II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 27 February 2008

on State aid C 46/07 (ex NN 59/07) implemented by Romania for Automobile Craiova (formerly Daewoo Romania)

(notified under document number C(2008) 700)

(Only the Romanian version is authentic)

(Text with EEA relevance)

(2008/717/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

1. PROCEDURE

(1) On 17 January 2007 the Commission requested information on several Romanian public undertakings, including SC Automobile Craiova SA (hereinafter Automobile Craiova), formerly Daewoo Romania (*), in the context of the national privatisation process. Romania submitted information by letter of 15 February 2007. The Commission requested further information on 8 March and 22 May 2007 which Romania submitted by letters of 21 March, 25 May and 31 May 2007. A meeting with the Romanian authorities was held on 3 May 2007.

(2) By letter of 5 July 2007, the Commission asked the Romanian authorities to remove the specific conditions attached to the privatisation contract for Automobile Craiova, indicating at the same time that failure to suspend any unlawful aid might lead the Commission to adopt a decision to initiate the formal investigation procedure on the basis of Article 88(2) of the EC Treaty and a suspension injunction on the basis of Article 11(1) of Council Regulation (EC) No 659/1999 [2].

(3) By letter of 18 July 2007, the Romanian authorities informed the Commission that the privatisation of Automobile Craiova would be notified to the Commission. By letter of 20 August 2007, the Commission reminded Romania that the privatisation of Automobile Craiova would have to be notified before any measure binding the public authorities was taken.

[1] OJ C 248, 23.10.2007, p. 25.

(*) Mistake: the text should read 'and its subsidiary Daewoo Romania'.

[2] Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

(4) In September 2007 the Commission learnt from the press that on 12 September 2007 Romania had signed a sale-purchase agreement (SPA) with the only bidder, Ford.

(5) By letter of 10 October 2007, the Commission informed Romania that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of unlawful aid and to issue a suspension injunction. The Commission Decision to initiate the procedure together with a suspension injunction was published in the *Official Journal of the European Union* ([3]). The Commission invited interested parties to submit their comments on the aid.

(6) Romania submitted its comments by letter of 24 October 2007. By letter of 23 November 2007, Ford submitted its comments, which were forwarded to Romania on 30 November 2007. Romania submitted its observations on Ford's comments by letter of 7 December 2007.

(7) The Commission asked for additional information by letters of 12 October 2007, 17 October 2007, 19 October 2007, 14 November 2007 and 14 January 2008. Romania submitted the additional information by letters of 18 October 2007, 24 October 2007, 6 November 2007, 12 November 2007, 19 November 2007, 23 November 2007, 7 December 2007, 8 January 2008 and 23 January 2008.

(8) The Commission met with the Romanian authorities and representatives of Ford on 5 October 2007, 12 October 2007, 7 November 2007, 15 November 2007, 17 December 2007 and 24 January 2008.

2. **DESCRIPTION**

2.1. **The undertaking concerned**

(9) Automobile Craiova is a company active in the trade in automotive spare parts. It also produces exhaust boxes and PVC joinery. The Romanian State holds 72,4 % of its shares through the Romanian privatisation agency, AVAS. The remaining 27,6 % of the shares are held by a private investment fund (SIF Oltenia) and by private-law natural and legal persons. Its shares are listed on the Bucharest stock exchange. Automobile Craiova made profits of EUR 83 479 in 2005 and of EUR 51 125 in 2006. Its turnover was EUR 2,15 million in 2005 and EUR 2,14 million in 2006.

([3]) See footnote 1.

(10) The company has one subsidiary, Daewoo Romania ('DWAR'), which is also the majority shareholder in Mecatim. The car producer DWAR was established in 1994 as a joint venture, the Romanian State holding 49 % of the shares and Daewoo Motors South Korea 51 %. After Daewoo Motors went bankrupt, DWAR acquired in 2006 51 % of its own shares. In line with Romanian company legislation, the 51 % of the shares were annulled in November 2007 so that DWAR was wholly owned by Automobile Craiova.

(11) In 2007 DWAR employed 3 959 people. In 2006 it produced 24 898 cars, mostly small models. The plan in 2007 was to produce about 19 000 cars. In January 2008 car production stopped. In addition, DWAR produces engines for different GM Daewoo subsidiaries. The Craiova plant has a production capacity of 100 000 cars/year.

(12) DWAR generated losses of around EUR 350 million in 2006 and of around EUR 3,4 million until 30 April 2007. In 2006 it had total debts of around EUR 88 million, of which EUR 56 million to the public budget and EUR 25 million to suppliers.

(13) According to the financial statements, in 2006 the company had land and fixed assets worth EUR 193 million, raw materials and other materials worth EUR 55 million, available cash amounting to EUR 96 million, and receivables and settlements totalling EUR 108 million. In conclusion, according to the balance sheet at the end of 2006, DWAR had net assets of EUR 419 million in 2006.

(14) Mecatim is a subsidiary of DWAR which owns 75 % of its shares; 20 % are held by AVAS and the remaining 5 % by minority private shareholders. The company is situated in Timişoara. Its core activity is the production of spare parts for vehicles and vehicle engines. However, the company has stopped production and is currently trading in vehicles.

(15) Automobile Craiova is based in a region eligible for aid under Article 87(3)(a) of the EC Treaty.

