COMMISSION DECISION

of 7 March 2012

on State aid No SA.29041 (C 28/2009, ex N 433/2009) Support measures in favour of Oltchim SA Râmnicu Vâlcea

(notified under document C(2012) 1369)

(Only the Romanian text is authentic)

(Text with EEA relevance)

(2013/246/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (hereinafter: 'TFEU'), and in particular the first subparagraph of Article 108(2) thereof [1],

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

Having regard to the decision by which the Commission decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the aid C 28/2009 (ex N 433/2009) [2],

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

Whereas:

I. PROCEDURE

(1) On 17 July 2009 Romania notified two support measures (hereinafter: 'the notification') in favour of Oltchim SA Râmnicu Vâlcea (hereinafter: 'Oltchim' or 'the company'): (i) the conversion of debt towards the public authorities amounting to RON 538 million (approximately EUR 128 million [3]) into equity and (ii) a state guarantee covering 80 % of a commercial loan amounting to EUR 424 million. Romania notified these state support measures for reasons of legal certainty, arguing that they did not involve state aid within the meaning of Article 107(1) TFEU.

(2) Prior to this notification, on 10 April 2008, PCC SE (hereinafter: 'PCC'), a company based in Duisburg, Germany, which currently owns a minority stake of 18,31 % in Oltchim, submitted a formal complaint, alleging that the planned debt-to-equity conversion involved incompatible state aid.

(3) Following the registration of the complaint, the Commission exchanged correspondence and information with the Romanian authorities, Oltchim and the complainant, and met on several occasions with the Romanian authorities and representatives of Oltchim, on the one hand, and with representatives of the complainant, on the other hand.

(4) On 15 September 2009 the Commission opened a formal investigation procedure pursuant to Article 108(2) TFEU with regard to the notified measures (hereinafter: 'the opening decision'). Romania submitted comments on the opening decision on 3 November 2009.

(5) The opening decision was published in the *Official Journal of the European Union* on 29 December 2009 [4]. By letters of 21 December 2009, the Commission invited eight companies potentially interested in the proceedings as competitors of Oltchim to submit comments on the opening decision.

(6) The Commission received comments from five third parties: by letter of 26 January 2010, from Vestolit GmbH & Co. KG (hereinafter: 'Vestolit'); by letter of 26 January 2010 from Ineos ChlorVinyls (hereinafter: 'Ineos'); by letters of 27 January 2010 and 28 January 2010, from two companies which requested confidentiality as regards their identity (hereinafter: 'Anonymous parties I and II'); and by letter of 29 January 2010, from Mr Virgil Bestea, a private individual.

[1] With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate. The TFEU has also introduced certain changes in terminology such as replacement of the terms 'Community' and 'common market' by, respectively, 'Union' and 'internal market'. The terminology of the TFEU will be used in this Decision.

[2] Commission Decision C(2009) 6867 final of 15 December 2009 (OJ C 321, 29.12.2009, p. 21).

[3] The ECB exchange rate on 17 July 2009 was EUR 1 = RON 4,2. In this decision all RON figures are converted into EUR at this exchange rate, unless figures were only available/provided in EUR, in which case only the EUR value is used.

[4] See footnote 2.

(7) These comments were transmitted to Romania by letter of 2 March 2010. Romania replied to the above-mentioned third party observations by letter of 8 April 2010.

(8) A sixth third party, Firebird Management LLC (hereinafter: 'Firebird') – an investment fund holding at the time 1,328 % of Oltchim's shares – submitted information and comments by letters of 27 May 2010 and 8 July 2010. Firebird's comments were transmitted to Romania by letters of 25 June 2010 and 27 July 2010 respectively.

(9) PCC, the complainant, submitted information on the case by letters of 6 May 2010, 18 May 2010, 19 May 2010, 28 May 2010, 13 June 2010, 18 June 2010, 22 July 2010, 6 August 2010, 2 September 2010, 18 October 2010, 9 April 2011 and 14 April 2011. Besides these submissions, PCC sent numerous pieces of information related to the case, principally including various newspaper articles and other information, mostly publicly available.

(10) Furthermore, Anonymous parties I and II (which also commented on the opening decision and which requested confidentiality as regards their identity) submitted further information on 21 September 2010, 22 February 2011, 28 February 2011, 26 July 2011 and 28 October 2011.

(11) The Commission transmitted the comments referred to above in recitals (9) and (10) to Romania, when they contained new information and arguments and were relevant to the current procedure, by letters of 25 June 2010, 2 August 2010, 9 September 2010, 22 September 2010, 20 October 2010 and 23 November 2011.

(12) Romania replied to the additional comments submitted by letters of 30 July 2010, 2 September 2010, 12 October 2010, 26 October 2010, 23 November 2010 and 7 December 2011. It also submitted additional information on the case by letters of 29 March 2011, 14 April 2011, 27 July 2011, 9 September 2011 and 21 September 2011.

(13) Following the opening decision, several meetings took place in Brussels between the Commission's departments and the Romanian authorities: on 30 June 2010, 15 July 2010, 19 May 2011 and 12 September 2011. The Commission's departments also met on several occasions with representatives of the complainant PCC.

(14) By letter dated 22 June 2011, the Romanian authorities withdrew their notification of 17 July 2009 with regard to the state guarantee for the loan of EUR 424 million. They also informed the Commission that they maintained their notification with regard to the debt-to-equity conversion.

(15) On 10 August 2011 the Romanian Government approved a Memorandum mandating the representatives of the Ministry of Economy, Trade and the Business Environment, AVAS [5] and Oltchim to adopt a private-law convention between AVAS and Oltchim whereby the company would acknowledge interests accruing on the public debt since 1 January 2007.

(16) By letter of 9 September 2011, the Romanian authorities announced that Oltchim and AVAS intended to conclude the above-mentioned private-law convention, and that AVAS would also convert the interests thus accrued into equity, together with the principal debt.

(17) 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. By letter of 16 February 2012, the new Romanian Prime Minister Mihai-Răzvan Ungureanu re-affirmed these commitments.

(18) Romania submitted additional comments and information by letters of 12 October 2011 and 23 December 2011.

(19) The letters mentioned in recitals 17 and 18 show that Romania modified the notification of Measure 1 in the sense that the conversion of the debt to the public authorities amounting to RON 538 million was to be followed by the privatisation of the resulting shareholding in Oltchim, and that the conversion has to be assessed in the light of the subsequent privatisation.

II. **BACKGROUND TO THE CASE**

II.1. **The company**

(20) Oltchim is a large Romanian petrochemical manufacturer, producing PVC, caustic soda, chlorine, DOP and polyether polyols. The company's main product is PVC (currently about 37,5 % of its overall production), with an EU market share of 2,1 % in 2008 [6]. Oltchim is one of the largest petrochemical companies in Romania and south-east Europe, manufacturing 78 types of 40 base chemical products. The company exports around 80 % of its production inside and outside Europe.

[5] The Romanian Privatisation Agency. See footnote 10 below.
[6] Oltchim's own figures.

(21) Oltchim is the main industrial employer in Vâlcea, a Romanian region assisted under Article 107(3)(a) TFEU. On 15 October 2011 the workforce consisted of 3 470 people ([7]). Owing to the current difficult financial situation, the company temporarily laid off 1 000 employees in December 2011 and a further 993 employees in January 2012 ([8]).

(22) The company started business in 1966, was reorganised in 1990 and was listed on the Romanian Stock Exchange in 1997. The Romanian State (currently via the Ministry of Economy) maintains a controlling stake of 54,8 % in the company. The principal minority shareholder is PCC, which is also the complainant in this procedure and also owns Rokita SA, a Polish competitor of Oltchim, with a stake of 18,31 %. The rest of the company shares are held by Nachbar Services Ltd (14,02 %), various individuals (11,04 %) and other legal entities (1,81 %).

II.2. **Events prior to Romania's Accession to the EU**

II.2.1. *The origin of the public debt*

(23) Over the period 1992-2008, Oltchim invested a total of approximately EUR 371 million in the modernisation of its production line (of which EUR 118,8 million was invested in 2007/2008). In relation to certain of these investments, Oltchim contracted over the period 1995-2000 a series of 12 commercial loans, totalling approximately DEM 171 million plus USD 60 million. The loans were backed by state guarantees, issued by the Ministry of Finance.

(24) Given that Oltchim was not able to repay the loans, the banks called on the state guarantees starting from November 1999.

(25) From 1999 to 2002, the Ministry of Finance made payments under the called guarantees. It charged substantial interest and penalties on the amounts thus paid on account of the state guarantees triggered between 1999 and 2002, fluctuating between 0,15 % and 0,3 % per day, i.e. 54 %-110 % per year ([9]).

(26) By June 2002, Oltchim's accrued debt towards the Ministry of Finance stemming from the state guarantees, plus the interest and penalties applied thereon, amounted to RON 303 million (approximately EUR 72 million). At that date, this amount was transferred from the Ministry of Finance to the Romanian agency entrusted with the recovery of public debt, AVAS ([10]), and was consolidated in USD so as to preserve the value of the debt in the hyperinflationary environment, the resulting amount being USD 91 million.

