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⁽¹⁾ Text with EEA relevance.

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

II

(Non-legislative acts)

DECISIONS

In the published version of this Decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...]	PUBLIC VERSION This document is made available for information purposes only.
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COMMISSION DECISION (EU) 2021/69**of 24 February 2020****on State aid SA.43549 (2017/C) (ex 2017/FC) (ex 2016/NN) (ex 2015/EO) implemented by Romania for CFR Marfă***(notified under document C(2020) 1115)***(Only the Romanian text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

- (1) By letter dated 24 September 2015, Romania informed the Commission that in June 2013 it converted into equity a public debt of RON 1 669 million (ca. EUR 363 million ⁽²⁾) owed by Societatea Națională de Transport Feroviar de Marfă CFR S.A. (hereinafter ‘CFR Marfă’), a State-owned rail freight company, to CFR Infrastructură, a State-owned rail infrastructure manager, various social security bodies and tax bodies ⁽³⁾. On the basis of the information provided by Romania, the Commission decided to open an *ex officio* case into the measures in favour of CFR Marfă, registered under the State aid case number SA.43549 (2015/CP).

⁽¹⁾ OJ C 198, 8.6.2018, p. 16.

⁽²⁾ The exchange rate used in this decision is identical to the one used in the Opening Decision, that is EUR 1 = RON 4,6, as shown on the ECB website on 13 September 2017. The EUR figures are for information purposes only; the official figures are presented in RON, https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/eurofxref-graph-ron.en.html

⁽³⁾ Emergency Order No 61/2013 regulating certain financial-fiscal measures of 12 June 2013, published in Romanian Official Gazette No 363 of 18 June 2013.

- (2) By letters dated 17 November 2015, 6 July 2016, and 6 April 2017, the Commission requested information on the measures in favour of CFR Marfă. Romania responded by letters dated 24 December 2015, 10 and 11 August 2016 and 12 May 2017. Romania also pre-notified the debt-to-equity swap on 5 October 2016 and Romania's pre-notification was merged with the above mentioned *ex officio* State aid case.
- (3) On 6 March 2017, the Commission received a formal complaint ('the Complaint') from the *Association of Private Rail Freight Operators in Romania* ('the complainant' or 'OPSFPR', which stands for *Organizația Patronală a Societăților Feroviare Private din Romania*) ⁽⁴⁾, representing the interests of private companies operating in the field of rail freight transport in Romania. The complaint together with a request for further technical information was sent to Romania on 6 April 2017. Romania commented on the complaint on 12 May 2017.
- (4) On 19 September, an Addendum to the Complaint was submitted to the Commission by the complainant. The non-confidential version of the Addendum was forwarded to Romania for comments. Romania replied on 6 October 2017.
- (5) By letter dated 18 December 2017, the Commission informed Romania that it had decided to initiate the formal investigation procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) in respect of the aid.
- (6) The Commission decision to initiate the procedure (hereinafter 'the Opening Decision' was published in the *Official Journal of the European Union* ⁽⁵⁾. The Commission invited interested parties to submit their comments on the aid/measure.
- (7) The Commission received the initial observations from Romania on the Opening Decision on 20 February 2018.
- (8) The Commission also received comments from interested parties on 6 July 2018. On 16 July 2018, the Commission forwarded them to Romania with the opportunity to react. Romania submitted its observations on third party comments by letter dated 14 August 2018.
- (9) The Commission sent subsequent requests for information to Romania, notably on 14 November 2018 and on 15 March 2019, to which the Romanian authorities replied on 19 December 2018, and on 27 June, 9 July, 13 September and 6 November 2019, respectively.
- (10) The Commission held various meetings with the Romanian authorities, the most recent being on 24 July 2019, after which Romania submitted additional information on 13 September 2019.

2. DETAILED DESCRIPTION OF THE AID

2.1. Beneficiary

- (11) CFR Marfă is a 100 % State-owned limited liability company ('State-owned enterprise' or 'SoE') providing rail freight services and operating multimodal terminals. Romania, as a sole shareholder, currently manages and supervises the company (e.g. regarding its annual budget) via the Ministry of Transport.
- (12) CFR Marfă was incorporated as a joint stock company on 1 October 1998, following the reorganisation of the Romanian Railways incumbent, *Societatea Națională Căile Ferate Române* ('SNCFR') ⁽⁶⁾, a vertically integrated railway company, which was then split into five independent companies: CFR Infrastructură (or CFR SA, the infrastructure manager, 100 % owned by the State, hereinafter 'CFR Infrastructură'), CFR Marfă, CFR Călători (the rail passenger operator, 100 % owned by the State), CFR Gevaro (providing services linked with restaurant cars and sleeping wagons) and *Societatea de Administrare Active Feroviare* – SAAF (company managing excess rolling stock, which is to be sold, leased or scrapped).

⁽⁴⁾ At the time of filing the complaint, the Association had 16 members out of which 13 active in the field of rail freight transport (as opposed to passenger rail transport). The members included Grup Feroviar Român S.A. ('GFR'), Deutsche Bahn Cargo Romania ('DB Cargo Romania'), Unicom Tranzit SA ('Unicom Tranzit'), Cargo Trans Vagon S.A. ('Cargo Trans Vagon'), Transferoviar Grup S.A. ('Transferoviar Grup'), Vest Trans Rail S.R.L. ('Vest Trans Rail'), Servtrans Invest S.A. ('Servtrans Invest'), Tehnotrans Feroviar S.R.L. ('Tehnotrans'), Via Terra Spedition, Rail Cargo Carrier Romania (part of the Austrian Rail Cargo Group), Tim Rail Cargo, Rail Force S.R.L. and Trans Expedition Feroviar S.R.L.

⁽⁵⁾ Cf. footnote 1.

⁽⁶⁾ Government Emergency Ordinance No 12/1998 on the reorganization of SNCFR and the transport by railways.

- (13) CFR Marfă provides rail freight transport services of, inter alia, domestic coal, cement, chemical products, grain and oil, wood, salt and metals, operates multimodal terminals and provides ancillary services, such as depot services, fuel services, and logistics. Among CFR Marfă's main clients are other SoEs, such as CE Hunedoara, the former chemicals producers Oltchim, Salrom, and district heating companies.
- (14) In 2017, rail freight accounted for 30,2 % of the freight transport market in Romania, compared to 30,7 % in 2013 and to only 24,9 % in 2007 ⁽⁷⁾. The share of road transport was relatively higher, ranging from 53,5 % in 2007 to 40,3 % in 2013 and 42,4 % in 2017, whereas the share of inland waterways transport varied from 25,2 % in 2007 to 29 % in 2013 and to 27,4 % in 2017 ⁽⁸⁾.
- (15) Romania granted access to its rail network to foreign rail freight operators in 1998 ⁽⁹⁾. Since Romania's accession to the EU in 2007, CFR Marfă's market share in the rail freight sector measured by volume (thousand tonnes of goods carried) decreased steadily from [70-80] % in 2007 to [50-60] % in 2014 and to [40-50] % in 2018. CFR Marfă's market share measured by distance carried (tonnes-km) also decreased from [60-70] % in 2007 to [40-50] % in 2014 and to [30-40] % in 2018 ⁽¹⁰⁾. This represents CFR Marfă's share of [5-10] % of the total freight market in Romania, comparing to the private rail freight operators combined market share of [10-20] % ⁽¹¹⁾.

