On the other hand, CET Govora relied on Oltchim`s supply of industrial water to operate[105].

(247) Regarding Salrom, Romania claims that the company was put in the situation of choosing between maintaining their business operational or shutting it down because of the unavailability of the utilities supplied to it by Oltchim. Oltchim's disappearance would have also meant the disappearance of the other client of Salrom, Uzinele Sodice Govora, with negative consequences for CET Govora.

(248) Regarding CET Govora, Romania claims that there was no practical solution to substitute Oltchim`s purchases of industrial steam from it. If CET Govora had stopped delivering steam to the two captive customers (considering that steam is an electricity generation by-product), the only option would have been the complete loss thereof through release into the atmosphere. As such, Romania argues that, from an economic point of view, the option any operator in CET Govora's situation would have taken was to convert the steam into debt rather than releasing it into the atmosphere, case in which it can be fully deprived of its value.

(249) Apart from the technological interdependence, Romania also argued that the decisions taken by CET Govora and Salrom to continue the supplies to Oltchim were justified and MEOP-conform, as long as both companies have secured the newly (i.e. after September 2012) created debt.

(250) Further on, Romania implies that CET Govora`s and Salrom`s decisions to deliver raw materials required for the restarting of Oltchim`s activity are similar to those made by private companies such as Bulrom Gas Impex, SC Arelco Power, Ciech Chemical Group, Tricon, Alum, MFC Commodities, Chemimplex. The base of such decision would have been the likelihood of recovering a larger amount of the debt in case the activity was restarted, the business became viable and the subsequent sale had succeeded.

(251) In principle, with regard to the technological interdependence existing between Salrom and CET Govora on the one hand, and Oltchim on the other hand, the Commission does not dispute the validity of Romania`s arguments.

(252) However, the Commission cannot accept Romania`s position as to the MEOP conformity CET Govora`s behaviour. This is further explained below.

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[105] It seems credible that CET Govora would have been unable to bear the cost for diversifying its supply of industrial water and that such works were possible within a reasonable timeframe.

(253) As can be seen from Table 7 below, between October 2012 and January 2013, Salrom`s claims against Oltchim increased by RON 15 million (approximately EUR 3 million). At the same time, as can also be observed in Table 8 below, CET Govora`s claims against Oltchim, also increased by RON 52 million (approximately EUR 12 million) out of which RON 27 million (approximately EUR 6 million) penalties for late payment.

(254) According to the latest information provided by Romania, during the September 2012 – January 2013 period, CET Govora supplied Oltchim with gas and steam amounting to approximately RON 50 million, while the payments received from Oltchim during the same period amounted to only approximately RON 8 million.[106] While on the one hand Romania submits that the penalties of RON 27 million would correspond to a higher debt, notably accumulated over a longer period starting with February 2008 and ending in December 2012, on the other hand, Romania failed to provide reliable figures as to the exact penalties corresponding to the accumulated debt during the assessed period starting in September 2012 and ending in January 2013.[107]

Table 7 – Evolution of Oltchim`s liabilities towards Salrom

Description	Total debt in RON	Of which:	
		Product supplies	Penalties
I. Debt as on 24 October 2012	**15,729,325.14**	15,383,302.06	346,050.08
II. Debt as on 30 January 2013	30,860,560.64	17,262,141.93	13,598,418.71
III. Difference (II-I)	15,131,235.55	1,878,839.87	13,252,368.63

Source: Comments of R/BDO on the Opening Decision, page 34.

Table 8 – Evolution of Oltchim`s liabilities towards CET Govora

Description	Total debt in RON	Of which:		
		Electricity	Steam	Penalties
I. Debt as on 24 October 2012	**84,543,999.44**	1,181,003.76	83,362,995.68	
II. Debt as on 30 January 2013	136,899,918.98	22,530,599.80	86,958,973.79	27,410,345.39
III. Difference	52,355,919.54	**21,349,596.04**	**3,595,978.11**	27,410,345.39

106 Romania's Reply of 16 May 2018, R15 et subseq.

107 Romania's Reply of 16 May 2018, R14 et subseq.

accrued during the period (II-I)				

Source: R/BDO comments on the Opening Decision, page 33.

(255) In any case, on the basis of the information collected, the Commission finds that Salrom and CET Govora had a fundamentally different approach towards Oltchim.

(256) Regarding Salrom, the Commission notes that the company took the decision of continuing the deliveries to Oltchim (for the restarting of the latter`s activity in October 2012) only after securing its deliveries by payment in advance. Moreover, in exchange for the reprise of the delivery of saline solution, as well as for the payment breakdown of debts, Salrom raised the condition of a real estate security, which was in fact approved by the Board of Directors and subsequently also by the Shareholders` Extraordinary General Assembly of 6 November 2012.

(257) Regarding CET Govora, the Commission notes that, contrary to Salrom`s situation, the company did not impose such a similar condition of advance payments for the reprise of deliveries, nor did it raise a similar condition of a real estate security regarding the previous debts owed to it by Oltchim.

(258) According to the Euroinsol's (i.e. the insolvency trustee of CET Govora) Report, the management of CET Govora approved for the continuation of the commercial relations with clients like Oltchim awarding discounts or the possibility to pay in instalments: as a consequence, CET Govora receivables of RON 136 million at the opening of Oltchim's insolvency procedure further increased by RON 44 million registered as receivables during the insolvency procedure (between 1 January 2013 and 30 June 2016).

(259) Furthermore, the report of CET Govora`s insolvency trustee shows that between 01 January 2008 and 30 June 2016 the company continuously delivered electricity and industrial steam to Oltchim at prices way below production costs (incurring in this period a loss amounting to RON 103.3 million (EUR 23.9 million). As a matter of fact, the report concludes that such supply contracts with Oltchim represent one of the main reasons for the insolvency of CET Govora itself. The global loss due to under-pricing of utilities sold to Oltchim amounted to EUR 91 million as Oltchim covered only 60 % of their cost price.

(260) Additionally, the continuous supply from CET Govora to Oltchim without any attempt for negotiation and measures to protect its claims against Oltchim[108] was decided by the Vâlcea County Council[109], on the basis of public policy considerations that a MEO would not have followed[110]. In any case, as a result of

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108 CET Govora's trustee also underlined that "CET Govora was the only company to continue to deliver electric power and process steam to Oltchim, thus taking up not only the risk of default, but the greater danger going insolvent itself […] [CET Govora's] management has failed to take either any firm actions to have the claims recovered or prevention measures for instance]…] warning defaulted debtors about the risk of rationing of even complete suspension of steam and electric power deliveries […] or any actions in extremis that are appropriate whenever there are signs that such claims risk being lost : renegotiating the delivery terms and prices and making such delivery conditional upon payment of the outstanding debt".

109 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.

110 For example, the Explanatory Notes No.15976 of 24.12.2012, explaining the reasons behind the Vâlcea County Council Decision No.86 of 28 December 2012, clearly exhibit the real aim of

those County Council Decisions, CET Govora was led to insolvency as described by CET Govora's insolvency trustee. This pleads towards the non MEO compliance of such decisions.

(261) As quoted by PCC in recital (133), CET Govora`s insolvency trustee notes also that "*the decision to deliver electric power by CET Govora had no economic rationale, and was politically motivated, and is an excellent example of the political interference in the management of the debtor*". The same trustee also declared[111] that "*For more than ten years Oltchim lived on the back of CET. A flea cannot feed an elephant. It is enough that it lost [RON] 136 million through the [R]eorganisation [P]lan. This means about EUR 35 million that we could have used to refurbish the machines, installations and equipment that have a lifespan of over 30 years, which have already exceeded their optimum performance cycle*."

(262) Additionally, CET Govora's trustee also underlined that "*CET Govora always supported the production process of Oltchim SA by supplying utilities (process steam and electric power) way below the production cost […] CET Govora was the only company to continue to deliver electric power and process steam to Oltchim, thus taking up not only the risk of default, but the greater danger going insolvent itself […] [CET Govora's] management has failed to take either any firm actions to have the claims recovered or prevention measures for instance]…] warning defaulted debtors about the risk of rationing of even complete suspension of steam and electric power deliveries […] or any actions in extremis that are appropriate whenever there are signs that such claims risk being lost: renegotiating the delivery terms and prices and making such conditional upon payment of the outstanding debt. Moreover we found also a particular situation in which the claim of Alpha Bank against Oltchim amounting to RON 2.5 million was taken-over at face value, although the [R]eorganisation [P]lan provided for payment of only 70 % thereof.[…] Consequently, the insolvency of Oltchim is another cause of insolvency [of] CET Govora[…] Considering the low, virtually inexistent chances of Oltchim being privatized for the sale price of EUR 306 million set out under the [R]eorganisation [P]lan, [the] 30 % of the claim entered by CET Govora to the statement of affairs of Oltchim, this amount too was a loss for the compan*y". Apart from that, as highlighted in the Romanian press at that time[112] various declarations indicated the real motivation behind the reprise of deliveries towards Oltchim was to avoid the firing of around 2,300 employees, considered and the social catastrophe for the region triggered by it. None of these are MEOP-conform grounds, under normal market conditions.

Vâlcea County Council`s efforts, i.e. saving the county`s and ultimately also the region`s economy, by approving the continuation of electricity and steam delivery by CET Govora towards the plants on the chemical platform, although the latter have not paid their debts towards CET Govora (despite undertaking to do so, at the moment when Oltchim resumed its activity). The same Explanatory Notes motivate the assignment of CET Govora`s claims against Oltchim over to Complexul Energetic Oltenia, in view of safeguarding working places, ensuring the normal functioning of Oltchim and other involved economical operators, as well as with the aim of ensuring thermal energy supply to the population. All these reasons represent motivations that a MEO would not take into account when deciding over a transaction http://www.cjvalcea.ro/images/sedinte/2012/12-28/ordinea/pct1.pdf .

111 See press article available at http://ziaruldevalcea.ro/2016/07/01/remus-borza-invingator-in-negocierea-cu-oltchimul-a-obtinut-tarife-crescute-la-energie-electrica-si-abur/ .

112 See Annex 18 and Annex 19 of PCC's submission of 2 September 2016.

(263) Consequently, the Commission considers that Measure 2 gives Oltchim a selective advantage regarding CET Govora but not regarding Salrom. **The recoverable advantage that CET Govora granted to Oltchim** through insufficient protection of its claims (i.e. by not making a prerequisite the repayment of historical claims or requesting securities on real estate securities for previous debts as Salrom did and by not imposing advance payments for the reprise of deliveries) is represented by the **amount** of penalties representing the time value of the non-recovery by CET Govora of its claims towards Oltchim, when deciding to continue supplies to Oltchim, over the period September 2012 – January 2013. As already explained in paragraphs (253) and (254) above, according to the information provided by R/BDO, such penalties amounted to approximately RON 27 million (approximately EUR 6 million). However, the figures submitted subsequently by Romania were inconclusive as to the exact amount corresponding to the assessed period.

6.1.2.3. Measure 3: AAAS and SoEs (in particular Electrica, Salrom, CET Govora, National Water Administration) – the 2015 debt cancellation under the Reorganisation Plan

A) The comparison made by AAAS and SoEs between the Reorganisation Plan and the liquidation scenario was flawed and based on erroneous considerations that a MEO would not have made

(264) As explained in recitals (51) to (73), the Plan prepared by the Court-appointed receivers – discussed on 9 March 2015 and approved by Oltchim's creditors – entailed total or significant debt waivers for Oltchim's creditors, since the expected sale price of Oltchim SPV was not sufficient to cover the entire debt of Oltchim SA.

(265) **First and foremost, by favouring a *de facto*[113] *en bloc* sale, and limiting the comparison of that scenario with a full liquidation of Oltchim, AAAS did not act as MEO.** According to Romanian law[114], AAAS had the legal means to propose for its own reorganisation plan because AAAS held (individually, and together with other SoEs) more than 20 % of Oltchim's claims; a MEO would have done so to maximize the recovery of its claims. In that situation, a MEO would have assessed and pursued the alternative of a sale process through functional asset bundles. Such third option offered better chances of success than the Plan, in particular in view of the six failed attempts in 2001, 2003, 2006, 2007, 2008 and 2012 to privatise Oltchim in a similar way to the *one-block* attempt foreseen in the Reorganisation Plan through the sale of Oltchim SPV: the proposed Reorganisation Plan implied a transfer of assets, employees and contracts to the SPV and was thus of a similar nature to that of the former attempts.

(266) Such an alternative would have increased the expected recovery for creditors by allowing more bid combinations, without discarding one single buyer and without precluding the possibility of part of Oltchim being simultaneously sold piece by piece as part of this process, based on the interest expressed by the bidders at an early stage of the procedure for the bundles proposed for sale. Thus, the expected price

[113] As per footnote 37, Oltchim SPV could have been composed of either the assets of the Vâlcea platform and/or of the Bradu site. Considering the long term historic loss-making activity characterizing Bradu, no purchaser would have bought it separately anyway (save in a liquidation procedure). Moreover, there was no plan to split the two sites into different bundles. Thus such an SPV scenario would have most likely have resulted in a *de facto* one-block sale, if successful at all.