(27) In accordance with Romanian law (GEO 51/1998), AVAS did not have a specific mandate to apply interest and penalties on the public debt that it was entrusted with recovering from the debtor companies.

II.2.2. *The 2003 debt conversion*

(28) The first attempt to privatise the company took place in 2001, when AVAS negotiated and signed with Exall Resources a sale agreement for the state's stake in the company. The sale agreement was cancelled owing to the buyer's inability to fulfil its payment obligations and its failure to guarantee the technological/environmental investments for the company.

(29) The second attempt to privatise Oltchim was made in October 2003, when the Romanian privatisation agency APAPS published an announcement for the sale of the State's stake. Potential investors were informed that the public debt would be converted into equity, with a view to increasing the attractiveness of the company to potential investors.

(30) However, as a potential investor (Rompetrol) and minority shareholders challenged the 2003 debt conversion in the Romanian courts, the privatisation offer was cancelled in early November 2003. Notwithstanding this, in November 2003 the AVAS debt of USD 95 million (i.e. the transferred USD 91 million plus further payments made by the Ministry of Finance in application of the guarantees and transferred to AVAS since June 2002), equal to RON 322 million, was converted into equity by decision of the Oltchim General Meeting of Shareholders (in which the state representatives had majority votes). The public stake in Oltchim thus increased from 53,26 % to 95,73 %.

(31) In November 2005, a commercial court in Vâlcea annulled the Oltchim General Meeting's decision on the debt conversion, on the ground that the debt conversion had been carried out without allowing the minority shareholders to also participate in the capital increase.

([7]) Company profile available from the Bucharest Stock Exchange, see http://investing.businessweek.com/research/stocks/snapshot/snapshot.asp?ticker=OLT:RO.

([8]) Information available on Oltchim's website: www.oltchim.ro.

([9]) Taking account of the fact that the Romanian currency in circulation at the time, the ROL, was subject to hyperinflation.

([10]) Eventually, at the time, the debt was transferred to the Romanian agency named '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 State Ownership) and renamed AVAS (*Autoritatea pentru Valorificarea Activelor Statului* – the Authority for State Assets Recovery). For the sake of simplification in this Decision, AVAS and AVAB will be referred to as AVAS.

(32) In June 2006 the Romanian Government issued an Emergency Ordinance ([11]) mandating the state representatives in the Oltchim General Meeting of Shareholders to vote not to appeal against the court ruling which had annulled the first debt conversion, and to take the necessary steps to reverse the conversion. The court decision annulling the debt conversion became final in August 2006. The share capital decrease effectively took place in November 2007. The debt resulting from the annulment of the debt conversion was re-entered in the accounts at its historical value of USD 95 million, subsequently equalling RON 317 million.

II.2.3. *Further accumulated debt*

(33) After the first transfer of the debt in June 2002 to AVAS, over the period June 2002 to December 2006 the Ministry of Finance continued to make payments on account of the state guarantees which had been triggered in November 1999. Over the period 2003-2006, while the 2003 debt conversion was still in place, the total sum of extra payments made by the Ministry of Finance on account of the triggered guarantees amounted to RON 191 million. In application of the convention concluded in June 2002 between the Ministry of Finance and AVAS for the transfer of the public debt, the Ministry of Finance also transferred to AVAS, in successive instalments following the actual payments made on account of the guarantees, all these receivables. AVAS also consolidated these receivables in USD, which in 2006 totalled USD 60 million.

(34) Thus on 1 January 2007, the date of Romania's accession to the EU, Oltchim's total debt to AVAS amounted to USD 60 million ([12]).

II.3. **Events after Romania's accession to the EU**

II.3.1. *Evolution of the debt*

(35) Since 1 January 2007, all payments concerning the external loans have been made by Oltchim. The Ministry of Finance no longer made any additional payment under the state guarantees.

(36) In November 2007, the amount of the reversal of the debt conversion of USD 95 million was entered into Oltchim's accounts and added to the USD 60 million linked to the further payments, thus resulting in a total public debt of USD 155 million (RON 508 million). This public debt of USD 155 million is indicated in Oltchim's accounts in RON (i.e. RON 508 million). This USD-denominated debt has been reported since then in Oltchim's accounts in RON, and the amount remained unchanged in the Romanian currency because, at every new reporting interval, the company reported in the balance sheet the historical RON value ([13]), which was always higher than the then-applicable value, as the RON appreciated against the USD over time.

(37) As an exception to the general rule provided by GEO 51/1998 (see recital (27) above), based on Article 2(2) of Government Emergency Ordinance 45/2006 (hereinafter: 'GEO 45/2006'), in 2007 AVAS charged interest amounting to RON 29,9 million, at the one-year LIBOR ([14]) rate for deposits in USD, for the Oltchim receivables transferred to it by the Ministry of Finance that were the subject of the 2003 debt conversion, for the period 2003-2006.

(38) Consequently, as from November 2007, the total amount owed by Oltchim to AVAS amounted to USD 155 million (RON 508 million) plus RON 29 million, for a total of RON 538 million. In what follows, this Decision will refer to the debt in RON as the notified debt conversion is also denominated in RON.

II.3.2. *The second debt conversion*

(39) In January 2007, the Romanian Parliament validated through Law 30/2007 the GEO 45/2006, which authorised AVAS to reverse the first debt conversion and mandated it to implement a second one, this time also respecting the priority rights of the minority shareholders.

(40) This second attempt to convert the debt into equity was opposed, however, by the new principal minority shareholder, PCC, which refused to participate in the operation.

(41) PCC had acquired a 1,2 % stake in Oltchim for EUR 7,5 million in May 2007, i.e. after the date when the national court ruling which annulled the first debt conversion became final because neither Oltchim nor the Romanian authorities appealed. When the debt conversion was reversed on the company's accounts, PCC's share of 1,2 % became a share of 12 % ([15]).

([11]) Government Emergency Ordinance No 45/2006.

([12]) As explained above in recital 32 the amount of USD 95 million resulting from the reversal of the debt conversion was entered into Oltchim's accounts only in the course of 2007.

([13]) The RON replaced the ROL on 1 July 2005; 1 RON equals 10 000 ROL.

([14]) The London interbank offered rate.

([15]) In May 2011 PCC bought on the stock exchange a further 3,6 % stake for EUR 2,6 million. In June 2011, PCC SE concluded an alliance with the UK investment fund Carlson Ventures Ltd, which had also acquired Oltchim shares on the stock exchange. PCC and Carlson Ventures now hold together 32 % of Oltchim.

(42) In April 2008 PCC lodged a complaint with the Commission, alleging that the debt conversion involved incompatible state aid (see recital 2 above).

(43) The Romanian authorities decided, in order to ensure compliance with Article 108(3) TFEU, to obtain state aid clearance from the Commission prior to carrying out the second debt conversion, and notified the measure.

II.4. **Oltchim's current situation**

(44) The Romanian authorities argue that after the reversal of the 2003 debt conversion in 2006 they tried again to privatise the company with the debt, in 2006 and 2008 respectively. According to the Romanian authorities, no investor was interested in buying on such terms.

(45) Moreover, according to the Romanian authorities, the challenges the company has been facing since 2008 are: (i) the stoppage of supplies of key raw materials from the main supplier Arpechim; (ii) the negative impact on the company's net asset value caused by the reinstatement of a significant debt after the reversal of the 2003 debt conversion in November 2007; (iii) the undercapitalisation of the company, also due to the debt conversion reversal; and, finally (iv) the effects of the global financial and economic crisis.

(46) For the financial year 2008, Oltchim made an operating loss of RON 71 million (EUR 17 million), a net loss of RON 226 million (EUR 54 million), and the accumulated losses reached RON 1,367 billion (EUR 325 million). After the closure of the main ethylene supplier Arpechim in November 2008, the company functioned at 45 % of capacity and about one third of the staff was temporarily laid off.

(47) At the end of 2008, Oltchim's shares held until that time by AVAS were transferred to the Ministry of Economy's portfolio.

(48) In December 2009 Oltchim purchased the assets (ethylene installation) of its previous supplier Arpechim for EUR [0]-[10] (*) and paid for its stocks/inventories EUR [10]-[20] million. According to the Romanian authorities, the acquisition was financed from customer advance payments. Arpechim restarted operations in May 2011.

(49) On 31 December 2009, Oltchim's financial accounts for 2009 showed an operating loss of EUR 26 million (RON 109 million), a net loss of EUR 52,4 million (RON 220 million), accumulated losses of EUR 377 million (RON 1,584 billion) and negative own funds in the amount of EUR 112 million (RON 469 million).

