Reports of Cases

JUDGMENT OF THE GENERAL COURT (Tenth Chamber, Extended Composition)

15 December 2021 *

(State aid – Measures taken by Romania to support a petrochemical company – Non-enforcement, accumulation and cancellation of public claims – Action for annulment – Period within which proceedings must be brought – Point from which time starts to run – Article 24(1) of Regulation (EU) 2015/1589 – Interest in bringing proceedings – Existence of one or more measures – State resources – Imputability to the State – Applicability of the private creditor test – Application of the private creditor test – Obligation to state reasons)

In Case T-565/19,

Oltchim SA, established in Râmnicu Vâlcea (Romania), represented by C. Arhold, L.-A. Bondoc, S.-E. Petrisor and K. Struckmann, lawyers,

applicant,

v

European Commission, represented by V. Bottka and F. Tomat, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for partial annulment of Commission Decision (EU) 2019/1144 of 17 December 2018 on State aid SA.36086 (2016/C) (ex 2016/NN) implemented by Romania for Oltchim (OJ 2019 L 181, p. 13),

THE GENERAL COURT (Tenth Chamber, Extended Composition),

composed of A. Kornezov (Rapporteur), President, E. Buttigieg, K. Kowalik-Bańczyk, G. Hesse and D. Petrlík, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 7 May 2021,

gives the following

* Language of the case: English.

Judgment

I. Background to the dispute

A. Factual background and administrative procedure

1 The applicant, Oltchim SA, which was established in 1966 and in which Romania has a 54.8% shareholding, was one of the largest petrochemical companies in Romania and South-East Europe. It was engaged in the manufacture of petrochemical products, mainly liquid caustic soda, propylene oxide-polyols, plasticisers and oxo-alcohols.

2 During the period from 2007 to 2012, the applicant's financial situation deteriorated in that it experienced a systematic increase in its operating losses, its accumulated losses and its negative equity.

3 In order to remedy this, Romania notified the Commission of the European Communities on 17 July 2009, inter alia, of a support measure consisting in the conversion of Oltchim's public debt into shares. On 7 March 2012, by Decision 2013/246/EU on State aid No SA.29041 (C 28/2009) (ex N 433/2009) – Support measures in favour of Oltchim SA Râmnicu Vâlcea (OJ 2013 L 148, p. 33) ('the 2012 decision'), the Commission concluded that the applicant's debt conversion of 1 049 000 000 Romanian lei (RON) (approximately EUR 231 million) did not constitute State aid.

4 On 23 November 2012, the Romanian Ministry of Finance, the Romanian Ministry of the Economy, the Romanian Ministry of Transport and Infrastructure, the Oficiul Participațiilor Statului și Privatizării în Industrie (Office of State Participation and Privatisation in Industry, Romania), and the Autoritatea pentru Valorificarea Activelor Statului (Authority for Capitalising State Assets, Romania), the latter having been subsequently renamed the Autoritatea pentru Administrarea Activelor Atatului (Authority Administrating the State Assets, Romania; 'AAAS'), as well as four public undertakings which were creditors of the applicant, namely Electrica SA, Salrom SA, CFR Marfă SA and CEC Bank SA, and two private banks which were creditors of the applicant, namely Banca Transilvania SA and Banca Comercială Română SA, the latter having subsequently become Erste Bank, entered into a memorandum of understanding with the applicant ('the Memorandum') for the financing of the resumption of the latter's production.

5 Having learned of the existence of the Memorandum in the press, the Commission opened an *ex officio* investigation on 16 January 2013.

6 On 30 January 2013, the applicant, at its own request, entered insolvency proceedings. In those proceedings, the court-appointed receiver completed, on 9 January 2015, the final list of creditors, showing the amount, priority and the status of each claim, and sent it to the competent national judicial authority.

7 On 9 March 2015, the applicant's creditors approved a reorganisation plan for the company, which provided, in essence, for the sale of the company to a new investor that would take over its assets or business ('the reorganisation plan' or 'the plan'). The approved plan also provided for the cancellation in part of the applicant's debt. On 22 April 2015, the competent national judicial

authority endorsed the reorganisation plan, approving the partial cancellation of the applicant's debt, the creation of a new entity (Oltchim SPV) and the transfer of all viable assets from the applicant to the latter. The reorganisation plan became final on 24 September 2015.

8 On 8 April 2016, the Commission informed Romania that it had decided to initiate the formal investigation procedure laid down in Article 108(2) TFEU.

9 On 6 March 2017, the applicant's creditors approved a revised reorganisation plan, which provided from that time for sale through asset bundles and not through the creation of a new entity. That revised plan was confirmed by the competent national judicial authority on 28 June 2017 and became final on 16 October 2017. Through application of that revised plan, most of the applicant's asset bundles were sold to the Chimcomplex company and a further bundle was sold to Dynamic Selling Group, while a new tender for the remaining bundles was launched in May 2018.

B. Contested decision

10 On 17 December 2018, the Commission adopted Decision (EU) 2019/1144 on State aid SA.36086 (2016/C) (ex 2016/NN) implemented by Romania for Oltchim SA (OJ 2019 L 181, p. 13) ('the contested decision').

11 In the contested decision, the Commission examined the classification as State aid of the following three measures and their compatibility with the internal market:

– the non-enforcement and further accumulation of the applicant's debts by AAAS between September 2012 and January 2013 ('Measure 1');

– the support for Oltchim's operations in the form of continued unpaid supplies by CET Govora and Salrom between September 2012 and January 2013 ('Measure 2');

– the cancellation of debt in 2015 under the reorganisation plan by AAAS, the Administrația Națională apele Române (National Administration of Romanian waters; 'ANE'), Salrom, Electrica and CET Govora ('Measure 3').

12 In section 6.1 of the contested decision (recitals 183 to 301), the Commission concluded that the measures referred to in paragraph 11 above constituted State aid, with the exception of the support of the applicant's operations by Salrom in the context of Measure 2 and the annulment of debt in 2015 under the reorganisation plan by CET Govora in the context of Measure 3. According to that decision, the measures classified as State aid had been granted in contravention of Article 108(3) TFEU and were, therefore, unlawful.

13 In section 6.2 of the contested decision (recitals 302 to 310), the Commission concluded that the State aid was incompatible with the internal market.

14 In sections 6.3 (recitals 311 to 315) and 6.4 (recitals 316 to 351) of the contested decision, the Commission held that the Romanian authorities had to recover the amounts corresponding to the aid measures at issue; however, that recovery could not be extended to the buyers of the applicant's assets, in the absence of economic continuity between it and them.

15 Article 1 of the contested decision is worded as follows:

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

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

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

(c) the debt cancellation under the reorganisation plan by AAAS, [the ANE], Salrom and Electrica SA for an aggregate amount, together with Article 1(a), of RON 1 516 598 405.'

16 Article 2 of the contested decision is worded as follows:

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

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

(b) the 2015 debt cancellation under the reorganisation plan by CET Govora.'

17 Article 3 of the contested decision is worded as follows:

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

18 In Articles 4 and 5 of the contested decision, the Commission ordered Romania to recover the State aid referred to in Article 1 of that decision from the applicant, with immediate effect, and established that the contested decision was to be implemented in full within six months of its notification. In Article 6 of the contested decision, the Commission ordered Romania to submit to it certain information and to keep it informed of the progress of the measures taken to implement the contested decision. In Article 7 of the contested decision, the Commission stated that that decision was addressed to Romania and that the Commission could publish the amounts of aid and recovery interest recovered in application of that decision.

II. Procedure and forms of order sought

19 By application lodged at the Court Registry on 14 August 2019, the applicant brought the present action.

20 On 3 December 2019, the Commission lodged its defence.

21 On 21 February 2020, the applicant lodged its reply.

22 The Commission lodged its rejoinder on 25 May 2020.

23 On 19 June 2020, the applicant submitted a reasoned request for a hearing under Article 106(2) of the Rules of Procedure of the General Court.

24 By letter from the Registry dated 19 March 2021, the Court, by way of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put to the parties written questions, to which the parties replied within the prescribed time limits.

25 At the hearing on 7 May 2021, the parties presented oral argument and answered the oral questions put by the Court.

26 The applicant claims that the Court should:

– annul Article 1 and Articles 3 to 7 of the contested decision;

– order the Commission to pay the costs.

27 The Commission contends that the Court should:

– dismiss the action as inadmissible;

– in the alternative, dismiss the action as unfounded;

– order the applicant to pay the costs.

III. Law

A. Admissibility of the action

28 The Commission raises two pleas of inadmissibility against the present action, the first relating to the action being out of time and the second to the applicant's lack of interest in bringing proceedings.

1. The claim that the action was brought out of time

29 The Commission is of the view that the action is inadmissible on the ground that it was brought out of time. According to the Commission, in essence, the period for bringing an action began to run from the time at which a representative of the applicant became aware of the contested decision. In the present case, pursuant to Article 24(1) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9), the Commission, by registered letters of 16 May 2019, sent to the applicant's court-appointed receivers, namely Rominsolv S.p.r.l. and BDO – Business Restructuring S.p.r.l., a non-confidential version of the contested decision in Romanian and in English. According to the Commission, BDO – Business Restructuring received that communication on 30 May 2019, while Rominsolv received it on 4 June 2019. Thus, the period for bringing proceedings began to run as soon as the first of them became aware of that version, in this case on 30 May 2019, and not from the date of publication of the contested decision in the Official Journal, namely 5 July 2019, with

the result that the latest date on which the present action could be brought was 12 August 2019. Since the application was lodged on 14 August 2019, the action, it is submitted, is inadmissible on the ground that it is out of time.

30 According to the Commission, the point at which the period prescribed for instituting proceedings under the sixth paragraph of Article 263 TFEU starts to run is the date of publication of the contested measure in the Official Journal only where that publication determines the entry into force or the taking effect of that measure and is provided for by the FEU Treaty. However, decisions adopted by the Commission under Article 9 of Regulation 2015/1589, such as the contested decision, take effect upon notification to the Member State concerned, which is the sole addressee of those decisions, and not upon their publication in the Official Journal. Thus, according to the Commission, the publication in the Official Journal of such a decision, pursuant to Article 32(3) of that regulation, does not constitute publication within the meaning of the sixth paragraph of Article 263 TFEU, but merely a way of becoming aware of that decision, for the purposes of the latter provision. Consequently, in State aid matters, the point at which the period for bringing proceedings starts to run is either the date of notification of the contested decision, as regards the Member State to which it is addressed, or, as regards interested parties, the day on which that decision came to their knowledge. Thus, in the Commission's view, if the date of receipt by an interested party of the communication of the contested decision provided for in Article 24(1) of Regulation 2015/1589 precedes the date of its publication in the Official Journal, it is from that earlier date that the period for bringing proceedings starts to run.

31 The Commission acknowledges that the interpretation of the sixth paragraph of Article 263 TFEU which it advocates conflicts with long-standing case-law of the Courts of the European Union. However, as it expressly confirmed at the hearing, it submits that the General Court must reconsider that case-law in the light, in particular, of the judgment of 17 May 2017, *Portugal* v *Commission* (C-339/16 P, EU:C:2017:384) and of the Opinion of Advocate General Campos Sánchez-Bordona in *Georgsmarienhütte and Others* (C-135/16, EU:C:2018:120), which, in the Commission's view, confirm its interpretation of that provision.

32 The applicant disputes the Commission's arguments.

33 Under the sixth paragraph of Article 263 TFEU, an action for annulment must be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

34 Notification within the meaning of the sixth paragraph of Article 263 TFEU takes place when the author of an act communicates that act to its addressee or addressees and thus enables them to become acquainted with it (see, to that effect, judgment of 21 February 2018, *LL* v *Parliament*, C-326/16 P, EU:C:2018:83, paragraph 48 and the case-law cited).

35 In the present case, it is common ground that, as is apparent from Article 7(1) of the contested decision, Romania was the sole addressee of the contested decision. Accordingly, since the applicant is not the addressee of that decision, the communication which it received of that decision, pursuant to Article 24(1) of Regulation 2015/1589, does not constitute notification within the meaning of the sixth paragraph of Article 263 TFEU (see, to that effect, judgment of 15 June 2005, *Olsen* v *Commission*, T-17/02, EU:T:2005:218, paragraphs 75 and 76 and the case-law cited).

36 In those circumstances, it is necessary to assess whether, in the circumstances of the present case, the starting point of the period within which the applicant was able to bring proceedings must be determined in accordance with the criterion of publication or in accordance with the criterion of the day on which the measure came to the knowledge of that party for the purposes of the sixth paragraph of Article 263 TFEU.

37 In that regard, it follows from the very wording of the sixth paragraph of Article 263 TFEU, and in particular from the words 'in the absence thereof', that the criterion of the day on which the measure came to the knowledge of the applicant is subsidiary to that of publication (see, to that effect, judgments of 10 March 1998, *Germany* v *Council*, C-122/95, EU:C:1998:94, paragraph 35, and of 11 March 2009, *TF1* v *Commission*, T-354/05, EU:T:2009:66, paragraph 33). Thus, the date of publication, if any, is, as opposed to the date on which the measure came to the knowledge of the applicant, the decisive criterion for determining the point at which the period prescribed for instituting proceedings started to run (order of 25 November 2008, *S.A.BA.R.* v *Commission*, C-501/07 P, not published, EU:C:2008:652, paragraph 22, and judgment of 11 November 2010, *Transportes Evaristo Molina* v *Commission*, C-36/09 P, not published, EU:C:2010:670, paragraph 37).

38 The Court has already had occasion to point out that, as regards measures which, according to the established practice of the institution concerned, were published in the Official Journal even though that publication was not a condition for their applicability, the criterion of the date on which a measure came to the knowledge of the applicant was not applicable and that it was the date of publication which made the period in which to institute proceedings start to run. In such circumstances, the third party concerned may legitimately expect that the decision in question will be published. That approach, which seeks to ensure legal certainty and applies to all third parties concerned, is valid in particular where the interested third party who instituted the proceedings became aware of the measure before its publication (see judgment of 11 March 2009, *TF1* v *Commission*, T-354/05, EU:T:2009:66, paragraph 34 and the case-law cited).

39 The case-law referred to in paragraph 38 above applies a fortiori to measures the publication of which in the Official Journal is required by EU law. That is the case here, since Article 32(3) of Regulation 2015/1589 requires decisions of the Commission taken pursuant to, inter alia, Article 9 of that regulation to be published in the Official Journal. In accordance with that obligation, a non-confidential version of the contested decision was published in full in the Official Journal of 5 July 2019 (OJ 2019 L 181, p. 13).

40 The Commission submits, however, that the Court must reconsider that case-law. According to the Commission, the criterion of publication within the meaning of the sixth paragraph of Article 263 TFEU refers only to the situation where publication of the contested measure in the Official Journal is a precondition for the entry into force or taking effect of that measure and is provided for in the FEU Treaty.

41 In order to examine whether the existing case-law should be reconsidered in the manner advocated by the Commission, it is necessary to take into account, first, the interpretation of the sixth paragraph of Article 263 TFEU and, second, the possible effect on that interpretation of the judgment of 17 May 2017, *Portugal* v *Commission* (C-339/16 P, EU:C:2017:384), and of the Opinion of Advocate General Campos Sánchez-Bordona in *Georgsmarienhütte and Others* (C-135/16, EU:C:2018:120), relied on by the Commission.

(a) The interpretation of the sixth paragraph of Article 263 TFEU

42 In accordance with settled case-law, the interpretation of a provision of EU law must take account not only of its wording but also of the context in which it occurs and the objectives of the rules of which it forms part (see, to that effect, judgment of 7 March 2018, *SNCF Mobilités* v *Commission*, C-127/16 P, EU:C:2018:165, paragraph 29 and the case-law cited).

43 In the first place, as regards the wording of the sixth paragraph of Article 263 TFEU, first, it should be noted that that provision uses the words 'publication of the measure' without adding anything to it and without requiring that such publication be a precondition for the entry into force or the taking effect of such a measure, or be provided for in the FEU Treaty. The wording of the sixth paragraph of Article 263 TFEU does not therefore suggest that the authors of the Treaty intended to restrict the concept of publication within the meaning of that provision solely to the situation where publication is a precondition for the entry into force or the taking effect of the contested measure and where publication is provided for by the FEU Treaty.