Table 1

Market share (rail freight) development CFR Marfă 2007-2018

Market share (%)		2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018 (*)
by volume of goods carried	CFR Marfă	[70-80]	[60-70]	[50-60]	[50-60]	[60-70]	[50-60]	[50-60]	[50-60]	[50-60]	[40-50]	[40-50]	[40-50]
	Other rail freight operators	[20-30]	[30-40]	[40-50]	[40-50]	[30-40]	[40-50]	[40-50]	[40-50]	[50-60]	[50-60]	[50-60]	[50-60]
by distance carried (tkm)	CFR Marfă	[60-70]	[50-60]	[40-50]	[40-50]	[40-50]	[40-50]	[40-50]	[40-50]	[40-50]	[30-40]	[30-40]	[30-40]
	Other rail freight operators	[30-40]	[40-50]	[50-60]	[50-60]	[50-60]	[50-60]	[50-60]	[50-60]	[60-70]	[60-70]	[60-70]	[60-70]

(*) First 9 months of 2018 only.

Source: Submission by Romania of 24 December 2015; Romania's Reply of 12 May 2017, Annex 2; Romania's Reply of 27 June 2019, point 29.1.

⁽⁷⁾ See Romania's reply to question 2, Annex 2 to Romania's Reply of 12 May 2017 and Eurostat data available at https://ec.europa.eu/eurostat/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=t2020_rk320&language=en

⁽⁸⁾ Ibid.

⁽⁹⁾ Article 15(2) of Government Emergency Ordinance No 12/1998.

⁽¹⁰⁾ See Romania's Reply of 27 June 2019, points 49-51.

⁽¹¹⁾ See Romania's reply to question 2, Annex 2 to Romania's Reply of 12 May 2017, Romania's Reply of 27 June 2018, point 29.1.

- (16) At the time of the Opening Decision, around 20 rail freight operators were active on the Romanian market. CFR Marfă's main competitors are all private operators with the following market shares (in terms of tonnes-km): SC Group Feroviar Roman SA ⁽¹²⁾. ('GFR'; [20-30] % in 2012 and [20-30] % in 2016), SC Unifertrans SA ([5-10] % in 2012 and [5-10] % in 2016), SC Cargo Trans Vagon SA ([5-10] % in 2012 and [0-5] % in 2016), SC DB Schenker Rail Romania ([5-10] % in 2012 and [10-20] % in 2016), SC Transferoviar Grup SA ([0-5] % in 2012 and [0-5] % in 2016), and Rail Cargo Carrier Romania ([0-5] % in 2016) ⁽¹³⁾. At present, the number of active carriers in the Romanian rail freight market has now increased to 28 ⁽¹⁴⁾.

2.2. The financial difficulties of CFR Marfă before the failed privatisation in 2013

- (17) Over the past decade, CFR Marfă's business activity was progressively reduced. The cargo volume carried by CFR Marfă decreased steadily from [...] thousand tonnes in 2007 to [...] thousand tonnes in 2016 (see Table 2 below).

Table 2

CFR Marfă's cargo volume in thousand tonnes in 2007-2017 per category

In thousand tonnes	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Cargo volume transported	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Source: Submission by Romania of 24 December 2015; Romania's Reply of 12 May 2017, annex 1; Romania's Reply of 19 December 2018, subsection E point 13.

- (18) With the downsizing of CFR Marfă's business activity also the number of employees was progressively reduced from 15 992 employees in full time equivalent ('FTE') in 2009 to 6 508 in 2014, to 6 155 in 2016 and to 5 717 in 2018 (see Table 3 below).

Table 3

CFR Marfă's employees in FTE in 2009-2018

In FTE	1999	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Number of Employees	29 289	15 992	10 813	8 257	9 053	8 767	6 508	6 454	6 155	5 995	5 717

Source: Submission by Romania of 24 December 2015, Romania's Reply of 12 May 2017, annex 1, yearly balance sheets of the company ⁽¹⁾, Romania's Reply of 27 June 2019, point 49.

⁽¹⁾ Yearly reports available on CFR Marfă's website (e.g. <http://www.cfrmarfa.cfr.ro/images/stories/financiar/indicatori%20financiar/indicatori%20financiar%20conform%20bilantului%20depus%20pe%20anul%20202017.pdf>)

- (19) The factors described in recitals 15 and 16 above adversely affected the financial situation of CFR Marfă. As presented in Table 4 below, CFR Marfă has been facing financial difficulties for several years.

Table 4

Key financial indicators of CFR Marfă in 2009-2016

In RON million	2009	2010	2011	2012	2013	2014	2015	2016
Total turnover	1 097,30	1 056,10	1 150,00	1 020,60	961,50	954,90	775,94	673,61

⁽¹²⁾ GFR is part of Grampet Group comprising of 14 companies active in rail transport sector in Central and Southeast Europe.

⁽¹³⁾ See Annex 1 of Romania's Reply of 12 May 2017 to the Commission's request for information.

⁽¹⁴⁾ Romania's Reply of 27 June 2019, point 51.2.

In RON million	2009	2010	2011	2012	2013	2014	2015	2016
EBITDA	– 186,60	– 97,10	25,10	– 41,50	– 89,70	17,70	27,56	– 43,69
Interest expenses	31,40	29,40	27,00	23,10	16,00	12,90	8,98	5,62
Total debt	1 261,60	1 673,40	1 891,20	2 186,60	666,30	720,20	788,25	868,13
Shareholders' equity	93,60	– 343,50	– 471,90	– 904,60	566,20	540,50	405,21	302,00
Subscribed share capital	247,33	248,15	251,60	263,96	1 987,54	1 988,35	2 012,12	2 012,12
Other equity	– 153,69	– 591,62	– 723,50	– 1 168,58	– 1 420,20	– 1 447,69	– 1 606,91	– 1 710,13
— <i>Re-evaluation reserves</i>	93,91	120,62	107,98	106,46	114,90	101,99	88,08	88,08
— <i>Reserves</i>	236,22	253,62	266,15	279,17	293,50	306,36	201,05	201,05
— <i>Accumulated profit/loss</i>	– 141,84	– 430,59	– 1 004,18	– 1 149,12	– 1 565,68	– 1 828,88	– 1 736,85	– 1 844,48
— Annual profit/loss	– 341,98	– 535,27	– 93,45	– 405,09	– 262,92	– 27,16	– 159,19	– 154,78
% of the share capital lost	– 62	– 238	– 288	– 443	– 71	– 73	– 20	– 15
Debt/Equity ratio	13,48	– 4,87	– 4,01	– 2,42	1,18	1,33	1,94	2,87
EBITDA/Interest coverage ratio	– 5,94	– 3,30	0,93	– 1,80	– 5,61	1,37	3,07	– 7,77

Source: Submission by Romania of 24 December 2015; Romania's Reply of 12 May 2017, annex 1.