(50) On 31 December 2010, Oltchim's financial accounts showed an operating profit of EUR 56 million, a net profit of EUR 32 million (RON 220 million) and accumulated losses of EUR 383 million. The positive operating and net result was due to the fact that the Arpechim assets purchased for EUR [0]-[10] were revalued at EUR [80]-[100] million, and the difference was entered in the books as 'gain from a bargain purchase'.

(51) On 30 June 2011, Oltchim's six-months financial accounts [16] showed an operating loss of EUR 7,4 million and a net loss of EUR 17,4 million, accumulated losses of EUR 401 million and negative own funds in the amount of EUR 358 million (without taking into account the debt to AVAS).

III. **THE OPENING DECISION**

(52) On 15 September 2009, the Commission opened a formal investigation into the two support measures in favour of Oltchim notified by Romania in July 2009:

— Measure 1: a debt conversion for the total value of RON 538 million (approximately EUR 128 million); and

— Measure 2: a 'shareholder guarantee' covering 80 % of a commercial loan of EUR 424 million for further modernisation investments. (Romania withdrew its notification with regard to Measure 2 by letter of 22 June 2011.)

(53) The Commission questioned whether, contrary to Romania's arguments, the notified support package conferred an undue advantage on the company and constituted state aid within the meaning of Article 107(1) TFEU.

(54) Furthermore, the opening decision identified as possible further state aid the fact that, since 1 January 2007, the State had not charged interest and/or penalties on the pending public debt (identified as 'Measure 3').

(55) Finally, the Commission doubted that the measures could be found compatible with the TFEU under the relevant state aid rules if found to involve state aid.

(*) Confidential information.

(16) The figures in the 30 June 2011 interim accounts were indicated in EUR.

IV. ROMANIA'S COMMENTS ON THE OPENING DECISION

(56) In their reply to the opening decision, the Romanian authorities maintained that none of the three measures constituted state aid within the meaning of Article 107(1) TFEU, as the behaviour of the Romanian State was consistent with market principles.

(57) In particular, Romania insisted that the notified measures (the debt conversion and the shareholder guarantee) would have ensured Oltchim's return to profitability by resolving the undercapitalisation issue and by providing the necessary funds for its growth strategy. Moreover, Romania stressed that the Commission had to take account of the dual role of the State as shareholder and creditor to Oltchim.

(58) Finally, Romania maintained that Measure 3 did not constitute state aid as the State's behaviour with regard to the non-enforcement of the past debt strictly related to the planned debt conversion, and that with regard to this debt the Romanian authorities had behaved consistently in line with what a market operator in a similar situation would have chosen to do.

V. COMMENTS FROM INTERESTED PARTIES

(59) In its comments on the opening decision, dated 26 January 2010, Vestolit expressed concerns about the state support package notified in July 2009 by Romania. Vestolit considers itself a competitor of Oltchim, as both parties are active in the production of PVC. According to Vestolit, no private investor would have supported an investment programme exclusively geared to the purchase and revamping of the outdated Arpechim ethylene installation.

(60) In its letter of 21 January 2010, Ineos argued that, based on the information in the opening decision, Oltchim seemed to be a firm in difficulty, and therefore the support measures to be taken by the Romanian State in its favour were unlikely to have been undertaken by a private investor. Ineos also drew attention to the fact that the European PVC market is characterised by significant overcapacity, and therefore any potential aid to one of the market players is likely to be highly distortive.

(61) The comments submitted by Firebird on 28 May 2010 are of similar content to those presented by the above-mentioned interested parties.

(62) By letter of 28 January 2010, another competitor of Oltchim, Anonymous party I, also made comments along the same lines as those of Vestolit and Ineos. It also stresses that operating aid cannot be found to be compatible with the TFEU, and there do not seem to be other grounds of compatibility in the case of Oltchim.

(63) By letter of 27 January 2010, Anonymous party II argued that all the support measures identified in the opening decision constitute incompatible aid. This Anonymous party II also maintained that:

(a) the state guarantees granted to Oltchim during the period 1995-2000 were still in place after Romania's accession to the EU, namely until 31 October 2009, and therefore should be treated as of the accession date as new aid;

(b) the difficulties that Oltchim has been facing since the triggering of the state guarantees in November 1999 are due to structural problems of the company (poor management, wrong business strategy choices, the lack of real and effective restructuring);

(c) the acquisition of Arpechim is against the business interests of Oltchim; this will not generate profit in the future;

(d) the subsequent payments made by the Ministry of Finance during the period June 2002 to December 2006 on the basis of the triggered state guarantees show that Oltchim was in difficulty throughout that period;

(e) Romania truly attempted to privatise the company only once, in 2001, and the successive 'failed' privatisation attempts of 2003 and 2006 were only a strategy for not enforcing the public debt;

(f) the business plan underlying the support package as notified in July 2009 was not credible, especially regarding the sensitivity analysis and the expected return on the investment;

(g) the State would have incurred a substantial loss by supporting such a sizeable investment programme, as the revenues expected from Oltchim's privatisation would not have covered the costs of the support measures;

(h) in view of the fact that the notified measures involved state aid, Romania should have proposed a restructuring plan for Oltchim, allowing an assessment of the compatibility of the aid under the Rescue and Restructuring Guidelines ([17]).

([17]) Community guidelines on state aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

(64) Later in the course of the procedure, PCC drew the attention of the Commission to the fact that in June 2010 the Romanian environmental protection agency had imposed an environmental fine of EUR 14,34 million on Oltchim for late return of CO_2 certificates for the year 2009 ([18]). In the view of PCC, the possible non-enforcement of the fine involved further state aid to the company. Firebird's letter of 8 July 2010 also raises the issue of the environmental fine.

(65) In October 2010 and October 2011 PCC also informed the Commission that the state-owned electricity supplier SC Electrica SA (hereinafter: 'Electrica') and other publicly owned creditors (Salrom Exploatarea Minieră Rm. Vâlcea, a salt solution and limestone supplier; and SC CET Govora SA, a supplier of industrial steam) have substantial rescheduled claims vis-à-vis Oltchim.

VI. ROMANIA'S COMMENTS ON THE OBSERVATIONS OF INTERESTED PARTIES

(66) In its reply of 8 April 2010 to the observations of interested parties, Romania largely refers to the notification and its earlier comments submitted in response to the opening decision.

(67) In particular, Romania claimed that, contrary to what one of the third parties alleges, the acquisition and revamping of the Arpechim petrochemical assets includes all necessary restructuring and is essential for the long-term viability of the company, and that the operation of the integrated Oltchim-Arpechim petrochemical unit platform can be expected to generate profits.

(68) Romania also repeats its arguments that the actions taken for the enforcement of the receivables against Oltchim did not confer any advantage on Oltchim. Finally, Romania also insisted on its intention to privatise Oltchim.

VII. WITHDRAWAL OF THE NOTIFICATION WITH RESPECT TO THE STATE GUARANTEE (MEASURE 2)

(69) According to Article 8 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([19]), a Member State may withdraw the notification after the opening of the formal investigation procedure in due time before the Commission has taken a decision on the aid character of the notified measure. In such a case, the Commission will close the procedure with a decision declaring the matter moot.

(70) The Romanian authorities have withdrawn the notification with respect to the state guarantee (covering 80 % of a loan up to EUR 424 million). Thus, as regards Measure 2, the Commission's investigation has become moot.

VIII. ROMANIA'S POSITION AFTER THE WITHDRAWAL OF MEASURE 2

VIII.1. Modification of measure 1 - Romania's intention to privatise

(71) In February 2011, a joint EU/International Monetary Fund (hereinafter: 'IMF') precautionary financial assistance programme was requested to support the re-launch of economic growth in Romania with a focus on structural reforms, while improving fiscal sustainability and consolidating financial stability. In May 2011, the Council adopted a decision ([20]) to make available to Romania precautionary medium-term financial assistance of up to EUR 1,4 billion. In March 2011, the IMF approved a new Precautionary Stand-By Arrangement ([21]) for Romania. Under this Agreement, the IMF places at Romania's disposal SDR 3 090,6 million (EUR 3,5 billion) of financial assistance for the next two years. The financing is conditional upon Romania meeting a series of targets for reducing budgetary deficit, specified in a Letter of Intent presented by the Romanian authorities and reflected in a Technical Memorandum of Understanding (hereinafter: 'TmoU'). The TMoU targets include *inter alia* reductions of payment arrears and losses for publicly owned enterprises. In the Letter of Intent and the TMoU of 2 December 2011 ([22]), Romania committed to announce the privatisation tender for Oltchim by the end of April 2012.

(72) This followed several public statements by the Romanian authorities that were made in the course of 2011 declaring the Romanian Government's intention to privatise Oltchim.

(73) Romania also declared its commitment to privatise Oltchim vis-à-vis the Commission. More specifically, by letter dated 21 October 2011 addressed to Vice-President Joaquín Almunia, Romanian Prime Minister Emil Boc declared that Romania was committed to privatising Oltchim fully (including the stake subject to the debt conversion) by May 2012. Following the appointment of a new government in Romania on 9 February 2012, the new Prime Minister, Mihai Răzvan Ungureanu, reconfirmed this commitment by letter dated 16 February 2012.