[114] Articles 33(4) and 94(1)(c) of the insolvency law.

from an open and transparent sale process through asset bundles could have only been higher than, on the one hand, the highly uncertain revenues from the privatisation *en bloc* foreseen in the Reorganisation Plan and, on the other hand, the revenues from liquidation.

(267) Second, even if focusing on the erroneously restricted comparison performed by R/BDO between the liquidation scenario and the proposed Reorganisation Plan (excluding an open, transparent sale process through asset bundles), on which the public creditors relied, this comparison was also flawed because:

(a) the proceeds of the Reorganisation Plan were over-estimated by the creditors approving the Reorganisation Plan and the outcome of the liquidation procedure was also far more certain than the expected outcome of the Plan, and

(b) on the contrary, the proceeds from liquidation were wrongly assessed.

(268) As regards the merits of the Reorganisation Plan, they were over-estimated by the creditors approving the Reorganisation Plan, because of the following:

(a) A successful sale, as provided in the Plan, was unlikely considering the numerous previous failures to privatise Oltchim. When the Plan was proposed and agreed, there was no investor and no reliable information on the price that could be obtained, despite several extensions of deadline for bid submissions from 31 January to 12 December 2014.

(b) Romania contests PCC's vision of Oltchim's financial situation as "below acceptable standards […] still generating losses" and underlines Oltchim has been ranked 63rd out of 100 in the ranking of the most profitable companies in South-Eastern Europe (156). On the one hand, such performance is an *ex-post* observation not available at the time of the vote and is as such not conclusive for the assessment of this measure[115] and, on the other hand, such performance was a purely exceptional one-off effect from the significant debt write-offs as explained by that very report *"in analysing the trends in corporate performance, we take out Oltchim, which topped the profitability and revenue growth rankings thanks to a controversial half a billion euro State debt write-off, which is being analysed by the European Commission for possible illegal state aid. The move, aimed at making the plant attractive to private investors, turned the company's debts into revenues, helping it record 507 million euro profit for 2015, a 73 % return on revenue, and a nearly fivefold jump in revenue to 697 million euro"*.

(c) The submission from an anonymous party (see 3.2.3) also supports the lack of interest from potential investors for a company like Oltchim characterized by significant operational difficulties causing a level of profitability far too low to make its business sustainable in the long term.

(d) Besides, State creditors should have considered: (i) the extremely long duration of the reorganisation phase (almost 6 years from the start of insolvency) most probably leading to a price decrease for Oltchim, and (ii) the contracting by

115 As per judgment of the Court of Justice of 5 June 2012, Commission v EDF, C-124/10 P, ECLI:EU:C:2012:318, paragraph 85. "*it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen*".

Oltchim of new debts during that period benefiting of a senior status compared to pre-insolvency debts, thus reducing considerably the expected recovery under the Plan: this risk of deviation in the amount of current debt was far more limited in the case of a liquidation, the duration of which was reduced. Considering the poor financial performance of Oltchim, this risk was real notwithstanding Romania's claim that Oltchim generated a positive EBITDA (see recital (165)).

(e) R/BDO clarified the fact that the price of EUR 306 million for Oltchim SPV shares mentioned in Winterhill 2013 report was erroneous but had been corrected in view of the meeting of creditors on 4 December 2014 to EUR 294 million. Still, this estimate was far higher than the equity value in the 2011 Raiffeisen study (ranging between EUR 28 million and EUR 97 million), while in the meantime Oltchim had suspended its production, a stance which was supported by Oltchim's minority shareholder, PCC, also active in the chemical industry.

(f) As explained in recital (141), Oltchim's minority shareholder PCC ordered a report on the financial situation of Oltchim to […]. This report, dated on August 2016, is based on a study from an independent certified valuator that estimated the value of Oltchim's tangible assets based on an analysis of the scenario A and B of the Reorganisation Plan's report prepared by R/BDO. This study uses the discounted cash flows (DCF) methodology to compute a valuation of Oltchim's assets in the context of the Reorganisation plan. Romania contested that approach by claiming in recital (157) that the DCF methodology could only be used for company valuation ; Romania supported its claim with references to materials from Harvard and Stern Universities. However, while those materials indeed convey the idea that the DCF methodology is a useful tool to value a company, they do not mention that the fair value of assets may not be also estimated through DCF. Furthermore, reference materials from Stern University to whom Romania referred to, actually identify the DCF methodology as one of the methodologies appropriate to estimate the fair value of assets[116]. Therefore this study performed with data available at the end of the vote uses a valid methodology that shows that considering the above-mentioned flaws in the EUR 306 million valuation from R/BDO, a MEO acting cautiously and reasonably may have been able to counter-estimate the value of Oltchim's tangible non-current assets between EUR 14 million and EUR 128 million in case of realization of the Reorganisation Plan. Those assets represented according to [the … report] circa 85 % of Oltchim's assets; a MEO would thus have concluded (after having taken into account the fact that an acquirer would have pre-deducted from its purchasing price the liabilities attached to the SPV, such as liabilities related to employees of Oltchim SPV) that the proceeds available for creditors, equal to the price that a potential buyer would been able to pay for Oltchim SPV net of procedural costs would have been in average smaller than the outcome of the most pessimistic outcome in the liquidation procedure estimated by Winterhill, as being an *ex-situ* sale worth EUR 141 million. The

116 http://people.stern.nyu.edu/adamodar/pdfiles/country/fairvalue.pdf - page 3 - "[First item] Approaches to estimating fair value - Discounted cash flow valuation, relates the value of an asset to the present value of expected future cash flows on that asset."

economic value of environmental liabilities being similar in both scenario (see recital (269)) and the current debts of Oltchim SA likely to be higher in the Reorganisation Plan than in the liquidation due to its longer period[117] a market economy creditor would have concluded that the liquidation scenario was maximizing its recovery.

(g) Such a stance cannot be rebutted by the figures quoted by Romania for the sale regarding the amount offered by Chimcomplex as part of the current sale process launched in August 2016 for the sale of circa 57 % of Oltchim SA's assets for the following reasons: (i) such value corresponds to a different sale process than the sale of Oltchim SPV (including liabilities towards for instance employees) (ii) this value corresponds to an ex-post observation that could not have been taken into account at the time by creditors when voting in early 2015 on the Plan (iii) this value is centred on 57 % of Oltchim's assets: it ignores the fact that other assets, mainly related to Bradu (which was planned in the Reorganisation plan submitted by R/BDO to be also included in the SPV) could be considered as having a negative value (instead of an additional positive value as claimed by Romania in its submission dated on 16 May 2018), as they had been continuously loss-making for years due to their absence of operation ; Bradu (formerly known as Arpechim) was loss-making even before being acquired by in 2009 by Oltchim for a symbolic price [118].

(h) The same also applies to ex-post observations submitted by Romania regarding the generation of positive EBITDA allowing Oltchim to reduce its post-insolvency current debts. The Commission notes that Romania did not refer to other ex-post values undermining the proceeds related to the one-block sale of Oltchim, such as the low value of a spontaneous bid from Chimcomplex of [more than EUR 100 million] limited to Vâlcea site (according to public sources)[119] in 2016 as submitted by PCC or of Mr Diaconescu (EUR 45 million in 2012) according to PCC (see recital (140)), by comparison to the expected EUR 293.7 million estimated by Wintherhill and supporting the Reorganisation report submitted to the creditors by R/BDO.

(i) Similarly, while as previously explained (see recital (266)) the value of the sale through asset bundles could only lead to a higher price than a process restricted to one-block sale, actual result of this sale through asset bundles (EUR 129 million), without constituting an *ex-ante* value, proved to be

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117 The Reorganisation Plan's report prepared by R/BDO mentioned a EUR 50.3 million current debt on 30 November 2014, deviating up to EUR 58 million in scenario A of the Plan and up to EUR 65 million EUR in scenario B (pages 86 and 90), within the 3-year period in which the one-block sale was expected to occur by R/BDO, without prejudice to further deviation in case of longer sale process that was highly to occur in view of the numerous failed past attempts of one-block privatisation.

118 Source: R/BDO Comments on the Opening decision, paragraphs 11, 16 and 18. According to R/BDO, "*[c]oncerning the value of the Arpechim Platform, in December 2009, the private seller, OMV Petrom, considered that the price of EUR 1 requested from the purchaser Oltchim SA was sufficient to satisfy its interests. As part of this transaction, according to the Real Estate Sale and Purchase Agreement authenticated on 29 January 2010, Oltchim SA paid RON 1 for the land and RON 0.50 for the buildings."* Furthermore, according to the same R/BDO *"[t]he result of the review of these documents reveals that SC OMV Petrom SA held the certainty that the value of the Arpechim platform, adjusted for the associated costs accompanying these assets (the environmental obligations), was zero for the creditors and possibly negative for the owner".*

119 https://www.ziaruldeiasi.ro/stiri/un-iesean-vrea-sa-cumpere-oltchim--137339.html

considerably lower than the Winterhill estimate of the proceeds in the Reorganisation Plan.

(269) On the contrary, as regards the potential proceeds of the liquidation[120] they were under-estimated by the State creditors when approving the Reorganisation plan by relying on R/BDO reports, because of the following:

(a) A MEO would not have just considered the case for an *ex-situ* liquidation (EUR 141 million of expected recoveries for creditors[121]); it would also have assessed the potential outcome of an *in-situ* sale or of an intermediary situation where a large part of the assets would have been bought as a functional group (see recital (11) in the Technical Annex).

(b) R/BDO's submitted that the environmental liabilities were not all encompassed in Winterhill's estimate of the liquidation value. However, the amount of EUR 464 million of environmental liabilities calculated by Oltchim taken into account by the Court-appointed receivers in their report to support the Reorganisation Plan instead of the liquidation of Oltchim is exaggerated: a large part of the assets were likely to be bought by a purchaser pursuing industrial activities at Oltchim's site, thus avoiding the integral demolition of the site assumed by this estimate. The central value of environmental liabilities taken into account in the liquidation scenario, should thus have been far smaller that Oltchim's estimate of EUR 464 million, as supported by PCC, which is also active in the petrochemical sector: the full replacement of Oltchim's contaminated soil by vegetal soil or the decommissioning of the plant's concrete structures (totalling circa EUR 420 million out of Oltchim's estimate of EUR 464 million) would for instance have not been necessary in case of a partial take-over of Oltchim's assets.

(c) Moreover a MEO would not have relied on an estimate originating from the debtor, directly interested in its own survival (thus discrediting the liquidation scenario) but on external, independent reports.

(d) The Commission considers that the environmental liabilities would have been neutralized and considered as equally impacting the recovery perspectives by a market economy creditor when comparing the proceeds to expect from a liquidation procedure and those from the proposed Reorganisation plan for the following reasons :

(1) According to Romania[122], the distribution of proceeds with or without pre-deducing the environment costs would correspond to the type of sale: either *in-situ* or *ex-situ* assets. An in-situ sale could be a possible outcome of a liquidation based on R/BDO submission (see recital (10) of the Technical Annex). In this context, this would amount to *de facto*

120 Liquidation revenues were determined by the Court-appointed receivers in their report to the creditors based on a "ex situ" assessment from Winterhill foreseeing the sale of Oltchim's assets at their scrap value, after deduction of their dismantling and removal costs. Winterhill is a consultant appointed on 3 June 2013 by the R/BDO to assess Oltchim's liquidation/market values. R/BDO argued that the liquidation value was negative due to environmental liabilities amounting to EUR 464 million based on an Oltchim estimate.

121 EUR 108 million for secured assets and EUR 32 million for the assets free of encumbrance according to the 2013 Winterhill study.

122 Submission dated 16 May 2018, point R13(i).

recognizing for the Romanian authorities that the environmental liabilities were not due in all possible outcomes of the liquidation procedure.

(2) Environmental liabilities as estimated by Oltchim in the liquidation scenario would also been considered with caution by the potential purchaser of Oltchim SPV.

(3) If transferred to the acquirer of Oltchim SPV, even discounted by an appropriate time-value, the aggregate amount of such liabilities would have been of the same order of magnitude as in the liquidation scenario because the costs of restoring Oltchim's site would have likely increased over time (notably due to inflation).

(4) Besides, a purchaser of Oltchim SPV would either have taken into account those liabilities in its bid or asked for the seller to keep them and pay for those, as illustrated by the case of the privatisation of Petrom where OMV made a pre-requisite to the transaction the fact that Petrom (through its shareholder) kept the environmental liabilities attached to the closure of Arpechim Pitesti (estimated to cost circa EUR 600 million to the Romanian State[123]).

(5) Furthermore, if the liabilities were to be transferred to the buyer, the latter might have been required by diligent environmental authorities to set up a guarantee to cover the cost of such liabilities; a market economy creditor would have expected that a purchaser meet difficulties to find a guarantor/bank in a context where Oltchim SA's profitability was low compared to the potentially high liabilities at stake.