44 Second, the use of the expression 'in the absence thereof' shows that the moment at which an applicant becomes aware of the contested measure was consciously designated by the authors of the Treaty as a subsidiary criterion to be applied only in the absence of publication of the contested measure.

45 In the second place, those conclusions are confirmed by the contextual and teleological interpretation of the sixth paragraph of Article 263 TFEU. In that regard, it should be noted that Article 263 TFEU – which forms part of Section 5, entitled 'The Court of Justice of the European Union', of Chapter 1, entitled 'The Institutions', of Title I of Part Six of the FEU Treaty – governs, in particular, the conditions under which individuals may bring an action before the Courts of the European Union for annulment of an act of an institution, body, office or agency of the European Union.

46 In that regard, it must be borne in mind that the provisions of the FEU Treaty concerning the right of interested parties to bring an action must not be interpreted restrictively (judgment of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, at p. 107, and order of 25 May 2004, *Schmoldt and Others* v *Commission*, T-264/03, EU:T:2004:157, paragraph 59).

47 The interpretation of the sixth paragraph of Article 263 TFEU advocated by the Commission amounts, in essence, to interpreting the criterion of publication within the meaning of that provision more restrictively than its wording would suggest, by adding to it an additional condition, according to which publication must be a precondition of the entry into force or the taking effect of the contested measure and must be provided for by the FEU Treaty. Aside from the fact that such an additional condition is not apparent from the wording of the sixth paragraph of Article 263 TFEU (see paragraph 43 above), it also runs counter to the underlying objective of that provision.

48 The purpose of the sixth paragraph of Article 263 TFEU is to safeguard legal certainty by ensuring that EU measures which produce legal effects cannot be called into question indefinitely (see, to that effect, order of 5 September 2019, *Fryč* v *Commission*, C-230/19 P, not published, EU:C:2019:685, paragraph 18 and the case-law cited). The principle of legal certainty requires that periods within which proceedings must be brought and the point at which those periods start to run be defined in a sufficiently precise, clear, foreseeable and easily verifiable manner (see, to that effect, judgment of 28 January 2010, *Uniplex (UK)*, C-406/08, EU:C:2010:45,

paragraph 39 and the case-law cited). The ability to determine with certainty the date from which EU acts become definitive, in the absence of any action being brought against them, is in the interests of legal certainty, and more generally in the interests of the stability of the EU legal order.

49 It was in pursuit of the objective of legal certainty that the authors of the FEU Treaty intended to give priority to the date of publication of the measure as the point from which the period for instituting proceedings starts to run – it being possible for any interested party to determine that date with the necessary certainty and without any possible doubt – over the date on which the contested measure came to the knowledge of the applicant.

50 First, that latter date may vary depending on when each person concerned acquired individual knowledge, with the result that the starting point of the period for bringing proceedings and, accordingly, the date on which it expires cannot be determined uniformly. Second, the date on which the contested measure came to the knowledge of the applicant may, in certain cases, be difficult to determine and be the subject of dispute, since proof of awareness is eminently factual and circumstantial.

51 Legal certainty therefore requires that, for the purpose of determining the starting point of the period prescribed for instituting proceedings, preference should be given to the certain, foreseeable and easily verifiable nature of the publication of the EU measure in the Official Journal, whether or not that publication determines the entry into force or taking effect of that measure and whether it is provided for in the FEU Treaty or in secondary law.

52 It should also be borne in mind that the rules concerning time limits for bringing proceedings must be applied by the Court in such a way as to ensure not only legal certainty, but also equality of persons before the law (see judgment of 19 June 2019, *RF* v *Commission*, C-660/17 P, EU:C:2019:509, paragraph 58 and the case-law cited).

53 As regards the latter point, it cannot, admittedly, be ruled out that, in practice, as the Commission rightly points out, an interested party may receive communication of the contested measure under Article 24(1) of Regulation 2015/1589 several weeks, or even several months, before its publication in the Official Journal, with the result that that party may, in such circumstances, benefit from a period of more than two months in which to prepare its action, and thus benefit from a longer period than that available to the Member State concerned.

54 However, any potential time gap between communication of a decision to the interested parties under Article 24(1) of Regulation 2015/1589 and its publication in the Official Journal largely depends on the speed with which the Commission services prepare the version of the decision in question for publication and possible delays in the publication of that version in the Official Journal. The reason for that time gap is therefore administrative in nature, or even conjunctural, and is therefore in no way attributable to the interested party in question. Therefore, it is for the Commission to ensure compliance with the principle of equal treatment by avoiding, as far as possible, such a time gap by means of implementation of appropriate administrative measures, and not by means of a restrictive interpretation of the sixth paragraph of Article 263 TFEU, such as that which it advocates.

55 Nor can the Commission rely on the fact that, in its view, the interpretation of the sixth paragraph of Article 263 TFEU followed in the case-law referred to in paragraphs 37 and 38 above would deprive Article 24(1) of Regulation 2015/1589 of all practical effect. It is sufficient to note in that

regard that the latter provision is not intended to govern the starting point of the period prescribed for instituting proceedings and that it cannot, in any event, affect the interpretation of a provision of primary law.

56 Accordingly, it follows from a literal, contextual and teleological interpretation of the sixth paragraph of Article 263 TFEU that, contrary to what is claimed by the Commission, the concept of publication of the contested measure, as the starting point of the period prescribed for the bringing of an action for annulment by an applicant who is not the addressee of that measure, must not be interpreted as covering only the situation where publication in the Official Journal determines the entry into force or the taking effect of that measure and is provided for by the FEU Treaty.

(b) The effect of the judgment of 17 May 2017, Portugal ***v*** Commission ***(C-339/16 P) and of the Opinion of Advocate General Campos Sánchez-Bordona in*** Georgsmarienhütte and Others ***(C-135/16)***

57 It is necessary to examine whether, as the Commission claims, the judgment of 17 May 2017, *Portugal* v *Commission* (C-339/16 P, EU:C:2017:384), and the Opinion of Advocate General Campos Sánchez-Bordona in *Georgsmarienhütte and Others* (C-135/16, EU:C:2018:120) changed the case-law in the manner envisaged by the Commission.

58 First, it must be noted that the case which gave rise to the judgment of 17 May 2017, *Portugal* v *Commission* (C-339/16 P, EU:C:2017:384), concerned a situation entirely different from that at issue in the present case, given that what was at issue in that case was the relationship between the criterion of publication and the criterion of notification in respect of an applicant who was the addressee of the contested measure and to whom it had been notified.

59 It is against that background that the Court of Justice took the view that it followed from a reading of the sixth paragraph of Article 263 TFEU, in conjunction with the third subparagraph of Article 297(2) TFEU, that, so far as actions for annulment were concerned, the date to be taken into account for the purpose of determining the starting point of the period prescribed for instituting proceedings was the date of publication, when such publication, which was a precondition for the coming into force of the measure, was provided for in that Treaty, and the date of notification in the other cases referred to in the third subparagraph of Article 297(2) TFEU, amongst which was the case of decisions which specified those to whom they are addressed. According to the Court of Justice, the notification of a measure is not subsidiary to the publication of that measure in the Official Journal for the purpose of determining the starting point of the period prescribed for instituting proceedings applicable to the addressee of that measure (see, to that effect, judgments of 17 May 2017, *Portugal* v *Commission*, C-337/16 P, EU:C:2017:381, paragraphs 36, 38 and 40; of 17 May 2017, *Portugal* v *Commission*, C-338/16 P, EU:C:2017:382, paragraphs 36, 38 and 40; and of 17 May 2017, *Portugal* v *Commission*, C-339/16 P, EU:C:2017:384, paragraphs 36, 38 and 40).

60 The Court of Justice therefore referred to the third subparagraph of Article 297(2) TFEU in order to clarify the relationship between the criterion of publication and that of notification to the Member State to which the contested measure was addressed. Since the sixth paragraph of Article 263 TFEU does not indicate whether one of those criteria takes precedence over the other, the Court of Justice relied on the third subparagraph of Article 297(2) TFEU in order to define them.

61 By contrast, the present case concerns the relationship between the criterion of publication and that of the moment at which an applicant who is not the addressee of the contested measure became aware of the measure. In this situation, the sixth paragraph of Article 263 TFEU itself provides for the subsidiary nature of the criterion of the moment at which an applicant became aware of a measure in relation to the criterion of publication.

62 Moreover, there is nothing to indicate that, in the judgment of 17 May 2017, *Portugal* v *Commission* (C-339/16 P, EU:C:2017:384), the Court of Justice intended to abandon the case-law referred to in paragraph 37 above. On the contrary, in paragraph 39 of its judgment, the Court of Justice confirmed the guidance provided in paragraph 35 of the judgment of 10 March 1998, *Germany* v *Council* (C-122/95, EU:C:1998:94), according to which it is clear simply from the wording of the sixth paragraph of Article 263 TFEU that the criterion of the day on which a measure came to the knowledge of an applicant, as the starting point of the period prescribed for instituting proceedings, is subsidiary to the criteria of publication or notification of the measure.

63 The case that gave rise to the judgment of 10 March 1998, *Germany* v *Council* (C-122/95, EU:C:1998:94), raised, in essence, the same matter as that at issue in the present case concerning the starting point for the period prescribed for bringing proceedings. That case concerned the admissibility of an action brought by a Member State against a decision of the Council of the European Union concluding an international agreement that was binding on the European Union, the content of which had been known to that Member State since the very day of its adoption, as a result of its participation in that adoption within the Council. That decision had subsequently been published in the Official Journal, its entry into force not being conditional on that publication. Before the Court of Justice, the Council maintained, in essence, on the same grounds as those put forward by the Commission in the present case, that the action was inadmissible, arguing that the date of publication in the Official Journal could be regarded as the starting point of the period prescribed for instituting proceedings only for measures in respect of which that publication was a precondition of their applicability.

64 However, the Court of Justice did not follow the interpretation advocated by the Council, since it is apparent, implicitly but necessarily, from paragraphs 34 to 40 of the judgment of 10 March 1998, *Germany* v *Council* (C-122/95, EU:C:1998:94), that, where the contested measure does not indicate to whom it is addressed or, if it does indicate to whom it is addressed, where the applicant is not the addressee of that measure, the publication in the Official Journal of that measure constitutes the starting point of the period prescribed for instituting proceedings, even where that publication is not a precondition for the entry into force or the taking effect of the measure, and even if the applicant has become aware of the measure, before the date of publication, by other equally reliable means.

65 Second, as regards the Opinion of Advocate General Campos Sánchez-Bordona in *Georgsmarienhütte and Others* (C-135/16, EU:C:2018:120, point 63), it is sufficient to note that, in its judgment of 25 July 2018, *Georgsmarienhütte and Others* (C-135/16, EU:C:2018:582), the Court of Justice did not endorse the statement made in point 63 of that Opinion.

66 Third, the fact, relied on by the Commission, that the case-law cited in paragraphs 37 and 38 above precedes the entry into force of Regulation 2015/1589 is irrelevant, given that the sixth paragraph of Article 263 TFEU has remained unchanged and that amendments made to secondary EU law clearly cannot alter the interpretation of the provisions of the Treaty. Moreover, it must be stated that Article 24(1) of Regulation 2015/1589, on which the Commission bases part of its argument, and Article 32(3) of that regulation, have remained, in

essence, unchanged in relation to the analogous provisions of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1).

(c) Conclusions

67 In the light of all the foregoing, it must be held that the starting point for the period prescribed for bringing an action for annulment against a Commission decision taken under Article 9 of Regulation 2015/1589, in relation to an applicant who is not the addressee of that decision, is the date of publication of that decision in the Official Journal.

68 Since the contested decision was published in the Official Journal on 5 July 2019 and the application was lodged on 14 August 2019, it must be held that the present action was brought within the period of two months laid down in the sixth paragraph of Article 263 TFEU, extended, in accordance with Articles 59 and 60 of the Rules of Procedure, by 14 and 10 days, respectively.

69 Accordingly, the first plea of inadmissibility raised by the Commission, alleging that the action was brought out of time, must be rejected.

2. The applicant's alleged lack of interest in bringing proceedings

70 The Commission contends that the applicant has no interest in bringing proceedings on account of the fact, first, that it is likely to cease to exist before the end of the present proceedings due to its imminent final liquidation and, second, that the present action serves only the interests of certain privileged private creditors of the applicant, and not the interests of the applicant itself.

71 The applicant disputes the Commission's arguments.

72 According to settled case-law, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in having the contested act annulled. Such an interest requires that the annulment of that measure must be capable, in itself, of having legal consequences and that the action may therefore, through its outcome, procure an advantage to the party which brought it (see judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 55 and the case-law cited). An applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible, and continue until the final decision, failing which there will be no need to adjudicate (see judgment of 20 June 2013, *Cañas* v *Commission*, C-269/12 P, not published, EU:C:2013:415, paragraph 15 and the case-law cited).

73 First, in the present case, it is not disputed that, at the time when the present action was brought, the applicant existed as a legal person. The Commission's argument that the applicant might cease to exist before the end of the present proceedings is purely hypothetical, since there is nothing in the file that makes it possible to establish with certainty whether and when the applicant might cease to exist.

74 Second, it should be borne in mind that one of the objectives of any insolvency proceedings is to maximise the assets of the insolvent undertaking, including by bringing an action challenging the debts that reduce those assets. If the Court were to annul the contested decision, and in particular

the recovery of the aid at issue, that annulment would be likely to have an impact on the applicant's remaining assets. It follows that, in the present proceedings, the applicant is acting in its own interest.

75 Moreover, the fact that that interest may coincide with that of other persons does not preclude the admissibility of the action (see, to that effect, judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 84).

76 Accordingly, the second plea of inadmissibility raised by the Commission, alleging that the applicant has no interest in bringing proceedings, must be rejected.

B. Substance

77 The applicant raises nine pleas in law concerning, in essence, the classification of each of the three measures mentioned in paragraph 11 above as State aid. In particular, as regards Measures 1 and 2, it submits that the contested decision is vitiated by a manifest error of assessment as regards the existence of an economic advantage and by a failure to state reasons or insufficient reasoning. As regards Measure 3, the applicant raises three pleas in law alleging manifest errors of assessment as regards (i) the existence of a transfer of State resources concerning Electrica, (ii) the imputability of that measure to the State, and (iii) the existence of an economic advantage, respectively, as well as a plea alleging infringement of the obligation to state reasons and, in addition, a plea concerning the calculation of the amount of aid to be recovered.

78 It should be noted from the outset that, in sections 6.1.1 and 6.1.2.1 to 6.1.2.3 of the contested decision, the Commission examined separately each of the three measures listed in paragraph 11 above and, in recital 298 of that decision, classified each of them separately as State aid. Next, in section 6.1.2.4 of the contested decision, the Commission found that Measures 1, 2 and 3 were intrinsically linked and pursued the same objective and concluded, in recital 299 of that decision, that 'Measures 1, 2 and 3 taken together constitute aid'. Lastly, the Commission, while listing each of those three measures in Article 1(a) to (c) of the contested decision, concluded in that article that they constituted State aid 'together and separately'.

79 It is therefore necessary first to examine whether Measures 1, 2 and 3 constitute three separate interventions or one single intervention.

1. Whether Measures 1, 2 and 3 constitute three separate interventions or one single intervention

80 Without putting forward a separate plea concerning the classification of Measures 1, 2 and 3 as separate interventions or as a single intervention, the applicant submits, in essence, that the existence of State aid in the present case could be established only individually, measure by measure and creditor by creditor.

81 Thus, in its application, the applicant states, with reference to section 6.1.2.4 of the contested decision, that the Commission 'had to demonstrate that concluding the Memorandum was imputable to the State with respect to each of the public creditors individually' and that 'the measures taken by the individual public creditors … had to be assessed individually'. In addition,

in the part of the application entitled 'State imputability has to be considered individually for all public creditors concerned', it claims, in essence, that 'the Commission had to demonstrate imputability for each individual public undertaking'.