2.2. **The privatisation process**

(16) On 19 and 21 May 2007 the Romanian privatisation agency, AVAS, announced the sale of its participation of 72 % in Automobile Craiova. Although several undertakings had previously submitted non-binding letters of interest, only two potential investors, Ford Motor Company ('Ford') and General Motors ('GM'), bought the Information Memorandum (i.e. the presentation file), which gave them access to the information contained in the Data Room and allowed them eventually to submit a final and binding bid.

(17) The presentation file contained certain conditions relating in particular to minimum production, employment and investment levels. The scoring grid showed that the price offered represented only 35 % of the total scoring, with aggregate investments accounting for 25 %, the achievement of a production integration level of 60 % in the fourth year accounting for 20 % and the commitment to a production level of 200 000 cars in the fourth year accounting for 20 %. If the offered integration level was below 60 % and/or if this level would be achieved only after four years, the investor would score 0 points. The same applied to the production level, where, if the offered production level was lower than 200 000 cars in the fourth year and/or if a longer period would be needed to reach this production level, the investor would also score 0 points.

(18) The deadline for submitting final offers was 5 July 2007. Being the only party to submit a binding bid, Ford was awarded the tender. Initially it offered a price of EUR 55 million and, after the subsequent negotiations, one of EUR 57 million.

(19) During the negotiation phase following the bidding process, the parties agreed that Ford, the buyer, would obtain through a reorganisation ownership of the industrial assets of Automobile Craiova, DWAR and Mecatim, while the non-core assets (mostly real estate and net excess cash) would be set aside and remain in state ownership. The State also undertook to use its best efforts to purchase the remaining 28 % from the private shareholders and sell them to Ford.

(20) The sales purchase agreement was signed on 12 September 2007.

3. **DECISION TO INITIATE THE FORMAL INVESTIGATION PROCEDURE AND TO ISSUE A SUPSENSION INJUNCTION**

(21) The formal investigation procedure was initiated on account of suspicions that the privatisation process entailed State aid.

(22) First, the Commission had doubts whether the tender itself was open, transparent and non-discriminatory. According to the information available at the time, which was based mostly on press articles, the Commission had grounds to assume that certain potential investors have been disadvantaged at an early stage and deterred from submitting a bid.

(23) Second, the Commission doubted that the conditions attached to the privatisation did not lead to a reduction in the sales price, thereby conferring an advantage on the undertaking to be privatised. According to the information available at the time of the decision to initiate the procedure, AVAS attached four conditions which were liable to reduce the sales price and might have deterred other potentially interested parties from submitting a bid. The price offered accounted for only 35 % of the total score.

(24) Further, the Commission wondered whether the Romanian authorities attached an employment guarantee to the privatisation. According to the presentation file, the potential bidders had to present a business plan, including their commitment to maintain the current number of employees. Also, the draft SPA attached to the presentation file stipulates the obligation for the buyer to maintain for the next five years the current number of employees; in the event of the buyer breaching its obligation, the SPA will *de jure* become null and void, without any notification or additional formality. Finally, the Romanian authorities informed potential buyers before the publication of the privatisation announcement that one of the main objectives of the privatisation was to maintain the current workforce.

(25) Lastly, the Commission had suspicions that the renegotiation of certain terms during the negotiation phase following the tender conferred an advantage on Ford, the buyer. According to the information available at that stage, it seemed that the Romanian State undertook to take over actual and potential claims against Automobile Craiova, including a customs claim of EUR 800 million. Further, during the subsequent negotiations, the State and Ford reached an agreement to reorganise the company in such a way that the core

activity (production of cars) would be separated from the non-core assets, in particular real estate. Following this reorganisation, Ford would acquire and pay for the industrial activity only and the State would retain ownership of the land.

(26) Since Romania went ahead and signed the privatisation contract despite its repeated warnings, the Commission issued at the same time a suspension injunction.

4. COMMENTS FROM ROMANIA

(27) First, Romania emphasises that the tender process was open, transparent, non-discriminatory and unconditional. The first announcement regarding the intention to privatise DWAR, published on 5 December 2006, and the announcement published on 9/12 March 2007 do not contain any pre-qualification or selection criteria, let alone any conditions which needed to be met by bidders. Moreover, the announcement on the privatisation published on 18/21 May 2007 did not contain any mandatory conditions, but simply award criteria which would allow the different bids to be scored. Further, Romania claims that the increase in the employment level was never a criterion in the tender procedure. In conclusion, all potential bidders had access to all the information available since the entire privatisation process was transparent. Therefore, no potential bidder was deterred from submitting an offer.

(28) Second, Romania argues that neither the presentation file nor the draft SPA imposed mandatory conditions without the possibility for potential bidders to negotiate them. It explains that AVAS initially intended to privatise DWAR as a whole but, during the privatisation process it decided to give potential bidders the option to bid only for the industrial assets (i.e. excluding the real estate). It stresses that, from the outset, all potential bidders were aware that the real estate was not included in the privatisation offer but would be sold separately.

(29) Third, Romania emphasises that the criteria in the presentation file did not have any effect on the bidders, especially since all potential interested parties were automotive undertakings. It also submits that these criteria had no influence on the purchase price offered by Ford, since they were compatible with its business plan. According to Romania, the production level of 200 000 cars per year, as required by AVAS in the presentation file, needs to be achieved for economic reasons: given the size and capacity of the car plant, which is equipped to build small models, production of less than 200 000 cars per year would not be profitable.