(6) As a consequence Oltchim SA would have been very likely asked by the potential purchasers to bear the cost for environmental liabilities. This point is reinforced by the explanations provided by the Romanian authorities, according to which, the environmental liabilities were mostly (if not all) kept by Oltchim; according to Romania, in privatisation, polluting companies are taken alongside all their obligations (including past environmental liabilities), while in Oltchim SPV' case, they were to remain with the seller due to the very setting of one-block sale attempt of Oltchim's main assets through Oltchim SPV.

(7) As a consequence, a market economy creditor would have reasonably considered that these liabilities would have been deducted from the proceeds of the sale of Oltchim SPV in a similar way to what was claimed by Romania in the case of the liquidation scenario. There was indeed a high probability that the environmental liabilities had to be pre-deducted from the proceeds of the sale of Oltchim SPV (in case they would not have been transferred) before payment to creditors (in the context where Oltchim SA should have then be liquidated soon after the sale of Oltchim SPV): the opposite might have amounted to a circumvention of the "polluter pays" principle within the EU through a complex setting of SPV.

123 http://romanialibera.ro/economie/companii/petrom-a-fost-dat-gratis-in-contul-poluarii-istorice-236881 .

(8) The fact that environmental liabilities are to be paid in a liquidation scenario cannot be an argument for postponing forever the liquidation of an unsustainable business: owing to the failure of the numerous past privatisation attempts, a MEO would have considered that the reorganization Plan as planned in 2014 was deemed to fail and that environmental liabilities would have to be paid anyway at a later stage when Oltchim would have been most likely liquidated after the failure of the Plan (with additional current post-insolvency debt to be also then pre-deducted from the liquidation' proceeds).

(9) Lastly, **Romania failed to give any example of liquidation of companies where the environmental liabilities were pre-deducted from the proceeds of the liquidation procedure** before the payment of creditors. This also confirms that a MEO could not have considered that in the liquidation phase, the environmental liabilities would have been pre-deducted from the proceeds of the assets' sale while in a reorganisation procedure, those liabilities would have been paid from the proceeds of the Plan after the payment of creditors.

(10) Thus, those liabilities were to be neutralized by a market economy creditor of Oltchim when comparing the Reorganisation Plan with a liquidation scenario.

(11) While noting that AAAS in its economic assessment did criticize the high value assumed by Oltchim[124], the Commission notes that Romania did not submit proof that AAAS or other State creditors conducted their own estimate of environmental liabilities, based on that observation. They also failed to neutralize that element between the liquidation and Reorganisation scenario.

(e) Lastly, R/BDO[125] stated that in the event of liquidation only secured creditors would have received amounts from the sale of assets. Hence, they recognize that they were prospects of recovery for the secured creditors in the liquidation scenario, meaning that the estimate of environmental liabilities by Oltchim (see recital (102)) should not have been taken into account by the creditors. Subsequently, Romania submitted that a majority of secured creditors voted for the Plan because they were convinced that they would not realize an amount "fully covering" their own claims in the liquidation scenario, thus not denying the possibility of a partial recovery for secured creditors.

B) The votes of the State creditors cannot not be considered as pari passu

(270) The Commission considers that the arguments raised by Romania regarding the alleged *pari passu* vote of State creditors (summarized in recitals (168) to (170)) are unfounded: in particular, neither AAAS nor Electrica could be considered as *pari passu* with secured creditors as most of their claims belonged to the budgetary creditors' category (respectively unsecured creditors' category) .

(271) Nor can the Commission consider that the State creditors within the categories of budgetary creditors (AAAS, Romanian Water Administration) and essential suppliers

[124] AAAS notably compared Oltchim's estimate amounting to EUR 464 million to those specified in *Romcontrol's* report i.e. 91.4 million and deemed the former exaggerated.

[125] Point 104 of their submission dated 1 September 2016.

(CET Govora, Romanian Water Administration) meet the "pari passu" conditions considering the absence of private creditors in those categories. Regarding unsecured creditors, the Commission also notes that the Romanian authorities recognize the irrelevance of the *pari passu* test for those ones considering the absence of the recovery for those creditors in the Reorganisation Plan ; the Commission also observes that Electrica and Salrom were not in a situation comparable to other unsecured creditors as they have claims both as secured and unsecured creditors.

(272) Moreover, the Romanian authorities claimed that the mere approval of the Plan by secured creditors (agreeing a write off comprised between circa 20 % and 27 %) proved that the claims of budgetary creditors were worthless ; the secured creditors could have secured a lower write-off according to Romania, would they have not accepted that the Plan ensures a minimum recovery of 20 % for budgetary creditors and 30 % for essential suppliers so as to make sure that these two latter categories would vote positively on the Plan. However, these arguments are flawed: if no recovery at all had been possible for budgetary creditors and essential suppliers in a liquidation scenario, then, the essential suppliers would have been very likely to accept far smaller recovery rates like 5 % (or even 10 %) of their claims in comparison to the 20-30 % recovery rate that they got in the Reorganisation Plan.

(273) The Romanian authorities also stressed that many private creditors voted in favour of the Plan in view of supporting the MEO-compliance of State creditors' vote. In fact, while private creditors holding either exclusively secured debt or a majority of secured debt mostly voted in favour of the Plan, the ones holding exclusively unsecured debt opposed it[126]. This further proves that AAAS and Electrica's vote in favour of the Plan was not MEO-conform, since, given their significant debt-write-off and proportion of non-secured debt, their position was closer to the latter private creditors, which voted against.

(274) Moreover, considering the flaws in R/BDO's comparison between the Reorganisation Plan and liquidation, a diligent MEO would have taken with a lot of caution the results of this study into account at the time of the vote. But the private creditors could not reasonably take into consideration the repeated statements (see recitals (27), (28), (30)) of Oltchim SA's shareholder implying that the Romanian State would not let Oltchim fail; they could not reasonably disregard the Memorandum approved by the Prime Minister, and the possibility that, in such a context, the Romanian State would try to give more aid to Oltchim, making in such circumstances the Reorganisation Plan more favourable than the liquidation for them, precisely because of the possibility of further aid to Oltchim. This explains the positive votes or abstentions of part of the private creditors, while other ones, such as Electrica Furnizare did vote against the Plan. As supported by PCC, the private creditors that approved the Reorganisation Plan were more acting like followers of the State decision rather than the promoters of the Reorganisation Plan.

(275) Based on recitals (270) to (274), the Commission concludes that vote of the public creditors was not *pari passu*.

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126 This for instance the case of the following unsecured creditors : Herbing Srl, Kronos Worldwide Limited, Tricon energy ltd Houston, Cooperative Centrale Raiffeisen - Rabobank International, Tesatoria Euro Tehnica Textil S.r.l., Electrica Furnizare S.A. or CFR Marfa. Furthermore, among private creditors holding a majority of unsecured/budgetary debt and a minority of secured debt, two voted against the Plan (Electrica Furnizare, DGFP Craiova), two abstained (notably the Dutch bank ING), but only one (MFC Commodities GmbH) voted in favour of the Plan.

C) A diligent counterfactual assessment based on contemporaneous evidence would have led a market creditor to oppose the Plan

(276) Based on the above-mentioned considerations, in view of the numerous weaknesses of the liquidation and Reorganisation plans presented to creditors in the Reorganisation report by R/BDO and absence of *pari passu* behaviour of public creditors with the one of the private creditors in any of the categories, the Commission considers that a diligent and prudent market economy creditor would have processed with its own test so as to compare the liquidation and Reorganisation plan at the time of the vote.

(277) AAAS' study was very concise and, while criticizing the amount of environmental liabilities, it did notably not consider the flaws in the value of the Reorganisation plan and thus misleadingly concluded that the Plan was maximizing its recoveries. In its submission Electrica did not deem useful to carry on its own ex-ante market economy test, and relied on R/BDO's study despite its flaws. The Romanian authorities did not provide any evidence of Salrom, National Water or CET Govora conducting any internal market economy creditor study at the time of the vote.

(278) **The Commission performed a MEO test, detailed in Technical Annex** , based on data available to creditors at the time of the vote. In this final version of the MEO test, the Commission took into account, when justified and appropriate, the comments that the Romanian authorities were invited to provide on a draft version of this test by the Commission during the formal proceedings (see recital (172)).

(279) **The results of this assessment show that the proceeds from the liquidation are higher or equal to those of the Reorganisation Plan in all three scenarios considered for AAAS, National Water Administration, Salrom and Electrica and CET Govora**.

(280) A MEO would also have taken into account the fact that, in view of the numerous past failures, there was a high probability of failure or of severe delays attached to the Reorganisation Plan: engaging into that way meant that Oltchim SA was allowed to commit to significant additional current debt, that would be pre-deducted from the proceeds of a liquidation, would the sale of Oltchim SPV foreseen in the Reorganisation Plan fail (or take longer as expected). As a consequence, the Reorganisation plan proceeds were deemed even lower for the creditors, notwithstanding the unavoidable administrative and legal costs they would incur to monitor internally their exposure to Oltchim during the Plan.

(281) As a consequence, as shown through the test described in the Technical **AAAS, Electrica, Salrom and National water did not act as MEO when favouring the Reorganisation plan over the liquidation procedure**, the expected proceeds of the Plan being smaller and far more uncertain. Their vote granted an advantage to Oltchim amounting to the write-off they accepted. The specific circumstances at stake in relation to CET Govora detailed in recitals (246) and (248) do not allow the Commission to conclude to the presence of an economic advantage for this creditor in relation with Measure 3.

(282) The Commission further notes that these write-off were actually implemented, as demonstrated by the exceptional result, recorded by Oltchim in 2015, related to the aggregate write-off from public and private creditors amounting to EUR 518 million (see recitals (91 and (268)b) and representing more than 95 % of the lower bound of

the write-off approved by the creditors (see Table 4) in the Plan, endorsed by the Court.

(283) Consequently, the Commission considers that, as part of Measure 3, while CET Govora's vote did not entail an advantage to Oltchim, the votes of AAAS, Electrica, Salrom and the National Water Administration provided Oltchim with an selective, economic advantage of RON 1,486 million (EUR 327 million[127]), which corresponds to the lower bound of the write-off range comprised between RON 1,486 million (EUR 327 million[128]) and RON 1,525 million (EUR 335 million) agreed by those creditors in the Reorganisation plan, such as detailed in the following table:

Creditor	**Advantage granted under Measure 3**	
	EUR	RON
AAAS	211 198 788	959 994 490
Electrica	109 574 383	498 065 377
Salrom	4 014 997	18 249 986
Romanian National Water Administration	2 234 711	10 157 777
Total	**327 022 879**	**1 486 467 630**

6.1.2.4. Overall assessment of economic advantage and State imputability of Measures 1, 2 and 3

(284) After the assessment of each measure separately, the Commission considers it necessary to make a more general assessment of the State strategy regarding Oltchim in the period between September 2012 and April 2015.

(285) Measures 1, 2 and 3 above are in fact intrinsically linked and part of the same main objective, that is supporting and maintaining Oltchim in the market, and securing its employees jobs, by way of non-enforcement of debts/debt write off/continuous supply. All these measures were channelled by and secured by the signature of the Memorandum initiated by the State and approved by the Prime Minister (see recitals (1), (31), (150), (203), (205) above). Moreover, these measures were supported by repeated press declarations of high level representatives of the State, making it clear that the Government had a strategic interest in keeping Oltchim in operation and that it intended to avoid its liquidation at all cost (see recitals (28), (30), (31), (204)d, (204)e, (204)f, (204)g, (204)h, and (204)i).

(286) This strategy appears even clearer when taking into account (i) the same identity of the grantors of the measures and their voting regarding the reorganisation of Oltchim, (ii) the chronology of the measures in question, (iii) their purpose, that is keeping Oltchim alive at all cost and avoid liquidation; and (iv) the undertaking's (financial

[127] Based on the foreign exchange rate of 1 EUR = 0.22 RON used at the time of the vote (see Table 4).

[128] Based on the foreign exchange rate of 1 EUR = 0.22 RON used at the time of the vote (see Table 4).

and risk) situation at the time when the decision to take each of the measures was made, that is Oltchim being close to insolvency.[129]

(287) Measure 3 leads to an advantage in favour of Oltchim which is not severable from Measures 1 and 2. Measure 3 would not have existed without measures 1 and 2. The accumulated debts towards AAAS under Measure 1 and CET Govora because of continued unpaid supplies under Measure 2 were later on cancelled under Measure 3.

(288) According to the Memorandum, the public and private actors signatory to it agreed to cooperate in order to develop a "Sustainable Strategy to re-launch" Oltchim having as main objective: (i) "to encourage and protect creditors, in particular the employees" for the full restarting of profitable activities and their operation on long term, while ensuring an adequate level of trust so that they would support the strategy, (ii) to allow the Parties to communicate to the markets, international community and the general public that they are assessing a long term sustainable solution for Oltchim, and (iii) to ensure the controlled reorganisation of Oltchim.