- (20) CFR Marfă has been loss making since 2008 ⁽¹⁵⁾. The accumulated annual losses in the financial years 2009 to 2012 amounted to RON 1 149,12 million (ca. EUR 250 million), which was the main factor for the decrease in shareholders' equity from a positive value of RON 93,6 million (ca. EUR 20 million) in 2009 to a negative value of RON 904,60 million (ca. EUR 197 million) in 2012. The shareholders' equity turned positive in 2013, at RON 566,20 million (ca. EUR 123 million), mainly due to a debt-to-equity swap agreed by the State ⁽¹⁶⁾ of RON 1 669 million (ca. EUR 363 million). The steady deterioration of the shareholders' equity resumed in 2013 (immediately after the 2013 debt-to-equity swap) and continued in 2015 and 2016.
- (21) As summarised in Table 5 below, CFR Marfă had already a significant level of debt in 2010, amounting to 126 % of total assets. Against the background of the deteriorating financial situation of the company, from 2010 to 2012 CFR Marfă's debts increased by around 31 %, to reach RON 2 186,56 million (ca. EUR 475 million), i.e. 171 % of total assets.

⁽¹⁵⁾ In 2007 it still made a net profit of RON 4,73 million (ca EUR 1,02 million) whereas in 2008 it registered annual losses of RON 169,45 million (EUR 36,83 million). Source: financial indicators from the balance sheets of 2007 and 2008 available on CFR Marfă's website at: http://www.cfrmarfa.cfr.ro/index.php?option=com_content&view=article&id=75%3Aindicatori-financiari-conform-bilantului-depus-pe-anul-2007-&catid=35&Itemid=194&lang=ro; and http://www.cfrmarfa.cfr.ro/index.php?option=com_content&view=article&id=170%3Aindicatori-financiari-conform-bilantului-depus-pe-anul-2008-&catid=35&Itemid=194&lang=ro

⁽¹⁶⁾ See recital 1 above, and subsection 4.1.5.2 below.

- (22) In 2012 the current liabilities (with due date of less than one year) represented 87 % of CFR Marfă's total liabilities and consisted of trade payables, tax payables and other liabilities (see Table 5 below).

Table 5

Overview of CFR Marfă's debts 2010-2016

In RON million	2010	2011	2012	2013	2014	2015	2016
Provisions	215,72	96,92	61,1	31,69	1,97	2,68	1,55
Long-term borrowings	324,74	272,82	223,77	169,95	113,23	57,15	—
Deferred revenue	2,24	2,49	2,23	2,49	1,61	1,73	1,4
Non-current liabilities	542,7	372,23	287,1	204,13	116,81	61,56	2,95
Trade payables*	556,36	709,55	841,85	301,12	448,10	604,60	731,54
Short-term borrowings	97,38	89,06	83,02	67,23	77,55	83,50	81,46
Taxes	310,86	487,48	631,57	52,15	69,00	14,07	30,79
Other liabilities	166,13	232,86	343,02	36,30	8,25	24,52	21,39
Current liabilities	1 130,73	1 518,95	1 899,46	456,80	602,90	726,69	865,18
Total debts	1 673,43	1 891,18	2 186,56	660,93	719,71	788,25	868,13
Total assets (= equity + debts)	1 329,96	1 419,28	1 281,94	1 227,16	1 260,21	1 193,47	1 170,12

Source: Submission by Romania of 24 December 2015; Private Investor Test application (* for trade payables), Deloitte, 29 March 2013; Romania's Reply of 12 May 2017, annex 1, financial reports published on CFR Marfă website: <http://www.cfrmarfa.cfr.ro/images/stories/financiar/sit%20fin%20extinse/Situatii%20financiare%20extinse%20la%2031.12.2014.pdf>

- (23) From 2010 to 2012 CFR Marfă's trade payables increased by 53 %, from RON 562,61 million (ca. EUR 122 million) to RON 862,43 million (ca. EUR 187 million). The majority of the outstanding trade payables ([90-100] % out of total trade payables in 2012) can be attributed to SoEs, namely CFR Infrastructură, Informatica Feroviară ⁽¹⁷⁾, CFR Călători and others (see Table 6 below).

Table 6

Overview of CFR Marfă's trade payables in 2010-2016

In RON million	2010	2011	2012	2013	2014	2015	2016	2017	2018
Total trade payables	562,61	726,74	862,43	318,72	465,70	607,68	724,17	934,66	991,88
— out of which SoEs	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

⁽¹⁷⁾ Informatica Feroviara is 100 % owned by CFR Infrastructură and provides railway IT services and software.

In RON million	2010	2011	2012	2013	2014	2015	2016	2017	2018
— out of which CFR Infrastructură	412,68	582,77	716,30	213,47	348,65	505,26	623,54	826,09	860,93
% CFR Infrastructură out of total trade payables	73,35	80,19	83,06	66,98	74,86	83,15	86,10	88,38	86,80

Source: Submission by Romania of 27 June 2019, point 39 and Commission's own calculations ⁽¹⁾.

⁽¹⁾ There are slight differences between the latest figures provided in Romania's Reply of 27 June 2019 (page 39) on the short term debt and trade payables of CFR Marfă (both overall and split by category) as compared to previous figures supplied by Romania or found in various yearly financial reports on the company's website, which explains the difference between some of the figures in Table 6 compared to Table 5. However, these differences are not material for the assessment of the aid granted and therefore the Commission will rely on the latest data available to it for the assessment of CFR Marfă's debts towards the State budget and towards CFR Infrastructură as per latest Romania's latest submitted data in its Reply of 27 June 2019.

- (24) According to the information provided by Romania, for the overdue debts towards CFR Infrastructură, CFR Marfă was charged interest and penalties (see Table 7 below).

Table 7

Overview of overdue liabilities (including interest rate and penalties) owed by CFR Marfă to CFR Infrastructură

Million RON	2010	2011	2012	2013	2014	2015	2016	2017	2018
Amount overdue, out of which	347	515,66	663,96	182,6	314,28	460,57	557,57	777,33	950,08
Interest rate and penalties (daily) for late payment %	0,05	0,05	0,05	0,05	0,06	0,05	0,05	0,03	0,03
Interest and penalties invoiced within the year	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
% of total debt represented by CFR Infrastructură	30,57	28,08	34,44	34,15	27,65	62,24	61,78	76,57	73,23

Source: Romania's Reply of 27 June 2019, points 36 and 39.