82 In addition, according to the applicant, when the Commission applied the private creditor test in order to determine whether there was an economic advantage within the meaning of Article 107(1) TFEU, it should have carried out, 'for each measure', an 'individual assessment of each of the public undertakings concerned'.

83 In its reply, the applicant also claims that 'imputability to the State (as well as all other constituent elements of the notion of State aid such as economic advantage) has to be assessed for each measure of each public creditor individually'.

84 In its reply to the General Court's measure of organisation of procedure, the applicant added, in essence, that, given the subject matter, nature, timing, purpose and context of Measures 1, 2 and 3, as well as the different identity of each of the grantors of those measures and its different situation at the time when those measures were adopted, they constituted three separate interventions, and not a single intervention, within the meaning of the judgment of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others* (C-399/10 P and C-401/10 P, EU:C:2013:175, paragraphs 103 and 104).

85 In its reply to the Court's measure of organisation of procedure, the Commission submits, in essence, that, in its application, the applicant did not dispute the existence of an economic advantage resulting from the interconnected nature of the measures at issue and that, therefore, any new plea raised by the applicant in that regard, even in response to that measure of organisation of procedure, is out of time and inadmissible. As regards the substance, the Commission reiterates certain findings in section 6.1.2.4 of the contested decision and considers that it demonstrated in that decision that the measures at issue were intrinsically linked and that they pursued the same objective, namely to support and maintain the applicant on the market and to protect its employees and that, therefore, together, they had conferred an economic advantage on the applicant and constituted State aid.

(a) The admissibility of the arguments put forward by the applicant

86 The Commission is of the view, in essence, that the arguments put forward by the applicant in its response to the Court's measure of organisation of procedure concerning the classification of Measures 1, 2 and 3 as a single intervention or as separate interventions constitute a new plea which is inadmissible.

87 It must be borne in mind that, according to Article 84(1) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or fact which have come to light in the course of the procedure. However, a plea or an argument which may be regarded as amplifying a plea put forward previously, whether directly or by implication, in the original application and which is closely connected therewith must be declared admissible (see judgment of 11 March 2020, *Commission* v *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo*, C-56/18 P, EU:C:2020:192, paragraph 66 and the case-law cited).

88 In the present case, as is apparent from paragraphs 81 and 82 above, all the pleas and arguments put forward by the applicant in its application are based on the premiss, first, that each of Measures 1, 2 and 3 must be assessed separately and, second, that those assessments must relate

individually to each creditor concerned by those measures. In addition, the applicant states, on several occasions in its application and in its reply, that the Commission was required to prove that each of those measures, taken individually, and, accordingly, the actions of each creditor in the context of each of those measures, were imputable to the State and conferred an advantage on the applicant.

89 The mere fact that the applicant did not present that line of argument as a separate plea in support of its action is not decisive. According to settled case-law, the application must be interpreted with a view to giving it practical effect by carrying out an overall assessment of the application (see judgment of 29 April 2020, *Intercontact Budapest* v *CdT*, T-640/18, not published, EU:T:2020:167, paragraph 25 and the case-law cited).

90 In those circumstances, the arguments put forward by the applicant in its response to the Court's measure of organisation of procedure, summarised in paragraph 84 above, are in addition to, and further develop, the line of argument already set out in its application and in its reply, with the result that they constitute an amplification of that line of argument and have a close link to it. Therefore, those arguments cannot be regarded as constituting a new plea within the meaning of Article 84(1) of the Rules of Procedure.

91 Moreover, the question as to whether Measures 1, 2 and 3 constitute three distinct interventions or just one single intervention is a necessary prerequisite for judicial review of the legality of the contested decision. In order to ascertain whether the Commission has succeeded in demonstrating to the requisite legal standard that the measures at issue were imputable to the State and conferred a selective economic advantage, it is necessary first to establish whether those criteria must be fulfilled for each measure taken separately or for all the measures, perceived as a single intervention.

92 It follows that the plea of inadmissibility raised by the Commission must be rejected.

(b) The classification of Measures 1, 2 and 3 as three separate interventions or as one single intervention

93 In the contested decision, the Commission found that Measures 1, 2 and 3 were intrinsically linked and were part of the same main objective, as set out in the Memorandum and the public statements of the Romanian authorities ('the public statements'), namely to support and maintain the applicant in the market and to protect the jobs of its employees, given the same identity of the grantors of the measures, the chronology of those measures, their purpose and the applicant's situation at the time when the decision to take each of the measures was made. The Commission concluded that Measure 3 could not be separated from Measures 1 and 2 and that all those measures constituted a series of tied interventions imputable to the State which gave the applicant an advantage, as put forward in the Memorandum (section 6.1.2.4 of the contested decision).

94 According to the case-law, it cannot be excluded that several consecutive measures of State intervention must, for the purposes of Article 107(1) TFEU, be regarded as a single intervention. That could be the case in particular where consecutive interventions, especially having regard to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions, are so closely linked to each other that they are inseparable from one another

(judgment of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraphs 103 and 104).

95 To that end, the Commission must base its decision on all the relevant matters of fact and law, such as, in addition to the criteria referred to in paragraph 94 above, the subject matter, nature and context of the interventions in question (see, to that effect, judgments of 13 September 2010, *Greece and Others* v *Commission*, T-415/05, T-416/05 and T-423/05, EU:T:2010:386, paragraphs 176 and 178, and of 15 January 2015, *France* v *Commission*, T-1/12, EU:T:2015:17, paragraphs 45 to 48), the identity of the grantors or beneficiaries thereof (see, to that effect, judgment of 15 January 2015, *France* v *Commission*, T-1/12, EU:T:2015:17, paragraphs 38, 47 and 48), and the question whether the various interventions at issue were planned or foreseeable at the time of the first intervention (see, to that effect, judgment of 12 March 2020, *Valencia Club de Fútbol* v *Commission*, T-732/16, under appeal, EU:T:2020:98, paragraph 169).

96 It is therefore necessary to examine whether, in the light of the criteria referred to in paragraphs 94 and 95 above, the Commission was entitled to form the view, without making an error of assessment, that Measures 1, 2 and 3 constituted a single State intervention.

(1) The subject matter and nature of Measures 1, 2 and 3

97 In the contested decision, the Commission did not examine, at least explicitly, the differences or similarities of the subject matter and nature of Measures 1, 2 and 3.

98 The applicant claims, in essence, that the subject matter and nature of the three measures at issue are different. Accordingly, it argues, Measure 1 was adopted by AAAS, acting as a 'classic' creditor, whereas Measure 2 was characterised by the existence of a situation of technological interdependence between its grantor, CET Govora, and the beneficiary, namely the applicant. As for Measure 3, it appears to be the culmination of the insolvency proceedings opened against the latter.

99 It should be noted, as the applicant submits, that the subject matter and nature of Measures 1, 2 and 3 are not the same. Measure 1 consists in the non-execution and further accumulation of debts by AAAS. This is, in essence, passive conduct on the part of AAAS, by which it refrained, for a relatively short period of four months, from enforcing its claims against the applicant. Furthermore, the accumulation of claims by AAAS during that period did not consist of new claims contracted during that period, but only in the accumulation of interest accrued on pre-existing claims. Measure 2 consists, for its part, in the continued unpaid supply of raw materials and the accumulation of debts without appropriate measures to protect CET Govora's claims. Measure 3 consists of active conduct on the part of AAAS, the ANE, Salrom and Electrica, by which they cancelled part of their claims under the reorganisation plan.

100 Thus, each of those measures is characterised by a specific subject matter and nature. Furthermore, as the applicant points out, and as is apparent in particular from recitals 246, 248 and 251 of the contested decision, Measure 2 was adopted by CET Govora in a very specific context characterised by the technological interdependence between CET Govora and the applicant, in so far as, first, the applicant was an important purchaser of, inter alia, the industrial steam supplied by CET Govora, and, second, CET Govora's activities depended on the applicant's

supply of industrial water. As for Measure 3, it is, in terms of its subject matter and its nature, also different from Measures 1 and 2, in that it consists of the partial annulment of the claims of certain creditors in the context of a reorganisation plan, which is not the case with Measures 1 and 2.

(2) The grantors of Measures 1, 2 and 3

101 In recital 286 of the contested decision, the Commission noted the 'same identity of the grantors of the measures'.

102 The applicant claims, in essence, that the grantors of Measures 1, 2 and 3 were different and that they were in different situations when they adopted those measures.

103 It should be noted, as the applicant submits, that AAAS is the grantor of the aid as regards Measure 1, CET Govora is the grantor of the aid as regards Measure 2 and AAAS, the ANE, Salrom and Electrica are the grantors of the aid as regards Measure 3. The grantors of the aid therefore differ, with the exception of AAAS, which is a grantor in respect of both Measure 1 and Measure 3.

104 Moreover, those different grantors are entities which differ in their legal nature. While AAAS is part of the public administration, the ANE, Salrom and CET Govora are public undertakings and Electrica is an undertaking the majority of the capital of which has been held by private persons since July 2014.

(3) The chronology of Measures 1, 2 and 3

105 In recital 286 of the contested decision, the Commission justified its conclusion that the three measures at issue constituted one single State intervention by, inter alia, 'the chronology of the measures in question', without further elaborating on the assessment of that criterion.

106 The applicant claims that there was a gap of almost three years between the adoption of Measures 1 and 2, on the one hand, and Measure 3, on the other.

107 In that regard, it should be noted that Measures 1 and 2 relate to the same period, namely that from September 2012 to January 2013. By contrast, the partial annulment of the applicant's debts, which is the subject matter of Measure 3, took place in 2015 (see paragraph 7 above). Thus, while Measures 1 and 2 were concurrent, Measure 3 was not taken until more than two years later.

108 Furthermore, there is nothing in the contested decision or in the file before the Court to suggest that Measure 3 was envisaged or foreseeable at the time of the adoption of Measures 1 and 2, that criterion being among the relevant factors which the Commission must take into account in accordance with the case-law cited in paragraph 95 above.

(4) The purpose of Measures 1, 2 and 3

109 In recitals 285 and 286 of the contested decision, the Commission stated that Measures 1, 2 and 3 had the same main objective, namely to support and maintain the applicant in the market and to protect the jobs of its employees.

110 The applicant claims that the purposes of the measures at issue were not the same. According to the applicant, by Measure 1, AAAS's objective was to 'gain time' in order to assess its situation. By Measure 2, CET Govora sought to protect its own economic interests, in view of its technological interdependence vis-à-vis the applicant. By Measure 3, the grantors' objective was to enforce their claims, while annulling some of them, in order to maximise the recovery of those claims in the context of the insolvency proceedings.

111 As regards Measure 1, it should be noted that, in the context of its assessment, the Commission essentially criticises AAAS for a certain amount of passivity during a relatively short period of four months, during which the latter did not enforce its claims against the applicant. According to the applicant, Romanian law nevertheless prevented AAAS from carrying out such enforcement. In those circumstances, it appears difficult to attribute a clear objective to that measure.

112 As regards Measure 2, it is sufficient to note that it is not disputed that this measure was intended, inter alia, to protect CET Govora's own economic interests and even to ensure its survival on the market, in a context characterised by the technological interdependence between CET Govora and the applicant, as has been noted in paragraph 100 above.

113 As regards the objective of Measure 3, it should be borne in mind that this measure was taken in the context of insolvency proceedings in the course of which both public creditors and private creditors voted in favour of a reorganisation plan entailing the partial cancellation of those creditors' claims against the applicant. By means of that cancellation, those creditors pursued the dual objective of restructuring the applicant and recovering their remaining claims or a part of those claims. Accordingly, the purpose of Measure 3 was not the same as the purpose of Measures 1 and 2.

(5) The applicant's situation at the time when Measures 1, 2 and 3 were adopted

114 In recital 286 of the contested decision, the Commission justified its conclusion that the three measures at issue constituted a single intervention by reference to 'the undertaking's (financial and risk) situation at the time when the decision to take each of the measures was made, that is Oltchim being close to insolvency'.

115 The applicant points out, however, that its situation at the time when Measure 3 was adopted was different from its situation at the time when Measures 1 and 2 were adopted, since Measure 3 was adopted in the context of the insolvency proceedings opened in respect of the applicant.

116 First, the Court notes that no insolvency proceedings were opened in respect of the applicant during the period to which Measures 1 and 2 relate. By contrast, Measure 3 was taken in the context of the insolvency proceedings which had been opened in respect of the applicant on 30 January 2013. The applicant's legal situation when Measure 3 was adopted was therefore different from that at the time when Measures 1 and 2 were implemented.

117 Second, it is clear from recitals 77 and 78 of the contested decision that the applicant's financial situation had also evolved between the period covered by Measures 1 and 2 and the time when Measure 3 was adopted. During the insolvency proceedings, before the reorganisation plan was approved, the applicant implemented measures to reduce its costs, deciding, inter alia, to dismiss employees, to change an electrolyser in the main production facilities and to restart its oxo-alcohols plant. Those measures enabled the applicant to improve its economic and financial

results, its turnover for 2015 having increased by 31% in comparison with 2014 and by 59% in comparison with 2013, while its earnings before interest, taxes, depreciation and amortisation (EBITDA) also improved.

(6) The context of Measures 1, 2 and 3

118 In recitals 285, 288 and 290 of the contested decision, the Commission took the view that the three measures at issue were intrinsically linked and inseparable also because of their context, which was characterised in particular by the existence of the Memorandum and a number of public statements made by the Romanian authorities.

119 The applicant submits that neither the Memorandum nor the public statements support the view that the measures at issue were intrinsically linked and inseparable, given, in essence, that there is no link between the Memorandum and those measures. The applicant states that the Memorandum merely established a framework for cooperation between its main creditors and shareholders, both public and private, and that it contained no obligation on the part of the State or other public bodies to grant it State aid. Nor does that memorandum contain contractual obligations to write-off claims. As for the public statements, they do not demonstrate that the State entered into binding commitments in regard to the applicant.

(i) The Memorandum

120 First, it should be noted from the outset that the Commission did not classify the Memorandum as a measure constituting State aid. It is therefore only one aspect of the context of the measures at issue.

121 Second, it should be noted that the Memorandum was signed not only by representatives of the administration but also by public undertakings and by two private banks, which were among the applicant's main creditors. The Commission does not claim that those creditors were coerced by the State to conclude that memorandum. The fact that both public and private creditors decided to conclude the Memorandum suggests that at least some of its signatories may have been guided by the safeguarding of their own economic interests when concluding it and not by an alleged objective of supporting and maintaining the applicant on the market.

122 Third, it should be noted that certain grantors of the alleged aid measures, namely CET Govora, in the context of Measure 2, and the ANE, in the context of Measure 3, are not parties to that memorandum.

123 Fourth, as regards the content of the Memorandum, it provided, in essence, that its signatories would undertake to cooperate with a view to developing a strategy ensuring the long-term viability of the applicant and enabling it to achieve a sustainable level of profitability, solvency and liquidity, with the aim, in particular, of protecting its creditors and ensuring its reorganisation. The Memorandum contained commitments on the part of the signatory banks, the State and the applicant to ensure the implementation of such a strategy.

124 However, none of the Memorandum's clauses mentions Measures 1, 2 or 3, either explicitly or implicitly. Specifically, none of its clauses requires AAAS to refrain from enforcing its claims against the applicant or not to take other action with regard to it in order to protect its claims, that being the subject matter of Measure 1. Equally, none of its clauses obliges AAAS, the ANE,

Salrom or Electrica to accept any cancellation of their claims, or to approve any reorganisation plan, which is the subject matter of Measure 3. As regards Measure 2, it is sufficient to note that its sole grantor, namely CET Govora, was not a party to that Memorandum.