([18]) According to Government Decision 780/2006 implementing Council Directive 2003/87, operators must return the CO_2 certificates corresponding to the previous year by 30 April. Failure to surrender the certificates in time is punishable by a fine.

([19]) OJ L 83, 27.3.1999, p. 1.

([20]) Council Decision 2011/288/EU (OJ L 132, 19.5.2011, p. 15).

([21]) See http://www.imf.org/external/pubs/cat/longres.aspx?sk=24767.0.

([22]) Available at http://www.imf.org/external/np/loi/2011/rou/060911.pdf.

(74) In the light of its budgetary constraints, Romania therefore no longer intends to remain the owner of Oltchim and finance the necessary investments through a state guarantee, but seeks to sell its shareholding in Oltchim.

VIII.2. **Developments regarding measure 3 - the interest agreement**

(75) By letter of 9 September 2011 the Romanian authorities informed the Commission that they intended to charge interest on the due AVAS debt amounting to RON 538 million as from 1 January 2007. Romania also explained that this would take place within a debt convention agreement between AVAS and Oltchim whereby the company would accept the interest due. In the same letter the Romanian authorities indicated that the interests thus accrued was also to be converted into equity, along with the main public debt, as notified under measure 1.

(76) By letter of 23 December 2011, the Romanian authorities provided a copy of the private law agreement concluded on 22 December 2011 between AVAS and Oltchim, whereby the company acknowledged the interest accruing on the public debt from 1 January 2007 until 31 December 2011 amounting to a total of RON 511 million. The Romanian authorities explained that the interest was calculated on a compound basis, using as default interest for the relevant periods the highest of the interest rates charged by the commercial banks for the loans granted effectively to the company since 1 January 2007 and using the applicable Commission reference and discount rates. This approach resulted in the following applicable interest rates and accrued interest on the AVAS debt:

Table 1

Breakdown of the interest charged by AVAS for the period 2007-2011

	2007	2008	2009	2010	2011
Applicable interest rate	1.1-30.6 -> 11,17 % 1.7-31.12 -> 10,24 %	14,86 %	18,85 %	14,00 %	13,22 %
Interest amount (rounded to **RON million**)	58	87	129	114	123
					Total interest on AVAS debt since 2007: RON 511 million

(77) In the same correspondence, the Romanian authorities also stated that preparations for implementing the AVAS debt conversion amounting to RON 538 million plus the interest accrued thereon were to be launched with a view to complying with the privatisation timeline proposed.

VIII.3. **Romania's arguments in view of the privatisation intention**

(78) As explained above, the Romanian authorities withdrew measure 2 (see section VII above). Following withdrawal of the notification with respect to the state guarantee, the Romanian authorities argued that the current measure 1, i.e. the conversion into equity of the AVAS debt amounting to RON 538 million plus the interest accruing on the AVAS debt from 1 January 2007 to 31 December 2011, amounting to an additional sum of RON 511 million, did not constitute state aid within the meaning of Article 107(1) TFEU. Romania argued that the measure would be in keeping with the market and as such would not confer an advantage on Oltchim. More specifically, the Romanian authorities argued that the creditor AVAS was better off by converting the entire debt into equity and selling its entire stake in the company in the short term than by enforcing the debt, as the market value of the resulting stake of AVAS in the company following the debt conversion was higher than the sum that AVAS would obtain from the liquidation of the company.

(79) Romania submitted a consultancy report prepared by Raiffeisen Capital & Investment SA (hereinafter: 'the consultancy report') in order to demonstrate that the state's best strategy for maximising its return was to perform the debt-to-equity debt conversion followed by the short-term sale of combined packages of shares.

(80) The consultancy report examines, on the one hand, the value of the AVAS claim in a liquidation scenario and, on the other hand, its value in a debt conversion + privatisation scenario.

(81) The liquidation assessment is based on two liquidation reports (a previous Raiffeisen liquidation report dating from February 2011, and a liquidation report by the independent consultancy Romcontrol SA Bucharest, dated March 2011). The outcome for the State in a debt conversion + privatisation scenario was estimated on the basis of the enterprise value method, which is one of the fundamental metrics used in business valuation. (A detailed description of the methodologies used and the outcome of the evaluation, as well as its critical assessment by the Commission, are to be found in section IX.3.3 below.)

(82) The report concludes that converting its total debt into equity would allow for a smoother and faster privatisation process for the company, and that the financial outcome of this option is superior to the choice of liquidation for AVAS.

IX. **ASSESSMENT**

IX.1. **General**

(83) In order to ascertain whether the measures under scrutiny constitute state aid, the Commission has to assess whether they fulfil the cumulative conditions of Article 107(1) TFEU. That provision states that '[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

(84) The Commission notes that, in the light of the withdrawal of the notification with regard to measure 2 (see section VII above), the following assessment concerns measures 1 and 3 only. Measure 1 has been modified, as Romania has linked the conversion of the debt into equity to the privatisation of Oltchim. The assessment of that latter measure is therefore carried out on the assumption that the equity stake which AVAS will hold after the conversion will immediately be sold to a private investor in a fair, open and transparent sales process, which aims at maximising the revenues for AVAS.

(85) Furthermore, the Commission considers that the issue of whether the creditor AVAS conferred any undue advantage to Oltchim in the way it treated the debt after 1 January 2007 has to be assessed in the context of GEO 51/1998 (see recital (27) above) and Law 30/2007 mandating AVAS to re-perform the debt conversion, of the notification of the debt conversion to the Commission – identified as measure 1 in the opening decision – and of the modification of measure 1 as a consequence of the doubts raised by the Commission and the constraints resulting from the EU/IMF programme.

(86) Moreover, the Commission notes that the intention to privatise the company in full by the end of May 2012, as communicated by the Romanian authorities in their letter of 21 October 2011 and re-confirmed in the letter from Prime Minister Ungureanu of 16 February 2012, is considered to be an integral part of measure 1.

(87) With regard to the environmental fine on the one hand, and the company's pending debts towards Electrica SA, Salrom Exploatarea Minieră Rm. Vâlcea, and SC CET Govora SA, on the other, the Commission notes that those alleged measures were not part of the opening decision. Therefore, they cannot form part of the present Decision. The Commission will inform the complainant in due time of the further course of action with regard to those allegations on the basis of Article 10 of Regulation (EC) No 659/1999.

IX.2. **Competence of the Commission prior to accession**

(88) As indicated in section V above, Anonymous Party II argued that some of the state guarantees granted to Oltchim during the period 1995-2000 were still in place after Romania's accession to the EU, namely until 31 October 2009, and therefore should be treated as of the accession date as new aid. The Commission must therefore assess the validity of that argument and its possible implications for the assessment of the notified measure.

(89) As a general rule, Article 107(1) TFEU is applicable only as of the date of accession onwards. An exception to that general rule is that of measures that were put into effect before accession and which continue to be applicable afterwards. Under the 2005 Accession Treaty between Romania and the EU ([23]), measures put into effect in Romania before the accession date which are still applicable after the date of accession (1 January 2007), which might constitute state aid within the meaning of Article 107(1) TFEU and do not qualify as existing aid for the purposes of Regulation (EC) No 659/1999 ([24]), are to be considered potential new aid starting from the accession date for the purposes of applying Article 108(3) TFEU.

(90) Point 2.1 of the second paragraph of Annex V to the 2005 Accession Act of Bulgaria and Romania ([25]), based on Article 22 of the same Accession Act, stipulates that 'all aid measures still applicable after the date of accession which constitute state aid and which do not fulfil the conditions set out above shall be considered as new aid upon accession for the purposes of the application of Article 88(3) of the EC Treaty'.

(91) The above-mentioned provision thus covers measures put into effect before the accession date (1 January 2007) which are still applicable after that date. The notion of 'applicable after the accession date' has been defined in a series of Commission decisions ([26]) as covering schemes and individual measures that are either not limited in

([23]) OJ L 157, 21.6.2005, p. 268.
([24]) OJ L 83, 27.3.1999, p. 1.
([25]) OJ L 157, 21.6.2005, p. 268.
([26]) See e.g. Commission Decision of 24.4.2007 in Case E 12/2005 Unlimited guarantee to Poczta Polska, OJ C 284, 27.11.2007, p. 2, Commission Decision of 18.7.2007 in Case C 27/2004 Agrobanka, OJ L 67, 11.3.2008, p. 3, Commission Decision of 28.1.2004 in Case CZ 14/2003 *Česka Spořitelna, a.s.*, OJ C 195, 31.7.2004, p. 2, and Commission Decision of 3.3.2004 in Case CZ 58/2003 *Evrobanka, a.s,*. OJ C 115, 30.4.2004, p. 40.

time or where the exact liability of the State is not exactly delimited – in other words, cases where the exact exposure of the State is still not known on the date of accession. In the light of the above considerations, it must be determined whether the state guarantees issued in favour of Oltchim throughout the period 1995-2000 were 'applicable after accession' in the sense that has been defined in the above-mentioned case practice. To that end, it must be verified whether a situation obtained in which the state guarantees were either not limited in time or where the exact exposure of the State was not known before the date of accession.