- (25) CFR Marfă's debts towards the State budget consisting of outstanding tax payables and outstanding social contributions payments (social security, contribution to the health insurance, contribution to the unemployment fund and to the special fund) more than doubled, from RON 376,21 million (ca. EUR 82 million) in 2010 to RON 838,47 million (ca. EUR 183 million) in 2012 (see Table 8 below).
- (26) At the same time, CFR Marfă's outstanding private bank loans decreased from RON [...] million (ca. EUR [...] million) in 2010 to RON [...] million (ca. EUR [...] million) in 2012 (see also recital 191 below explaining that CFR Marfă prioritised the repayment of private bank loans, salaries and non-public suppliers while postponing payments towards the State budget).
- (27) According to the Romanian authorities, since the second part of 2013 onwards, CFR Marfă had no more overdue debts towards the State budget (see Table 8 below).

Table 8

Overview of CFR Marfă's overdue debts (including interest and penalties) towards the State budget since 2008 (including ANAF, CNPP, ANOFM and CNAS (social contribution))

In RON million	2008	2009	2010	2011	2012 (*)	June 2013 (**)	After June 2013	2014	2015	2016 (***)	2017 (****)	2018
Principal amount	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Interest for late payment	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Penalties for late payment	[...]	[...]	[...]	[...]	[...]		[...]	[...]	[...]	[...]	[...]	[...]
TOTAL overdue debts towards the State budget	130,2	309,41	376,21	627,4	838,47	1 001,2	0	0	0	0	0	19,9

(*) CFR Marfă figures for 2012 include additional debt taken over on 28 June 2012 by CFR Marfă through mergers with SC Intreținere și Reparații Vagoane SA (RON [...] million) and with SC de Transport Maritim de Coastă Ferry Boat SA (RON [...] million). See Romania's Reply to question 16 and 19 of the Commission's request for information of 12 March 2019, submitted on 27 June 2019.

(**) Overdue debt towards the State budget by CFR Marfă that was fully written off in July 2013 following the debt-to-equity swap. This figure does not include the liabilities in amount of RON 668 million by CFR Infrastructură, which were taken over by CFR Marfă under the Emergency Governance Ordinances 32/13 and 61/13 – see Annex 4 to Romania's Comments on the Opening Decision.

(***) Interest and penalties for late payments together constitute RON [...] million (ca. EUR [...] million) on June 2013 – see Annex 4 to Romania's Comments on the Opening Decision.

(****) For the years 2016 and 2017 see recitals 89-90 below.

Source: Romania's Reply of 27 June 2019, point 18, 19 and 21; Also Annex 4 to Romania's comments on the Opening Decision submitted on 20 February 2018 ('Romania's Comments on the Opening Decision').

2.3. History of CFR Marfă's failed privatisation attempts and the 2013 debt-to-equity swap

- (28) CFR Marfă is on the list of SoEs monitored by the International Monetary Fund ('IMF') and the World Bank ⁽¹⁸⁾ and was also covered by the EU in the second and third Balance of Payments financial assistance programmes ⁽¹⁹⁾. The international creditors recommended Romania in 2010 to privatise its majority stakes in several SoEs, including CFR Marfă, in order to reduce the outstanding payments and arrears negatively affecting Romania's State budget.
- (29) According to publicly available information, Romania intended to privatise CFR Marfă at least since 2007 ⁽²⁰⁾. In a Letter of Intent dated 16 June 2010, Romania stated that it remained committed to privatising CFR Marfă in 2011 ⁽²¹⁾.
- (30) In view of the commitments made by Romania through the Letter of Intent and Technical Memorandum of Understanding signed with the IMF and at the same time with the EU ⁽²²⁾, Romania approved the privatisation strategy for a majority stake (51 %) in CFR Marfă through Government Decision No 46 of 13 February 2013.

⁽¹⁸⁾ See for example IMF/Romania: Letter of Intent, and Technical Memorandum of Understanding of 5 February 2010; IMF/Romania: Letter of Intent, and Technical Memorandum of Understanding of 16 June 2010 and others accessible under the following link: <http://www.imf.org/external/country/rou/index.htm?type=9998#23>, accessed on 31 March 2016.

⁽¹⁹⁾ See for example Institutional Paper 312 of November 2015 with the title 'Balance of Payments Assistance Programme: Romania, 2013-2015' available at: https://ec.europa.eu/info/sites/info/files/file_import/ip012_en_2.pdf, pages 3, 28 and 30. For the previous programmes, see also: https://ec.europa.eu/info/sites/info/files/file_import/ip012_en_2.pdf

⁽²⁰⁾ See for example press articles accessible under the following links: http://english.banknews.ro/article/2370_ministry_of_transport_wants_1_billion_euros_from_cfr_marfa_privatisation.html, Article of 13 December 2016, <https://www.railwaygazette.com/news/freight-for-sale/32838.article>, Article of 31 March 2008, accessed on 17 March 2016.

⁽²¹⁾ IMF, 2010, Romania—Staff Report for the 2010 Article IV Consultation, Fourth Review Under the Stand-By Arrangement, and Requests for Modification and Waiver of Non-observance of Performance Criteria—Staff Report; Staff Supplement; Public Information Notice and Press Release on the Executive Board Discussion; Statement by the Executive Director for Romania. IMF Country Report No 10/227, July 2010, page 97.

⁽²²⁾ See for Annex 4 of the Institutional Paper 312 of November 2015 with the title 'Balance of Payments Assistance Programme: Romania, 2013-2015' available at: https://ec.europa.eu/info/sites/info/files/file_import/ip012_en_2.pdf, in particular pages 57, 69, 71, 81.