(30) Fourth, Romania argues that it acted as a market economy operator when selling its participation in Automobile Craiova. It claims that the price obtained represents the market value and presents the following arguments: DWAR purchased 51 % of the shares in 2006 from the former parent company Daewoo Motors Ltd. for a sales price of USD 50 million. Therefore, the total value of all the shares at that time was EUR 78 million. Ford offered EUR 57 million for 72,4 % of the shares in Automobile Craiova, corresponding to EUR 78 million for all of them. Also, taking the value per share traded on the stock exchange, the value of all the shares in Automobile Craiova on 16 March 2007 was about EUR 59 million. Therefore, the purchase price of EUR 57 million paid by Ford for 72 % of the shares is above the market price. In addition, under the restructuring process, AVAS will also remain owner of the non-core assets. Finally, according to the valuation of DWAR made by an independent expert KPMG after the bankruptcy of the parent company, the company was valued in 2004 at between USD 18 million and USD 81 million, depending on the valuation method used.

(31) Fifth, as regards the alleged indemnification, Romania submitted detailed information on the debt arrangement included in the special law on the privatisation of Automobile Craiova. It argues that, according to normal business practice, AVAS takes over only debts which are not foreseeable and cannot be quantified. It emphasises that Automobile Craiova and DWAR do not have any outstanding debts towards the State, except those deriving from the normal course of business. In addition, because of the payments amounting to USD 10 million paid in 2006 to the parent company ([4]), DWAR does not have any outstanding debts to former Daewoo subsidiaries.

(32) Sixth, as regards the customs claim of EUR 800 million, Romania explained its origin. According to Law 71/1994 on attracting foreign investors, Romanian companies were exempted from customs duties and profits tax if they fulfilled four conditions: the foreign subscribed capital is at least USD 50 million; at least 50 % of production is exported; a production integration level of at least 60 % is achieved; and the share capital does not decrease within 14 years of the date of the foreign subscription with the result that the foreign participation falls below USD 50 million.

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

(33) The local customs authority calculated the production integration level of the company in 2005 and came to the conclusion that the 60 % ceiling was not reached. Thus, it claimed repayment of the tax exemptions, which amounted to EUR 800 million. DWAR challenged the decision before the National Customs Authority. Since the court of first instance upheld the repayment decision, DWAR filed a new appeal. The court of appeal, in a judgment of 27 June 2007, annulled the repayment order.

(34) In conclusion, Romania stresses that DWAR did not benefit from any debt waiver.

(35) Seventh, the Romanian authorities argue that maintaining the current workforce was never a condition of the privatisation since it was not an award criterion. In addition, the draft SPA attached to the presentation file was only indicative and so potential bidders could have understood that the individual terms of the contract could be subject to bilateral negotiations. Therefore, potential bidders who did not plan to maintain the current workforce could have nevertheless submitted an offer with a different business plan.

(36) Lastly, as regards the subsequent negotiations on other contractual terms, Romania claims that they were part of the normal negotiation process preceding the conclusion of the SPA.

5. COMMENTS FROM THIRD PARTIES

(37) By letter of 23 November 2007, Ford intervened as an interested party in the procedure initiated by the Commission.

(38) First, Ford argues that the privatisation process was open, transparent, non-discriminatory and unconditional. All the correspondence between Ford and AVAS during the privatisation process was disclosed in the Data Room.

(39) Second, the award criteria were not mandatory conditions liable to deter potential bidders. On the contrary, Ford declared that it was its understanding that these criteria were negotiable. Further, the scoring criteria had no impact on Ford's offer since Ford's business plan easily exceeded the requirements set out in the presentation file.

(40) Third, the purchase price paid by Ford to AVAS represents the market value of the shares covered by the tender procedure. Ford stated that it had intended paying a maximum purchase price of USD 100 million (i.e. EUR 71,4 million) for all the shares, which would correspond to a price of EUR 51,7 million for 72,4 % ([5]). It did not intend to offer a higher price, even in the absence of the award criteria. Initially, Ford offered a purchase price of EUR 55 million and, after negotiations with the Romanian authorities, one of EUR 57 million. Furthermore, Ford was the only bidder, so that its offer represents the market value.

(41) Lastly, Ford argues that indemnifications contained in the SPA were standard business practice for the acquisition of companies and thus in conformity with the market and did not lead to a sale at a price lower than the highest possible bid. Ford highlights the fact that such indemnifications relate only to risks outside the ordinary course of business and are impossible to assess by a new investor on taking over a company. Ford has assumed all the debts and liabilities of Automobile Craiova, including DWAR, that had arisen in the ordinary course of business and that were quantified and disclosed in the Data Room. However, Ford was not willing to assume potential risks which it could not assess and quantify on the basis of due diligence.

6. ASSESSMENT

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

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

6.1.1. *State resources and conferring of an advantage*

(43) The conditions pertaining to the privatisation contract were attached by the Romanian public privatisation agency, AVAS. By attaching such conditions, which could lead to a fall in the sales price, as shown below, the Romanian State accepted that it would not obtain the highest possible price. The lower sales price for the 72,4 % stake is thus paid from the revenue forgone by the State. Therefore, the measures involve state resources.