125 Moreover, Clause 8.1 of the Memorandum provided as follows:

'No provision of this Agreement shall be construed as a waiver, restriction, limitation or suspension of any rights, prerogatives or interests of any Party, arising from or in connection with any contracts to which they are a party, or which can arise from any applicable laws. For the avoidance of any doubt, the Parties agree that this Agreement shall not be construed as a moratorium for the suspension of payments or of the restructuring or as covering any obligation of the Banks, Electrica or [AAAS] to agree on the rescheduling of debts or to agree on any other restructuring measure or to offer any financing, implement any measures for extinguishing the debts, suspension of payments or other similar measures in connection with Oltchim.'

126 Thus, that clause in the Memorandum expressly established that, 'for the avoidance of any doubt', it did not require its signatories either to withdraw their claims against the applicant or to accept any reorganisation plan or, more generally, to waive any contractual right or other right in respect of the applicant.

127 Fifth, it is apparent from the findings made by the Commission in the contested decision that, in actual fact, the alleged impact of the Memorandum was different as regards each of the three measures at issue and each grantor of the alleged aid. The following examples attest to this. Regarding Measure 1, as is apparent from recital 231 of the contested decision, the fact that Electrica signed the Memorandum did not prevent it from adopting measures to recover its dues in November 2012, unlike AAAS, which had also signed the Memorandum. Regarding Measure 2, as the applicant states, and as is apparent from recitals 255 to 257 and 263 of the contested decision, the fact that Salrom signed the Memorandum also did not prevent it from conducting itself like a private creditor, which led the Commission to conclude that Salrom had not granted State aid to the applicant in the context of Measure 2. As regards Measure 3, it is sufficient to note that, as is apparent from footnote 84 to the contested decision, CFR Marfă, a public undertaking that was a party to the Memorandum, voted against the reorganisation plan.

128 Therefore, in view of the content of the Memorandum and the conduct of its various signatories under Measures 1, 2 and 3, it appears, first, that the Memorandum had only a limited impact on the scope of those measures and, second, that the impact which it may have had on each of those measures was not the same.

129 That conclusion is not called into question by the fact, emphasised by the Commission, that the Memorandum was signed by representatives of three ministries and approved by the Prime Minister. As the applicant submits, it was, at the material time, predominantly owned by the State and was, itself, a party to the Memorandum, with the result that the fact that the Memorandum was signed by high-level public officials appears to stem from the legal framework governing the organisation and functioning of its main State shareholders. In any event, that fact in no way alters the content of the Memorandum and also did not prevent its various signatories from acting differently and in a non-coordinated manner in the context of each of the measures at issue, as pointed out in paragraph 127 above.

(ii) The public statements

130 In recital 285 of the contested decision, the Commission also referred, by reference to other recitals of that decision, to several public statements made by the Romanian authorities in order to demonstrate that the three measures at issue formed part of an overall strategy aimed at keeping the applicant in operation and preventing its liquidation.

131 It should be noted from the outset that the Commission did not classify the public statements as measures constituting State aid.

132 Accordingly, it is necessary to examine whether the public statements, as part of the context, are capable of demonstrating that Measures 1, 2 and 3 were so closely linked that it was impossible to separate them, with the result that they must be regarded as a single instance of State aid.

133 The Commission made reference to the following statements:

– A statement by the Romanian Prime Minister in a press article of 1 October 2012, in which he stated, inter alia, that he had to 'explain today the reserve plan for resuming activities, saving jobs and preparing a new privatisation procedure, under very different, considerably improved conditions', that 'Oltchim's restarting plan' would shortly be presented, and that the authorities would formally open discussions with all of its main creditors for that purpose (recital 27 of the contested decision). That statement announces the start of the discussions which led to the adoption of the Memorandum approximately one and a half months later. It therefore has no content independent of the Memorandum itself;

– A statement made by the State Secretary of the Ministry of Economy on 17 October 2012, in which he announced the partial reopening of the applicant and the Government's intention to grant it rescue aid (recital 28 of the contested decision). However, that 'rescue aid' was not granted and is not, in any event, covered by the contested decision;

– A statement made by the Minister for the Economy on 15 November 2012 in which he declared, in essence, that the idea of insolvency could be dismissed if a deal with Oltchim's main creditors was concluded and announced the adoption of the Memorandum, which was signed eight days later, the purpose of which was, according to that statement, 'to be able to restart, rescue, restructure Oltchim in a controlled manner, with the creditors' agreement' (recital 30 of the contested decision). The impact of that statement is limited, since, contrary to what that minister had just announced, insolvency proceedings were opened approximately two months later. Moreover, that statement merely announces the signature of the Memorandum and therefore has no independent content in relation to it;

– Statements made by the leaders of the applicant's trade union (recital 204(b) and footnote 72 to the contested decision). However, since these are not statements made by representatives of the State, they are irrelevant;

– A press article of 26 January 2013, in which it is stated that the former Minister for the Economy had discussed the consequences of the failed privatisation of the applicant, stating, inter alia, that 'entry into insolvency of Oltchim [would be] a chance [for] restructuring and [increasing the value] of the viable parts', (recital 204(c) of the contested decision). That statement does not contain any commitment on the part of the State;

– A press article of 29 March 2013, according to which, in essence, the Romanian Prime Minister stated that the Commission would not approve the grant of State aid to the applicant, that, for that reason, the applicant should obtain financing from banks and traders, and that the Government had an interest that 'jobs are preserved' (recital 204(d) of the contested decision). That statement indicates, contrary to what the Commission suggests, that the Member State concerned had no intention of granting State aid to the applicant. As for the fact that the Government 'had an interest' that jobs should be preserved, the Court sees no need to criticise it for that, and no evidence that the State was willing to grant aid to the applicant;

– A statement by the Minister for the Economy dating from March 2013, in which he mentioned that his preference was to find a strategic investor in the applicant's capital, which was more important than the sale price (recital 204(e) of the contested decision). That statement does not include any commitment on the part of the Romanian authorities;

– A statement by the Minister for the Economy of 30 May 2013, in which he indicated that 'beyond its brand, Oltchim [held] an important number of patents that [were] worth millions of euros' and that 'the destruction of this company was equivalent to the destruction of a treasury of intellectual property' (recital 204(f) of the contested decision). That declaration does not, however, relate to the measures at issue;

– A statement made by the Minister for the Economy on 9 July 2013, in which he stated, inter alia, that 'solutions to save the [applicant could] be found', that the applicant's problem was 'one of pride and national dignity' and that it '[was] worth saving it' (recital 204(g) of the contested decision). Although, admittedly, that statement suggests that the Romanian authorities wished to 'save' the applicant, it is merely a political declaration intended to reassure employees and, more generally, the public. Moreover, that statement does not contain any clear, specific, concrete and firm commitment on the part of the Romanian authorities to secure the adoption of the reorganisation plan, the scope of which was not yet known at the time of that declaration;

– A statement from the Minister for the Economy dating from September 2013, in which he announced, in essence, that the applicant's creditors would shortly approve 'financing', that it would obtain loans from private banks and that 'Oltchim No 2' would 'at the end of September' no longer have any debts (recital 204(h) of the contested decision). That statement appears to refer to private financing and does not contain any clear, precise, concrete and firm commitment on the part of the State. Furthermore, the fact that that minister decided 'against the liquidation of large SOEs [(public undertakings)]' is also merely a political declaration which does not involve any clear commitment on the part of the State;

– A statement made by the Romanian Prime Minister on 19 February 2014, in which he urged the new Minister for the Economy to take over 'the Oltchim problem', adding that he 'would not want the situation to explode … out of lack of political capacity' (recital 204(i) of the contested decision). This statement is very general;

– Statements made by the Minister for the Economy dating from 2014, according to which the applicant '[was] a company of national and strategic interest', 'the investors [were interested] in taking over Arpechim refinery as well' and 'Oltchim [would] never be closed' (recital 204(j) of the contested decision). Although that last assertion might indeed suggest that the Romanian authorities wished to prevent the applicant's closure, the fact remains that that statement is not sufficiently specific and concrete.

134 Moreover, the mere fact that public and private creditors take into consideration the public statements of officials in order to determine their conduct on the market is not sufficient to show that there were such close links between Measures 1, 2 and 3 that it was impossible to separate them.

135 Furthermore, with regard more specifically to Measure 3, which was adopted on 9 March 2015, those various public declarations predate it by approximately one or two years, the date of the declaration closest to the date of that measure being 3 June 2014, that is to say, approximately nine months before that measure was adopted. Accordingly, although those statements may be taken into account as part of the overall context, it has not been established, in view of the time that elapsed between those statements and the date of the adoption of Measure 3, that they had a sufficiently close link to that measure.

136 Therefore, although the Commission was entitled to take account of those statements, as part of the overall context of Measures 1, 2 and 3, their content does not indicate that there were such close links between Measures 1, 2 and 3 that it was impossible to separate them, with the result that they had to be regarded as a single instance of State aid.

(7) Conclusion

137 Taking into consideration all the criteria set out in the case-law cited in paragraphs 94 and 95 above, in particular the subject matter and nature of Measures 1, 2 and 3, the different identity of the grantors of those measures, the chronology of those measures, the fact that they were not envisaged or foreseeable at the time of the first intervention, their purpose, the applicant's situation at the time when each of them was implemented and their context, it must be concluded that, contrary to what the Commission found in section 6.1.2.4 of the contested decision, the measures at issue are not so closely linked that it would have been impossible to separate them. Consequently, Measures 1, 2 and 3 must be regarded as being three distinct interventions for the purposes of the application of Article 107(1) TFEU.

2. Classification of the measures at issue as State aid

138 It should be noted that, according to settled case-law, classification of a measure as 'State aid', for the purposes of Article 107(1) TFEU, requires all of the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (see judgment of 21 October 2020, *Eco TLC*, C-556/19, EU:C:2020:844, paragraph 18 and the case-law cited).

139 In its review of State aid, the Commission must, in principle, provide proof in the contested decision of the existence of State aid. It is for the Commission to show that the requirements for a finding of State aid, within the meaning of Article 107(1) TFEU, are met (see judgment of 24 September 2019, *Netherlands and Others* v *Commission*, T-760/15 and T-636/16, EU:T:2019:669, paragraphs 194 and 196 and the case-law cited).

140 In the present case, the applicant does not dispute that Measures 1 and 2 involve State resources and are imputable to the State. By contrast, it disputes that that condition is satisfied in relation to Measure 3. Moreover, the applicant is of the view that none of the measures at issue confers on it an advantage.

(a) The existence of a transfer of State resources in the context of Measure 3 and the imputability of that measure to the State

141 In section 6.1.1.3 of the contested decision, the Commission stated that the cancellation by AAAS, Electrica, Salrom, CET Govora and the ANE of part of their respective claims under the reorganisation plan involved a transfer of State resources and was imputable to the State.

142 The applicant claims, in essence, first, that the partial cancellation of Electrica's claims under Measure 3 did not involve a transfer of State resources and, second, that Measure 3, taken as a whole, was not imputable to the State.

(1) Whether the partial cancellation of Electrica's claims under the reorganisation plan involved a transfer of State resources

143 The applicant observes that in July 2014 Electrica, which had until then been a public undertaking, was privatised, with the result that from that date it was no longer a public undertaking under the State's dominant influence. Accordingly, the resources of Electrica were not State resources, and consequently the cancellation of some of that undertaking's claims in respect of the applicant did not involve any transfer of State resources.

144 The Commission submits, in essence, that the question as to whether Electrica was a public undertaking is not relevant in the present case, since Romania played an essential role in the implementation of Measure 3 and in choosing its methods of financing.

145 In the contested decision, the Commission stated that, from July 2014, the majority of the shares in Electrica were privately owned, with the State holding only 48.78% of its capital.

146 The contested decision does not contain any other reasoning relating to the situation of Electrica, as it stood following its privatisation, which could explain why the Commission considered that the partial cancellation of its claims under Measure 3 involved a transfer of State resources.

147 According to the case-law, in order for it to be possible to classify advantages as 'State aid' within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources (see judgment of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 20 and the case-law cited). The concept of intervention 'through State resources', within the meaning of that provision, is intended to cover, in addition to advantages granted directly by the State, those granted through a public or private body appointed or established by that State to administer the aid (see judgment of 9 November 2017, *Viasat Broadcasting UK* v *TV2/Danmark*, C-657/15 P, EU:C:2017:837, paragraph 36 and the case-law cited). Accordingly, Article 107(1) TFEU covers all the financial means by which the public authorities may support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Even if sums corresponding to the aid measure in question are not permanently held by the State, the fact that they constantly remain under public control, and are therefore available to the competent national authorities, is sufficient for them to be categorised as 'State resources' (see judgment of 15 May 2019, *Achema and Others*, C-706/17, EU:C:2019:407, paragraph 53 and the case-law cited; see also, to that effect, judgments of 17 July 2008, *Essent Netwerk Noord and Others*, C-206/06, EU:C:2008:413, paragraph 70 and the case-law cited, and of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 25 and the case-law cited).

148 In the present case, the Commission does not dispute the applicant's assertion that, as from July 2014, Romania no longer controlled the majority of the voting rights in Electrica, could not appoint the majority of the members of that undertaking's administrative, managerial or supervisory bodies and did not have any special rights under that company's articles of association enabling it to control the decisions of that undertaking.

149 There is nothing in the file before the Court to support the conclusion that Electrica's resources used in connection with Measure 3 were constantly under public control, and therefore available to the competent national authorities, within the meaning of the case-law cited in paragraph 147 above.

150 The mere fact that an undertaking such as Electrica signed the Memorandum in 2012 (recital 203 of the contested decision) does not mean that its resources were under the control of the State. In any event, when Measure 3 was implemented in 2015, the State no longer controlled Electrica's resources.

151 Similarly, the fact that a private undertaking might take into consideration public statements made by the authorities (recital 205 of the contested decision) when deciding on its market conduct in no way means, in the absence of any other concrete evidence to that effect, that its resources are under the control of the State or at the State's disposal.

152 Moreover, the fact, emphasised by the Commission, that the claims of Electrica in question in the context of Measure 3 were contracted before its privatisation is irrelevant, since, first, the debts and claims in existence before the privatisation of an undertaking are usually reflected the sale price of that undertaking and, second, Electrica's decision to approve the reorganisation plan was taken in 2015, that is to say, after its privatisation.

153 Likewise, the fact that, after Electrica's privatisation, the State held 48.78% of its capital and that, therefore, according to the Commission, it retained a 'high degree of influence' over Electrica's business policy does not mean, in the absence of other specific evidence to that effect, that its resources were constantly under the control of the State or at its disposal within the meaning of the case-law cited in paragraph 147 above. On the contrary, the analysis set out in paragraphs 148 to 152 above suggests that, despite its admittedly significant shareholding, which, however, became a minority share in Electrica, the State had no mechanism enabling it to control the way in which that undertaking managed its resources in relation to Measure 3.

154 Lastly, the Commission cannot rely on the judgment of 27 September 2012, *France* v *Commission* (T-139/09, EU:T:2012:496). In that judgment, the Court found that aid measures adopted in favour of certain agricultural producers' organisations, financed in part by optional private contributions, involved a transfer of State resources on the ground, in essence, that the French authorities decided unilaterally on the measures financed by the aid scheme and on the detailed rules for their implementation, while the beneficiaries of those measures had the power only to participate or not in the system thus defined by the State, by agreeing or refusing to pay the contributions fixed by the State. Unlike that case, in the present case the Commission has not demonstrated that the Romanian authorities had unilaterally decided how Electrica's resources were to be used in the context of Measure 3.

155 With regard to Electrica Furnizare, another creditor of the applicant, most of whose shares were held by Electrica between 2011 and 2017, it is sufficient to note that, in the contested decision, the Commission did not classify the conduct of that company as a measure constituting State aid, with the result that the arguments of the parties in that regard have no bearing on the lawfulness of the contested decision.

156 It follows from the foregoing that the Commission has not succeeded in demonstrating to the requisite legal standard that Measure 3 involved a transfer of State resources as regards the partial cancellation of Electrica's claims or, accordingly, that it constituted State aid in so far as it was granted through Electrica.