- (31) According to publicly available information, on 5 April 2013, the Romanian Ministry of Transport published a notice on the sale of the 51 % stake in CFR Marfă with a starting price of RON 797 million (ca. EUR 173 million) ⁽²³⁾. By 8 May 2013, Romania received three bids for CFR Marfă's shares from the US based OmniTRAX Inc., GFR, and a consortium of Transferoviar Grup and Donau-Finanz ⁽²⁴⁾. On 15 May 2013, Romania announced that all three applications were rejected and that it would restart the privatisation process ⁽²⁵⁾.
- (32) On 17 May 2013, Romania published a notice on the sale of CFR Marfă's shares in international, national and local media and on the websites of the Ministry of Transport and CFR Marfă. The potential investors were invited to express their interest in the acquisition of the majority stake (51 %) in CFR Marfă by 23 May 2013.
- (33) On 23 May 2013, the submitted expressions of interest containing prequalification documents had been assessed and a shortlist of prequalified bidders was established. The shortlisted bidders, the Transferoviar Grup and Donau-Finanz consortium, GFR and OmniTRAX Inc., were notified by letter dated 23 May 2013.
- (34) Between 24 May 2013 and 20 June 2013, the prequalified bidders received access to the data room allowing them to carry out due diligence. The prequalified bidders were also invited to submit non-binding preliminary offers by 5 June 2013 and binding bids by 20 June 2013. According to publicly available information, after prequalified bidders withdrew from the transaction, GFR remained the sole bidder by the deadline of 20 June 2013, offering ca. EUR 202 million for the 51 % stake and promising further investments amounting to ca. EUR 201,4 million ⁽²⁶⁾.
- (35) In the meantime, on 12 June 2013 Romania converted into equity RON 1 669 million (ca. EUR 363 million) of debts of CFR Marfă towards CFR Infrastructură and the State budget (in the form of the social security and tax payables) ⁽²⁷⁾.
- (36) Romania foresaw approving the main terms and conditions of the agreement on purchase and sale of shares between 25 June 2013 and 1 August 2013, thus aiming for completion of the transaction in October 2013. GFR however did not pay the purchase price by the deadline established, and the privatisation failed.
- (37) Two other bidders – OmniTRAX and the consortium of Transferoviar Group and Donau-Finanz –, which had expressed their interest in buying CFR Marfă in 2013 besides GFR, withdrew from the bid. Subsequently, as reflected in various press declarations of the Government, other privatisation plans were envisaged but none of them were finally implemented (for instance, in 2015 a privatisation via IPO was announced but the project was abandoned) ⁽²⁸⁾.

2.4. CFR Marfă's financial situation after the failed privatisation

- (38) In 2013, CFR Marfă's total debt dropped significantly thanks to the debt-to-equity swap but then increased again immediately afterwards. After CFR Marfă's privatisation failed, the total debt kept on steadily increasing: by 9 % in 2014 and 2015, when it reached RON 788,25 million (ca. EUR 171 million), and by 10 % in 2016, when it reached RON 868,13 million (ca. EUR 189 million, see Table 4 above). The overall debt continued to increase steadily in the subsequent years, reaching RON 1 214,66 million (ca. EUR 264 million) in 2018, which corresponds to a 20 % increase compared to RON 1 013,13 million (ca. EUR 220 million) debt in 2017 ⁽²⁹⁾.

⁽²³⁾ <http://www.railwaygazette.com/news/freight/single-view/view/cfr-marfa-privatisation-bids-invited.html>; and <http://www.cfrmarfa.cfr.ro/images/stories/CFRMarfa/enANUNT.pdf>, accessed on 17 March 2016.

⁽²⁴⁾ <http://www.railwaygazette.com/news/freight/single-view/view/cfr-marfa-privatisation-bids-in.html>, accessed on 17 March 2016.

⁽²⁵⁾ <http://www.railwaygazette.com/news/policy/single-view/view/all-cfr-marfa-privatisation-bids-rejected.html>, accessed on 17 March 2016.

⁽²⁶⁾ <http://www.railwaygazette.com/news/freight/single-view/view/news-in-brief-74.html>, accessed on 17 March 2016.

⁽²⁷⁾ Emergency Order No 32/2013 of 23 April 2013, Romanian Official Gazette Part I No 245, 29 April 2013; and Emergency Order No 61/2013 of 12 June 2013. The swap measure was implemented for the amount of RON 1 669 million which includes: (i) the debts of CFR Infrastructură to ANAF, in the amount of RON 527,2 million, taken over by CFR Marfă under Government Decision Order No 32/2013; (ii) the amount of RON 140,78 million, which represents a debt of CFR Marfă to CFR Infrastructură; (iii) the amount of RON 1 001,2 million, which represents a debt of CFR Marfă to ANAF.

⁽²⁸⁾ <http://www.ziare.com/dan-coman-sova/ministrul-transporturilor/sova-privatizarea-cfr-marfa-va-fi-reluata-in-acest-an-1289691>, article published on 24 March 2014.

⁽²⁹⁾ See Financial Indicators Report as per company's Balance Sheet published on CFR Marfă's website at the following addresses: <http://www.cfrmarfa.cfr.ro/images/stories/financiar/indicatori%20financiar/Indicatori%20financiar%20conform%20bilantului%20depus%20pe%20anul%202018.pdf> (for year 2018); <http://www.cfrmarfa.cfr.ro/images/stories/financiar/indicatori%20financiar/Indicatori%20financiar%20conform%20bilantului%20depus%20pe%20anul%202017.pdf> (for year 2017).

- (39) Furthermore, following the failed privatisation, CFR Marfă's current liabilities continued to increase by 32 %, 21 % and 19 % in 2014, 2015 and 2016 respectively, constituting most of the debts (92 % in 2015 and 99,7 % in 2016, see Table 5 above), whereas CFR Marfă's trade payables steadily rose from RON 251,34 million (ca. EUR 55 million) in 2013 to RON 731,54 million (ca. EUR 159 million) in 2016, again with the majority (90 % in 2016) of these trade payables attributable to the SOEs. In particular, CFR Marfă's trade payables towards CFR Infrastructură almost tripled from RON 213,47 million (ca. EUR 46 million) in 2013 to RON 623,5 million (ca. EUR 135,5 million) in 2016 (see Tables 5 and 6 above).
- (40) After a slight improvement in 2014 (an operating loss of RON 27,16 million (ca. EUR 6) million in 2014 compared to a loss of RON 262,92 million (ca. EUR 57 million) in 2013, CFR Marfă's financial situation deteriorated further. A loss of RON 159,19 million (ca. EUR 35 million) and RON 154,78 million (ca. EUR 34 million) was recorded in 2015 and 2016 respectively. CFR Marfă's shareholders' equity decreased again by 47 %, that is from RON 566,2 million (ca. EUR 123 million) in 2013 to RON 302 million (ca. EUR 66 million) in 2016 (see Table 4 above).
- (41) The financial difficulties of CFR Marfă need to be seen in a wider context of influencing factors, besides increased competition from (national and foreign) private rail freight carriers and from other modes of transport. According to the publicly available reports, these additional factors include in particular mismanagement, lack of transparency and accountability, huge costs, significant backlogs from contracts with other SOEs (some of which are in difficulty themselves), outdated rolling stock, managers leaving the company and joining direct competitors, as well as corruption allegedly depleting the company of significant amounts of financial resources (millions of euros) or important customers contracts, as reported by the press ⁽³⁰⁾ ⁽³¹⁾ and in various official communication for the relevant State agencies ⁽³²⁾.