([5]) Based on an exchange rate of EUR 1 = USD 1,4.

(44) In addition, the Commission takes note of the fact that the actions of the public privatisation agency, AVAS, are attributable to the State. This fact is not disputed by the Romanian authorities.

(45) A given measure cannot be regarded as constituting aid if it does not confer an advantage ([6]). Accordingly, the Commission must determine whether the measure in question confers an advantage.

(46) An undertaking benefits from an advantage if it obtains something positive from the State which it would not have obtained under normal market conditions. To this end, it has first to be assessed whether the State acted as a market economy operator or as a state authority which sold a company under conditions not corresponding to normal market conditions.

(47) According to Article 86(1) of the EC Treaty, public companies are subject to State aid rules. Article 295 of the EC Treaty stipulates that Community rules are neutral as regards public and private ownership.

(48) In conformity with the settled case law of the European courts ([7]) and with the rules and practice developed by the Commission regarding State aid in the context of privatisations ([8]), when a Member State either acquires or sells shares in companies, no advantage is conferred if the behaviour of the Member States is the same as that which a market economy investor would have.

(49) Consequently, when the privatisation takes place by way of the sale of shares on the stock exchange, it is generally assumed to be on market conditions and not to involve aid. However, when the privatisation is carried out through a trade sale, it can be assumed that no aid is involved only if the following conditions are fulfilled: first, the company is sold by a competitive tender that is open to all comers, transparent and non-discriminatory; second, no conditions are attached which are not customary in comparable transactions between private parties and which are capable of potentially reducing the sales price; third, the company is sold to the highest bidder; and, fourth, bidders must be given enough time and information to carry out a proper valuation of the assets being bid for ([9]). In other cases, trade sales must be vetted for any possible aid and must therefore be notified.

(50) In such cases, assessing whether a transaction concerning state assets involves aid generally means determining whether a market economy operator placed in a similar situation would have behaved in the same way, i.e. would have sold the company at the same price. In applying the market economy investor principle, non-economic considerations, such as industrial policy reasons, employment considerations or regional development objectives, which would not be acceptable to a market economy operator, cannot be taken into account as reasons for accepting a lower price but, on the contrary, point to the existence of aid. This principle has been repeatedly explained by the Commission ([10]) and constantly confirmed by the Court ([11]).

([6]) See Case T-471/93 *Tiercé Ladbroke SA* v *Commission*, at points 54 and 56-63.

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

([8]) XXIIIrd Report on Competition Policy (1993), p. 255. This set of rules, specifically for the aviation sector, can be found in '*Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector*' (OJ C 350, 10.12.1994, p. 5), which states that '*Aid is excluded […] if, upon privatisation, the following conditions are fulfilled: the disposals made by way of an unconditional public invitation to tender […]. On the other hand, the following sales are subject to the pre-notification requirements of Article 93(3) of the EC Treaty because there is a presumption that they contain aid: […] all sales that are realised in conditions that would not be acceptable for a transaction between market economy investors.*'

([9]) Points 402 et seq. of the XXIIIrd Report on Competition Policy (1993). See also point 248 of the XXIst Report on Competition Policy (1991): '*[…] no aid is involved where the shareholdings are sold to the highest bidder as a result of an open and unconditional bidding procedure. If shareholdings are sold under other conditions, aid elements may be present.*'

([10]) See, for example, the Commission Decision on TASQ of 3 May 2000, which states that '*The French authorities also showed that the invitation to tender was transparent and unconditional […]. In particular, the documents submitted to the Commission showed that the sale of TASQ was not conditional on, for example, job maintenance, locations or continuation of activity.*' This fact enabled the Commission to conclude that no aid was involved in that privatisation.

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

(51) Therefore, if any of the above requirements are not fulfilled, the Commission considers that the privatisation should be assessed to determine whether it entails State aid and must therefore be notified ([12]). Consequently, compliance with these requirements would ensure that the State obtains the highest price, i.e. the market price, for its shares and no State aid is therefore involved.

(52) By imposing certain conditions on the buyer in the privatisation, the State potentially lowers the sales price and thus forgoes additional revenues. Also, some conditions can deter potentially interested investors from submitting a bid in the first place, so that the competitive environment of the tender is disturbed and even the highest of the offers eventually submitted does not necessarily represent the actual market value ([13]).

(53) By imposing such conditions and thus accepting that it will not receive the best price for the shares or assets owned by it, the State does not act like a market economy operator, who would try to obtain the highest possible price. Instead, the State chooses to sell the undertaking at a price below the market value. A market economy operator would not have an economic interest in attaching comparable conditions (in particular, such as maintenance of the level of employment, conditions beneficial for the geographical region concerned or ensuring a certain investment level) but would sell the company to the highest bidder, who would then be free to determine the future of the acquired company or assets ([14]).

(54) This does not mean that all the conditions of a privatisation automatically result in the presence of some State aid elements. First, the conditions that are also normally encountered in transactions between private parties (certain standard forms of indemnification on account of the solvency of the bidder or conformity with domestic legislation on labour relations) do not constitute a problem. Second, the conditions which do not normally seem to be present in transactions between private persons result in the presence of State aid only to the extent that they make it possible to reduce the sales price and can confer an advantage. The fact that these conditions do not result in aid must be demonstrated in each case in question ([15]).