(92) Having examined the terms and conditions under which the state guarantees in question were issued, the Commission notes that they represented separate and individual, one-off measures, whereby the State backed up the company for taking out specified loans of determined amounts and determined duration. The date until which the guarantees were valid was established when they were issued, as the guarantees stipulated a validity period up to the expiry of the underlying loans, which was precisely defined in the underlying loans. That validity period was not modified afterwards. Therefore, upon accession their validity in time was indeed limited, and had been established at a date prior to accession, namely when the loan agreement was concluded. The Commission must therefore take note that the first of the situations in which a given measure will qualify as 'new aid' as of the accession date onwards, namely its lack of limitation in time upon the accession date, is not satisfied in the present case.

(93) Secondly, the maximum liability of the State was delimited at the moment in time at which the guarantees were granted, as the guarantees cover only the specific loan for which they are granted. Therefore, it must also be concluded that the second case of 'applicability after accession', namely unknown exposure of the State as of the accession date onwards, is not applicable.

(94) In addition, the Commission also observes that the state guarantees were triggered before the accession date. From the date of their triggering, the State became liable for the repayment of the outstanding amount of the loans that were taken with their back-up, and indeed, it subrogated itself into the obligations of the company for the repayment of the loans in question, becoming consequently a creditor of Oltchim for the amounts paid on account of the guarantees. As indicated in Section II.2 above, the payments made on account of the triggered guarantees lasted until 2006. No further payments were made on this account as of the accession date onwards, as Oltchim was able to service the still-outstanding part of the loans.

(95) It is therefore to be concluded that the state guarantees granted to Oltchim during the period 1995-2000 cannot be qualified as new aid within the meaning of point 2.1 of the second paragraph of Annex V to the 2005 Accession Act of Bulgaria and Romania.

IX.3. **Existence of aid: Advantage**

IX.3.1. *The private creditor test*

(96) Romania argues that the notified measure, consisting of converting RON 1 049 million of public debt into equity with a view to selling the total resulting public stake shortly afterwards (by the end of May 2012) does not confer any undue advantage on the company, because any private creditor in a situation similar to the one of the public creditor AVAS would have chosen that method of debt recovery rather than the liquidation of the company, which is financially less advantageous for the public creditor.

(97) In order to determine whether the notified measure confers an undue advantage on Oltchim, the Commission should assess whether the public creditor AVAS pursued the recovery of the public debt with the same diligence as a private creditor seeking to maximise recovery of the debt owed to it ([27]). That perspective takes into account the fact that, with the transfer of the public debt to AVAS, recovery of the debt is pursued by an institution that has no other relationship with the company but the one of a creditor with its debtor. The assessment does not disregard the fact that the Ministry of Economy is the public shareholder of Oltchim, but it takes into account that the public shareholder does not have a role to play with respect to the recovery of the public debt, which is entrusted to the creditor AVAS. The Commission notes, however, that the effects of the debt conversion followed by privatisation for the current shareholder, i.e. the Ministry of Economy, must also be assessed in order to reach a conclusion on whether the proposed debt conversion followed by privatisation is a better financial solution for the State than wholly liquidating the company.

IX.3.2. *Recovery of the public debt – Assessment of measure 3*

(98) In the opening decision, the Commission considered that an additional element of state aid could stem from the fact that the State has not charged any interest and/or late payment penalties on Oltchim's overdue public debt after Romania's accession to the EU. That public debt resulted from the triggering of the state guarantees (see description above in recitals 23-27 and assessment of the state guarantees above in recitals 88-95). In the opening decision, the Commission took the view that the failure to accrue interest or enforce the public debt conferred an advantage on Oltchim, given that the company enjoyed capital free of charge.

(99) In order to assess whether Romania behaved like a private creditor with regard to the outstanding debt resulting from the triggering of the state guarantees, it is necessary to assess the behaviour of the Romanian State over the period from 2007 until today, based on the information available to the Romanian authorities at the relevant points in time.

([27]) See Case C-342/96 *Spain v Commission (Tubacex)* [1999] ECR I-2459, paragraph 46, Case T-152/99 *HAMSA v Commission* [2002] ECR II-3049, paragraph 167.

(100) The Commission first of all notes that the fact of not charging interest and penalties as of 2007 and until the modification of the notification of measure 1 results from GEO 51/1998 (see recital (27)). It also has to be seen against the background of Law 30/2007, mandating AVAS to re-perform the debt conversion. At the time the Romanian authorities were considering a continuation of Oltchim's activities and planning further investments rather than its liquidation.

(101) Therefore, the Commission first of all needs to ascertain whether Romania, by deciding in 2007 to carry out the debt-for-equity swap, rather than seeking the enforcement of the debt and/or liquidation of the company, behaved like a private creditor. In that regard, the Commission notes that Romania had pursued the strategy of a debt-to-equity conversion with a view to continuing Oltchim's activities since the first (failed) attempt to do so in 2003. The behaviour of the Romanian authorities in that regard was therefore consistent with their prior behaviour. Reactions from the market to previous privatisation attempts, as well as the court actions of minority shareholders, showed that the market believed in the fundamental viability of Oltchim's business.

(102) Furthermore, the Commission notes that Romania had at its disposal also a business plan ([28]) for Oltchim which indicated that the company was viable.

(103) In the light of those elements, the Commission considers that it was not unreasonable for Romania, in its role as creditor, to decide to perform the debt to equity conversion and to pass a law along those lines that did not envisage charging interest and penalties on the outstanding debt, as that debt was to be in any event converted into equity.

(104) That analysis is not contradicted by the fact that Romania, prior to carrying out the debt-for-equity swap, sought state aid clearance. Indeed, by doing so, Romania merely fulfilled its obligations under Article 108(3) TFEU. Given the difficulties Romania had encountered with minority shareholders before, and kept encountering for the application of Law 30/2007, it made perfect sense to seek confirmation from the Commission that the planned operation did not amount to state aid.

(105) Due to the state aid assessment and the application of the standstill obligation, the debt-for-equity swap was eventually delayed by five years. In that regard, the Commission observes first of all that, up to mid-2011, Romania had the firm intention of pursuing an expansive investment strategy with regard to Oltchim, which was explored by a number of expert studies ([29]). It would have been against the State's strategy of making further investments in order to return the company to profitability and increase its value with a view to privatising in the medium-to-longterm to charge at the same time interest on the pending public debt.

(106) As a result of the doubts the Commission had raised with regards to the expansive investment strategy in its opening decision and, more importantly, as a result of the budgetary problems and the EU/IMF programme, Romania changed its strategy in 2011 and decided to privatise the company immediately after the debt-for-equity swap. It thereby abandoned the initial plans to make further investments of EUR 424 million before privatising.

(107) In the new context, the charging of interest on the debt became a sensible strategy for the State in order to maximise the recovery of the debt owed to it.

(108) As outlined in recitals 75-77 above, further compound interest was charged on the public debt, corresponding to the period 1 January 2007 onwards, by means of a private agreement concluded in December 2011 between Oltchim and AVAS. In particular, the interest rates that were applied on the public debt corresponded to whatever were the higher: the Commission reference rates relevant for each period or the interest rates applied for private loans of the company for the same period which can be considered adequate.

(109) On the basis of the above, the Commission concludes that Oltchim did not derive an advantage from the way in which the public authorities pursued, after accession, the recovery of the public debt to be now converted into equity.

IX.3.3. *The debt conversion – measure 1*

(110) The Commission must also assess whether measure 1, consisting (following modification of the notification – see recitals 14-16, 69-70 and 75-77 above) of converting into equity a total of RON 1 049 million of public debt, to be followed shortly by full sale of the resulting public

([28]) In particular, there was a business plan prepared by Oltchim's management for the period 2006-2010, and an independent advisory opinion by Raiffeisen dated May 2007 and a Technical consultancy report by Techno Orbichem dated May 2007.

([29]) e.g. the business plan notified to the Commission on 17 July 2009 and a study prepared by Roland Berger dated 13 April 2011, submitted by the Romanian authorities to the Commission on 14 April 2011.

stake (privatisation), confers any undue advantage on Oltchim. The total public debt to be converted into equity includes the main public debt, held by the privatisation agency AVAS, of RON 538 million, and the interest accruing on the AVAS debt from 1 January 2007 to 31 December 2011, of RON 511 million.

(111) In order to assess whether the proposed debt conversion involves any undue advantage for Oltchim, it should be determined whether the debt conversion is indeed the best mechanism for maximising recovery of the public debt, as Romania argues. In practice, the Commission needs to determine whether a hypothetical private creditor in a situation comparable to the one of the privatisation agency AVAS, which is the creditor of Oltchim, would have indeed preferred that mechanism of recovering the debt to other recovery alternatives available, considering the fact that the debtor is facing serious financial difficulties. The Ministry of Economy, the current shareholder of Oltchim, does not have any role to play with respect to the recovery of the public debt, but nevertheless the outcomes of the two possible scenarios for the public shareholder are also taken into account in the analysis below.