(289) Overall, an MEO in a situation closest to that of AAAS would - considering the numerous past failures of a one-block privatisation - have first tried to impose its view of a reorganisation plan notably based on a sale through asset bundles. AAAS had the means (see recital (265)) to maximise its debt recovery from Oltchim by first requesting from the Court an enforcement of its claims, and, thus triggering the insolvency of the latter, and then putting forward as foreseen by the insolvency law, its own proposal for a reorganisation plan (Article 94 (1) of the insolvency law).

(290) In conclusion, since Measure 3 cannot be reasonably separated from Measures 1 and 2, all these measures constitute a series of tied interventions imputable to the State giving Oltchim an advantage, as put forward in the Memorandum.

(291) Consequently, overall, the Commission considers that a total selective, economic advantage has been granted by AAAS to Oltchim in the amount of EUR 217,827,557[130] (RON 990,125,260), and the aggregate selective economic advantage granted to Oltchim by AAAS, Salrom, CET Govora, National Water Administration and Electrica creditors is equal to RON 1,516,598,405 (EUR 333,651,649) for Measure 1 and 3 combined[131] to be increased by the advantage related to Measure 2.

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

(292) Public support is liable to distort competition even if it does not help the recipient undertaking to expand and gain market share. It is enough that the aid allows it to maintain a stronger competitive position than it would have had if the aid had not

129 See, for instance, judgments in T-11/95 BP Chemicals v. Commission and paragraph 81 of the Commission Notice on the notion of State aid 2016/C 262/01.

130 The aggregate amount for Measure 1 and 3 combined is smaller than the sum of advantages computed under Measure 1 (EUR 33 million) and Measure 3 (EUR 327) so as not to double count the portion of the advantage granted by AAAS under Measure 1 which is written-off as part of Measure 3. The advantage granted by AAAS under combined Measure 1 and 3 was computed by adding to the write-off granted by AAAS as part of Measure 3 (EUR 211 million) the portion of the EUR 33 million of additional debt granted under Measure 1 not written-off under Measure 3; around 20 % of the EUR 33 million of advantage related to AAAS' lack of action between September 2012 and January 2013 (Measure 1) was not written-off in 2015 (Measure 3) and thus needs to be added with respect to Measure 1 so as to compute the advantage granted by AAAS with respect to Measure 1 and 3 combined.

131 See footnote 130.

been provided. In this context, for aid to be considered to distort competition, it is normally sufficient that the aid gives the beneficiary an advantage by relieving it of expenses it would otherwise have had to bear in the course of its day-to-day business operations.[132]

(293) Public support to undertakings only constitutes State aid under Article 107(1) TFEU insofar as it "affects trade between Member States". In that respect, it is not necessary to establish that the aid has an actual effect on trade between Member States but only whether the aid is liable to affect such trade.[133] In particular, the Union Courts have ruled that "where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-[Union] trade, the latter must be regarded as affected by the aid." [134]

(294) Public support can be considered capable of having an effect on trade between Member States even if the recipient is not directly involved in cross-border trade. For instance, the subsidy may make it more difficult for operators in other Member States to enter the market by maintaining or increasing local supply.[135]

(295) The Commission considers that, 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.

(296) Oltchim is active in the production of basic chemicals, i.e. on competitive markets in Europe and worldwide.

(297) Therefore, the Commission concludes that the measures have the potential to distort or threaten to distort competition and affect trade between Member States.

6.1.4. Conclusion on the existence of the aid

(298) Given that all conditions for the existence of State aid within the meaning of Article 107(1) TFEU (see subsections 5.1.1. to 5.1.3 above) are met for all three measures, the Commission concludes that:

- *Measure 1* constitutes State aid;
- *Measure 2* constitutes State aid for CET Govora and is aid-free for Salrom;
- *Measure 3* constitutes State aid for AAAS, The National Water Administration, Salrom, Electrica, and is aid-free for CET Govora.

(299) Measures 1, 2 and 3 taken together constitute aid for AAAS, National Water Administration, Salrom, CET Govora and Electrica. Based on recital (291) above,

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132 Judgment of the Court of Justice of 3 March 2005, *Heiser*, C-172/03, ECLI:EU:C:2005:130, paragraph 55.

133 Judgment of the Court of Justice of 14 January 2015, *Eventech v The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 65; Judgment of the Court of Justice of 8 May 2013, *Libert and others*, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 76.

134 Judgment of the Court of Justice of 14 January 2015, *Eventech v The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 66; Judgment of the Court of Justice of 8 May 2013, *Libert and others*, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 77; Judgment of the General Court of 4 April 2001, *Friulia Venezia Giulia*, T-288/97, ECLI:EU:T:2001:115, paragraph 41.

135 Judgment of the Court of Justice of 14 January 2015, *Eventech v The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 67; Judgment of the Court of Justice of 8 May 2013, *Libert and others*, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 78; Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415, paragraph 78.

the Commission concludes that an aid equal to RON 1,516,598,405 (EUR 333,651,649) to be increased by the advantage related to Measure 2 has been granted by the Romanian State to Oltchim.

6.1.5. Legality of the aid

(300) The Commission notes that Measures 1, 2 (regarding CET Govora) and 3 (regarding AAAS, The National Water Administration, Salrom, Electrica) were granted in years 2012-2015 in breach of stand-still obligations laid down in Article 108(3) TFEU.

(301) Therefore, given that the measures were found to constitute State aid within the meaning of Article 107(1) TFEU, the Commission concludes that they constitute unlawful State aid.

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

(302) 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.

(303) 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.[136] In this case, the Romanian authorities did not claim any legal basis for the compatibility assessment.

(304) Given that Oltchim qualifies as undertaking in difficulty (see recital (88)), the only ground for compatibility identified by the Commission in the opening decision[137] was rescue and restructuring aid based on the 2014 R&R Guidelines.

(305) Indeed, ,the Romanian authorities did (at a fairly late stage in the proceedings[138]) claim the possible eligibility of the measures as restructuring aid and have raised the possibility of qualifying the Reorganisation Plan as restructuring plan for this purpose. To this end, Romania emphasises the very considerable progress made by the company during the reorganization period.

(306) However, after the investigation phase, the Commission concludes that the criteria for compatible rescue or restructuring aid laid down in the R&R Guidelines are not complied with by any of the measures, even under the Reorganisation Plan as it was approved and implemented by Romania.

(307) Specifically, at the very least, the Commission could not identify any significant real, actual and sufficient contribution to the restructuring costs that would be supported with Oltchim's own resources, within the meaning of point 35 of the 2014 R&R Guidelines. The amount of aid substantially exceeds the sale price otherwise obtained following the tender. Concretely, the overall amount of aid exceeds EUR 333 million (figure which corresponds only to Measures 1 and 3 combined and which should be complemented with the amount of aid corresponding to Measures 2), whereas the amount obtained from the sale of most of Oltchim's assets does not exceed EUR 143 million, which is substantially lower than the

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

137 See opening decision in SA.36086 (2016/NN)(ex2013/CP) – Romania Potential aid to Oltchim SA, paragraph 148, http://ec.europa.eu/competition/state_aid/cases/263778/263778_1773690_109_2.pdf

138 See Romania's Reply of May 2018 to the REQ dated 30 January 2018, Section IV. Point A, page 31.

minimum 50 % own contribution threshold required by the 2014 R&R Guidelines[139]. The Reorganisation Plan of Oltchim has not yet been completed at this date, given that the new tender for the sale of the remaining Oltchim's assets is still ongoing and not expected to be complete before April 2019. Therefore, the Commission considers that no additional potential source of financing from asset sales can be taken into account for the purposes of determining the own contribution than those already registered as part of the sale revenues corresponding to the first completed tender.

(308) Furthermore, according to point 65 of the 2014 R&R Guidelines, "*where State support is given in a form that enhances the beneficiary's equity position, for example where the State provides […] or writes off debt […] aid to cover losses should only be granted on terms which involve adequate burden sharing by existing investors"*. Romania did not provide any information demonstrating an adequate burden sharing under the Reorganisation Plan. Point 67 of the R&R Guidelines also requires that "*any State aid that enhances the beneficiary's equity position should be granted on terms that afford the State a reasonable share of future gains in value of the beneficiary, in view of the amount of State equity injected in comparison with the remaining equity of the company after losses have been accounted for"*. In the case of Oltchim, such an adequate burden sharing was not demonstrated.

(309) Lastly, given the important position of Oltchim in the chemical sector in Romania, and its significant market shares in the various product and geographic markets where it is active, and pursuant to section 3.6.2. of the R&R Guidelines, Oltchim ought to have implemented measures in order to limit distortions of competition created by the aid. In this context, the Commission notes that Romania failed to propose any structural or behavioural compensatory measures.

(310) Consequently, the Commission concludes that the Reorganisation Plan cannot meet several of the cumulative conditions required by the 2014 R&R Guidelines and therefore cannot further pursue this avenue despite Romania's declared availability to make further submissions to this end.

6.3. Recovery

(311) According to the TFEU and the established case-law of the Union Courts, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market[140]. The Union Courts have also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation.[141]

(312) In this context, the Union Courts have established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored.[142]

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139 Although Measure 1 and 2 were put in place before the entry into force of the 2014 R&R Guidelines, the application of the 2004 R&R Guidelines would remain the same with respect to the own contribution principle (point 44).

140 See Case C-70/72 Commission v Germany [1973] ECLI:EU:C:1973:87, paragraph 13

141 See Joined Cases C-278/92, C-279/92 and C-280/92 Spain v Commission [1994] ECLI:EU:C:1994:325, paragraph 75.

142 See Case C-75/97 Belgium v Commission [1999] ECLI:EU:C:1999:31, paragraphs 64 and 65.

(313) In line with the case-law, Article 16(1) of Council Regulation (EU) No 2015/1589[143] stated that "where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary […]".

(314) As demonstrated in recital (291) and (299), the aid granted to Oltchim under the three measures together – amounting to RON 1,516,598,405 (EUR 333,651,649) million (for Measure 1 and 3 combined), to be increased by the aid amount related to Measure 2 – was implemented in breachof Article 108 TFEU, and is to be considered as unlawful and incompatible aid. This aid must therefore be recovered in order to re-establish the situation that existed on the market prior to their granting.

(315) Recovery shall cover the time from when the advantage accrued to the beneficiary[144], that is to say when the aid was put at the disposal of the beneficiary, until effective recovery, and the amount to be recovered shall bear interest until effective recovery.

6.4. The issue of economic continuity in the sale of Oltchim[145]

(316) In the event of a negative Commission decision regarding the recovery of incompatible aid to an undertaking in the context of Articles 107 and 108 TFEU, the Member State in question is required to recover the incompatible aid. The recovery obligation may be extended to a new company, to which the company in question has transferred or sold part of its assets, where that transfer or sale structure will trigger the conclusion that there is economic continuity between the two companies.[146]

(317) According to the Court decision *on Italy and SIM 2 v. Commission*,[147] on which the Commission founded its decisions on *Olympic Airlines*, *Alitalia* and *SERNAM*,[148] the assessment of economic continuity between the "old" entity and the new structures is established based on a set of indicators. The following factors may be taken into consideration: the scope of the sold assets (assets and liabilities, maintenance of workforce, bundle of assets), the sale price, the identity of the buyer(s), the moment

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143 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

144 Oltchim has obtained: (i) an economic advantage of RON 152 million (EUR 33 million) granted by AAAS corresponding to the accumulation of Oltchim's debt towards AAAS within the period between 21 September 2012 and 30 January 2013 under Measure 1, which is representative of the time-value attached to the deferral of the request for enforcement of AAAS's claims implying a higher exposure for the latter to Oltchim until 21 April 2015, from that period to the endorsement of the Plan by the Court on 22 April 2015; (ii) an economic advantage of RON 1,516,598,405 granted by AAAS, Salrom, Romanian National Water Administration and Electrica corresponding to Measure 1 and 3 combined (without double counting) from the endorsement of the Plan by the Court on 22 April 2015; (iii) an economic advantage under Measure 2 granted by CET Govora within the period between 21 September 2012 and 30 January 2013 in form of further accumulation of debt owed by Oltchim for its continuous supply during that period, from that period.

145 The information in this section is mainly based on the 3rd Report (point 3.2.3), 4th Report (points 2.2 and 3.1), 5th Report (section 4) and 6th Report on the Sale Process of Oltchim's asset bundles (point 3.1) prepared by Oltchim's advisers.

146 Judgment of the General Court of 28 March 2012, *Ryanair Ltd v European Commission*; Case T-123/09, ECLI:EU:T:2012:164, point 155.

147 Judgment of the Court of 8 May 2003, *Italian Republic and SIM 2 Multimedia SpA v Commission of the European Communities*, Joined cases C-328/99 and C-399/00, ECR 2003 I-4035.

148 Commission Decision of 17 September 2008, State aid N 321/2008, N 322/2008 and N 323/2008 – *Greece – Vente de certains actifs d'Olympic Airlines/ Olympic Airways Services*; Commission decision 12 November 2008 State aid N 510/2008 – *Italy – Sale of assets of Alitalia; Commission decision* of 4 April 2012 SA.34547 – *France – Reprise des actifs du groupe SERNAM dans le cadre de son redressement judiciaire*.

of the sale (after the initiation of preliminary assessment, the formal investigation procedure or the final decision), and the economic logic of the operation. This set of indicators was confirmed by the Court in its decision of 28 March 2012 *Ryanair v. Commission*,[149] which confirmed the *Alitalia* decision.