Conditions attached to the privatisation of Automobile Craiova

(55) In the case in point, the tender procedure organised by the Romanian authorities was geared primarily to achieving a given level of production and amount of employment in Craiova. The Romanian authorities have not produced any evidence to show that these conditions were imposed for reasons that a market economy operator would have taken into account.

([12]) See the XXIIIrd Report on Competition Policy (1993), p. 255.

([13]) In several of the Commission Decisions, the absence of conditions. i.e. the unconditional nature of the tender, was a decisive argument that allowed the Commission to conclude that privatisation procedures did not include State aid. See, for example, the Commission Decisions of 15 February 2000 on Dessauer Geräteindustrie (OJ L 1, 4.1.2001, p. 10), of 13 December 2000 on SKET Walwerkstechnik (OJ L 301, 17.11.2001, p. 37) and of 30 January 2002 on Gothaer Fahrzeugtechnik (OJ L 314, 18.11.2002, p. 62), in which the Commission explained: ' *To rule out any aid element in the transaction, the BvS would have had to demand a price corresponding to the company's market value. The Commission therefore verifies whether the sales procedure was an appropriate one for the purpose of establishing the market value. […] the sales price is the market price if the sale is effected through an open and* ***unconditional*** *tender procedure and the assets go to the highest or only bidder.*'

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

([15]) Such an analysis was carried out, for example, in the Commission Decision of 20 June 2001 on GSG and enabled the Commission to conclude that no aid was involved even in the presence of some unusual conditions because it found that those conditions could not lead to a reduction in the sales price.

(56) When privatising Automobile Craiova, the privatisation agency set four conditions in the form of award criteria in order to select the successful bidder: the price offered represented 35 % of the total score, the total investments 25 %, the achievement of a production integration level of 60 % in the fourth year 20 %, and the commitment to a production level of 200 000 cars in the fourth year 20 %. If the last two requirements were not fulfilled by the potential investor, the offer would score 0 points on those particular criteria. Thus, it was practically impossible for a potential investor making different industrial use of the car plant to win solely on account of a higher sales price, without achieving the production and integration levels required (assuming that the investment level was the same).

(57) Assuming that a competitive investor might have proposed a similar level of investments but would not have been able to fulfil the production level criterion, this competitive bidder would (in order to win the bid) have to propose a price equivalent to 230 % of the price proposed by Ford ([16]). In concrete terms, in order to outbid Ford's offer of EUR 57 million, a potential investor would need to propose a sales price in excess of EUR 133 (i.e. EUR 76 million higher) in order to compensate for the non-fulfilment of the condition relating to the production level. These factors must have been taken into account by both Ford and its potential competitors and thus influenced their decision to submit a bid and the price offered.

(58) The Commission notes that, although the formal announcement of the privatisation of Automobile Craiova did not contain any reference to conditions, the precise conditions being laid down only in the subsequent Information Memorandum, the general objective of the Romanian authorities as regards the maintenance of a certain level of employment and a certain level of car production at the site was publicly known. For the Commission, there are indications that certain potential investors who might have considered a different industrial strategy had been deterred from showing a concrete interest in the company at this initial stage.

([16]) In the above calculations, the Commission assumed that the impact of the condition relating to the integration level can be ignored. As rightfully pointed out by Ford and in line with the Commission's practice, this requirement is in breach of the internal market rules regarding the free movement of goods. Accordingly, Ford undertook to achieve a 60 % integration level within four years of the privatisation 'subject to consistency with EU law'. Since Ford highlighted this aspect in its correspondence with AVAS, which was also available to GM, it is assumed that GM too understood that this particular requirement could be accepted conditionally without having any practical consequences for its offer. However, if the price would also have to compensate for the failure to meet this criterion, the price differential would be even wider than explained above.

(59) It should here be emphasised that the production of 200 000 cars per year represents a doubling of the current capacity, which, particularly at the present time, is significantly underutilised. The production level that needs to be achieved is specified in detail and will therefore certainly lead to a substantial increase in market presence. The Commission considers that this situation is comparable to that in which the economic conduct of a company is influenced by state measures that reduce the costs normally borne by companies or by direct subsidies.

(60) As regards the distinction drawn by the Romanian authorities between conditions and the scoring model, the Commission does not recognise the relevance of the argument. Scoring the production and integration levels amounts *de facto* to the actual conditions attached to the privatisation, which, in the Commission's view, have reduced the sales price. It cannot accept the argument that the sales price obtained reflects the market value of the company. In this case too, there are indications for the Commission that potential investors with a different production strategy or industrial activity who did not envisage producing 200 000 cars per year and achieving a 60 % integration level might have been deterred from the start from submitting an offer and that their competitive position in the tender was without doubt significantly impaired. These appear to be circumstances in which the Romanian authorities opted for the scoring method described above. Indeed, a bidder with a different industrial strategy decided in the end not to submit an offer after participating in the tender procedure.

(61) As regards the negotiability of the conditions attached, the Commission cannot accept Romania's argument that the negotiability of the conditions was known to all potential investors and could be easily deduced from the tender documents. It is true that AVAS, in response to Ford's questions, confirmed that the draft SPA was only indicative and served as a basis for further negotiations. However, this statement refers only to those contractual negotiations which are inherent in a share sale by way of negotiations based on final, improved and irrevocable bids and does not generally provide confirmation that further negotiations on the mandatory terms set out in the public announcement and, in particular, the elements of the scoring grid were in fact possible. Romania did not provide any evidence which would show that the criteria of the scoring grid could have been considered negotiable. In fact, if the scoring criteria were negotiable, the scoring model would lose any practical relevance.