(112) Romania argues that, considering the current situation of the company (serious undercapitalisation and excessive indebtedness), the only realistic options that a private creditor in a situation comparable to the one of the public creditor AVAS would have are either (i) to liquidate the company, or (ii) to convert the debt into equity and subsequently sell the entire resulting stake in the company. Any private creditor faced with such choices would prefer the one that maximises recovery of the pending debt. In other words, the creditor would choose the 'debt conversion followed by privatisation' option if the return expected from privatisation exceeded the amount that could be recovered through liquidation.

(113) In order to demonstrate that the debt conversion followed by a sale of the resulting stake brings more revenues to the creditor than liquidation, Romania submitted a report by an independent consultancy (see recitals 78-82 above) which compares the outcomes for the creditor of the two scenarios, i.e. debt conversion followed by privatisation and liquidation respectively.

(114) The Commission has critically assessed the report, in order to verify whether its results withstand scrutiny and demonstrate indeed that, by converting its debt into equity, AVAS behaves like a private creditor. Having scrutinised the report, the Commission observes the following:

(115) **Value of the AVAS claim in a liquidation scenario**: The liquidation assessment is based on a previous Raiffeisen liquidation report dating from February 2011, and on a liquidation report by the independent consultancy Romcontrol SA Bucharest, dated March 2011.

(116) Under Romanian law, companies in which the State holds a stake of at least 50 % + 1 are liquidated under the so-called 'special voluntary liquidation procedure' established by Government Emergency Order 88/1997, Government Decision 577/2002 and Law 137/2002. Under that special voluntary liquidation procedure, the amount obtained by the liquidator from the sale of the company's assets is to be used for covering the company's outstanding debts following the same order of preference as established by Law 85/2006 (the Romanian insolvency law). Accordingly, liquidation proceeds must be used for covering debts in the following order of preference: 1) liquidation costs; 2) salaries owed; 3) privileged debt (i.e. debt secured with pledges, mortgages and other special privileges); 4) budgetary debt (taxes and other fiscal obligations); 5) debt to the Ministry of Finance on account of triggered state guarantees; 6) debt from public loans; 7) ordinary (non-secured) debt; 8) shareholders. In the present case, AVAS would be within the third category of creditors (privileged creditors), yet ranking after several (private) privileged creditors of Oltchim, as the public debt was only partially secured.

(117) The consultancy Romcontrol estimated the liquidation value of Oltchim's assets as of 15 December 2010, relying on the net adjusted asset method, which takes into account the limited time of exposure on the market of the assets put up for sale ([30]).

(118) On the basis of the results of the liquidation value of assets as estimated by Romcontrol, Raiffeisen estimated the outcome for the creditor AVAS and for the State as shareholder, by taking into account the company's liabilities as of 31 December 2010 and its preliminary financial statements of the same date ("the February 2011 Raiffeisen liquidation study"). That study estimates that the proceeds to be obtained from the sale of Oltchim's assets would allow for recovery of approximately [20]-[30]% of the company's total liabilities. The creditor AVAS, as a partially guaranteed creditor, would have recovered around RON [80]-[100] million (which represents [10]-[30]% of the then total claim of RON 538 million). Given the negative gap between the liquidation proceeds and the company's liabilities, the State in its capacity as shareholder would not collect anything.

(119) In October 2011, Raiffeisen updated the estimates of the February 2011 liquidation study to take into account the 30 June 2011 financial data of the company and to include the interest charged on the public debt as of January 2007 onwards.

([30]) The special voluntary liquidation procedure was estimated to last for approximately 18 months.

(120) According to the updated estimate AVAS, being a partially guaranteed creditor of Oltchim, would collect RON [100]-120] million of its total debt towards the company (which represents [10]-[20] ([31]) of the total claim, i.e. the principal debt of RON 538 million plus interest). The Ministry of Economy, the public shareholder, would again collect nothing. The sum to be obtained by AVAS was subsequently discounted ([32]) to its present value on 30 June 2011. As a result, AVAS would collect EUR [10]-[40] million in the event of the liquidation of the company.

Table 2

Collection of the State's claim in a liquidation scenario

	Claim (million EUR)	Collection total (million EUR)	Collection NPV at 10,7 % (million EUR)
AVAS (Creditor)	209,4	[20]-[30]	[10]-[30]
Ministry of Economy (shareholder)	Shareholding	[0]-[10]	[0]-[10]
State total		**[20]-[30]**	**[10]-[30]**

(121) That amount must then be compared with the expected return of converting AVAS' claim into equity, followed by a privatisation of the company.

(122) **Value of the AVAS claim in a debt conversion + privatisation scenario**: in the report, the outcome for the State in a debt conversion + privatisation scenario was estimated on the basis of the enterprise value (hereinafter: 'EV') method, which is one of the fundamental metrics used in business valuation.

(123) With respect to the use of that method, the Commission notes that, in principle, there are several methods for estimating the value of the equity of an undertaking.

(124) One of the methods often used is that of the multiple of the EBITDA (earnings before interest, taxes, depreciation, and amortisation). It allows the value of the equity of an undertaking for year X to be assessed by multiplying the EBITDA of year X by a factor (the multiple) considered to be appropriate for the sector and subtracting the net debt from the result.

(125) Another method is discounted cash flow analysis. The undertaking's nominal free cash flows for the coming years are discounted at the weighted average cost of capital, or WACC ([33]), and the net debt is subtracted from the value obtained.

(126) A third method is that of the multiple of turnover. It allows the value of an undertaking's equity in year X to be assessed by multiplying the turnover of year X by a factor (the multiple) considered to be appropriate for the sector and subtracting the net debt from the result.

(127) All these methods (future EBITDA, cash flow or turnover) use projected values. In the case at hand not all estimation methods that are based on projected values in a business plan can be used meaningfully. Given the envisaged immediate privatisation of the company, only the new owner will be in a position to determine the company's future business strategy, and therefore the relevant business plan projections necessary for using these methods are not available, nor can they be anticipated ([34]). As the new owner will have to undertake significant investments, nor can past results of the company be used to make predictions for the future.

(128) Under those circumstances, the Commission takes the view that the only two methods available for estimating the value of the combined stake of the Romanian State, i.e. AVAS and the Ministry of Economy, are market capitalisation and the EV. It has to be noted that EV also includes the parameters used for market capitalisation.

(129) Market capitalisation is defined as the share price multiplied by the number of shares in issue, providing a total value for the company's shares outstanding. This metric represents the public consensus on the value of a company's equity and could be used as a proxy for the public opinion of a company's net worth.

([31]) The recovery rate of [10]-[20]% is lower than the previously calculated [15]-[25]%, as in the meantime the additional interest charged by AVAS, which is non-secured debt, was also taken into account.

([32]) Discounted to 30 June 2011 at a discount rate of 10.7 %, the value of WACC (weighted average cost of capital) determined by the consultancy firm Roland Berger, in a study dated 13 April 2011, submitted by the Romanian authorities to the Commission on 14 April 2011.

([33]) See footnote 32.

([34]) Although in the original notification Romania presented a business plan, the financial projections therein were based on extensive investments amounting to EUR 424 million, and therefore such projections cannot be relied upon in the current context, where the State renounced the further investment plans.

(130) Oltchim's market capitalisation was calculated on the basis of its share price observed on the Bucharest Stock Exchange ([35]) over a period of 44 months (2008-August 2011). That interval is sufficiently long to be relevant and the market capitalisation over that period is also a good indication of what the market is prepared to pay for the company.

(131) In that context, the Commission notes, as a positive aspect, the fact that the share price, during the recent period May-August 2011, was always higher than its 44 months average. More precisely, whereas the 44 months weighted average is RON 0,53 per share, the share price even reached RON 2,05 in July 2011 ([36]). Thus, the data used for establishing the market value can be considered to be conservative.

(132) Furthermore, with regard to the share price development since September 2011 (the last data range used by the Raiffeisen study), the Commission notes, as a positive aspect, that, in the recent past (since mid-October 2011), the share price has risen significantly and has been constantly higher than the weighted average of RON 0,53 used in the market capitalisation formula.

Figure 1

Oltchim's share price development on the Bucharest Stock Exchange 23.2.2011-23.2.2012



Source: http://www.bvb.ro/ListedCcompanies/SecurityDetail.aspx?s=OLT&t=0

(133) Before the planned debt conversion, Oltchim's market capitalisation in the observed period (January 2008-August 2011) was on weighted average ([37]) EUR 45 million and in the last three months of the observed period (June-August 2011) it was constantly over EUR 100 million. The market capitalisation therefore clearly exceeds the liquidation value of Oltchim (EUR [10]-[40] million), which provides a first indication that selling the State's stake in a privatisation would be preferable to liquidating the company.