2.5. Scope of the formal investigation procedure

- (42) On 18 December 2018, the Commission initiated formal proceedings on five support measures:

Measure 1: Non-enforcement of steadily increasing debts towards the State (social security debts and outstanding taxes) since at least 2010 until the 2013 debt-to-equity swap (*Measure 3* below), which converted all of CFR Marfă's overdue debts towards the State into equity of CFR Marfă;

Measure 2: Non-enforcement of steadily increasing CFR Marfă's debts towards CFR Infrastructură since at least 2010 until the 2013 debt-to-equity swap (*Measure 3* below), which converted 85 % of CFR Marfă's overdue debts towards CFR Infrastructură into equity of CFR Marfă;

Measure 3: A debt-to-equity swap amounting to RON 1 669 million (ca. EUR 363 million) in 2013;

Measure 4: The continued non-enforcement of debts towards the State (social security debts and outstanding taxes) after the 2013 debt-to-equity swap;

Measure 5: The continued non-enforcement of steadily increasing CFR Marfă's debts towards CFR Infrastructură after the 2013 debt-to-equity swap.

- (43) In the Opening Decision, the preliminary conclusion of the Commission was that the above-described measures entailed State resources and were imputable to the State. Additionally, given the unlikelihood that any rational private operator would have provided CFR Marfă with such measures, the Commission took the preliminary view that the measures provided CFR Marfă with an undue advantage; such advantage would be selective, given that CFR Marfă was its sole beneficiary.

⁽³⁰⁾ <https://www.romaniajournal.ro/society-people/law-crime/the-fight-against-corruption-still-on-searches-at-cfr-calatori-and-cfr-marfa/>, Article of 28 October 2014, <https://www.romania-insider.com/another-romanian-businessman-targeted-in-corruption-case>, Article of 30 October 2014;

<http://www.business-review.eu/news/former-cfr-marfa-director-mihut-craciun-investigated-in-eur-6-million-fraud-case-137031>, Article of 3 May 2017, <http://www.capital.ro/diicot-cfr-marfa-urma-sa-vanda-un-nou-lot-de-vagoane.html>, Article of 4 May 2017.

⁽³¹⁾ <http://www.capital.ro/examen-pentru-guvern-faliment-sau-privatizare-pentru-cfr-marfa.html>, Article of 3 February 2017.

⁽³²⁾ <https://www.diicot.ro/index.php/arhiva/1910-comunicat-de-presa2-19-10-2016>, press release of the National Directorate Anti-corruption dated 19 October 2016, concerning a number of former executives of CFR Marfă, <http://www.pna.ro/comunicat.xhtml?id=6788>, press release of the National Directorate Anti-Corruption dated 2 November 2015, concerning a former General Manager of Galati Regional branch of CFR Marfă, <http://www.pna.ro/comunicat.xhtml?id=8485>, press release of the National Directorate Anti-corruption dated 10 November 2017, concerning a former Secretary of State in Ministry of Transport.

- (44) The Commission also noted that the measures were likely to affect trade between Member States as CFR Marfă was in competition with other rail freight carriers from other Member States. The measures enabled CFR Marfă to continue operating so that it did not have to face, as other competitors, the consequences that would normally follow from its poor financial results.
- (45) On the basis of the above, the Commission's preliminary view was that the measures seemed to constitute State aid within the meaning of Article 107(1) TFEU.
- (46) The Commission also expressed doubts on the compatibility of the measures, in particular since the Romanian authorities did not provide any possible compatibility grounds. The Commission's preliminary view was that CFR Marfă could have been considered a firm in difficulty in the sense of the 2004 and of the 2014 Guidelines on State Aid for rescuing and restructuring non-financial enterprises in difficulty ('the R&R Guidelines') ⁽³³⁾, amongst others in view of the fact that the company was fulfilling the conditions for being put under insolvency since at least 2010.
- (47) However, the criteria for compatible rescue and restructuring aid laid down in the R&R Guidelines were not complied with by any of the measures. In particular, in the absence of a notified restructuring plan (the Romanian authorities did not claim the eligibility of the measures as restructuring aid), the Commission could neither assess the necessary components of restructuring, including investment and modernisation measures, nor evaluate whether such measures would be able to restore the long term viability of the company, and would be kept to a minimum, so that undue distortions of competition would be avoided. Lastly, there were no meaningful compensatory measures proposed by the Romanian authorities.
- (48) Also, since the measures were granted in breach of the notification and standstill obligations laid down in Article 108(3) TFEU, the Commission noted that they appeared to constitute unlawful State aid. In the absence of notification of the restructuring plan, and on the grounds that behaviour of public creditors was not conform to the *market economy operator* ('MEO') principle, while the requirements of the applicable 2004 and 2014 Rescue and Restructuring Aid Guidelines were not met, these five measures could not be declared compatible with the internal market.

3. COMMENTS ON THE OPENING DECISION

3.1. Observations from interested parties

- (49) The complainant submitted its observations on the Opening Decision within the legal deadline, and agreed to the findings of the Commission in the Opening Decision. In particular, the complainant provided further comments on two aspects raised in the Opening Decision, namely on Romania's argument that CFR Marfă is a company of 'strategic importance', and on Romania's claims that CFR Infrastructură did not relieve CFR Marfă of its debt and that it actually took firm steps towards enforcing its claims upon CFR Marfă between 2013 and 2017.
- (50) First, the complainant submits that, contrary to the Romania's assertion, CFR Marfă is not 'of strategic importance' for the rail freight transport sector in Romania.
- (51) The complainant, representing an association of rail freight operators, considers it incorrect to state that CFR Marfă is the only operator having the required resources and organisational capacity for acting in case of crises and gives the example of at least 10 carriers that carry a large range of freight ⁽³⁴⁾, and are thus comparable to CFR Marfă in terms of resources.
- (52) As regards the transport of military goods, the complainant submits that any private operator could apply for the issuance of a special authorisation such as the one held by CFR Marfă. The lack of interest for applying for such an authorisation is, in the view of the complainant, due to the limited demand for such transport services.
- (53) Second, the complainant considers that none of the claims presented by Romania according to which the debts of CFR Marfă were enforced by the State is true.

⁽³³⁾ Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2), ('the 2004 R&R Guidelines'); Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1) ('the 2014 R&R Guidelines').

⁽³⁴⁾ See Table 7 in the Submission of OPSFPR of 6 July 2018.