(62) The Commission does not agree with the argument put forward by Romania according to which AVAS confirmed that it was possible to change its position in the course of the negotiations. This answer refers exclusively to Ford's question regarding the planned requirement for the purchaser to renounce the right to claim protection and reimbursement from the State in the event of Automobile Craiova's assets being successfully claimed by third parties. It is the Commission's opinion that it cannot be deduced from this statement that all the conditions would generally be negotiable.

(63) The Commission cannot accept the calculations put forward by Romania, which aim at demonstrating that the price paid by Ford represents the market value of Automobile Craiova. First, the sales price paid by Ford for 72 % of Automobile Craiova, including DWAR and Mecatim, cannot be compared to the price that DWAR paid in 2006 for 51 % of its own shares. Also, the general economic context at the time of the latter sale has to be taken into account: when the bankrupt Daewoo Motors agreed to sell its 51 % in 2006, DWAR was confronted with significant liabilities (the pending customs claim, debts towards other Daewoo subsidiaries, etc.).

(64) Second, the comparison between the sales price and the stock exchange value of the shares in Automobile Craiova, which was about EUR 50 million, cannot be accepted. It does not take into consideration the fact that, for the acquisition of a majority holding, the value of the shares is significantly higher than the sum of the price for individual shares. In addition, since only a very small proportion of the shares are actually available on the market, the stock exchange price might not reflect the real value of the company.

(65) Accordingly, the Commission has to conclude that the conditions attached to the privatisation of Automobile Craiova have lowered the sales price and deterred other potential bidders from submitting a bid. As a direct result, the State has renounced the receipts from the privatisation.

(66) In the light of the above considerations, the Commission concludes that, in the case at issue, an economic advantage has been conferred by way of state resources on the economic activities privatised.

Open, transparent, non-discriminatory tender

(67) When initiating the procedure under Article 88(2) of the Treaty, the Commission had doubts whether the tender was transparent and non-discriminatory and, in particular, whether all potentially interested parties had equal access to information regarding the company to be privatised, the award criteria and the possibility of negotiating certain contractual terms with the privatisation agency. According to the information available at that time, the Romanian authorities held preliminary discussions with certain car producers before the official privatisation announcement was published.

(68) Romania argues that all potential investors had equal access to information, with none of them being favoured. The preliminary contacts that the government had with the potential interested parties did not affect the privatisation strategy and procedure.

(69) On the basis of the information supplied by them, the Commission notes that the Romanian authorities conducted informal preliminary discussions with several potential investors which addressed similar aspects regarding the company to be privatised: full ownership of the industrial assets, the company's debts and liabilities, and a swift privatisation process. It is presumed that the State as the seller would engage in those discussions with the aim of obtaining preliminary information such as market demand, minimum sales price, etc. Unless such discussions are conducted with the aim or result of establishing conditions to be attached to the tender, the Commission agrees that it can be considered usual for the government to engage in consultations and preliminary discussions with potential investors before publishing a privatisation announcement.

(70) After the publication of the privatisation announcement, only two potential bidders, Ford and GM, bought the presentation file, enabling them to obtain access to the Data Room and eventually to submit a final and binding offer. It is true that, after publication of the privatisation announcement, all correspondence between AVAS, on the one hand, and Ford and GM, on the other, was available to them in the Data Room. Therefore, the Commission concludes that, at that particular stage of the privatisation, both potential investors had equal access to information.

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

Waiving of debts

(72) When initiating the procedure under Article 88(2) of the EC Treaty, the Commission expressed doubts that AVAS might waive within the context of the privatisation certain debts of the company (in particular the customs claim amounting to EUR 800 million) and that it would offer a guarantee concerning the payment of debts towards the other former Daewoo subsidiaries.

(73) As regards the customs claim, Romania provided conclusive information showing that the customs claim was declared unfounded by a national court: the claim originated from the wrongful interpretation and application of national legislation. Thus, the customs claim was annulled. According to the case law of the Court of Justice, national courts must give full effect to Community law provisions regarding State aid. Further, national courts may refuse, if necessary, to apply any provision of national law that is contrary to Community law provisions ([17]). The Commission assessed the grounds for the annulment of the customs claim through the court judgment and concluded that it did not lead to the granting of new aid.

(74) As regards current liabilities deriving from the normal course of business, Romania argued that these will not be taken over by AVAS but will be paid by DWAR.

(75) As regards the guarantee offered by AVAS against contingent liabilities, the Romanian authorities explained that the state guarantee applies only to unknown claims related to DWAR's past activity, which no new investor could have assessed and quantified with due diligence. Further, Romania asserts that taking over such liabilities is normal business practice under the usual contractual negotiations.

(76) In conclusion, the Commission's doubts as regards the potential debt waiver expressed in the decision to initiate the procedure have been allayed.