(2) Whether the remaining part of Measure 3 can be imputed to the State

157 The applicant claims that the remaining part of Measure 3, that is to say, the partial cancellation of the claims of AAAS, Salrom, CET Govora and the ANE under the reorganisation plan, was not imputable to the State.

158 The Commission disputes the applicant's arguments. It submits that, in the contested decision, it demonstrated to the requisite legal standard that Measure 3 was imputable to the State.

159 In the contested decision, the Commission concluded that Measure 3 was imputable to the State on the ground, first, that, under Romanian insolvency law, the reorganisation plan could not be approved without the consent of AAAS or CET Govora (recital 201 of the contested decision). Second, that plan was drawn up by the court-appointed receiver, which was part of the State (recital 202 of the contested decision). Third, that plan was approved thanks to the private and public creditors which had signed the Memorandum in November 2012, which was the channel used by the State to keep the applicant on the market and to ensure the required majority within the creditors' assembly so as to secure the adoption of that plan (recitals 202, 203 and 205 to 210 of the contested decision). Fourth, the State's intention to keep the applicant on the market was confirmed by the public statements (recital 204 of the contested decision). Fifth, the Commission put forward some more specific evidence demonstrating the imputability to the State of the conduct of the ANE in the context of Measure 3 (recitals 212 to 217 of the contested decision).

160 It is apparent from the case-law that, in order for it to be possible to classify advantages as 'State aid' within the meaning of Article 107(1) TFEU, they must be attributable to the State (see judgment of 13 September 2017, *ENEA*, C-329/15, EU:C:2017:671, paragraph 20 and the case-law cited). In that regard, it should be noted that, where an advantage is conferred by a public authority, that advantage is, by definition, attributable to the State, even if the authority in question enjoys legal autonomy vis-à-vis other public authorities (see, to that effect, judgment of 12 December 1996, *Air France* v *Commission*, T-358/94, EU:T:1996:194, paragraph 62).

161 In the present case, since Article 1(c) of the contested decision defined Measure 3 as the debt cancellation 'under the reorganisation plan' by certain creditors, it is necessary to examine whether that plan, the approval of which by the applicant's creditors led to the partial cancellation of the applicant's debt, was, as a whole, imputable to the State within the meaning of Article 107(1) TFEU.

162 It should be noted that the partial cancellation of certain debts in the context of Measure 3 was not a unilateral cancellation, decided separately by each of the creditors in question, but a collective cancellation, made in the context of insolvency proceedings, subject to specific statutory rules

concerning, inter alia, the majority required at the creditors' meeting to approve the reorganisation plan. In other words, the individual vote of a given creditor in favour of the plan could not lead to the approval of that plan unless its claims, by themselves, met the statutory requirements regarding the majority necessary for that purpose.

163 It should also be noted that the list of creditors included a large number of both public and private creditors and that the votes cast in favour of that plan came from both public and private creditors.

164 Accordingly, in order to ascertain whether the Commission was right to consider that the reorganisation plan was imputable to the State, it is first necessary to ascertain whether the vote in favour of approving the reorganisation plan on the part of AAAS, the ANE, Salrom and CET Govora was imputable to the State. Second, it will be necessary to determine whether, together, the creditors whose vote in favour of approving the reorganisation plan was imputable to the State had the majority required, under national law, to approve that plan.

(i) The imputability to the State of the votes of AAAS, Salrom, CET Govora and the ANE

– *The imputability to the State of AAAS's vote*

165 It is apparent from recitals 186, 187 and 201 of the contested decision that the Commission considered that AAAS's vote was imputable to the State on the ground, inter alia, that it was part of the public administration and was subordinate to the government.

166 This finding is not contested by the applicant.

– *The imputability to the State of Salrom's vote*

167 The applicant claims that the contested decision does not contain any assessment of whether Salrom's vote in favour of the reorganisation plan was imputable to the State. The facts that the State held the majority of Salrom's shares, that it had appointed representatives on its board of directors and that Salrom's annual budget had to be approved by the State are indeed sufficient to show that Salrom was a public undertaking, but not that its vote in favour of approval of that plan was imputable to the State.

168 The Commission submits, in essence, that the imputability of Salrom's vote to the State stems from the 'high degree of intervention of the State in the definition of the entire measure and its method of financing', in particular from the Memorandum and the public statements.

169 First, the Court finds that, in section 6.1.1.3 of the contested decision (recitals 201 to 218), which deals with the imputability to the State of Measure 3, the Commission failed to examine whether the vote of Salrom – the applicant's creditor and supplier of, inter alia, saline solution – was imputable to the State. That section contains only two references to Salrom, one in footnote 70 to the contested decision, which merely indicates that Salrom was one of the signatories to the Memorandum, and the other in recital 218 to that decision, which is the concluding recital in that section of the contested decision, and in which the Commission concludes that the granting of Measure 3 by Salrom, among others, was imputable to the State. In the same section, the

Commission referred, generally and without specifically mentioning Salrom, to the signing of the Memorandum by a number of the applicant's creditors and to the public statements in order to justify the imputability to the State of Measure 3.

170 In that regard, it is not disputed that Salrom was a public undertaking when Measure 3 was adopted. However, according to the case-law, it is not possible to deduce imputability of a measure to the State from the mere fact that that measure was taken by a public undertaking. Even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed, although it cannot be demanded that it be demonstrated, on the basis of a precise inquiry, that in the particular case the public authorities specifically incited the public undertaking to take the aid measure in question (see, to that effect, judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraphs 51 to 53).

171 In the case of advantages granted by public undertakings, it is necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of the measure at issue, it being possible to deduce imputability to the State from a set of indicators arising from the circumstances of the case and the context in which that measure was taken. In that respect, the Court of Justice has previously taken into consideration the fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities, or the fact that, apart from factors of an institutional nature linking the public undertakings to the State, those undertakings, through which the aid had been granted, had to take account of directives issued by a public body. Other indicators might, in certain circumstances, be relevant in concluding that an aid measure taken by a public undertaking is imputable to the State, such as, in particular, its integration into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or to ordinary company law), the intensity of the supervision exercised by the public authorities over the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the scope of the measure, its content or the conditions which it contains (judgment of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraphs 52, 55 and 56).

172 It should, however, be noted that, in section 6.1.1.3 of the contested decision, aside from establishing the existence of the Memorandum and of the public statements, the Commission did not note the existence of indicia such as those set out in paragraph 171 above making it possible to establish the imputability to the State of Salrom's conduct in the context of Measure 3.

173 As regards the fact that Salrom signed the Memorandum, it should be noted, as the applicant submits, first, that the Memorandum expressly provided that its signatories were under no obligation to withdraw their claims against the applicant, to accept a specific reorganisation plan or, more generally, to waive any contractual right or other right in respect of the applicant, with the result that that memorandum did not impose any obligation on Salrom as regards the reorganisation plan.

174 Second, there is nothing in the contested decision that reveals why the Memorandum played a decisive role in Salrom's conduct with regard to Measure 3. On the contrary, that undertaking's conduct in the context of Measure 2 suggests that that was not the case, as follows from paragraph 127 above.

175 The same applies to the public statements, as has been pointed out in paragraphs 134 and 136 above.

176 Second, it is true that, in section 6.1.1.2 of the contested decision (recitals 188 to 200), which deals with the imputability to the State of Measure 2, the Commission observed that Romania held 51% of Salrom's shares, had appointed State representatives on its board of directors and that Salrom's annual budget had to be approved by the State, with that *ex ante* approval concerning, inter alia, the amounts corresponding to the commercial claims of customers such as the applicant (recitals 191 and 192 of the contested decision). The Commission stated, nevertheless, that it was not necessary to conclude that Salrom's conduct in connection with Measure 2 was imputable to the State, since that measure did not constitute aid from Salrom on the ground, in essence, that Salrom had acted as a private creditor would have done (recitals 193 and 263 of the contested decision).

177 However, since Measure 2 relates to the period from September 2012 to January 2013, it must be noted that there is nothing in the contested decision capable of demonstrating that those circumstances still held true in 2015, when Measure 3 was adopted. In order to analyse whether the criterion of imputability is fulfilled, it is necessary to take into account the situation at the time when the measure was adopted (see, to that effect and by analogy, judgment of 2 July 2015, *France and Orange* v *Commission*, T-425/04 RENV and T-444/04 RENV, EU:T:2015:450, paragraphs 221 and 229).

178 Even if all of those circumstances still held true in 2015, it must nonetheless be stated that the Commission did not find Salrom's conduct in relation to Measure 2 to be imputable to the State. Accordingly, it is not possible to ascertain the Commission's assessment of those circumstances and in particular to know whether they were sufficient to impute Measure 2, in so far as it involves Salrom, to the State. Therefore, even if those circumstances were still relevant in 2015, the Court cannot substitute its own assessment for that of the Commission, which is lacking.

179 Consequently, it must be concluded, as the applicant submits, that, in the contested decision, the Commission did not demonstrate to the requisite legal standard that Salrom's vote in favour of approving the reorganisation plan was imputable to the State.

– *The imputability to the State of CET Govora's vote*

180 The applicant claims that the contested decision does not contain any assessment of whether CET Govora's vote on the reorganisation plan was imputable to the State. However, CET Govora did not sign the Memorandum and, therefore, it is unlikely that it could have influenced its vote. Furthermore, according to the applicant, the decisions of the Vâlcea County Council (a public entity which, as is apparent from recital 194 of the contested decision, is the sole shareholder of CET Govora), which were mentioned in recital 195 of that decision, did not concern Measure 3.

181 The Commission submits, in essence, that, as is apparent from recital 196 of the contested decision, it is 'implausible', in the light of the general context of CET Govora's conduct, that the latter was free from any influence by the State, having regard, in particular, to the Memorandum and the public statements.

182 In recitals 201 and 205 of the contested decision, the Commission expressly referred to its analysis of the imputability to the State of Measure 2, in so far as it concerned CET Govora, a creditor of the applicant and supplier to it of, in particular, electricity and steam, in order to substantiate its

conclusion that CET Govora's vote in favour of approval of the reorganisation plan was imputable to the State. Thus, in recital 201 of the contested decision, the Commission referred to recital 200 of that decision, which is the concluding paragraph of the analysis on the imputability to the State of Measure 2, and that general reference must therefore be understood as a reference to all the factors set out to that end in the context of the analysis of the imputability to the State of Measure 2. In that connection, the Commission noted, in essence, first of all, that CET Govora was entirely held by the State, next, that the continued unpaid supply of electricity to the applicant, which was the subject matter of Measure 2, had been put in place in the context of the implementation of several decisions issued by the Vâlcea County Council and, lastly, that the 'wider context' demonstrated that it was 'implausible to consider [that] CET Govora [had been] free from any influence by the State' (recitals 194 to 198 of the contested decision). In addition, in section 6.1.1.3 of the contested decision, the Commission made a general reference to the signing of the Memorandum by some of the applicant's creditors and to the public statements in order to justify the imputability of Measure 3 to the State.

183 In that regard, it should be noted that it is not disputed that CET Govora was a public undertaking at the time when Measure 3 was adopted. However, as has been stated in paragraph 170 above, according to the case-law, it is not possible to presume imputability to the State of a measure on the basis of the mere fact that that measure was taken by a public undertaking.

184 In accordance with the case-law referred to in paragraph 171 above, the Commission must take account of a set of relevant indicators in order to establish whether CET Govora's conduct in the context of Measure 3 was imputable to the State.

185 In that regard, the Commission cannot validly rely on the Memorandum, since CET Govora did not even sign it. Moreover, even if CET Govora had taken it into account in its vote in the context of Measure 3, the fact remains, as noted in paragraph 173 above, that the Memorandum expressly provided that its signatories were under no obligation to withdraw their claims against the applicant, to accept a particular reorganisation plan, or, more generally, to waive any contractual right or other right in respect of the applicant. As regards the public statements, it is sufficient to refer to paragraph 136 above.

186 As for the indicators referred to in the contested decision in the context of Measure 2, to which the Commission referred, it must be stated that they relate to the period from September 2012 to January 2013 and that the contested decision does not contain any evidence capable of demonstrating that those circumstances still held true in 2015, when Measure 3 was adopted, it being noted that, according to the case-law cited in paragraph 177 above, for the purposes of analysing whether the imputability criterion is fulfilled, it is necessary to take into account the situation at the time when the measure was adopted.

187 Moreover, certain factors relating to CET Govora's conduct that were noted in connection with Measure 2 are irrelevant for the purposes of examining whether CET Govora's vote in favour of the reorganisation plan was imputable to the State. Thus, as the applicant submits, the decisions of the Vâlcea County Council mentioned in recitals 29, 85 and 195 of the contested decision concerned Measure 2 alone and had no connection with the approval of the reorganisation plan which took place more than two years later.

188 As for the elements of the 'wider context' to which recitals 196 and 197 of the contested decision refer, they are not directly relevant to the question of whether CET Govora's vote in favour of the reorganisation plan was imputable to the State. The Commission does not define clearly the link

which it establishes between, on the one hand, the fact that CET Govora's Chief Executive Officer was convicted by the national criminal courts for misuse of office and trafficking in influence committed between October 2011 and July 2014 and, on the other hand, CET Govora's vote in favour of the reorganisation plan. Likewise, the fact that CET Govora's Chief Executive Officer had subsequently been the applicant's Chief Executive Officer between October 2012 and February 2013 and that he then, after February 2013, once again became the Chief Executive Officer of CET Govora, is irrelevant. Apart from the fact that that fact also relates to a period preceding the period concerned by Measure 3, the mere fact that a particular natural person was, at different times, appointed Chief Executive Officer of two public undertakings does not mean, as such, that the actions adopted by one of those undertaking two years later are imputable to the State.

189 Consequently, in the absence of other relevant and contemporaneous indicators in the contested decision, it must be concluded, as the applicant submits, that the Commission has not succeeded in demonstrating to the requisite legal standard that CET Govora's vote in favour of approving the reorganisation plan was imputable to the State.

– *The imputability to the State of the ANE's vote*

190 In the contested decision, the Commission based its conclusion that the ANE's vote in favour of approving the reorganisation plan was imputable to the State on, inter alia, the facts: that the ANE was a public institution of national interest with legal capacity that was coordinated by the central public water authority; that its object was, inter alia, to apply the national strategy and policy in the field of management of water resources, to ensure observance of the regulations in this field, to manage and operate the infrastructure of the national water management system and to ensure that a number of activities of national and social interest were carried out; that the members of its board of administration were appointed by order of the head of the central public water authority and included a representative of the Ministry of Public Finances and a representative of the central public water authority and that the general director of the ANE was appointed, suspended and released from office by order of the director of the central public water authority; and that the income and expense budget of the company were approved by the board of administration with the consent of the head of the central public water authority.

191 The applicant claims that, in the contested decision, the Commission confused two separate institutions. In particular, the reference to the ANE in the category of 'Unsecured creditors under Article 96 of the [Romanian] Insolvency Law' in Table 1 in recital 67 of the contested decision is incorrect, since that claim belongs to another public institution, namely the National Water Administration – Olt Water Basin Administration ('the ANE-OWB'). According to the applicant, the ANE-OWB voted in favour of the reorganisation plan, whereas the ANE did not vote either in favour of or against that plan. Therefore, in the contested decision, the Commission failed to analyse the imputability to the State of the ANE-OWB vote.

192 The Commission states that the ANE-OWB is one of the 11 regional branches of the ANE. In its view, the considerations set out in recitals 212 to 217 of the contested decision with regard to the ANE also apply to that branch.

193 In essence, the applicant merely asserts that the Commission referred, incorrectly, to a body which is not the body with claims against it. However, it does not dispute either the fact, noted by the Commission in its defence, that the ANE-OWB is a subsidiary of the ANE, or the Commission's conclusion that, in essence, the considerations set out in recitals 212 to 217 of the

contested decision with regard to the ANE apply, *mutatis mutandis*, to its subsidiary. In the absence of any evidence to the contrary, the factors set out in the contested decision with regard to the ANE also apply to its subsidiaries.