(318) As mentioned in recital (5) above, after several exchanges on the issue of economic continuity with the Romanian authorities, on 23 December 2016, DG COMP sent a preliminary assessment letter on economic continuity to the Romanian authorities. In this letter, based on the information provided by the Romanian authorities on the scope of the sale concerning 9 asset bundles and on the process of the sale (in form of a market-driven tender), DG Competition took the preliminary view that the sale process of Oltchim as designed at that time by the Romanian authorities did not necessarily lead to economic continuity between Oltchim and the undertaking(s) that might have emerged from the sale process, without prejudice to the assessment of crucial elements not yet known at that time such as the actual completion and observed outcome of the sale, the actual scope of the transfer, its price and its economic logic.

(319) At this stage of the sale process, after the approval vote from the Creditors' Assembly on two of the buyers for the majority of Oltchim's assets, most of these elements are known. In order to decide on whether there is State aid benefiting the buyer(s) of Oltchim, the Commission will assess each of the five criteria listed above as follows.

6.4.1. Scope of the assets sold under the revised Reorganisation Plan

(320) The Commission observes that the assets taken over by the main buyer - Chimcomplex via asset bundles 1-5 and partially 7 - represent only 58 % of the Oltchim's assets and production facilities (based on the Winterhill valuation). As for DSG, it would take over a very limited share of Oltchim's assets, namely the asset bundle 6 (the PVC processing plant that it has historically been leasing from Oltchim). The DSG targeted assets account for a very small portion of Oltchim’s assets and production facilities (1.94 % based on the Winterhill valuation).

(321) As regards Chimcomplex, it will not acquire or take over any liabilities of Oltchim, commercial contracts or any existing raw material, (un)finished products or spare parts. Potential costs related to the land's historical pollution stay with the Seller in accordance with the "*polluter pays*" principle. This is in line with Commission's view expressed in its letter of 23 December 2016 according to which "Oltchim's liabilities […] including past environmental debts, shall remain with Oltchim". The same is valid for DSG.

(322) As regards employees, the tender specifications or the sales contract did not require the buyers to rehire any of the workforce. However, the potential buyers were offered the possibility of rehiring Oltchim's employees and asked to indicate whether they opt to do so in their Indicative Offers, indicating the number of employees taken over in accordance to their respective business plans. Finally, it appears that Chimcomplex intended to rehire 1215 employees, i.e. around 62 % of Oltchim's employees at the time of its binding offer[150]. The figure which the Seller considered relevant for the evaluation of the binding offers (see further recital (335)) was only a

[149] Judgment of the General Court of 28 March 2012 in Case T-123/09, *Ryanair Ltd v. Commission*, ECLI:EU:T:2012:164.

[150] Source: 4th Report on Oltchim's sale.

maximum of 984 employees - the number of employees who actually agreed to the rehire package, that is approximately 50 % of the overall number of Oltchim's current workforce. In any case, the proportion of employees that would be eventually be transferred to Chimcomplex remains below the figures of employees rehired in in previous decisions of the Commission where no economic continuity could be established[151].

(323) Furthermore, the Commission notes that the supply and sale contracts significant for the operational business will be terminated. In particular, Chimcomplex submits that it has its own network of clients, so that the client based will considerably change post-acquisition of the targeted assets. Chimcomplex also explicitly confirmed that it would not use Oltchim's trademark.

(324) Finally, the Commission notes that the scope of activities to be carried out by Chimcomplex and by DSG on the bundles acquires from Oltchim will be to a certain extent different in comparison with the activities of Oltchim at the moment of the signature of the SPA as demonstrated below (see in particular subsection 5.4.5.).

(325) As regards the remaining unsold asset bundles 8, 9, and part of bundle 7, these only represent a minority of Oltchim's business and are made out of non-operational assets. Hence, the scope of activities to be carried out by the potential buyer(s), would be clearly not encompassing Oltchim's business and the scope of the activities to be carried out using these assets would highly likely be different than Oltchim's.

6.4.2. The sale price

(326) In order to avoid economic continuity, the assets under the tender process have to be sold at their market price. Such a market price is defined as the price which could be set by a private investor acting under market conditions.[152]

(327) Following the completion of the tender, Romania has sold the majority of the assets contained in the various bundles sold (1 to 6 and partially 7) through an open, transparent, non-discriminatory and non-conditional tender process to the bidders submitting the highest bid with secured financing as explained below.

(328) First, the invitation to submit an expression of interest for the Oltchim's various asset bundles did not present any limitation as to the parties that could submit offers; therefore any entity was free to submit an offer in the tender process.

(329) As it is transparent from the various Reports on the sale of Oltchim's assets (see recital (8)), Chimcomplex was only one of numerous other participants (reaching in the final stage a total of 9 actors) to the tender for various combinations of Oltchim's assets, as run by the judicial administrators of Oltchim, together with AT Kearney ("the Seller").

(330) Second, as regards the principle of transparency, the Seller provided all bidders with enough time and the necessary and detailed information, in order to allow them to carry out a proper valuation of the assets as part of the due diligence process. According to the 2nd and 3rd Reports on Oltchim's sale mentioned in recital (8) above, the tenderers providing proof of secured financing for the price included in their

[151] See for instance Commission's decision of in case SA.31550 – *State aid implemented by Germany for Nürburgring*, recital 235, where it is mentioned that 85 % of employees were taken over by the buyer from the seller.

[152] Judgement of the Court of 16 December 2010 in case C-239/09 *Saydaland*, paragraph 34.

indicative offers have been granted full access to an electronic data room, they could participate in meetings with the Oltchim's management, could visit the various site's premises and participate in a structured question and answers process.

(331) Furthermore, there was constant communication throughout the tender process between the Seller (AT Kearney) and all the bidders who qualified for the respective steps of the tendering process in the period following the public announcement of sale and teaser distribution to potential bidders (starting on 23 August 2016), the receipt of expression of interest and signing of non-disclosure agreements by interested bidders (from September to December 2016), as well as between 23 January 2017 (the deadline for submission of indicative offers) and 26 June 2017 (the deadline for submission of final bidding offers).

(332) Third, the evidence submitted by Romania shows that there was no discrimination between the tenderers at any stage of the bidding process. Indeed, as it is also obvious from the above in recitals (328) et subseq. above, all bidders received information and clarifications on the selection criteria of the tender, on the rules and procedures, on the deadlines for the submission of indicative and final offers, on the extension of such deadlines, on the financial and economic situation of Oltchim, on elements missing from the bidders' indicative or final offers, and on possible queries of the bidders. During the process, after some initial intransparencies with regard to the equal access to information had been removed, all bidders were provided with the information necessary for carrying out a proper evaluation of the assets sold under the 9 bundles.

(333) Fourth, apart from limitations stemming from the legal framework, no conditions were set upon the bidders, as clearly demonstrated in the tender's invitation to submit an expression of interest and the various letters sent to the bidders by the Seller (AT Kearney).

(334) Fifth, the combination of bidders selected was the one maximizing the price for the Seller, considering the withdrawal of White Tiger Management that proved to be unable to respect the objective criteria of transaction certainty aiming at securing through guarantees the payment of the price for its bid (see recital (181)). This conclusion on the maximum price obtained is not in contradiction with the rejection of the higher bid of White Tiger compared to Chimcomplex on the ground that the financing of the bid was uncertain and not guaranteed to the required standard, thereby offering poor certainty for the transaction.

(335) The maximising price principle was also not contradicted by the bonus attached to the transfer of employees that was added by the Seller, in its evaluation of the bids, on top of the price offers. This bonus corresponding to 40 % of the averagedismissal costs (such additional value amounting to EUR 5000 per employee) was capped at a maximum number of 50 % of Oltchim's employees. Under Romanian insolvency law, the redundancy payments take indeed priority over any other claims of private or public creditors. Thus, from the creditors' perspective the redundancy payments have the same effect as if the price paid were accordingly lower. In addition, in the case at hand, this bonus did not make any difference in the ranking of the different bids. [153]

[153] See page 23 of the Report to the Creditor Assembly contained in Annex 1 to the 5th Report on Oltchim's sale.

(336) As regards the remaining unsold bundles (8, 9 and part of asset 7), which represent the minority of Oltchim's assets, based on the information provided by Romania in its submission of 20 April 2018, as well as the latest 7th Report submitted by the Seller on 16 July 2018, these are also planned to be sold at market prices, as established through a planned tender process designed similarly to the already completed tender, that is in an open, transparent, non-discriminatory manner, to the bidders that will submit the highest valid and reliable bids for the bundle(s), therefore at a market price.

(337) Based on the above, the Commission takes the view that the selection process as such was sufficient for safeguarding that the price of the assets sold to the selected and approved buyers corresponds to the market price which was the only selection criterion (subject to proof brought by the bidder that the financing of its bid was secured). Thus, the Commission concludes that the sale of Oltchim's asset bundles has been done or is planned to be done through an open, transparent, non-discriminatory and non-conditional tender process and, thus, the tender process guaranteed the sale was done or will be done according to the market price for the assets bundles sold.

6.4.3. The identity of the buyer(s)

(338) The identity of the owners of the seller and the buyer provides a strong indication as to whether the transfer of assets will lead to an actual economic continuity[154]. The main buyer Chimcomplex, is controlled by SCR, itself ultimately controlled by its main individual shareholder with 97.25 %. Based on the information available to it, the Commission finds that neither SCR's ultimate controlling individual nor any of the entities directly or indirectly controlled by him or by SCR hold any equity interest in either Oltchim or any of Oltchim's shareholders.

(339) As regards DSG, it is worth noting that it had a lasting commercial relationship with Oltchim. DSG has been renting the PVC processing facility, including the employees, from Oltchim since January 2014. Prior to renting Ramplast facilities (asset bundle 6 in the sale procedure), DSG was one of Oltchim’s main distributors of PVC profiles. Based on the information available to the Commission, there are no corporate relationships between DSG and Oltchim.

6.4.4. The moment of the sale

(340) The Commission needs to assess whether the moment of the tender process may lead to a circumvention of a decision by the Commission to recover incompatible state aid.

(341) In this case, the Commission notes that the insolvency procedure was launched and the judicial administrators were appointed by the competent national court in 2013. The sale of the assets was launched by the judicial administrators in 2016, prior to any Commission decision regarding the conclusion of the formal investigation procedure. Also, for the main buyer – Chimcomplex, the bank letters securing the sale were presented already in December 2017 and the beginning of 2018, that is before the adoption of the present decision.

(342) In the case at hand, the Commission considers that the fact that the sale was launched by the judicial administrators appointed by the competent national court and that the

[154] See for instance Commission's decision of 15 October 2014 in case SA.3379 – *NCHZ*, recital 159.

decision about the transfer of the majority of Oltchim's assets has taken place before the adoption of the present decision is less conclusive in terms of economic continuity than a situation where the decision to sell would be taken by the aid beneficiaries themselves or where the sale process would be launched only after the adoption of a negative decision with recovery such as the present one.

6.4.5. The economic logic of the operation

(343) The criterion of economic logic aims at assessing whether the buyer of the assets will employ them in the same way as the previous owner. Economic continuity is absent if the buyer integrates the assets in its own economic activities and thereby creates additional synergies instead of merely using them in the same way as the seller[155].

(344) The Commission notes, based on the information available to it, that Chimcomplex intends to vertically integrate the selected asset bundles (1-5 and partially 7) into its own business model together with its current production facilities in Onești, Romania, in order to create a chemical and petrochemicals supplier with a product portfolio of […].[…].

(345) Furthermore, according to the plans of the acquirer[156], further investments in the new assets will be pursued in order to integrate them in its own production chain and develop them further, allowing Chimcomplex to increase certain capacity loads, gaining efficiency and productivity.

(346) In particular, Chimcomplex will thus not use the assets it purchases in the same way as insolvent company Oltchim. On the contrary, Chimcomplex will integrate the acquired assets in its own business strategy, realising synergies, which justify its interest in buying the bundle assets it bid for. Moreover, the operation of some of the assets has been structurally loss making and it could therefore require further restructuring, investments and optimization works.

(347) The afore-mentioned elements demonstrate that the economic logic of Chimcomplex's offer do not consist in a continuation of the economic activity of Oltchim, but in the integration of a part of its assets and part of the workforce of Oltchim's acquired bundles in a separate group which pursuits its own economic logic, industrial strategy and objectives.

(348) Based on the considerations above, the Commission concludes that the economic logic of the operation is to make Chimcomplex use the assets contained in Oltchim's bundles 1-5 and partially 7 under different conditions and not to continue the strategy of Oltchim.

(349) Lastly, as regards the remaining unsold bundles 8, 9 and partially 7, they represent a minority of Oltchim's assets and only contain non-operational assets. Therefore, even in the extreme hypothetical case whereby all remaining bundles would be acquired by one single potential buyer (other than Chimcomplex, which already confirmed no interest in acquiring any of remaining assets), they would not constitute the same business that Oltchim was running before the first sale process was completed and would be unlikely their potential buyer could qualify as the continuator or Oltchim's business.