Negotiation phase

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

(78) During the negotiation phase, AVAS and Ford agreed on a corporate restructuring process which was also laid down in the SPA. Under this corporate restructuring, Automobile Craiova and Mecatim will be merged with DWAR. The core assets (i.e. industrial assets) of all three companies will remain in the ownership of DWAR. The remaining non-core assets (in particular real estate) will be hived off into a new company (Newco). The net excess cash available to DWAR will also be transferred to Newco. Further, AVAS has undertaken to use its best efforts to acquire the remaining shares of the new DWAR (i.e. core assets) from the minority shareholders and sell them to Ford.

(79) The arguments put forward by Romania have allayed the Commission's doubts regarding the negotiation phase.

6.1.2. *Selectivity*

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

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

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

6.1.4. *Conclusion*

(82) In view of the considerations set out above, the Commission concludes that the conditions attached entail State aid because they lead to a reduction in the sales price for the 72,4 % stake in Automobile Craiova and confer an advantage on the privatised economic entity. The present decision applies only to this sale of the 72,4 % stake by AVAS to Ford. It does not prejudge any future assessment of a potential sale of the remaining 27,6 % of shares.

([17]) See, for example, Case C-119/05 *Italy v Lucchini*.

(83) The Commission notes that the economic activity benefits from the advantage conferred and from State aid.

6.2. **Quantification of the aid**

(84) The amount of State aid granted is equal to the difference between the market value of the company (i.e. the highest possible price which AVAS would have obtained for the 72,4 % participation in Automobile Craiova if no conditions had been attached) and the price actually received. This difference was borne by the State.

(85) Naturally, it is difficult to estimate what price would have been achieved in an open, transparent, non-discriminatory and unconditional tender. The best possible solution would be to annul the result of the tender and reorganise the privatisation, with no conditions being attached, thus ensuring that no State aid is granted. This solution was proposed to the Romanian authorities but they did not accept it.

(86) In order to assess the aid element granted to the privatised economic activity resulting from the privatisation, the market value of the company needs to be assessed. Following discussions with the Romanian authorities and Ford, and in the light of the particular circumstances of the case, the Commission considers it appropriate in the case at hand to base the analysis of the market value on the net asset value of the company sold.

(87) When looking at the book value of the company at the time of the tender, according to the balance sheet as of 31 March 2007 (i.e. the latest data available to the potential bidders for determining their bids), the total value of company's assets minus the total debts amounted to EUR – 465 million. This value does not include the real estate, which ultimately was not purchased by Ford. In addition, as explained above, in the SPA both parties decided that the sale would be followed by a corporate restructuring process. First, Ford would not acquire valuable non-core assets, which were to be carved out and to remain with AVAS. Second, AVAS would also retain the net excess cash of RON 310 million (around EUR 92 million), together with the corresponding liabilities of the company (it was estimated that the cash would be sufficient to pay the liabilities). Lastly, the balance sheet of March 2007 included the provisions for the potential repayment of the customs claim (described in points (25) and (73)), which significantly reduced the net asset value of the company; following the court's judgment this claim disappeared and the provision could be released.

(88) In addition to these elements, the Romanian authorities submitted arguments in favour of certain adjustments in the values in the balance sheet in order to adequately reflect the actual value of the assets. In particular, the value of land and buildings, machinery and equipment, other tangibles and inventories has been adjusted accordingly in order to reflect their actual market value.

(89) If all those factors are taken into account, i.e. the net excess cash is deducted, if liabilities and the provisions for the customs claim are disregarded and if, finally, the above adjustments are applied, the resulting net asset value of 100 % of DWAR would amount to EUR 115 923 000, meaning that the net asset value of 72,4 % of DWAR amounts to EUR 83 928 000.

(90) The difference between the net asset value as determined and the price actually paid by Ford (EUR 57 million) amounts to EUR 26 928 000. In conclusion, the State aid amounts to EUR 26 928 000 million.

6.3. **Classification of the state measure as unlawful aid**

(91) According to Article 1(f) of Council Regulation No 659/1999 'unlawful aid' means new aid put into effect in contravention of Article 88(3) of the EC Treaty.

(92) The Romanian authorities did not notify the measure before its implementation and put it into effect in contravention of Article 88(3). Consequently, the measure constitutes unlawful aid.

6.4. **Compatibility of the unlawful aid**

(93) Since it has been established that the state measure constitutes aid within the meaning of Article 87(1) of the EC Treaty, it is necessary to consider whether the measure could be compatible with the common market.

(94) The exemptions in Article 87(2) of the EC Treaty do not apply in the present case because the aid measure neither has a social character nor is granted to individual consumers. Moreover, the measure does not make good the damage caused by natural disasters or exceptional occurrences and is not granted to the economy of certain areas of the Federal Republic of Germany affected by its division.

(95) The exemptions provided for in Article 87(3)(b) and (d) of the EC Treaty do not apply either. They refer to aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State and to aid to promote culture and heritage conservation.

(96) This leaves the exemptions provided for in Article 87(3)(a) and (c) of the EC Treaty and in the relevant Community guidelines.

Rescue and restructuring guidelines

(97) The Commission does not possess any information which would show that the aid can be considered to be compatible with the EC Treaty on the basis of the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([18]).

(98) Under these guidelines, the company receiving restructuring aid must be in difficulty, i.e. unable, whether through its own resources or with funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term. It is true that DWAR made losses of EUR 350 million in 2006 and had debts of EUR 88 million; however, the company had assets valued at EUR 419 million (mainly real estate). Moreover, following the privatisation and the sale to Ford, DWAR would become part of a larger business group within the meaning of the guidelines which most likely could financially support it to overcome its difficulties. In conclusion, DWAR does not rank under the guidelines as a company in difficulty.