(134) The second method that can be used is the Enterprise Value (EV). EV is a measure of a company's value which is often used as an alternative to straightforward market capitalisation, because it is considered to provide a more accurate representation of the firm's value. EV is defined as the sum of the market capitalisation of a company and its net financial debt. That method was used by Raiffeisen Capital.

(135) Following the calculation of the market capitalisation, the other element in the EV formula, the net debt, was computed as the sum of all financial debts of the company (all interest-bearing debts of the company – namely, bank loans and overdue/rescheduled liabilities) ([38]).

(136) As a next step, it is then possible to calculate the median, average and weighted average of the EV and EV/share over the 44-month period. The report did so for two scenarios: with the interest charged on the debt under the agreement, and without it.

(137) On that point, the Commission is of the view that the interest charged under the agreement should not be taken into account for the purpose of calculating the enterprise value (EV) for the following reasons: *ceteris paribus*, if debt increases, equity goes down. Those two effects go in opposite directions and should in principle bring no change to the EV. If the market knew about the interest, it would price the shares downward accordingly. However, in the current case the interest amount was added ex post and not anticipated by the market. Therefore, the contemporaneous information held by the market at the moment of the valuation is relevant.

(138) Against those considerations, the following EV/share values have been calculated for the observed period.

([35]) The percentage of shares traded in that period varied between 0,01 % and 13,45 % of total shares per month.

([36]) In the period February 2011 – February 2012, the 52-week peak even reached RON 2,21 per share.

([37]) The weighted average was calculated on the basis of traded share volume.

([38]) The minority interest and preferential shares items are zero and the cash and cash equivalents, having insignificant values, were not considered in the computation of net debt.

Table 3

Calculation of Oltchim's EV/share value in the observed period

Period	Number of shares	Average share price	Market capitalisation (share price x number of shares)	Net debt in RON thou	Enterprise value (market capitalisation plus net debt) in RON thou	Enterprise value per share
Jan. -08	343 023 858	1,10	378	[1 200]-[1 400]	[1 700]-[1 800]	[4]-[6]
Feb. -08	343 023 858	0,91	314	[1 200]-[1 400]	[1 600]-[1 700]	[4]-[6]
Mar. -08	343 023 858	0,81	279	[1 200]-[1 400]	[1 600]-[1 700]	[4]-[6]
Apr. -08	343 023 858	0,87	300	[1 200]-[1 400]	[1 600]-[1 700]	[4]-[6]
May -08	343 023 858	1,04	358	[1 300]-[1 500]	[1 700]-[1 800]	[4]-[6]
Jun. -08	343 023 858	0,96	330	[1 300]-[1 500]	[1 700]-[1 800]	[4]-[6]
Jul. -08	343 023 858	0,72	247	[1 300]-[1 500]	[1 600]-[1 700]	[4]-[6]
Aug. -08	343 023 858	0,63	216	[1 300]-[1 500]	[1 600]-[1 700]	[4]-[6]
Sep. -08	343 023 858	0,47	160	[1 300]-[1 500]	[1 500]-[1 600]	[4]-[6]
Oct. -08	343 023 858	0,37	127	[1 300]-[1 500]	[1 500]-[1 600]	[4]-[6]
Nov. -08	343 023 858	0,21	71	[1 200]-[1 400]	]1 400]-[1 500]	[4]-[6]
Dec. 08	343 023 858	0,16	54	[1 400]-[1 600]	[1 400]-[1 500]	[4]-[6]
Jan. -09	343 023 858	0,15	51	[1 400]-[1 600]	[1 600]-[1 700]	[4]-[6]
Feb. -09	343 023 858	0,13	45	[1 400]-[1 600]	[1 600]-[1 700]	[4]-[6]
Mar. -09	343 023 858	0,15	53	[1 400]-[1 600]	[1 600]-[1 700]	[4]-[6]
Apr. -09	343 023 858	0,25	84	[1 400]-[1 600]	[1 600]-[1 700]	[4]-[6]
May -09	343 023 858	0,27	93	[1 400]-[1 600]	[1 600]-[1 700]	[4]-[6]
Jun. -09	343 023 858	0,30	104	[1 400]-[1 600]	[1 700]-[1 800]	[4]-[6]
Jul -09	343 023 858	0,33	113	[1 400]-[1 600]	[1 700]-[1 800]	[4]-[6]
Aug. -09	343 023 858	0,32	109	[1 600]-[1 800]	[1 700]-[1 800]	[4]-[6]
Sep. -09	343 023 858	0,28	96	[1 600]-[1 800]	[1 700]-[1 800]	[4]-[6]
Oct. -09	343 023 858	0,27	91	[1 600]-[1 800]	[1 700]-[1 800]	[4]-[6]
Nov. -09	343 023 858	0,23	79	[1 600]-[1 800]	[1 700]-[1 800]	[4]-[6]
Dec. -09	343 023 858	0,26	89	[1 600]-[1 800]	[1 700]-[1 800]	[4]-[6]
Jan. -10	343 023 858	0,23	79	[1 600]-[1 800]	[1 700]-[1 800]	[4]-[6]
Feb. -10	343 023 858	0,22	77	[1 600]-[1 800]	[1 700]-[1 800]	[4]-[6]
Mar. -10	343 023 858	0,27	92	[1 600]-[1 800]	[1 700]-[1 800]	[4]-[6]
Apr. -10	343 023 858	0,31	105	[1 600]-[1 800]	[1 800]-[1 900]	[4]-[6]
May -10	343 023 858	0,22	76	[1 600]-[1 800]	[1 800]-[1 900]	[4]-[6]
Jun. -10	343 023 858	0,21	71	[1 700]-[1 900]	[1 900]-[2 000]	[4]-[6]
Jul. -10	343 023 858	0,18	62	[1 700]-[1 900]	[1 900]-[2 000]	[4]-[6]
Aug. -10	343 023 858	0,19	64	[1 700]-[1 900]	[1 900]-[2 000]	[4]-[6]
Apr. -10	343 023 858	0,19	66	[1 700]-[1 900]	[1 900]-[2 000]	[4]-[6]
Oct. -10	343 023 858	0,22	76	[1 700]-[1 900]	[1 900]-[2 000]	[4]-[6]
Nov. -10	343 023 858	0,22	75	[1 800]-[2 000]	[2 000]-[2 100]	[4]-[6]
Dec. -10	343 023 858	0,20	69	[1 800]-[2 000]	[2 000]-[2 100]	[5]-[7]
Ian. -11	343 023 858	0,21	74	[1 800]-[2 000]	[2 000]-[2 100]	[5]-[7]

Period	Number of shares	Average share price	Market capitalisation (share price x number of shares)	Net debt in RON thou	Enterprise value (market capitalisation plus net debt) in RON thou	Enterprise value per share
Feb. -11	343 023 858	0,26	88	[1 800]-[2 000]	[2 000]-[2 100]	[5]-[7]
Mar. -11	343 023 858	0,30	102	[1 800]-[2 000]	[2 000]-[2 100]	[5]-[7]
Apr. -11	343 023 858	0,44	152	[2 000]-[2 200]	[2 100]-[2 200]	[5]-[7]
May -11	343 211 383	0,77	265	[2 000]-[2 200]	[2 300]-[2 400]	[5]-[7]
Jun. -11	343 211 383	1,61	551	[2 000]-[2 200]	[2 600]-[2 700]	[6]-[8]
Jul. -11	343 211 383	2,05	702	[2 000]-[2 200]	[2 800]-[2 900]	[6]-[8]
Aug. -11	343 211 383	1,32	452	[2 000]-[2 200]	[2 600]-[2 700]	[6]-[8]

(139) On the basis of this table, the median, average and weighted average of EV per share was calculated.

Table 4

Oltchim's median, average and weighted average of EV per share

	Share price	Enterprise value per share
Median	[0,10]-[0,30]	[4]-[6]
Average	[0,30]-[0,50]	[4]-[6]
Weighted average	[0,40]-[0,60]	[4]-[6]

(140) The EV (median, average, weighted average) calculated as explained above can then be used for determining the value of the State's share 'post debt conversion' by deducting from this EV the company's debt that remains pending after the conversion; this will remain a liability of the company which has to be serviced.

(141) The result is the market value of total equity as shown in Table 5.

Table 5

Calculation of market value of equity based on the EV method

Calculation of the market value of total equity after the debt conversion	Scenarios		
	EV based on 44 months' **median** share price	EV based on 44 months' **average** share price	EV based on 44 months' **weighted average** share price
EV/share (RON)	[4]-[6]	[4]-[6]	[4]-[6]
Number of shares before conversion	343 211 383	343 211 383	343 211 383
Enterprise value (RON million)	[1 700]-[1 800]	[1 800]-[1 900]	[2 000]-[2 100]
Net debt after debt conversion (RON million)	[1 600]-[1 700]	[1 600]-[1 700]	[1 600]-[1 700]
Market value of equity (RON million)	[100]-[200]	[200]-[300]	[400]-[500]
Market value of equity (EUR million)	[20]-[30]	[50]-[60]	[90]-[100]

(142) With respect to the net financial debt used in the above-described calculation, both steps of the calculation, viz. (i) the calculation of the EV formula and (ii) the subsequent subtraction in order to arrive at the market value of equity, should in principle be based on the market value of the company's debt.