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155 See Commission's decision of 15 October 2014 in case SA.33797 – *NCHZ*, recital 164.

156 See Chimcomplex's submissions of 24 November 2017 and of 16 January 2018.

6.4.6. Conclusion on the economic (dis)continuity of Oltchim through the sale of assets to Chimcomplex, DSG and other potential buyers for the remaining unsold bundles

(350) Oltchim's assets have been sold or are planned to be sold at their market price, as established through an open, transparent, non-discriminatory and non-conditional tender process, to the bidders that submitted or will submit the highest bid for the bundles combination maximising revenues from the sale. Romania has informed the Commission that the approved main buyer – Chimcomplex for asset bundles 1-5 and partially 7 does not have an economic or corporate link to Oltchim. . Likewise, DSG currently operates asset bundle 6 (leased PVC processing plant) but has no ownership or corporate link with Oltchim. In any case, the decision on the sale was taken prior to the present negative decision of the Commission regarding the formal investigation procedure. Finally, each of the new owners and potential buyers will use the assets under different conditions and according to different business models than Oltchim. The scope of the buyers' activities will be to a considerable extent different to the activities of Oltchim.

(351) In the light of the above, the Commission takes the view that there is no economic continuity between Oltchim and any of Chimcomplex and DSG, the buyers of most of Oltchim's asset bundles, which are therefore not liable for any State aid to be recovered from the beneficiaries. Likewise, the Commission considers it highly unlikely that there will be economic continuity between Oltchim and any potential buyer(s) of the remaining assets that are planned for sale through a new tender as described in Romania's submission of 20 April 2018.

7. CONCLUSION

(352) The Commission finds that the measures 1, 2 (regarding CET Govora) and 3 (regarding AAAS, The National Water Administration, Salrom, Electrica) taken together or separately constitute State aid to Oltchim SA within the meaning of Article 107(1) TFEU.

(353) The Commission finds that the measures 2 (regarding Salrom) and 3 (regarding CET Govora) do not constitute State aid to Oltchim SA within the meaning of Article 107(1) TFEU.

(354) The Commission also finds that Romania has unlawfully implemented the measures 1, 2 (regarding CET Govora) and 3 (regarding AAAS, The National Water Administration, Salrom, Electrica) in breach of Article 108(3) TFEU.

(355) The Commission concludes that the aid elements under measures 1, 2 (regarding CET Govora) and 3 (regarding AAAS, The National Water Administration, Salrom, Electrica) are incompatible with the internal market, because the relevant conditions of the 2014 R&R Guidelines were not met and no other compatibility grounds were identified and must be recovered from the beneficiary, together with recovery interest.

(356) Such recovery will not concern Chimcomplex and DSG, due to the absence of economic continuity between Oltchim and the two aforementioned buyers Chimcomplex and DSG.

HAS ADOPTED THIS DECISION:

Article 1

The following measures subject to this Decision unlawfully put into effect by Romania in breach of Article 108(3) TFEU, together and separately, constitute State aid:

(a) the non-enforcement and further accumulation of debts between September 2012 and January 2013;

(b) support to the operations of Oltchim in the form of continued unpaid supplies and further accumulation of debt since September 2012 by CET Govora without appropriate measures to protect its claims in the amount to be determined together with Romania during the recovery phase;

(c) the debt cancellation under the Reorganisation Plan by AAAS, the National Water Administration, Salrom and Electrica SA for an aggregate amount, together with Article 1 (a), of RON 1,516,598,405.

Article 2

The following measures subject to this Decision do not constitute State aid within the meaning of Article 107(1) TFEU:

(a) Support by Salrom to the operations of Oltchim in the form of continued supplies since September 2012;

(b) The 2015 debt cancellation under the Reorganisation Plan by CET Govora.

Article 3

The State aid referred to in Article 1(a) and (c), amounting to a total of RON 1,516,598,405 million, as well as the State aid referred to in Article 1 (b), unlawfully granted by Romania, in breach of Article 108(3) TFEU, in favour of Oltchim, is incompatible with the internal market.

Article 4

(1) Romania shall recover the aid referred to in Article 1 from the beneficiary.

(2) The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

(3) The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004[157].

Article 5

(1) Recovery of the aid referred to in Article 1 shall be immediate and effective.

(2) Romania shall ensure that this decision is implemented within six months following the date of notification of this Decision.

[157] Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140 30.4.2004, p. 1).

Article 6

(1) Within five months following notification of this Decision, Romania shall submit the following information to the Commission:

(a) the total amount (principal and recovery interests) to be recovered from the beneficiary;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents demonstrating that the beneficiary has been ordered to repay the aid.

(2) Romania shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 7

(1) This Decision is addressed to Romania.

(2) The Commission may publish the amounts of aid and recovery interest recovered in application of this decision, without prejudice to Article 30 of Council Regulation (EU) 2015/1589.

Done at Brussels, 17.12.2018

For the Commission
Margrethe VESTAGER
Member of the Commission

EUROPEAN
COMMISSION

Brussels, 17.12.2018
C(2018) 8592 final

ANNEX

ANNEX

to the

Commission decision

ON THE STATE AID
SA.36086 (2016/C) (ex 2016/NN)
implemented by Romania
for Oltchim SA

PUBLIC VERSION

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Technical annex

Market economy creditor test relating the choice between the proposed Reorganisation Plan and liquidation procedure

1. GROSS PROCEEDS AND COSTS ASSOCIATED IN THE REORGANISATION PLAN AND IN THE LIQUIDATION PROCEDURE

(1) The Commission carefully reviewed the different reports, data and studies available regarding Oltchim that a prudent market economy creditor – in the situation of AAAS, Electrica, Salrom, CET Govora and respectively the National Water Administration – would have reasonably taken into account to assess the merits of the reorganisation plan proposed to the creditors on 9 March 2015 and of the alternative path of triggering Oltchim's bankruptcy.

(2) Based on those *ex-ante* data, the Commission established a central, reference scenario that a market economy creditor would have regarded as the most likely for each of the Reorganisation plan and of the liquidation procedure.

(3) The Commission then analysed the robustness of the results obtained in that central scenario by assessing the proceeds obtained by the creditors in a pessimistic and in an optimistic scenario.

1.1. Gross proceeds from the liquidation and reorganisation plan

(4) In its report finalized on 30 April 2013, Winterhill performed an assessment of Oltchim's assets in a *in-situ* scenario corresponding to the situation where a buyer would purchase Oltchim's numerous assets in one bulk.

(5) That value was used to establish the starting sale price of Oltchim SPV at EUR 306 million in the Reorganisation plan (see the Opening Decision, point 47)[1].

(6) Oltchim SA's *in-situ* value has been computed by Winterhill by using a net replacement cost methodology. Such a methodology is an acceptable *proxy* of the liquidation value of a company that would be bought in one bulk by a purchaser: as underlined by Winterhill in its 2013 report, such a value is indeed representative of both the cost of acquiring lands, equipments and machineries, setting up the associated buildings and paying for their installation costs, as well as of the depreciation induced by time for each of the assets purchased.

(7) In the opposite, contrary to what was foreseen in the Reorganisation plan, the *in-situ* value was not representative of the market price related to the sale of Oltchim SA as a going concern through Oltchim SPV: a purchaser of Oltchim SPV's shares would have strongly preferred relying on the expected revenues and profit it could get from its investment in Oltchim SPV taken as a whole company (with for instance the obligations stemming from the transfer of employees' contracts from Oltchim SA) rather than on a net replacement cost of Oltchim SA's assets that ignores the liabilities attached to the SPV's take-over and tends to disregard the level of profitability of the business that can be conducted thanks to the assets for sale.

(8) Therefore, consistently with the very approach taken by Raiffesen in 2009 (Raiffesen advisory report performed, p71), the enterprise value of Oltchim SPV can be

[1] R/BDO clarified the fact that the price of EUR 306 million for Oltchim SPV shares evoked in Winterhill 2013 report was erroneous but had been corrected in view of the meeting of creditors on 4 December 2014 to EUR 294 million.

computed through an enterprise valuation method relying on EBITDA multiples: taking into account the availability of detailed EBITDA forecasts at the time of the vote in the Reorganisation Plan prepared by the Court-appointed administrators, the methodology of EBITDA multiples is indeed an appropriate way to determine the enterprise value of Oltchim SPV, which is equivalent to the value of Oltchim SPV's shares considering the absence of financial debt.

1.1.1. Gross proceeds and duration of the liquidation procedure

(9) Winterhill (to which R/BDO refer to in their Reorganisation report) computed an *ex-situ* value corresponding to Oltchim SA's liquidation value in case its assets would have been sold individually, by applying notably standardized ratios on the *in-situ* value of most of the items forming Oltchim SA's. For instance, in order to compute the *ex-situ value* of the equipment and installations (estimated at EUR 99.1 million), Winterhill divided by two the *in-situ* estimate of EUR 198.2 relating to Oltchim's equipment and installations (which represents a significant part of the total *in-situ* value of Oltchim's assets estimated at EUR 297 million) .

(10) This supports the view that there was a *continuum* of intermediary possibilities between the liquidation of Oltchim's assets in one bulk or individually, as further strengthened by R/BDO's submission (point 100) : "creditors could choose between a reorganisation […] and the bankruptcy" ; for the latter they refer to two possible types of sales :"in situ, ex situ". An *ex-situ* sale is representative of a pessimistic scenario where no assets would be bought as a functional group. An *in-situ* sale is representative of an optimistic situation where a single purchaser would buy all the asset one bulk. A central scenario would rely on the likely, average scenario where around half of the asset's value would be sold as a functional group while the remainder would only be sold at scrap value. This is the reason why it is appropriate to take the average between Winterhill's *ex-situ* and *in-situ* value to design the central liquidation value that an MEO could have expected[2], whereas the Wintehill's *ex-situ* value[3] would represent the pessimistic outcome of the liquidation procedure and Winterhill's *in-situ*[4] value the optimistic outcome of the liquidation procedure.

(11) Furthermore, the liquidation was reasonably expected to be finalized within 18 months, based on R/BDO's submission in the Reorganisation plan (page 110).

1.1.2. Gross proceeds from the reorganisation plan

Reference scenario

(12) Regarding the reorganisation plan, the "scenario A" of the Reorganisation plan foresaw the sale of Oltchim SPV to a purchaser interested in running the assets with the oxo-alcohols plant restarted and no additional, external funding needed. Such a scenario was representative of a reference view of Oltchim's SPV potential sale prospect.

(13) In this scenario, the Court-appointed administrators assumed that the sale of Oltchim SPV would occur within a 36-month period[5]. Therefore, in average, one may consider that a central view was to be conducted within 18 months.

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2 Circa EUR 217 million, out of which EUR 171 million from secured assets.
3 Circa EUR 140 million, out of which EUR 108 million from secured assets.
4 Circa EUR 294 million, out of which EUR 234 million from secured assets.
5 Opening decision, recital 47.

(14) A market economy creditor would have valued Oltchim SPV' sale price associated with that scenario, in accordance with the EBITDA multiple methodology described in recital (8), by multiplying the average of EBITDA forecasts over the 3-year period computed by R/BDO[6] in the Reorganisation plan with the 5.0x multiple for commodity chemical producers advised by Raiffesen in its 2009 report. Contrary to the Romanian authorities' assumption in their submission dated on 16 May 2018 (section E, chapter II points 13-14) , a MEO had no reason to assume higher EBITDA forecasts that the ones proposed by R/BDO in the "scenario B" of their plan. Nor would a MEO had considered Raiffesen's estimate as flawed and considered alternative EBITDA multiples such as the one proposed by the Romanian authorities that are partly based on *ex-post* data not available at the time of the creditors' vote.

Pessimistic scenario

(15) In a pessimistic scenario, one might consider that the potential purchasers of Oltchim SPV would have tried to rely on Oltchim SA's historical financial performance to set the price for their offers. Oltchim SA's 10-year historical EBITDA average amounted to minus EUR 7.4 million. However such a distressed performance is the mere result from Oltchim's difficulties notably from 2012; a MEO would thus have stressed the EBITDA assumed by R/BDO in the reference scenario by applying for instance a 50% discount on the average of 3-year EBITDA forecasts by BDO in the reference scenario (i.e. EUR 3.4 million). The 5.0x EBITDA multiple was then also appropriate to establish the price for Oltchim SPV's shares in this pessimistic scenario.

(16) In a pessimistic scenario, it made sense to assume that the maximum period of 36 months would be needed in order to achieve the sale of Oltchim SPV.

(17) In view of comparing the proceeds from a liquidation procedure lasting 18 months and from a Reorganisation plan in the pessimistic scenario lasting 36 months, a discount factor based on the sectoral WACC[7] is to be applied, for this difference of 18 months, to the proceeds and costs associated with the sale of Oltchim SPV.