194 In those circumstances, although it is admittedly regrettable that, in the contested decision, the Commission confused ANE with its subsidiary, it is, at most, merely a formal error which has no bearing on the merits of the contested decision.

195 Accordingly, the applicant's arguments in that regard must be rejected.

– *Interim conclusions*

196 In the light of the foregoing considerations, it must be concluded that, in the contested decision, the Commission managed to show that AAAS's vote and the vote of the ANE's subsidiary in favour of approving the reorganisation plan were imputable to the State. By contrast, it has not succeeded in demonstrating to the requisite legal standard that Salrom's vote and CET Govora's vote regarding that plan can be imputed to the State.

(ii) Whether the reorganisation plan can be imputed to the State

197 In the first place, in the contested decision, the Commission stated, in recital 201 thereof, in essence, that Measure 3 was imputable to the State because the reorganisation plan could not be approved without the consent of AAAS or CET Govora.

198 That conclusion is, however, incorrect.

199 First, as is apparent from paragraphs 180 to 189 above, the Commission has not succeeded in demonstrating to the requisite legal standard that CET Govora's vote in favour of approving the reorganisation plan was imputable to the State.

200 Second, even if CET Govora's vote in favour of approving the reorganisation plan was imputable to the State, it must be noted, as the applicant submits, that the Commission's conclusion in recital 201 of the contested decision is not consistent with the description of the national insolvency rules in the contested decision.

201 In that regard, it is apparent from recital 42 of the contested decision that, in accordance with Articles 100 and 101 of legea nº 85 privind procedura insolvenței (Law No 85 on insolvency proceedings; 'the Romanian Insolvency Law') of 5 April 2006 (*Monitorul Oficial al României, Partea I*, No 359 of 21 April 2006), a reorganisation plan must be regarded as being accepted if an absolute majority of the categories of creditors votes in favour of the plan, provided that at least one of the disadvantaged categories accepts the plan. The plan is deemed to be accepted by a category of creditors if, in that category, the plan is accepted by creditors holding an absolute majority of the value of the claims belonging to that category.

202 In addition, it is apparent from recital 43 of the contested decision that, in accordance with Article 3(21) of the Romanian Insolvency Law, the term 'disadvantaged category' means a claim category for which the reorganisation plan stipulates, inter alia, a decrease in the amount of the claim.

203 In the present case, as is apparent from Table 1 in recital 67 of the contested decision, the applicant's creditors are divided into five categories, meaning that, in order to approve the plan, at least three of the five categories had to vote in favour of it. It is not disputed that, in the present case, all of the creditor categories were disadvantaged categories within the meaning of Article 3(21) of the Romanian Insolvency Law, as is apparent from footnote 42 to the contested decision.

204 It is apparent from that same table, moreover, that AAAS and CET Govora, together, held an absolute majority of the value of the claims only in two categories, namely that of 'budgetary creditors' and that of 'unsecured creditors under Article 96 of the [Romanian] Insolvency Law', as the Commission indeed acknowledges in recital 201 of the contested decision.

205 Accordingly, AAAS and CET Govora did not hold the majority required to approve, by themselves, the reorganisation plan.

206 The fact, noted in recital 205 of the contested decision, that a third category, namely that of employees, had 'naturally' favoured the plan, given that it did not provide for any reduction in employees' claims, is irrelevant, since the Commission did not at any time claim that the employees' vote was imputable to the State.

207 Moreover, the Commission has not established that AAAS and CET Govora together had the power to block the adoption of the reorganisation plan. On the contrary, it is apparent from the information on how the various creditors voted, set out in recital 74 of the contested decision and in the table in paragraph 75 of Romania's observations of May 2018, that there would have been a sufficient number of creditors voting in favour of that plan to be regarded as accepted by three of the five categories of creditors, including by at least one 'disadvantaged category', even if AAAS and CET Govora had voted against the reorganisation plan.

208 Third, AAAS and ANE's subsidiary, the votes of which were imputable to the State, as the Commission correctly found, together held an absolute majority of the claims in only one single category, namely that of budgetary creditors. Consequently, by themselves, they could neither have adopted the reorganisation plan nor blocked its approval by the creditors' assembly.

209 Fourth, even if CET Govora's vote in favour of approving the reorganisation plan was imputable to the State and had to be added to those of AAAS and the ANE subsidiary, it should be noted that they together held an absolute majority of the value of the claims only in two categories, namely that of 'budgetary creditors' and that of 'unsecured creditors under Article 96 of the [Romanian] Insolvency Law'. Furthermore, even in the event that they had voted against the reorganisation plan, there would have been a sufficient number of creditors voting in favour of that plan for it to be regarded as accepted by three of the five categories of creditors, including by at least one disadvantaged category. Accordingly, by themselves, they could neither have adopted the reorganisation plan nor blocked its approval by the creditors' assembly.

210 In the second place, the assertion, in recital 202 of the contested decision, that, in essence, Measure 3 is imputable to the State because the reorganisation plan had been 'produced' by the court-appointed receiver, which was part of the State, must be rejected. It is apparent from recital 41 of the contested decision that the court-appointed receiver 'prepares' the reorganisation plan, which must then be discussed and approved by the creditors. The court-appointed receiver does not therefore have the power to adopt the reorganisation plan.

211 In the third place, it is admittedly true, as the Commission points out, that the competent court, which is an emanation of the State, must also approve the plan, in accordance with the applicable national law. However, that court cannot approve a plan which has not been adopted by the creditors. In reality, if the Commission's argument were to be followed, it would be tantamount to considering that any reorganisation plan adopted in the context of insolvency proceedings was imputable to the State solely because of the involvement in the proceedings of a court-appointed receiver and a judge.

212 The Commission cannot base any argument in that regard on the judgments of 26 October 2016, *DEI* v *Commission* (C-590/14 P, EU:C:2016:797, paragraphs 59, 77 and 81), and of 3 March 2016, *Simet* v *Commission* (T-15/14, EU:T:2016:124, paragraphs 38, 44 and 45). It is clear that the aid measures at issue in those cases were in no way comparable to Measure 3 at issue in the present case. The case giving rise to the first judgment referred to above concerned State aid granted to producers of aluminium and amended by an interim order of the competent national court, extending the application of a preferential tariff for the supply of electricity. The case giving rise to the second judgment referred to above concerned State aid granted by the Italian authorities in execution of an order of a national court. In those cases, the aid measures in question, the nature and subject matter of which are in no way comparable to those of a reorganisation plan adopted in the context of insolvency proceedings, originated from the State, whereas, in the present case, the decision to cancel part of the applicant's debts was taken, as the Commission itself pointed out, by the applicant's creditors and not by the court-appointed receiver or the competent court.

213 In the fourth place, the assertion, set out in particular in recitals 203 to 205 and 209 of the contested decision, that, in essence, the existence of the Memorandum and the public statements shows that Measure 3 was, as a whole, imputable to the State, must be rejected for the reasons set out in paragraphs 128 and 136 above.

214 In particular, the fact, noted in recital 205 of the contested decision, that the signatories to the Memorandum and CET Govora together held the necessary majority in four of the categories of creditors is irrelevant. First, at no time did the Commission argue, let alone demonstrate, that the votes of the private bank signatories to the Memorandum were imputable to the State. Second, as regards the votes of Electrica and Salrom, it is sufficient to refer to paragraphs 156 and 167 to 179 above, whereas CET Govora did not even sign that memorandum. The Commission could not therefore conclude, in recital 206 of the contested decision, that the Memorandum had enabled the required majority to be obtained at the creditors' assembly.

215 It follows from the foregoing that the Commission has not succeeded in demonstrating to the requisite legal standard that Measure 3 was imputable to the State and that, accordingly, it constituted State aid.

(b) The pleas relating to Measures 1 and 2 alleging manifest errors of assessment as regards the existence of an economic advantage

216 In the first place, in recital 219 of the contested decision, the Commission stated that the aid was clearly selective, since Measures 1 and 2 were granted exclusively to the applicant, whereas other undertakings, in the petrochemical sector or in other sectors, in a similar legal and factual situation, in the light of the objective pursued by those measures, had not benefited from them.

217 In the second place, in recitals 221 and 222 of the contested decision, the Commission considered that the private creditor test was not applicable in the present case.

218 In the third place, in recital 223 of the contested decision, the Commission explained that, 'for [the] sake of completeness', it had nevertheless performed the private creditor test for each of the measures at issue. Thus, in sections 6.1.2.1 (recitals 224 to 243) and 6.1.2.2 (recitals 244 to 263) of the contested decision, the Commission applied that test to Measures 1 and 2, respectively, and concluded that those measures conferred on the applicant a selective economic advantage, with the exception of the support given to the applicant by Salrom in the context of Measure 2, which, according to the Commission, had acted like a private creditor and therefore did not confer any economic advantage on the applicant.

219 The applicant disputes the Commission's findings that (i) the private creditor test was not applicable in the present case and (ii) an economic advantage had been conferred on it under Measures 1 and 2, to the extent indicated in paragraph 218 above.

220 It should be stated from the outset that it is no longer necessary to examine the applicant's plea alleging manifest errors of assessment regarding the existence of an economic advantage in the context of Measure 3. As has been noted in paragraphs 156 and 215 above, the Commission did not demonstrate to the requisite legal standard that that measure involved a transfer of State resources and was imputable to the State, which suffices for the conclusion that Measure 3 does not constitute State aid, in the light of the cumulative nature of the conditions set out in Article 107(1) TFEU, as is apparent from the case-law referred to in paragraph 138 above.

(1) The applicability of the private creditor test

221 In recitals 221 and 222 of the contested decision, the Commission considered that, contrary to what Romania had maintained during the administrative procedure, the market economy operator test was not applicable in the present case, on the ground, in essence, that Romania had steadily and clearly acted in its capacity as a public authority to save the applicant from bankruptcy, including by means of the public statements and the Memorandum, and not as a shareholder investing in the applicant or as a creditor of that company.

222 Recital 222 of the contested decision refers, in that regard, to recitals '204 et [seq.]', 274 and 276 of that decision. It should, however, be noted from the outset that those references do not appear to add anything to the reasons set out in recitals 221 and 222 of the contested decision. Indeed, recitals '204 et [seq.]' of the contested decision refer in particular to the public statements, which are already referred to in recital 222 of the contested decision, whereas recitals 274 and 276 of that decision concern the application, and not the applicability, of the private creditor test in the specific context of Measure 3.

223 As regards the applicability of that test, the applicant claims, in essence, that the measures at issue do not involve the exercise by the State of public powers, as is shown by the fact that they could have been, and indeed were, taken also by private creditors. In addition, the nature and subject matter of the measures, their context, the objective which they pursue and the rules to which they are subject also indicate that that test is applicable in the present case. According to the applicant, neither the Memorandum nor the public statements are capable of excluding the applicability of that test.

224 The Commission disputes the applicant's arguments. It contends, in essence, that the private creditor test is not applicable in the present case because, when Romania adopted the measures at issue, it acted in its capacity as a public authority, and not as a private creditor, as is demonstrated by the Memorandum and the public statements.

225 It should be borne in mind that the private creditor test and the private investor test are specific expressions of the market economy operator test which are used in order to examine whether the conduct of a public creditor or a public investor, respectively, is liable to give rise to State aid.

226 According to the case-law, it is necessary to distinguish between the roles of the State as a shareholder of an undertaking, on the one hand, and the State acting as a public authority, on the other. Thus, the private investor test applies where the Member State concerned confers, in its capacity as shareholder, and not in its capacity as public authority, an economic advantage on an undertaking. In order to determine whether a measure is the act of the State in its capacity as a shareholder, and not in its capacity as a public authority, an overall assessment must be carried out, taking into account, in particular, the nature and subject matter of the measure, its context, the objective pursued and the rules to which that measure is subject (see, to that effect, judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraphs 80, 81 and 86).

227 If a Member State relies on the private investor test during the administrative procedure, it must, where there is doubt, establish unequivocally and on the basis of objective, verifiable and contemporaneous evidence that the measure implemented falls to be ascribed to the State acting as shareholder. If the Member State concerned provides the Commission with the requisite evidence, it is for the Commission to carry out a global assessment, taking into account – in addition to the evidence provided by the Member State – all other relevant evidence. However, the Court of Justice has made it clear that the private investor test is not an exception which applies only at the request of a Member State, but, where it is applicable, is among the factors which the Commission is required to take into account for the purposes of establishing whether there is State aid. Accordingly, where it appears that the private investor test could be applicable, the Commission is under a duty to ask the Member State concerned to provide it with all relevant information enabling it to determine whether the conditions governing the applicability and the application of that test are met, and it cannot refuse to examine that information unless the evidence produced has been established after the adoption of the decision to make the investment in question (see, to that effect, judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraphs 82 to 86, 103 and 104).

228 The Court of Justice has also had occasion to state that, where a public creditor granted payment facilities in respect of a debt owed to it by an undertaking, the private creditor test was, in principle, applicable (see, to that effect, judgment of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 71).

229 In addition, the Court of Justice has stated that the 'starting point' for determining whether the private creditor test is to be applied must be the economic nature of the Member State's action and that, when it appears that the private creditor test might be applicable, it is for the Commission to examine that possibility, irrespective of any request to that effect (see, to that effect, judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraphs 25 and 27).

230 In certain cases, the applicability of the private investor test may even be presumed, on account of the very nature of the measure in question (see, to that effect, judgment of 11 December 2018, *BTB Holding Investments and Duferco Participations Holding* v *Commission*, T-100/17, not published, EU:T:2018:900, paragraph 53).

231 In the present case, it should be noted that, in recitals 221 and 222 of the contested decision, the Commission based its conclusion regarding the inapplicability of the private creditor test, in essence, on the existence of the Memorandum and the public statements. However, since the Commission did not classify that memorandum and those statements as State aid, they must be regarded solely as part of the overall context of the measures at issue.

232 As such, the Commission did not carry out an overall assessment of all the relevant factors, in particular those relating to the nature and subject matter of the measure, the objective pursued and the rules to which that measure was subject, as required by the case-law referred to in paragraphs 226 and 227 above.

233 It is true that it cannot be ruled out that the contested decision may be read as indicating, implicitly but necessarily, that, according to the Commission, the overall context had such significance in the present case that it was sufficient, in itself, to conclude that the private creditor test was not applicable, irrespective of the other factors identified in the case-law.

234 The applicant submits, however, that those other factors demonstrated that the private creditor test was applicable in the present case.

235 It is therefore necessary to examine whether, in the light of all the relevant factors, relating to the nature and subject matter of Measures 1 and 2, their context, the objective which they pursue and the rules to which they are subject, the Commission was entitled to conclude, without committing any error, that the private creditor test was not applicable to Measures 1 and 2.

236 In the first place, as regards the subject matter and nature of Measures 1 and 2, it follows from paragraph 99 above that Measure 1 concerns, in essence, the appropriateness of enforcing AAAS's claims and the arrangements and timetable for any such enforcement. Any private creditor could also be faced with such a decision.

237 Likewise, Measure 2 concerns the manner in which supplies of raw materials to an undertaking in difficulty should be continued or suspended. Any private supplier may also be faced with such a decision.

238 The nature of Measures 1 and 2 is therefore essentially economic and does not, as such, imply the exercise of public powers.

239 In the second place, as regards the context of those measures, first, it should be noted that, as the applicant points out, the relevant period with regard to Measures 1 and 2 began in September 2012, whereas the Memorandum was signed on 23 November 2012. Thus, Measures 1 and 2 were implemented approximately two months before the Memorandum was signed, with the result that the Memorandum could not be the reason for their adoption.

240 Second, as the applicant submits, and as has been noted in paragraph 124 above, no clause in the Memorandum required AAAS not to enforce its claims against the applicant. As for CET Govora, which is the only provider of aid under Measure 2, it is not even a signatory to the Memorandum.

241 Third, as noted in paragraph 127 above, the fact that they had signed the Memorandum did not prevent some of the signatories from conducting themselves like private creditors.