- (54) *On the one hand*, while the complainant acknowledges that CFR Infrastructură has initiated certain procedures to recover a portion of CFR Marfă's infrastructure utilisation tax ('IUT') debt, it notes that only a part of the total amount of debt has been enforced. Specifically, while CFR Infrastructură held enforceable titles (garnishment orders, i.e. orders requiring third parties who owe money to CFR Marfă to transfer their debt payments to CFR Infrastructură) in an amount of RON [...] (ca. EUR [...] million), only RON [...] (ca. EUR [...] million) have been enforced ⁽³⁵⁾ (out of the total overdue debt amounting to no less than RON [...] (ca. EUR [...] million)).
- (55) The complainant further submits that since the submission of the Complaint to the Commission in March 2017, the amount of the debt from infrastructure utilisation taxes owed by CFR Marfă to CFR Infrastructură has steadily increased, yet CFR Marfă has continued to use CFR Infrastructură's rail freight network.
- (56) The complainant cites two documents supporting this view:
- (a) CFR Marfă's Board of Directors Note issued on 23 March 2018, stating that the IUT debt of CFR Marfă to CFR Infrastructură was RON [...] (ca. EUR [...] million), consisting of RON [...] (ca. EUR [...] million) as a main debt and RON [...] (ca. EUR [...] million) in the form of penalties ⁽³⁶⁾.
- (b) A letter addressed to CFR Marfă by the Legal Division of CFR Infrastructură on 26 March 2018, in which CFR Infrastructură estimated that the debt of CFR Marfă to CFR Infrastructură was RON [...] (ca. EUR [...] million), out of which an amount of RON [...] (ca. EUR [...] million) was overdue ⁽³⁷⁾.
- (57) Therefore, the complainant considers that despite the on-going non-payment and accumulation of the IUT debt, CFR Marfă has continued to use the rail freight track infrastructure managed by CFR Infrastructură without impediment and hence, benefitted from further State aid. Moreover, the complainant explains that CFR Infrastructură has expressly confirmed that CFR Marfă should be able to pursue its commercial activities and that it would not take any measure that would lead to the blocking of CFR Marfă's activities ⁽³⁸⁾. Specifically, in a letter to CFR Marfă, CFR Infrastructură explains that '[In view of the above, we show that] during the course of these procedures CNCF 'CFR' SA considered the situation of the debtor and proceeded to recover outstanding debts in a legal framework, without blocking the commercial activity of SNTFM 'CFR Marfă' SA.'
- (58) *On the other hand*, the complainant also contends that Romania's statement quoted in the Opening Decision that, as of 2017, CFR Marfă had 'no more debts towards the State budget' is both misleading and incorrect. The complainant notes that CFR Marfă continues to operate on the market and, therefore, is constantly accumulating debts towards the State budget.
- (59) The complainant also mentions a note from CFR Marfă where the company acknowledges '[b]eing unable to pay the current debts to employees, State Budget and suppliers and especially will not be able to participate on March 29, 2018 in two main transport tenders to accomplish the income required for the company's activity. The two tenders are [Oltenia Power Complex] and the [SALROM Salt National Company].'⁽³⁹⁾
- (60) Finally, the complainant reiterates its views already presented in the Addendum to the Complaint dated 12 September 2017 on the negative effects of the aid, namely that (i) the aid has had serious distortive effects on competition in the liberalised Romanian rail freight market by favouring CFR Marfă over its competitors; (ii) the aid has led to a grave deterioration of the estate of rail infrastructure in Romania, and that (iii) such distortions are aggravated by the Romanian State's breaches of public procurement law in relation to the discriminatory award of public sector rail freight contracts to CFR Marfă. With regard to the latter points, the complainant acknowledges these issues do not fall under the remit of a State aid assessment by the Commission.

⁽³⁵⁾ Notes of the Board of Directors of CFR Marfă no. 90 dated from 23 March 2018, attached to Note no. 29 dated 23 March 2018, no. 16 of 26 March 2018 – Annex 3 and Annex 6 of the Comments from the complainant. According to those notes, the overall debt of CFR Marfă towards CFR Infrastructură was RON [...] (ca. EUR [...] million), of which overdue debts in the amount of RON [...] (ca. EUR [...] million).

⁽³⁶⁾ Note of the Board of Directors of CFR Marfă no. 90 dated of 23 March 2018, attached to Note no. 29 dated 23 March 2018 (see Annex 3 to the Comments from Complainant).

⁽³⁷⁾ See highlighted text in Annex 5 of the Addendum to the Complaint presenting a Letter sent by CFR Infrastructură to CFR Marfă on 26.3.2018.

⁽³⁸⁾ Paragraph 17-19 of Comments from Complainant and Annex 5 containing Letter to CFR Marfă from the legal division of CFR Infrastructură dated 26 March 2018.

⁽³⁹⁾ Annex 7 of Comments from complainant on the Opening Decision: 'Note on debts of CFR Marfă to CNCF SA' Annexed to Document dated 23.3.2018 of CFR Marfă endorsed by CFR Marfă's management.

- (61) Lastly, in its observations on the Opening Decision, the complainant underlines that the duration of the various aid measures was considerably long and that the aid has a particularly distortive effect on private rail freight operators in Romania. Therefore, it requests the Commission to order a suspension injunction to stop granting State aid to CFR Marfă in form of the non-repayment of infrastructure utilisation tax and of accumulated debts towards the State budget (i.e. *Measures 4 and 5*).

3.2. Comments from Romania

- (62) Romania considers that none of the measures defined in the Commission's decision to initiate the formal investigation procedure represent incompatible State aid and puts forward a number of reasons. First, as a general comment Romania provides arguments that activities performed by CFR Marfă are of a strategic interest to the State. Secondly, Romania comments on each of the measures subject to the Opening Decision as summarised below in subsections 3.2.3 to 3.2.5.

3.2.1. Romania's comments concerning the strategic importance of CFR Marfă and the applicability of Article 107(1) TFEU

- (63) Romania submits that CFR Marfă is a commercial company of strategic interest to the State, which, apart from competing on a rail freight market with private rail freight operators, also carries out activities related to country's defence needs and NATO membership, as well as engages in transportation of strategic materials in sectors of major importance to the country's economy, the energy sector and social sectors.
- (64) Romania argues that CFR Marfă has the following obligations related to the country's defence needs ⁽⁴⁰⁾:
- (i) To participate, together with other responsible stakeholders, in the drafting and implementation of the mobilisation plan;
 - (ii) To ensure the necessary reserves and capacities (rolling stock, ferries, personnel, etc.) for the performance of the mobilisation tasks. Although these reserves may be used in the commercial rail freight activity of CFR Marfă, CFR Marfă is obliged to establish these reserves at various points on the national rail network, for which the authorities do not offer compensation. In addition, where such reserves are no longer necessary for commercial purposes because a transport demand does not exist anymore, such resources may not be disposed of and must be kept and maintained operational at the expense of CFR Marfă, which covers the related costs from the revenues obtained from other supplies of services. The estimation of costs related to establishing and maintaining these reserves operational was provided by Romania only very late during the proceedings ⁽⁴¹⁾ due to the fact that 'public authorities did not prepare any calculation methodologies in this respect' and because such information would be classified as state secret ⁽⁴²⁾. Based on the information provided by Romania, the total estimated costs with the maintenance of reserves for defence purposes would amount to RON [...] million (EUR [...] million) for the period between 2008 and 2018, and to RON [...] million (EUR [...] million) for the period between 2010 and 2018.
 - (iii) To draw up the documents related to the supplementation of the necessary workforce;
 - (iv) To ensure the civil protection of its own staff, of passengers and of the goods entrusted for transport purposes in the event of special circumstances, including calamities;
 - (v) to carry out military shipments (both at NATO and at national level), to ensure the continuity of the transportation of military troops and materials in peacetime and in the event of a crisis, calamities and war or other special circumstances, as well to supply wagons, personnel and other resources under request of Ministry of National Defence. These obligations are performed by CFR Marfă on the basis of the provisions of protocols, joint orders and agreements ⁽⁴³⁾ concluded between the Ministry of National Defence and the Ministry of

⁽⁴⁰⁾ Romania's Comments on the Opening Decision; Annex 1 to Romania's submission of 14 August 2018; Romania's Reply of 19 December 2018. See also Romania's submission of 6 November 2019 and therein contained letters from the National Ministry of Defence and the Agency for National Reserves and Special Issues (ANRSPS).