Optimistic scenario

(18) A market economy creditor would have also considered as an optimistic scenario the "scenario B" of the Reorganisation plan[8], that assumed Oltchim's business would be enhanced by its purchaser through a restart of the phthalic Anhydride-DOF plant with the use of external financing sources. On the contrary, a MEO would not have considered as realistic to assume an extended restart of the Bradu operations (including PVC/VCM and Petrochemical plant) as proposed by the Romanian authorities in their submission dated on 16 May 2018 (section E, chapter II point 19): a MEO had no reason to assume higher EBITDA forecasts that the ones proposed by R/BDO in that in the "scenario B" of their plan.

(19) A restrained period of 18 month (as in the liquidation scenario) was assumed: a shorter period would have proven to be too challenging for Oltchim to get the external financing needed so as to trigger the preliminary restart of the phthalic

6 EUR 6.85 million.

7 Average WACC of 11.58% for the chemical industry according to Data base from Professor Aswath Damodaran, specialist in corporate finance and equity valuation at the Stern School of Business (New York), EV/EBITDA ratio, January 2015 (http://people.stern.nyu.edu/adamodar/)

8 Average of EUR 10.9 million over the 3-year period assessed by R/BDO.

anhydride–DOF plant. The implementation of that upside was indeed a pre-requisite to secure the higher price attached to the optimistic scenario "B" from a purchaser of Oltchim SPV.

(20) Regarding the EBITDA multiple, an optimistic scenario may have averaged the 5.0x multiple proposed by Raiffesen with higher ones from other sources such as the 8.46x multiple stated in the specialized database from the Stern School of Business[9], for the group of diversified chemical companies for which Oltchim is mentioned to belong to (hence, 6.73x).

2. COSTS TO BE DEDUCTED FROM THE PROCEEDS OF THE SALE OF OLTCHIM SPV OR OF OLTCHIM SA'S LIQUIDATION PROCEDURE

(21) In both procedures, UNPIR costs of 2% of the proceeds were assumed to be deducted, in accordance with R/BDO's statement in the Reorganisation plan's report (page 96). 4% of administrator fees were also deducted from the proceeds based on Romania's submission dated 16 May 2018. Also, EUR 12 million of security costs (calculated based on R/BDO's submission on a *pro rata* basis for the 18 months of expected liquidation duration) – necessary to the preservation of the assets – were also allocated between secured and unencumbered assets based on Articles 121 and 123 of the insolvency law concerning the liquidation procedure.

(22) The amount of current (post-insolvency) debt computed by R/BDO[10] was withdrawn from the liquidation proceeds in all three scenarios.

(23) The average amount of current debt (including the forecast of aggregate amount of debt related to post-insolvency salaries at the time of the sale of Oltchim SPV) over the 3-year reorganisation plan computed by R/BDO were assumed for both central (scenario A)[11] and optimistic (scenario B) scenarios. To take into account the consequences of an increase in a current debt should the reorganisation plan result in a continuation of Oltchim's poor financial performance, the amount of current debt estimated by R/BDO in the scenario A at the end of the 1st year[12] was retained as the amount of current debt to be repaid in the pessimistic scenario related to the Reorganisation plan.

(24) Similarly, the average tax computed for each possible year of sale of Oltchim SPV over the 3-year period by R/BDO for the scenario A and B have been retained respectively for the reference and optimistic scenario of the Reorganisation plan (see table infra.), in consistence with Romania's submissions[13].

(25) According to R/BDO, Oltchim's restart in case of a liquidation involving assets being sold *in-situ* would have implied EUR 2.5 million of start-up costs ; therefore those costs have been deducted from the price offered by a potential purchaser in case of liquidation *in-situ*[14]. 50% of them have been modelled in the reference scenario as only half of the assets' value is assumed to be sold as a functional group and to

9 Ibid as footnote 7 (Global enterprise value multiples, January 2015).

10 EUR 50.34 million at the date of 30 November 2014.

11 EUR 66.36 million for scenario A (reference scenario for this MEO test) and EUR 69.52 million for scenario B (optimistic scenario for this MEO test) (Reorganisation plan's BDO Report, page 97).

12 EUR 70.43 million.

13 Section E, chapter II, point 35 of their submission dated 16 May 2018.

14 50% of those costs were taken into account in the reference scenario that assumes that only a part of Oltchim assets are taken over in one bulk with a view to operate them, the remainder being sold individually.

remain operated as a plant, thus needed to be restarted, while the remainder is assumed to be sold at scrap value.

(26) The environmental liabilities would have been neutralized by a market economy creditor when comparing the proceeds to expect from a liquidation procedure and those from the proposed Reorganisation plan, as supported by the reasoning detailed in recital (269) in the body of this decision.

(27) The decommissioning of the mercury electrolysis plant and soil reclamation (EUR 26.6 million) – as well as the upgrade of plants both needed according to R/BDO in case of liquidation (EUR 24.6 million) and "gradually due if Oltchim is maintained operational"– have been considered as neutral in the comparison between the liquidation scenario and the Reorganisation plan. Such an approach is consistent to the approach applied to environmental liabilities (see recital (26)) in the following : those exceptional costs should indeed have been taken into account, one the one hand, by Oltchim SA's creditors in the liquidation scenario, and on the other hand, by a potential purchaser when putting a bid for Oltchim SPV. The Romanian authorities did not disagree with the fact that bidders would have taken into account those costs as equal in both liquidation and reorganisation' scenarios in case of purchase of these facilities with a view to operate them in point 10 of their submission dated on 16 May 2018 ; it is worth noting that this is an assumption that positively impacts the proceeds from the Plan by comparison to the ones from liquidation as in the pessimistic and reference liquidation scenarios, those upgrade costs would not have been necessary in full.

(28) Lastly, the liquidation procedure would have required Oltchim SA to bear compensatory payments due to remaining employees in March 2015 dismissed in the liquidation scenario. In the reference and pessimistic scenario, those payments are estimated on the basis of R/BDO's submission (EUR 24.6 million), while being assumed equal to EUR 9.6 million on the basis of Raiffesen estimate in the optimistic scenario[15].

(29) In the reorganisation scenario, EUR 1.5 million of fees related to asset transfers have been taken into account based on R/BDO's report supporting the Reorganisation plan.

3. CALCULATION OF THE NET PROCEEDS FOR EACH CREDITORS IN THE REORGANISATION PLAN AND IN THE LIQUIDATION PROCEDURE

(30) Based on the previous assumptions, the aggregate gross and net proceeds in the liquidation procedure and Reorganisation plan are computed in the following sub-sections.

Liquidation procedure

(31) Taking into account the provisions of the insolvency law, notably its articles 121 and 123, the following cash waterfall has been modelled in the liquidation scenario: the proceeds from the secured assets (see item [A] in the following chart) are distributed

[15] Raiffesen estimated in 2009 at RON 58 million compensatory payments due in case of dismissal of the employees on Oltchim's payroll at the end of 2008. This means a RON 74.3 million compensatory payment due in case of the dismissal of employees, at the end of 2014 by adjusting the former with (i) inflation of 4.22 % in CAGR between 2008 and 2014 (computed from Eurostat yearly inflation data) (ii) the decrease in Oltchim's headcount from 4,204 employees at the end of 2008 to 2,345 at the end of 2014 (source: Bloomberg).

as a priority to the secured creditors, after payment of the related procedural costs ([C]).

(32) Proceeds from unencumbered assets are allocated at first for the payment of procedural/preservation costs as well as salaries.

(33) In all three scenarios the proceeds from unencumbered assets after procedural and employees costs are not enough to fully cover the current post-insolvency debt, severance or start-up costs. The surplus from proceeds from secured assets that arises in the optimistic scenario, is therefore allocated to cover those costs. If there is any amount of proceeds remaining, it is then shared between budgetary creditors, in accordance with the rank of creditors foreseen in Article 123 of the insolvency law. In all three scenarios, no proceeds are obtained by the unsecured creditors located after the salaries and budgetary creditors in the rank of creditors.

Liquidation procedure			
	Pessimistic scenario ***Ex-situ sale*** ***(million EUR)***	**Central scenario** ***(million EUR)***	**Optimistic scenario** ***In-situ* sale** ***(million EUR)***
Gross proceeds (total) ***- from secured assets (A)*** ***- from unencumbered assets (B)***	**140** ***108*** ***32***	**216.9** ***171.1*** ***45.8***	**293.7** ***234.2*** ***59.5***
Procedural costs (UNPIR) and security/preservation/asset administration costs ***- on secured assets (C)*** ***- on unencumbered assets (D)***	**(15.9)** ***(13.2)*** ***(2.7)***	**(18.4)** **(15.9)** **(2.5)**	**(20.9)** ***(18.5)*** ***(2.4)***
Claims from employees (*paid before current debt*) (E) from unencumbered assets	**(2.1)**	**(2.1)**	**(2.1)**
Current debt to be repaid, severance payments, start-up costs (F)	***(75.2)***	***(76.5)***	***(62.4)***
Current debt's coverage ratio by overall proceeds net of procedural, employee, secured debt repayment from secured assets and severance/start-up costs	***29.1%***	***44%***	***114%***
Net proceeds: ***- from secured assets (Ω=A-C)*** ***- from unencumbered assets***	***94.8*** ***(49.3)***	***155.2*** ***(37.1)***	***215.7*** ***(9.7)***

(Φ=B-D-E-F)			
Payment to creditors (other than employees)			
Secured creditors (G), ***out of which:***	**94.8**	**155.2**	**195.8**
- AAAS's secured tranche	***1***	***1.7***	***2.1***
- Electrica's secured tranche	***21.4***	***35.7***	***44.2***
- Salrom	***1.7***	***2.7***	***3.47***
Budgetary, ***out of which:***	**0**	**0**	**10.1 (=Ω+Φ-G)**
- AAAS	***0***	***0***	**9.5**
- Romanian Water Admin.	***0***	***0***	**0.7**
Unsecured creditors under Article 96 of the insolvency law, ***out of which***	**0**	**0**	**0**
CET Govora	***0***	***0***	***0***
National Water Administration	***0***	***0***	***0***
Other unsecured creditors	**0**	**0**	**0**
Salrom	***0***	***0***	***0***

(34) In their submission dated on 16 May 2018, the Romanian authorities did not deduct the current debt from the proceeds from liquidation in their simulation (in contrast to proceeds from the sale of Oltchim SPV). While this omission by the Romanian authorities seems to be erroneous, in case a MEO had considered that assumption, he would have found that the proceeds for the different pre-insolvency creditors in case of a liquidation would have been even higher than those in the table above, as shown below:

Liquidation procedure (if no pre-deduction of current debts)			
	Pessimistic scenario ***Ex-situ sale*** ***(million EUR)***	**Central scenario** ***(million EUR)***	**Optimistic scenario** ***In-situ*** **sale** ***(million EUR)***
Gross proceeds (total)	**140**	**216.9**	**293.7**
- from secured assets (A)	***108***	***171.1***	***234.2***
- from unencumbered assets (B)	***32***	***45.8***	***59.5***
Procedural costs (UNPIR) and security/preservation/asset administration costs	**(15.9)**	**(18.4)**	**(20.9)**
- on secured assets (C)	***(13.2)***	**(15.9)**	***(18.5)***
- on unencumbered assets (D)	***(2.7)***	**(2.5)**	***(2.4)***
Claims from employees (*paid before current debt*) (E) from	**(2.1)**	**(2.1)**	**(2.1)**

unencumbered assets			
Severance payments, start-up costs (F)	***(24.9)***	***(26.2)***	***(12.1)***
Net proceeds: ***- from secured assets (Ω=A-C)*** ***- from unencumbered assets*** ***(Φ=B-D-E-F)***	 ***94.8*** ***1.1***	 ***155.2*** ***13.2***	 ***215.7*** ***40.6***
Payment to creditors (other than employees)			
Secured creditors (G), ***out of which:*** ***- AAAS's secured tranche*** ***- Electrica's secured tranche*** ***- Salrom***	**94.8** ***1*** ***21.4*** ***1.7***	**155.2** ***1.7*** ***35.7*** ***2.7***	**195.8** ***2.1*** ***44.2*** ***3.47***
Budgetary, ***out of which:*** ***- AAAS*** ***- Romanian Water Admin.***	**1.1** ***1.0*** ***0.1***	**13.2** ***12.4*** ***0.9***	**60.5 (=Ω+Φ-G)** **56.6** **3.9**
Unsecured creditors under Article 96 of the insolvency law, ***out of which*** ***CET Govora*** ***National Water Administration***	**0** ***0*** ***0***	**0** ***0*** ***0***	**0** ***0*** ***0***
Other unsecured creditors ***Salrom***	**0** ***0***	**0** ***0***	**0** ***0***

Reorganisation Plan

(35) The proceeds from the sale of Oltchim SPV have been allocated in the following order in the Reorganisation plan: they are firstly used so as to honour the current debt repayment including pay the cost of asset transfers and procedural (UNPIR) costs, and tax on the profit made according to Article 102(1) of the insolvency law.