242 As regards the public statements, it is sufficient to refer to paragraphs 130 to 136 above, from which it is apparent that those statements did not contain any clear, specific, concrete and firm commitments on the part of the State requiring AAAS and CET Govora to adopt conduct characterised by the exercise of public powers (see, to that effect, judgment of 2 July 2015, *France and Orange* v *Commission*, T-425/04 RENV and T-444/04 RENV, EU:T:2015:450, paragraphs 235 to 245).

243 In the third place, as regards the objectives of Measures 1 and 2, reference is made to paragraphs 111 and 112 above, from which it is apparent that no clear objective can be assigned to Measure 1, whereas Measure 2 pursues the objective of maintaining the viability of CET Govora itself.

244 In the fourth place, as regards the rules to which Measures 1 and 2 were subject, these do not involve the exercise of public powers either.

245 The rules applicable to Measure 1 are, in essence, those relating to claim enforcement procedures. While it is true that there are special laws governing the recovery of State debts, which provide, inter alia, for the possibility of direct enforcement of claims without a court ruling, the fact remains that AAAS, the passive conduct of which forms the subject matter of Measure 1, did not avail itself of that possibility in the present case (see paragraphs 266 to 275 below).

246 As regards Measure 2, it relates, in essence, to the contractual relationships between CET Govora, Salrom and the applicant from September 2012 to January 2013.

247 As a result, it is apparent from the nature, subject matter, context and objective of Measures 1 and 2 and the legal rules to which they were subject that those measures came within the economic and commercial sphere and did not relate to the exercise by the State of public powers.

248 Accordingly, the Commission was wrong to take the view that the private creditor test was not applicable to Measures 1 and 2.

(2) The existence of an economic advantage as regards Measure 1

249 In section 6.1.2.1 of the contested decision (recitals 224 to 243), the Commission found that AAAS had conferred an economic advantage on the applicant as a result of the non-enforcement and accumulation of claims during the period from September 2012 to January 2013, on the ground, in essence, that AAAS had not acted as a private creditor would have done. Indeed, although it was aware of the applicant's difficult and deteriorating financial situation, AAAS did not adopt measures to attempt to enforce its claims or, at least, to achieve a better creditor position.

250 In particular, in the contested decision, the Commission relied on several factors in order to demonstrate that AAAS had conferred an economic advantage on the applicant in connection with Measure 1, namely:

– unlike the circumstances surrounding the adoption of the 2012 decision, the non-enforcement and accumulation of claims by AAAS during the period concerned could not be justified by an imminent privatisation project;

– the period concerned was long enough to allow AAAS to take enforcement measures;

– AAAS could have relied on the special rights which it held as a public authority to enforce its claims;

– Legea No 137 privind unele măsuri pentru accelerarea privatizării (Law No 137 on measures to accelerate privatisation; 'the Romanian Law on Privatisation') of 28 March 2002 (*Monitorul Oficial al României, Partea I*, No 215 of 28 March 2002) did not prevent AAAS from recovering its claims;

– AAAS did not submit any contemporaneous report or internal document showing that it had acted like a private creditor;

– unlike AAAS, other creditors of the applicant took steps to recover or protect their claims;

– the Memorandum proves that AAAS accepted non-recovery and the accumulation of debts;

– AAAS could have relied on the provisions of the Romanian Insolvency Law which allow it to propose an alternative reorganisation plan;

– AAAS could have threatened the applicant with the opening of insolvency proceedings;

– AAAS could have seized the applicant's accounts or obtained pledges on real estate.

251 The applicant disputes each of those points. It claims, in essence, that the Commission made a manifest error of assessment in finding that Measure 1 did not satisfy the private creditor test. The Commission, it argues, has not shown that it manifestly would not have obtained the same advantages from a private creditor in a situation comparable to that of AAAS.

252 The Commission disputes the applicant's arguments. It submits that, in the contested decision, it demonstrated to the requisite legal standard that AAAS had conferred an economic advantage on the applicant as a result of the non-enforcement and accumulation of its claims against it.

253 According to the case-law, the private creditor test is intended to determine whether the recipient undertaking would manifestly not have obtained comparable facilities from a private creditor in a situation as close as possible to that of the public creditor that sought to recover sums due to it by a debtor in financial difficulty and, accordingly, whether that undertaking could, in circumstances corresponding to normal market conditions, have obtained the same advantage as that which had been made available to it through State resources (see judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 28 and the case-law cited).

254 It must also be noted that, according to the case-law, when faced with a debtor experiencing a substantial deterioration of its financial situation, each creditor must make a decision as to whether it is possible to recover its claims and, if so, how this might be done. Its decision is influenced by a number of factors, including the creditor's status as the holder of a secured, preferential or ordinary claim, the nature and extent of any security it may hold, its assessment of the chances of the firm being restored to viability, as well as the amount that it would receive in the event of liquidation. It is therefore for the Commission to determine, for each public body in question, having regard to, inter alia, the abovementioned factors, whether the facilities granted by them were manifestly more generous than those that would have been granted by a hypothetical

private creditor in a situation comparable to that of the public body in question vis-à-vis the recipient undertaking and seeking to recover the sums owed to it (see, to that effect, judgment of 17 May 2011, *Buczek Automotive* v *Commission*, T-1/08, EU:T:2011:216, paragraph 84 and the case-law cited).

255 It is therefore necessary to examine whether the Commission has demonstrated to the requisite legal standard that, by not enforcing its claims and by accumulating others during the period concerned, AAAS had granted the applicant facilities which the latter would manifestly not have obtained from a private creditor in a situation as close as possible to that of AAAS, within the meaning of the case-law cited in paragraph 253 above.

256 First, the applicant claims that, during the very short period of that measure, AAAS did not enforce its claims because it was still seeking the best possible solution to recover those claims, as evidenced by the Memorandum. In addition, during the period concerned, AAAS could still rely on the Commission's findings and economic analysis in the 2012 decision, which confirmed that debt conversion and privatisation was more profitable than liquidation. Moreover, as was noted in paragraph 99 above, the applicant states, without being contradicted by the Commission on that point, that the accumulation of claims by AAAS during that period did not consist of new claims contracted during that period, but only in the accumulation of interest accrued on pre-existing claims.

257 In that regard, it should be noted that, in the 2012 decision, adopted approximately six months before the beginning of the period covered by Measure 1, the Commission had concluded, inter alia, that the conversion of the applicant's debts into capital did not constitute State aid and that privatisation would be more advantageous than liquidation, bearing in mind that the Romanian authorities had undertaken to privatise the applicant in full in the short term (recitals 17, 52, 73, 86, 153, 160 and Article 2 of the 2012 decision).

258 It is, however, apparent from the contested decision that the attempt to privatise the applicant failed on 22 September 2012 because certain minority shareholders blocked the planned debt to equity conversion.

259 Accordingly, the relevant period with regard to Measure 1 began, according to recital 224 of the contested decision, following the failure of that attempt. Thus, according to the contested decision, AAAS should have proceeded to enforce its claims against the applicant immediately after that failure or, at most, within a period of four months following that failure, or taken other measures to obtain a better creditor position in that same period of time.

260 However, first, as the applicant submits, the Commission has not shown that a private creditor in a situation comparable to that of AAAS would necessarily have taken the view, at that time, that no other attempt at privatisation would be conceivable, given that the failure of the latter was not due to the lack of potential investors, to the profitability of the proposed investment or to the applicant's financial situation.

261 Although, admittedly, the Commission noted that other earlier attempts had also failed and that there was no longer any privatisation project imminent at that time, it has not demonstrated that a private creditor in a situation comparable to that of AAAS would necessarily have expected that the applicant's privatisation was henceforth ruled out, given not only the specific reasons for that last failure, but also the fact that, barely six months previously, the Commission had itself considered that such a possibility was foreseeable in the short term.

262 Second, it must be noted, as the applicant submits, that the relevant period in relation to Measure 1 was relatively short, namely from 22 September 2012 to 31 January 2013, that is to say, approximately four months. Since, in the 2012 decision, the Commission had concluded that the privatisation scenario was more advantageous than the liquidation scenario, it would have been legitimate for a private creditor in a situation comparable to that of AAAS to consider the options available to it for a certain time instead of immediately enforcing its claims, which could have led to the applicant's liquidation, a scenario which, according to that decision, would have been disadvantageous.

263 Although there are no rules as to the promptness with which a creditor must act in order to enforce its claims, hypothetical private creditors cannot be expected to demand that the undertaking be declared insolvent as soon as it fails and not to take any account of its longer-term potential, even if it is not, however, acceptable for the public authorities passively to allow debts to be run up over long periods without the slightest prospect of improvement (see, to that effect, Opinion of Advocate General Mischo in *Spain* v *Commission*, C-480/98, EU:C:2000:305, points 36 and 37).

264 The private creditor test does not therefore require an application to be made for the immediate winding-up of the undertaking in difficulty, since it could be quite conceivable that a private creditor, with significant resources at its disposal, might have had an interest in maintaining the activity of a debtor undertaking for a certain period, if the cost of immediate liquidation proved to be higher than the cost of granting aid (Opinion of Advocate General Poiares Maduro in *Spain* v *Commission*, C-276/02, EU:C:2004:211, point 39).

265 Moreover, the fact, noted in recital 234 of the contested decision, that the applicant had suspended its production and had no prospect of operating revenues in the near future, which, according to the Commission, should have led AAAS to initiate enforcement proceedings, has only a partial basis in fact. It is apparent from recitals 29 and 244 of the contested decision that on 24 October 2012, that is to say, at the beginning of the period covered by Measure 1, the applicant resumed production and was therefore able to generate revenue.

266 Second, the applicant submits that AAAS was legally prevented from asserting its claims, in accordance with Article 16(5)(c) of the Romanian Privatisation Law, for as long as it was placed under special administration. That was the case since the ordinance of the Minister for the Economy of 2 July 2012.

267 In that regard, it is not disputed that, as is apparent from recital 228 of the contested decision, the special laws governing the recovery of State debts, in particular Article 50(1) and (2) of the ordonanță nº 51 de urgență privind valorificarea unor active ale statului (Government Emergency Ordinance No 51 on the recovery of certain State assets) of 15 December 1998 (*Monitorul Oficial al României, Partea I*, No 482 of 15 December 1998), give AAAS special rights including, in particular, the right to enforce its claims directly, by means of its own bailiffs, without a court decision.

268 However, Article 16(5)(c) of the Romanian Privatisation Law prevented budgetary creditors from enforcing their claims against the applicant. That provision, as applicable at the material time, provided as follows:

'From the establishment of the special administration procedure during the privatisation period, the company shall apply the following extraordinary measures: … the budgetary creditors shall suspend, until the transfer of ownership over the shares, any enforcement measure initiated against the

company and shall refrain from initiating such measures. The same provisions shall apply to the public institution concerned if it is a creditor.'

269 It is not disputed that, during the period covered by Measure 1, the applicant was placed under the special administration procedure. Nor is it disputed that AAAS was a budgetary creditor within the meaning of Article 16(5)(c) of the Romanian Privatisation Law.

270 Therefore, as the applicant points out, that provision of national law applied to AAAS.

271 First, the Commission stated, however, in recital 229 of the contested decision, that the Ministry of the Economy had, 'for unexplained reasons', maintained the applicant under the special administration procedure even after the failed privatisation in September 2012.

272 However, that criticism is ineffective, since the Commission did not classify the decision of the Minister for the Economy to maintain the applicant under the special administration procedure as State aid, but solely the conduct of AAAS.

273 Second, in recital 229 of the contested decision, the Commission stated that AAAS could have tried to challenge the 'Ministry's decision to prolong without explanation [the applicant's] special status'.

274 However, the Commission has not demonstrated that a hypothetical private creditor in a situation comparable to that of AAAS would have decided to initiate such legal proceedings, in the light in particular of their expected duration in relation to the very short period covered by Measure 1. The duration of legal proceedings is a factor which is liable to have a significant influence on the decision-making process of a normally prudent and diligent private creditor (see, to that effect, judgment of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 81).

275 Before the Court, the Commission asserts that Romania could have amended the Romanian Privatisation Law. However, such a consideration does not appear in the contested decision. The Commission cannot supplement the statement of reasons for the contested decision during the proceedings (see, to that effect, judgment of 24 May 2007, *Duales System Deutschland* v *Commission*, T-289/01, EU:T:2007:155, paragraph 132).

276 Third, in the contested decision, the Commission found that, unlike AAAS, certain public and private creditors, including Electrica, Salrom, Polcheme SA and Bulrom Gas, had initiated enforcement proceedings during that period.

277 The applicant claims that most private creditors acted in the same way as AAAS.

278 In that regard, it should be noted, first of all, that, in the contested decision, the Commission did not submit any evidence capable of demonstrating, either expressly or implicitly, that AAAS and three of the four creditors referred to in paragraph 276 above, namely Salrom, Polcheme and Bulrom Gas, were, during the relevant period, in a comparable situation. On the contrary, it is apparent from recital 231 of the contested decision that Polcheme and Bulrom Gas were among the secured creditors, whereas almost all of the claims held by AAAS were unsecured.

279 As regards Electrica, the Commission did indeed state, in recital 231 of the contested decision, that it would have had the 'same recovery ratio' as AAAS, according to a 2011 study by Raiffeisen Bank. However, in 2012, that is to say, before it was privatised, Electrica was a public creditor. For the purposes of applying the private creditor test, it is only the conduct of private creditors in a situation as close as possible to that of AAAS that is relevant (see, to that effect, judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 28 and the case-law cited).

280 Moreover, the Commission did not call into question the applicant's argument that most of its private creditors, like AAAS, did not enforce their claims or adopt other protective measures during the period concerned. Although the Commission criticises the applicant for not having shown that those other private creditors were in a situation comparable to that of AAAS, that same criticism may be raised against the Commission itself, since it has not shown that the four creditors which it mentioned in the contested decision were in a situation that was comparable to that of AAAS. According to the case-law, it is for the Commission to demonstrate that the conduct of a public creditor did not satisfy the private creditor test and that, accordingly, it granted an advantage (see, to that effect, judgment of 20 September 2017, *Commission* v *Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 29).

281 It should also be noted, for the sake of completeness, that the application of the private creditor test may be based on the conduct of a hypothetical private creditor in a situation comparable to that of the public creditor in question (see the case-law cited in paragraph 254 above). The application of that test does not therefore necessarily require that an actual private creditor in such a comparable situation be identified. However, in the contested decision, the Commission also failed to demonstrate that a hypothetical private creditor in a situation comparable to that of AAAS would have enforced its claims or adopted other protective measures during the period concerned, the duration of which was relatively short.

282 In that regard – and the Commission has not disputed this in a substantiated manner – it was likely that, in view of the amount of AAAS's claims, the enforcement of those claims would have led to the opening of insolvency proceedings.

283 It is important to take into account the fact that almost all of AAAS's claims were unsecured. In that regard, the Commission has not shown that a private creditor with an exposure similar to that of AAAS would have had an economic interest in initiating insolvency proceedings, given that, by contrast with the secured creditors, it risked losing a greater part of its claims in the context of such proceedings. Thus, for such a creditor, potential privatisation or another solution might, at that time, have appeared to be both conceivable and more attractive for the reasons already set out in paragraph 262 above. At the very least, it would be legitimate for such a creditor to assess the options open to it for a certain amount of time instead of rushing into taking action such as that advocated by the Commission.

284 The ground, set out in recital 242 of the contested decision, that AAAS could have brought about the opening of insolvency proceedings and then proposed an alternative reorganisation plan is neither sufficiently substantiated nor convincing. Even if AAAS could propose an alternative reorganisation plan in the context of insolvency proceedings, the Commission has not shown either that it could, on its own, have brought about its adoption, or that that alternative plan would have led to a better recovery of AAAS's unsecured claims.