(143) However, the Commission notes first that, since Oltchim's debt is not traded and in the absence of a local market for debt trading, it is very difficult to establish a market price for that debt. Instead, one could theoretically determine the market value of the debt by establishing the rating of the company pre- and post-debt conversion. That rating could then be used to estimate the probability of default which in turn can be used to estimate the market value of debt. In the absence of such ratings, the Commission considered that such an exercise is not possible, and that the errors generated by the use of a poorly estimated market value would be significant.

(144) Second, if one assumed that the net debt was traded at the same discount to its book value before and after the swap, then the results of the calculation consequently do not change at all, irrespective of the size of the discount. Any change in the value of the net financial debt would then lead to a proportionate change, of opposite sign, in the value of the market capitalisation. The impact of adding either the book value of debt or its market value is neutral, as the value of debt is first added to obtain EV and then subtracted to obtain the new equity value of shares.

(145) Third, assuming that the debt remaining after the conversion is traded at a different discount than before the conversion, a meaningful calculation would need to take into account the fact that after the debt-for-equity swap the market value of the remaining debt would probably still be lower than its book value, but at any rate higher than the market value of the debt pre-swap. In the absence of a basis to establish those discounts, it is, however, not possible to simulate the effects of a change in those discounts, as too many parameters would need to be varied at the same time.

(146) On the other hand, the Commission notes that Oltchim's financial statements have been prepared in accordance with IFRS standards and audited by the independent auditor KPMG. In those financial statements, financial liabilities are presented at their fair value according to the stipulations of IAS 39. IAS 39 defines fair value as the amount for which an asset could be exchanged, or a liability settled, between knowledgeable, willing parties in normal conditions of competition. On that basis, KPMG certified that the fair value of the company's long-term debt was not significantly different from its book value.

(147) On the basis of the above considerations, the Commission is of the view that it is indeed appropriate to use the book value of the debt in order to calculate the market value of the equity.

(148) However, in order to verify the robustness of the calculation, the Commission, in addition, carried out a sensitivity analysis, i.e. it determined the percentage difference between the book value and market value of the net debt pre-conversion which would equalise the present value of the State's stake post-conversion and the liquidation value, assuming that the market value of the debt will correspond to its book value following the debt-to-equity conversion. That percentage value can be considered a kind of 'margin of error' for the estimation of the market value of the debt.

(149) The Commission is of the view that, of all scenarios (EV based on median, average, weighted average), the weighted average represents the most accurate scenario, as in that case the values are weighted by traded share volumes. For that scenario, the above-mentioned margin is 15 %. The Commission concludes that a margin of that size is sufficiently large to lead one to consider that the EV calculation is based on solid data.

(150) Subsequently, once the market value of the equity has been calculated, one can calculate the value of the State's resulting stake from that market value of total equity based on the public shareholding, which will be as follows after the debt conversion ([39]):

Table 6

The Romanian State's shareholding in Oltchim before and after the planned debt conversion

	Shareholding **before** debt conversion	Shareholding **after** debt conversion AVAS debt plus interest thereon is debt converted
AVAS	0 %	[80]-[100]%
Ministry of Economy	54,81 %	[0]-[5]%
State total	54,81 %	[80]-[100]%

(151) As a result, after converting the AVAS main debt plus interest charged under the agreement, Oltchim will have a market value of equity ranging between EUR [20]-[30] and [90]-[100] million, which will lead to a present value ([40]) of the combined public stake ([80]-[100]%) of between EUR [15]-[30 and [75]-[90] million. In Table 7, below, the EVs as assessed for all the scenarios are summarised and compared with the values applicable in the case of a liquidation.

([39]) For the purposes of the analysis the report did not take into account the possible participation of private shareholders in the capital increase as its impact on the value of the Romanian State's stake is considered to be neutral.

([40]) Discounted by the discount factor of 10,7 to 30 June 2011 similarly to the liquidation value.

Table 7

Comparison of the debt conversion followed by privatisation *versus* liquidation scenarios on the basis of the EV method

State's expected revenue EUR million	Debt conversion and immediate privatisation			Net present value of the revenues obtained through liquidation	Comparison
	EV based on 44 months' **median** share price	EV based on 44 months' **average** share price	EV based on 44 months' **weighted average** share price		
Market value of equity	[20]-[30]	[45]-[60]	[90]-[100]		
Market value of combined public stake	[15]-[40]	[45]-[60]	[80]-[100]		
Net present value of combined public stake (98,44 %)	[15]-[40]	[30]-[50]	[75]-[90]	[10]-[40]	Liquidation < Debt conversion and privatisation
Net present value of AVAS stake (96,54 %)	[15]-[40]	[30]-[50]	[70]-[80]	[10]-[40]	Liquidation < Debt conversion and privatisation
Net present value of Ministry of Economy stake (1,9 %)	[0]-[1]	[0]-[1]	[1]-[2]	[0]-[1]	Liquidation < Debt conversion and privatisation

(152) In all assessed EV scenarios both the public creditor AVAS and the public shareholder Ministry of Economy obtain better results from the debt conversion followed by privatisation than if the company were liquidated. The shareholding of the current public shareholder, the Ministry of Economy, will be reduced by the debt conversion, which results in a stake of [80]-[100]% for the creditor AVAS. However, the Ministry has no reason to oppose the debt conversion as in the event of liquidation it would not obtain anything for its stake in the company. The public creditor AVAS would still obtain more even in the scenario with the lowest estimated EV than in the case of deciding to liquidate the company (EUR [10]-[30] million, versus EUR [10]-[30] million).

(153) On the basis of the above findings, it can be concluded that, if that 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 for Oltchim as that measure allows the public creditor AVAS to recover more than if it decided to place the company in liquidation. In that respect, the Commission takes note of the commitment made by the Romanian authorities (see recitals 17 and 73 above) to privatise the company in full by 31 May 2012.

(154) The Commission considers that the quantitative assessment on the basis of the market capitalisation method and the EV method is also supported by the following two arguments, which were not quantified by the independent expert.

(155) First of all, the assessment is based on the stock market price. However, as the State's stake in Oltchim will be sold as one entity, the acquirer will be able to control the company. Therefore, the acquirer will be willing to pay a control premium for the stake, as is normally the case in comparable transactions.

(156) Second, the Commission observes that PCC was willing to pay in 2007 EUR 7,5 million for a de facto 12 % stake in Oltchim and in 2011 EUR 2,6 million for a further 3,6 % stake in Oltchim. This indicates on the one hand that one private investor considered that the value of Oltchim had increased in 2011 compared with 2007 (as it was willing to pay a higher price per share), and that, based on the 2011 transaction, 100 % of the shares would be valued at EUR 73 million, which is substantially above the liquidation value.

IX.4. **Conclusion on the advantage criterion**

(157) On the basis of the above findings, namely that: (i) the company did not derive any undue advantage from the way in which the public authorities pursued recovery of the public debt that is the subject of the notified measure, and (ii) the debt conversion as such does not confer any undue advantage on the company, the Commission concludes that the advantage criterion is not met by the currently notified measure (resulting from the combination of former measures 1 and 3). In the light of that finding, the other cumulative criteria in the definition of the concept of state aid stemming from Article 107(1) of the TFEU do not need to be analysed for the assessment of the currently notified measure.

X. **CONCLUSION**

(158) The formal investigation procedure initiated under Article 108(2) TFEU with respect to measure 2 (the state guarantee) must be terminated as being moot, following withdrawal of the notification of that measure.

(159) The currently notified measure (the combination of former measures 1 and 3) does not involve state aid within the meaning of Article 107(1) TFEU.

(160) That conclusion is based on the firm intention of Romania to sell its stake in Oltchim in full, as expressed in the letter of Prime Minister Emil Boc of 21 October 2011, and re-confirmed in the letter of Prime Minister Ungureanu dated 16 February 2012,

HAS ADOPTED THIS DECISION:

Article 1

The Commission has decided to close the formal investigation procedure under Article 108(2) of the Treaty on the Functioning of the European Union in respect of the notified state guarantee (measure 2) in favour of Oltchim, in view of the fact that Romania has withdrawn its notification and will not pursue that measure further.

Article 2

Measure 1, notified by Romania on 17 July 2009 and amended on 22 June 2011, 9 September 2011, 21 October 2011 and 16 February 2012, does not constitute state aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 3

Measure 3, put in place by Romania in 2007, does not constitute state aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 4

This Decision is addressed to Romania.

Done at Brussels, 7 March 2012.

For the Commission

Joaquín ALMUNIA

Vice-President