(36) In the scenarios considered, the gross proceeds of the plan were to be lower than the minimum foreseen in the Reorganisation plan of EUR 295 million. According to the Reorganisation plan (see notably BDO's report page 101) and based on the explanations submitted by the Romanian authorities on 16 May 2018, the potential net residual amount (after procedural costs and current debts) is distributed in the following way: 70% of the net amount for secured creditors, 100% of their claims is paid to employees to settle pre-insolvency debt to them, , the then residual amount for essential suppliers within the limit of 30% of their initial claim the potential remainder being then paid to budgetary creditors. **In the following scenario, there is**

no residual amount available as only current debt holders recover part of their claims through proceeds from the sale of Oltchim SPV.

Reorganisation plan – EBITDA Multiples Methodology			
	Optimistic scenario (Scenario B) ***(million EUR)***	**Central scenario (Scenario A)** ***(million EUR)***	**Pessimstic scenario** ***(million EUR)***
Enterprise value, *based on:*	**73.5**	**34.3**	**17.2**
EBITDA	***10.9***	***6.9***	***3.4***
EBITDA multiple	***6.7***	***5.0***	***5.0***
Current debt (incl. post-insolvency debt due to employees), cost of asset transfers and UNPIR costs	**(72.5)**	**(68.5)**	**(72.2)**
Coverage ratio of current debt from proceeds nets of UNPIR costs, asset transfer fees and taxes	**102%**	**48%**	**22%**
Tax on incomes obtained	**(7.8)**	**(7.4)**	**(3.7)**[16]
Net proceeds	**0**	**0**	**0**
Payment to creditors			
Employees	***0***	**0**	**0**
Secured creditors, *out of which:*	***0***	**0**	**0**
- *AAAS's secured tranche*	**0**	***0***	***0***
- *Electrica's secured tranche*	**0**	***0***	***0***
- *Salrom*	**0**	***0***	***0***
Budgetary, *out of which:*	***0***	***0***	***0***
- *AAAS*	**0**	**0**	**0**
- *National Water Admin.*	**0**	**0**	**0**
Unsecured creditors under Article 96 of the insolvency law, *out of which*	***0***	***0***	***0***
CET Govora	**0**	**0**	**0**
Other unsecured creditors	***0***	***0***	***0***
Salrom	**0**	**0**	**0**

[16] Assumed as 50% of the income tax in the reference scenario considering the proceeds are divided by two between reference and pessimistic scenarios.

Alternative assessment of proceeds in the Reorganisation plan - *Dividend Discount Model*

(37) A MEO would have been willing to double check those results by relying on the Dividend Discount Model (hereafter, "DDM"), another valuation tool frequently used by private investors. The share price of Oltchim SPV could be assessed by looking at the expected dividend cash flow from the point of view of an investor.

(38) The enterprise value could be computed as the following:

$$EV = \sum_{i=1}^{\infty} \frac{(Profit_1 \times Dividend\ distribution\ Rate) \times (1+g)^i}{(1+WACC)^i}$$

Where: **Profit$_1$** can be calculated as the profit (net income) that can be reasonably expected after Oltchim SPV's operations restructuring has been completed

Dividend distribution rate is the share of profits that is distributed to shareholders.

g is the growth rate applicable for diversified chemical industry players at that time;

WACC is the relevant sectoral weighted average cost of capital

(39) Similarly to the enterprise value's assessment based on EBITDA multiple, a MEO would have assumed:

(a) In a **reference** scenario, Profit$_1$ can realistically be assumed as equal to the average profit computed by R/BDO in their Reorganisation report over the 3-year period in scenario A (EUR 5.7 million) within which Oltchim SPV was expected to be sold.

(b) In a **pessimistic** scenario, Profit$_1$ can realistically be assumed as equal to half of the profit expected in the reference scenario (EUR 2.85 million).

(c) In an **optimistic** scenario, Profit$_1$ can realistically be assumed as equal to the average profit computed by R/BDO in their Reorganisation report over the 3-year period within which Oltchim SPV was expected to be sold in scenario B (EUR 7.0 million).

(40) In all three scenarios, the growth rate **g** has been assumed to be equal to the 4.0%[17] (in value terms), the distribution rate to 46.56%[18] and the WACC (see footnote 162) equal to 11.58%. The distribution rat assumed has been is relatively optimistic for all scenarios considering the high investment needs that Oltchim was requiring at that time.

(41) The above-mentioned formula can be simplified as the following:

$$EV = \frac{(Profit_1 \times Dividend\ distribution\ Rate) \times (1+g)}{WACC - g} = 6.39 \times Profit_1$$

[17] CAGR based on Professor's Damodaran data base dated 5 January 2015, the average, aggregate growth in net income for diversified chemicals companies over the preceding 5 years was 21.49%.
Source: http://pages.stern.nyu.edu/~adamodar/New_Home_Page/dataarchived.html

[18] Ibid, average pay-out for diversified chemical companies' shareholders. Study dated 5 January 2015.

(42) Based on the DDM, a market economy creditor would have computed the following estimates of the enterprise value of Oltchim SPV:

Reorganisation plan – Dividend Discount Model			
	Optimistic scenario (Scenario B) ***(million EUR)***	**Central scenario (Scenario A)** ***(million EUR)***	**Pessimstic scenario** ***(million EUR)***
Enterprise value*, based on DDM:*	**44.7**	**36.4**	**18.2**
Current debt (incl. post-insolvency debt due to employees), cost of asset transfers and UNPIR costs	**(72.5)**	**(68.5)**	**(72.2)**
Tax on incomes obtained	**(7.8)**	**(7.4)**	**(7.0)**
Net proceeds	**0**	**0**	**0**
Payment to creditors			
Employees	***0***	**0**	**0**
Secured creditors*, out of which:*	***0***	**0**	**0**
- AAAS's secured tranche	**0**	***0***	***0***
- Electrica's secured tranche	**0**	***0***	***0***
- Salrom	**0**	***0***	***0***
Budgetary*, out of which:*	***0***	***0***	***0***
- AAAS	**0**	**0**	**0**
- Romanian Water Admin.	**0**	**0**	**0**
Unsecured creditors under Article 96 of the insolvency law, *out of which*	***0***	***0***	***0***
CET Govora	**0**	**0**	**0**
National Water Administration	**0**	**0**	**0**
Other unsecured creditors	***0***	***0***	***0***
Salrom	**0**	**0**	**0**

(43) This assessment based on the DDM confirms that in the Reorganisation scenario, a MEO would have considered that there was no residual amount available allowing any recovery from the sale of Oltchim SPV, would it have happened, as only current debt holders recover part of their claims through proceeds from the sale of Oltchim SPV

4. RESULTS OF THE MEO TEST FOR EACH CATEGORY OF CREDITORS AND SENSITIVITY ANALYSIS

Secured creditors

(44) In conclusion, based on the above-mentioned calculations, secured creditors achieve in all three scenario related to the liquidation procedure positive recoveries between EUR 94.8 and 195.8 million, while in the reorganisation plan's proceeds, no surplus is available as proceeds are not enough to pay for the full amount of current debt and procedural costs, based on both EBITDA multiples and Dividend discount methodologies. Therefore, **secured creditors acting as market economy creditors would have preferred the liquidation procedure from the perspective of their secured claim on a standalone basis.**

(45) This conclusion is corroborated by the following sensitivity analysis: even with an optimistic EBITDA multiple of 6.7x (see recital (20)), a minimum break-even EBITDA of circa EUR 32.5 million (i.e. around three times the EBITDA related to the optimistic scenario of the Reorganisation plan) would have been required so that Oltchim SPV's value reaches an amount (EUR 219 million) allowing secured creditors to get higher proceeds in the Reorganisation plan compared to the pessimistic scenario attached to the liquidation procedure (i.e. proceeds for secured creditors of EUR 94.8 million).

(46) A market economy creditor would have noted that this breakeven EBITDA of EUR 32.5 million (ensuring proceeds from the Plan higher than from the liquidation) was unrealistic because it was far higher than the one from the above-mentioned optimistic scenario (EUR 10.9 million), built on the basis of an assessment of Oltchim business. Furthermore, the Court-appointed receiver's estimate of proceeds from the Plan amounting to EUR 295/306 million implied that a purchaser would have been ready to consider Oltchim able to reach an EBITDA even higher (circa EUR 44 million p.a. of EBITDA, on the basis of an optimistic EBITDA multiple of 6.7x) which was even more unrealistic.

(47) **Therefore, a secured creditor willing to maximize its proceeds would have preferred to trigger the liquidation procedure.**

Budgetary creditors

(48) In two of the three scenarios, the proceeds of the liquidation procedure are insufficient to repay, even partly, any claim due to the budgetary creditors. However EUR 10 million are recovered by budgetary creditors in the optimistic scenario of the liquidation procedure. By contrast, none of the three scenarios of the reorganisation plan results in distributions to budgetary creditors, and this, in addition to the substantial risk of failure of sale of Oltchim SPV based on past privatisation failure and of increase of the post-insolvency current debts (see recital (52)).

(49) Furthermore, even in the case of very low proceeds illustrated by the pessimistic and reference scenario in the liquidation procedure, budgetary creditors come before pre-insolvency debt from essential suppliers under Article 96 of the insolvency law in the liquidation procedure, while they were to be paid after the latter in the Reorganisation plan.

(50) **Therefore budgetary creditors acting as market economy creditors would have favoured the liquidation procedure from the perspective of their budgetary claim on a standalone basis.**

Unsecured creditors

(51) Unsecured commercial creditors, including essential suppliers, do not recover any of their claims recorded in these two categories neither in any of the scenarios related to the liquidation procedure, nor in any of the scenarios related to the reorganisation plan.

(52) Even when comparing scenarios where expected proceeds were equal to zero in both liquidation and reorganisation, a MEO would have favoured the liquidation as the reorganisation to avoid the certain further accumulation of current debt in a context of the uncertain generation of sufficient new revenues in the Plan. Such a behaviour would have been consistent with DGFP Craiova's one during the creditors assembly in August 2016 who was mentioned its opposition to the prolongation of the reorganisation period at that time to avoid an increase in current debts, according to PCC submission, which proved that irrespective of the fact that DGFP Craiova belonged to both secured and budgetary creditors, the risk of deviation of the current debt during the Reorganisation period was assessed as real.

(53) In addition, the administrative and legal costs incurred by the creditors to pursue the monitoring of their exposure in the reorganisation plan were to be higher than in the liquidation procedure, the duration of which was expected to be shorter.

(54) **Therefore unsecured creditors acting as market economy creditors would have favoured the liquidation procedure from the perspective of these claims on a standalone basis to avoid further accumulation of current debt.**

5. CONCLUSION OF THE MARKET ECONOMY CREDITOR TEST

(55) As a conclusion of this market economy creditor test, notably based on recitals (47) and (50) of this Technical Annex, **AAAS, holding secured and budgetary claims, should have favoured the liquidation (as did another creditor holding both secured and budgetary claims namely, DGFP Craiova) if it had acted as an MEO and thus granted an advantage to Oltchim under Measure 3 amounting to the agreed partial write-off of its claim (EUR 211 to EUR 216 million).**

(56) Based on recitals (47) and (54) of this Technical Annex, **Electrica, holding both secured and unsecured creditor claims, should have favoured the liquidation if it had acted as an MEO and thus granted an advantage to Oltchim under Measure 3 amounting to the agreed partial write-off of its claim (EUR 110 to 112 million).**

(57) **Based on recital** (50) and (54) of this Technical Annex, **the Romanian Water Administration holding only budgetary claims and claims of unsecured creditor under Article 96 of the insolvency law should have favoured the liquidation if it had acted as an MEO and thus granted an advantage to Oltchim under Measure 3 amounting to the agreed partial write-off of its claim (EUR 2 million).**

(58) Furthermore, the above-mentioned considerations tend to indicate that Salrom should have also favoured the liquidation in order to maximize their proceeds. This is also the case for CET Govora, strictly based on those considerations.

(59) As far as CET Govora and Salrom are concerned, in addition to their unsecured claims, they were also exposed to Oltchim as post-insolvency, current debt holders. So they may also have considered their potential recovery via their claims stemming

from the current debt. The calculations (see above-mentioned tables) show that the coverage ratios of the current debt were higher in average in the liquidation scenario (71%) compared to the Reorganisation plan (57%).

(60) **Regarding Salrom, based on recitals (54) and (59) of this Technical Annex, the conclusion of this MEO test is that it should have favoured the liquidation if it had acted as an MEO and thus provided Oltchim with an economic advantage amounting to the agreed write-off of its claim (EUR 4 million).**

(61) As far as CET Govora is concerned, the specific constraints of this creditor need to be taken into account: a MEO acting in the situation of CET Govora would have considered the absence of proceeds in both liquidation and Reorganisation plan; it would have balanced the risk of increasing its exposure on Oltchim SA in the Reorganisation plan with the very special circumstances at stake for its own survival due to its large interdependence with Oltchim (larger than Salrom's one). Therefore that MEO may have favoured the Reorganisation plan.

(62) **In view of the latter, the conclusion of this MEO test is that CET Govora's behaviour was compliant with the market economy creditor principle regarding its vote in favour of the Plan.**

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