(99) In addition, the granting of restructuring aid is conditional on the existence of a sound restructuring plan the duration of which must be as short as possible and which restores the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to the future operating conditions. Romania did not provide such a restructuring plan.

(100) Further, undue distortions of competition must be avoided. This usually takes the form of a limitation on the presence which the company can enjoy on its market or markets after the end of the restructuring period (i.e. compensatory measures). As regards Automobile Craiova, the conditions attached to the privatisation ensure a significant capacity increase and, thus, an increased presence on the relevant market.

(101) Despite the doubts raised by the Commission when initiating the formal investigation procedure, Romania did not establish that these conditions had been met. The Commission concludes therefore that the conditions laid down in the guidelines have not been met.

Regional aid guidelines

(102) The Commission notes that Automobile Craiova is located in an assisted area under Article 87(3)(a) of the EC Treaty that is eligible for regional aid. Nevertheless, Romania did not provide any information to show that the conditions for the granting of regional aid as laid down in the guidelines on national regional aid were met.

(103) The Commission notes that the conditions attached to the privatisation agreement did indeed relate to the planned investments and maintenance of employment, which could be compared to the objectives of regional aid. However, the point is made that the reduced price achieved by Ford was not made conditional on compliance with the rules set out in the guidelines on national regional aid, such as maintenance of the project in the region for a certain period of time, verification of eligible costs or rules concerning cumulation of aid, transparency and monitoring.

(104) In addition, the Commission notes that Romania notified the regional aid separately ([19]). This aid will be assessed in a new decision on its own merits.

Other guidelines and frameworks

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

([18]) OJ C 244, 1.10.2004, p. 2.

([19]) State aid N 767/07: Large Investment Project — Romania — Ford Craiova.

Conclusion

(106) In vies of the considerations set out above, the Commission concludes that the aid is incompatible with the common market.

7. **RECOVERY**

(107) Pursuant to Article 14(1) of Council Regulation (EC) No 659/1999, where negative decisions are taken in cases of unlawful aid, the Commission must decide that the Member State concerned must take all necessary measures to recover the aid from the beneficiary.

(108) Only incompatible aid can be recovered. The Commission has established that aid amounting to EUR 26 928 000 was unlawfully granted. This aid is not compatible under any of the EC State aid provisions and so needs to be recovered.

(109) The Commission concludes that the beneficiary of the State aid is the economic entity which has been privatised, i.e. the core industrial assets held by Automobile Craiova and DWAR or any subsequent entity. It notes that, according to the provisions of the SPA, following the corporate restructuring process, this economic entity will be the owner of only the core industrial assets, which have benefited from the conditions attached to the privatisation, and not of the non-core assets.

(110) In view of the specific suspension clauses in the SPA as well as the suspension injunction issued by the Commission, the SPA between AVAS and Ford has not yet entered into force. Consequently, the Commission concludes that the aid has not been put at the disposal of the beneficiary and so no recovery interest needs to be paid.

(111) The Commission notes that the net excess cash of Automobile Craiova and DWAR (as well as other non-core assets) is not part of the transaction between AVAS and Ford and is not therefore taken over by the latter. Thus, when calculating the net asset value of the company for the quantification of the aid, the Commission did not take into account this net excess cash. In conclusion, following the present decision, the aid will not be repaid out of this net excess cash. The Commission therefore, requests to be kept informed about the corporate restructuring and in particular to be given evidence on the level of the net excess cash at the date of the SPA and at the date of the repayment, as well as information on any differences arising between those two dates,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Romania has implemented under the privatisation process for Automobile Craiova, amounting to EUR 26 928 000, is incompatible with the common market.

Article 2

1. Romania shall take all necessary measures to recover from the beneficiary the aid referred to in Article 1 and unlawfully made available to the beneficiary.

2. The sums to be recovered shall include interest from the date on which they were at the disposal of the beneficiary until the date of their recovery.

3. Interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([20]).

4. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the Decision.

Article 3

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

2. Romania shall ensure that this Decision is implemented within four months following the date of its notification.

Article 4

1. Within two months of notification of this Decision, Romania shall submit the following information to the Commission:

(a) the total amount to be recovered from the beneficiary;

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

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

(d) documents demonstrating that the aid has been repaid;

([20]) OJ L 140, 30.4.2004, p. 1.

(e) documents demonstrating that the aid has not been repaid out of the non-core industrial assets which are to be transferred to the newly created company owned by AVAS and the minority shareholders (in particular, net excess cash and real estate) as defined in the sale-purchase agreement;

(f) a detailed description of the implementation of the corporate restructuring process as defined in the sales-purchase agreement.

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

Article 5

This Decision is addressed to Romania.

Done at Brussels, 27 February 2008.

For the Commission
Neelie KROES
Member of the Commission

ANNEX

Information regarding the application of the Commission Decision in case C 46/07 (ex NN 59/07) on aid implemented by Romania for Automobile Craiova

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

Identity of the beneficiary	Total amount of aid received (*)	Total amount of aid to be recovered (*) (Principal)	Total amount already repaid (*)	
			Principal	Recovery interest

(*) In of national currency (million)