285 Similarly, the Commission has not shown that a hypothetical private creditor in a situation comparable to that of AAAS would have seized the applicant's accounts during the period concerned or could have obtained securities for its claims, such as a pledge on real estate. The Commission merely mentioned such a possibility without in any way carrying out a specific and substantiated examination to that end. Thus, by way of example, the Commission did not examine the availability of liquid assets or immovable property of sufficient value from among the applicant's assets that a hypothetical private creditor in a situation comparable to that of AAAS could have seized or over which it could have obtained security. Nor did it examine the procedures to be followed and the conditions required in order to do that and whether, in the light of those procedures, such a hypothetical private creditor would have acted in the manner the Commission advocated, during the relatively short period from 22 September 2012 to 31 January 2013. In any event, in accordance with the case-law referred to in paragraph 254 above, it is for the Commission to demonstrate that it was clear that such a hypothetical private creditor would have acted in the way that it advocated during the period covered by Measure 1. As regards the specific examples given by the Commission in the contested decision, they do not concern creditors with an exposure comparable to that of AAAS.

286 Furthermore, the applicant claims, without being contradicted in a substantiated manner by the Commission on this point, that, in any event, Article 16(5)(c) of the Romanian Privatisation Law prevented AAAS from imposing such measures on it.

287 Fourth, in the contested decision, the Commission criticised the Romanian authorities for not having submitted any contemporaneous report or internal document showing that AAAS had acted, during the period concerned, like a private creditor.

288 The applicant submits, in essence, that it was legitimate for AAAS not to prepare such documents immediately, given that it had signed the Memorandum with the precise aim of keeping all options open and assessing its viability.

289 In that regard, it should be noted, first of all, that AAAS had available to it, during the relevant period, the Commission's economic analysis set out in the 2012 decision, which constituted a contemporary assessment accessible to any creditor, relating in particular to the advantages and disadvantages of the liquidation scenario as opposed to that of privatisation. For the reasons already set out in paragraphs 256 to 265 above, and as the applicant claims, it was legitimate for a creditor to consider that that evaluation remained relevant during the period concerned.

290 Next, the creditors, including AAAS, also had at their disposal the October 2011 study by Raiffeisen Bank, described by the Commission as 'the latest available study at that time' (recital 230 of the contested decision). That study, submitted to the Commission by the Romanian authorities during the administrative procedure which led to the adoption of the 2012 decision, compared the proceeds from a liquidation of the applicant with those from a privatisation. It is apparent from the contested decision that, according to that study, in the liquidation scenario, AAAS would have recovered approximately EUR 23 000 000, whereas, in the debt conversion and privatisation scenario, it would have recovered between EUR 22 900 000 and EUR 79 500 000. While it is true that that study preceded, by one year, the adoption of Measure 1, the Commission does not claim that the data in that study were no longer pertinent during the relevant period for that measure. In addition, given that that study was submitted to the Commission by Romania and that it contains specific data on the recovery of AAAS's claims, it is likely that the latter had access to it or was in a position to have access to it, a point which is not disputed by the Commission.

291 Lastly, Clause 1.1(b) of the Memorandum provided for a viability analysis to be conducted. That analysis was commissioned on 23 November 2012, that is to say, the very day on which the Memorandum was signed and was drawn up by Alvarez & Marsal. It follows that the creditors who signed the Memorandum, including AAAS, acted promptly, by commissioning that analysis approximately two months after the failure of the last attempt to privatise the applicant.

292 Accordingly, it seems legitimate that a private creditor in a situation comparable to that of AAAS would wait for the results of that analysis on the viability of the debtor before deciding, in full knowledge of the facts, on the steps to be taken on the basis of that analysis, instead of immediately enforcing its claims, it being noted, moreover, that the accumulation of claims by AAAS against the applicant during the period concerned did not consist of new claims contracted during that period, but only in the accumulation of interest accrued on pre-existing claims.

293 The Commission submits that Romania has not established that that analysis had been carried out for or on behalf of AAAS, or even that it had been used by AAAS.

294 However, there is no rule of law requiring a private creditor to carry out its own economic analysis. Such analyses may be commissioned collectively by the creditors and made available to them, as in the present case. In any event, the Commission has not even argued that a private creditor in a situation comparable to that of AAAS would, for example because of certain characteristics peculiar to it, necessarily have carried out a separate analysis.

295 Fifth, as regards the assertion, in the contested decision, that the Memorandum proves that AAAS agreed to non-recovery and the accumulation of debts, it is sufficient to refer to paragraph 124 above, from which it is apparent that the Memorandum did not contain any such commitment.

296 Sixth, as regards the Commission's findings in recitals 231 and 241 of the contested decision that AAAS could 'threaten' the applicant with the opening of insolvency proceedings, suffice it to note that it seems doubtful that such a threat would have been perceived as credible for the reasons set out in paragraph 283 above.

297 Accordingly, it must be concluded that, in the contested decision, the Commission did not demonstrate to the requisite legal standard that, by not enforcing its claims and by accumulating others during the period concerned, AAAS had granted the applicant facilities which it would manifestly not have obtained from a private creditor in a situation as close as possible to that of AAAS, within the meaning of the case-law cited in paragraph 253 above. The Commission has failed to show that a hypothetical private creditor in a situation comparable to that of AAAS would have immediately enforced its claims or would have taken other measures to recover them or to protect them during the relatively short period from 22 September 2012 to 31 January 2013, or that such enforcement or such measures would have enabled it to recover or protect part of its claims.

298 It follows from the foregoing that the Commission has not succeeded in demonstrating to the requisite legal standard that Measure 1 conferred an advantage on the applicant and that it therefore constituted State aid.

(3) The existence of an economic advantage as regards Measure 2

299 In section 6.1.2.2 of the contested decision (recitals 244 to 263), the Commission stated that there was a technological interdependence between CET Govora and Salrom, on the one hand, and the applicant, on the other, in the sense that each of them was at the same time a supplier and a utility client of the other. While CET Govora supplied electricity and steam to the applicant and Salrom provided it with saline solution and chalk, the applicant supplied CET Govora and Salrom with the industrial water necessary for their activities. Thus, those undertakings were captive customers of each other, with the result that the disappearance of one of them would have led to the disappearance of the others.

300 However, the Commission considered that CET Govora's conduct was not consistent with that of a private creditor and conferred an advantage on the applicant, in particular because CET Govora had decided to continue to supply electricity and steam to the applicant 'free of charge', without requesting advance payments in exchange for the resumption of those supplies, or real estate collateral in respect of the previous debts owed to it by the applicant. In addition, according to the Commission, the decision to continue supplies was taken by Vâlcea County Council on the basis of political considerations which a private creditor would not have followed.

301 By contrast, according to the Commission, Salrom acted as a private creditor would have done and therefore did not confer an advantage on the applicant, since it made the continuation of its supplies conditional on advance payments and the creation of a charge on immovable property.

302 The applicant claims that the Commission made a manifest error of assessment in finding that CET Govora's conduct in the context of Measure 2 did not satisfy the private creditor test.

303 The Commission disputes the applicant's arguments.

304 In the present case, first, it should be noted that, in the contested decision, the Commission based its argument that CET Govora did not act as a private creditor would have done, in essence, on a comparison between its conduct and that of Salrom. To that end, the Commission stated that those two undertakings continued to supply the applicant between September 2012 and January 2013 despite the non-payment of its debts. While Salrom demanded advance payments and real estate collateral from the applicant, CET Govora did not impose similar conditions.

305 The applicant considers, in essence, that it is not sufficient to compare CET Govora's actions with Salrom's actions in order to conclude that CET Govora did not act as a private creditor would have done.

306 In the present case, first of all, it must be stated that the nature and subject matter of the respective conduct of CET Govora and Salrom, namely the continued supply of raw materials to the applicant, were comparable and that that continued supply took place in parallel, during the same period, and thus fell within a similar context.

307 Next, it should also be noted that there was a technological interdependence between CET Govora and Salrom, on the one hand, and the applicant, on the other hand, as the Commission itself found in the contested decision.

308 Lastly, the figures in tables 7 and 8 of the contested decision, which are not contested, show that the evolution of the applicant's debts to CET Govora and Salrom were broadly comparable during the period covered by Measure 2. It is apparent from those tables that the latter undertakings' claims almost doubled during that period, with similar trajectories.

309 In those circumstances, the Commission was entitled, in the contested decision, without committing any error, to take the view, implicitly but necessarily, that CET Govora and Salrom were in a comparable situation in the context of Measure 2.

310 It is true, as was set out in paragraph 279 above, that, for the purposes of applying the private creditor test, it is necessary to compare the conduct of a public creditor with that of a private creditor, whether real or hypothetical, whereas, in the present case, the Commission compared the conduct of two public undertakings.

311 However, it is important to note that, given their situation of technological interdependence with the applicant, both CET Govora and Salrom were in a very particular, even unique, situation with regard to the applicant. It is that very particular situation, common to both CET Govora and Salrom, which justified, in the specific circumstances of the present case, comparing them with each other.

312 In addition, the Commission concluded that Salrom had acted like a private creditor in the context of Measure 2. Thus, being a public undertaking which, however, acted as a private creditor, the comparison with it, as a reference in order to illustrate the conduct of a hypothetical private creditor in a situation comparable to that of CET Govora, is justified.

313 Second, it should be noted that CET Govora and Salrom acted very differently in the context of Measure 2, as the Commission rightly points out in the contested decision.

314 While Salrom requested and obtained advance payments for its supplies and secured its claims as far as possible by means of a charge on immovable property, CET Govora did not take comparable measures.

315 The applicant considers, however, that CET Govora nevertheless did take certain measures to secure its claims against it.

316 First of all, the applicant claims that CET Govora received payments from it in the sum of RON 8 million between September 2012 and January 2013. However, as is apparent from recital 254 of the contested decision, during that period CET Govora made supplies to the applicant in the amount of approximately RON 50 million, with the result that the payments received represent only a small portion of them.

317 Next, the applicant mentions the existence of an 'undertaking' on its part to pay for the electricity supplied by CET Govora in instalments until February 2013. However, it has failed to provide more information regarding the amount of those payments in instalments and whether it actually paid them, which would make it possible to understand the scope and relevance of such a commitment.

318 Lastly, the applicant claims that CET Govora added penalties to the claims held by it in regard to the applicant arising between February 2008 and December 2012. However, the aim of such a measure is not to secure CET Govora's claims.

319 Third, it is apparent from recital 260 of the contested decision that the decision for CET Govora to continue to supply the applicant, without negotiating or protecting its claims, was taken by the Vâlcea County Council. The applicant's assertion that that authority took that decision on the basis of CET Govora's proposals and purely economic considerations is not supported by any evidence. Moreover, it is contradicted by the public-policy grounds relied on by the municipal authorities to justify the adoption of that decision, which are referred to in footnote 110 to the contested decision and are not disputed by the applicant.

320 Fourth, the applicant claims that, if CET Govora had not continued to supply it, it would have suffered losses and become insolvent itself.

321 It is sufficient to note in this regard that the Commission did not criticise CET Govora for continuing to supply the applicant as such, but for continuing to supply it without any measures to protect its claims. The applicant's argument on that point is, therefore, ineffective.

322 Fifth, the applicant claims that 'numerous private suppliers' continued, like CET Govora, to supply it despite the existence of outstanding claims. However, that argument is not substantiated, since the applicant has not even identified those other 'numerous private suppliers'.

323 Sixth, the applicant criticises the Commission for having relied on the statements of PCC, one of its minority shareholders, or on those of CET Govora's court-appointed receiver, inter alia, in recitals 258, 259, 261 and 262 of the contested decision. According to the applicant, those statements are irrelevant and contradict Romania's submissions made during the administrative procedure. In addition, it argues, PCC has only 'limited credibility'.

324 Those arguments are, however, ineffective. Those statements are of only secondary relevance in the scheme of that part of the contested decision, since the Commission's conclusions were based primarily on a comparison of CET Govora's conduct with that of Salrom and on the fact that it was Vâlcea County Council which required CET Govora to continue its supplies.

325 Seventh, the applicant states that CET Govora has the legal obligation not to interrupt the public service of delivering heating and thermal energy to the public.

326 That argument is, however, irrelevant, since the applicant is an industrial customer of CET Govora, with the result that that obligation is not applicable to the contractual relationship between them.

327 It follows that the plea alleging a manifest error of assessment as regards the existence of an economic advantage in the context of Measure 2 must be rejected as unfounded.

3. The plea alleging a failure to state reasons or an inadequate statement of reasons as regards Measure 2

328 The applicant submits, further, that, in the contested decision, the Commission infringed its obligation to state reasons, in essence, because, first, it is not sufficient to compare CET Govora's actions with Salrom's actions in order to conclude that CET Govora did not act as a private creditor would have acted and, second, the Commission relied on statements made by PCC and CET Govora's court-appointed receiver without explaining why these were more credible than the explanations provided by the Romanian authorities.

329 The Commission disputes the applicant's arguments.

330 In accordance with the second paragraph of Article 296 TFEU, the Commission is required to state the reasons for its decisions. It is settled case-law that the statement of reasons required by that provision must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review (see judgment of 22 March 2001, *France* v *Commission*, C-17/99, EU:C:2001:178, paragraph 35 and the case-law cited).

331 In the present case, first, as has been stated in paragraphs 306 to 309 above, the relevant factors justifying the comparison made between CET Govora and Salrom in the context of Measure 2 are clearly identifiable from an overall reading of section 6.1.2.2 of the contested decision. The reasoning set out in the contested decision in that regard is coherent and sufficient.

332 As regards, second, the reasoning in the contested decision regarding the credibility of the statements made by PCC and CET Govora's court-appointed receiver, that argument is not, in any event, capable of leading to the annulment of the contested decision in that respect, for the reasons already set out in paragraph 324 above.

333 It follows that the plea alleging a failure to state reasons or an inadequate statement of reasons as regards Measure 2 must be rejected as unfounded.

4. Conclusions

334 In the light of all of the foregoing, it must be concluded that the Commission has not demonstrated to the requisite legal standard that Measures 1 and 3 constituted State aid, without there being any need to examine the other pleas raised by the applicant in relation to those measures.

335 By contrast, all of the applicant's pleas relating to Measure 2 must be rejected as unfounded.

336 Consequently, Article 1(a) and (c) of the contested decision, and Articles 3 to 5 of that decision in so far as they relate to the measures provided for in Article 1(a) and (c) of the contested decision, must be annulled.

337 Article 6 of the contested decision must also be annulled, in so far as Romania's obligation, provided for in that article, to communicate certain information to the Commission concerns Measures 1 and 3.

338 The applicant also claims that Article 7 of the contested decision should be annulled. However, Article 7(1) of that decision merely states that Romania is the addressee of that decision, in accordance with Article 31(2) of Regulation 2015/1589. Since no plea in law or argument has been raised by the applicant in that regard, the claim for annulment of Article 7(1) of the contested decision must be rejected.

339 As for Article 7(2) of the contested decision, that provision provides for publication of the amounts of aid and interest recovered pursuant to the contested decision. Accordingly, Article 7(2) of that decision must also be annulled, in so far as it relates to the measures referred to in Article 1(a) and (c) of that decision.

IV. Costs

340 Under Article 134(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

341 Since the Court has rejected the pleas of inadmissibility raised by the Commission and the action has been upheld as regards two of the three measures forming the subject matter of the contested decision, the Court considers it fair in the circumstances of the case to order the applicant to bear one quarter of its own costs, with the remainder of its costs being paid by the Commission, which should also bear its own costs.

On those grounds,

THE GENERAL COURT (Tenth Chamber, Extended Composition)

hereby:

1. **Annuls Article 1(a) and (c) of Commission Decision (EU) 2019/1144 of 17 December 2018 on State aid SA.36086 (2016/C) (ex 2016/NN) implemented by Romania for Oltchim SA;**

2. **Annuls Articles 3 to 6 and Article 7(2) of Decision 2019/1144 in so far as they concern the measures referred to in Article 1(a) and (c) of that decision;**

3. **Dismisses the action as to the remainder;**

4. **Orders Oltchim to bear one quarter of its own costs;**

5. **Orders the European Commission to pay three quarters of the costs incurred by Oltchim and to bear its own costs.**

Kornezov Buttigieg Kowalik-Bańczyk

Hesse Petrlík

Delivered in open court in Luxembourg on 15 December 2021.

E. Coulon S. Papasavvas
Registrar President