⁽⁴¹⁾ Romania's submission of 13 September 2019, Annexes 1 and 2.

⁽⁴²⁾ Romania's Reply of 27 June 2019, point 2.2 and 2.4.

⁽⁴³⁾ The inter-ministerial protocol No M-86 of 2 July 2003 on the cooperation between the Ministry of National Defence and the Ministry of Transport, Construction and Tourism for the coordination and performance of transports via rail, naval and air channels of communication, the implementing rules of this inter-ministerial protocol approved by Joint Order No M 163/1053/2003 of the Ministry of National Defence and the Ministry of Transport, Construction and Tourism, and the Agreement for the supply of rail transport services for the Ministry of National Defence within the domestic traffic and establishing the military transport documents and means of payment No A 220 of 12 January 2001, submitted as Annex 2 of Romania's Reply of 12 May 2017 to the Commission's request for information and Annex No 9 of Romania's Comments on the Opening Decision.

Transport, Construction and Tourism, as well as under respective agreements between Romania and NATO. Romania estimated the proportion of military shipments at [...] % of the yearly turnover of CFR Marfă⁽⁴⁴⁾, but did not provide a detailed, justified calculation of it, claiming State secrecy;

- (vi) To maintain and develop a ferry line designed to be an extension of PAN-European Corridor IV, as a means of connection between Europe and Asia. Romania submits that since the ferry lines, which connect Europe and Asia through the Constanta harbour are not profitable and cause losses⁽⁴⁵⁾, the ferryboats owned by CFR Marfă were stationed in the seaport of Constanta and did not provide any commercial activity in the period of 2008-2018. Romania explains that the costs for the maintenance of the ferryboats (which are included in the numbers provided in point (ii) of the recital 64 above) would amount to RON [...] million (EUR [...] million) for the period 2008-2018, and to RON [...] million (EUR [...] million) for the period of 2010-2018⁽⁴⁶⁾.
- (65) Furthermore, Romania argues that, apart from the country's defence needs, CFR Marfă also has a strategic importance in that it supplies transportation services of coal and other strategic products to the biggest industrial customers (mainly SOEs such as Complexul Energetic Oltenia, Complexul Energetic Hunedoara, CET Govora and other coal-fired plants), which produce such basic utilities as electricity, heat and hot water. According to Romania, these shipments are usually performed on the basis of contracts concluded following tenders, in which other private operators participate and compete with CFR Marfă, but in times of crisis (e.g. severe weather conditions such as snowfalls, blizzards, droughts) such shipments can be demanded by public authorities to be carried out also outside the existing contracts. Romania submits that hydropower plants and wind systems do not have the capacity required to cover the electricity deficit caused by a decrease in the production of thermal power plants, which are the main sources of electricity (Complexul Energetic Oltenia alone accounting for 20-30 % of the electricity production in Romania). Thus, according to Romania, ensuring the continuity of supply of such strategic materials to these industrial customers is necessary to maintain the living standards of the population and to avoid a negative impact on the activities of economic operators, which makes such shipments a matter of national security, as corroborated by findings of the Constitutional Court of Romania in the Judgment No 91 of 28 February 2018⁽⁴⁷⁾.
- (66) Furthermore, Romania claims that the accumulation of debts for the services of strategic shipments rendered by CFR Marfă to its industrial customers (mainly SOEs, recital 65) was the underlying cause of CFR Marfă accumulating overdue debt towards ANAF. Romania estimates the amounts of the corresponding penalties and interest generated by the non-payment of CFR Marfă's debt to ANAF to correspond to the amount of debt accumulated by these SOEs for the services of strategic shipments of CFR Marfă⁽⁴⁸⁾.
- (67) Romania also notes that CFR Marfă and other public entities have an obligation to participate (free of charge) in various exercises (e.g. simulations of railway accidents) organized by public authorities (such as the General Emergency Inspectorate) and that CFR Marfă provided freight transport resources without any monetary compensation in the interest of/for certain public authorities or public institutions (in the form of custody and stocking of items amongst others for the National Reserve Agency, leasing of special equipment for specific interventions for the Winter Central Commandment)⁽⁴⁹⁾. Romania has not provided any quantification of the costs incurred for the activities above.
- (68) Romania submits that CFR Marfă is the only operator who possesses the capacities necessary to ensure a proper and timely performance of the above-mentioned obligations in the area of defence and national security. Consequently, Romania argues that the recovery of CFR Marfă's debts by enforcement proceedings, immediate liquidation or opening of the insolvency proceedings is not an acceptable solution as it could result in significant periods of time when the resources required for the country's national security and defence could not be used⁽⁵⁰⁾.
- (69) Therefore, having regard to the provisions of Article 107(1) TFEU, Article 4 TEU and point 17 of the Commission Notice No 2016/C 262/01 on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union ('NoA')⁽⁵¹⁾, Romania argues that:

⁽⁴⁴⁾ Minutes of the 24 July 2019 meeting between Romania and the Commission;

⁽⁴⁵⁾ Romania's Comments on the Opening Decision.

⁽⁴⁶⁾ Romania's submission of 13 September 2019, Annexes 1 and 2.

⁽⁴⁷⁾ Romania's Reply of 19 December 2018; also point 7.2 in Romania's Reply of 27 June 2019.

⁽⁴⁸⁾ Romania's submission of 13 September 2019, Annex 1 and 2.

⁽⁴⁹⁾ Romania's Reply of 19 December 2018; also pages 8 and 9 in Romania's Reply of 27 June 2019.

⁽⁵⁰⁾ Romania's Comments on the Opening Decision. See also Annex 1 to Romania's submission of 14 August 2018.

⁽⁵¹⁾ OJ C 262, 19.7.2016, p. 1.

- (a) all of the circumstances above allow Romanian authorities to take any measure meant to ensure the territorial integrity, to maintain public order and to safeguard national security, even if that measure affected competition in a certain field;
- (b) any measure taken in the interest of and meant to ensure national security, territorial integrity and public order, irrespective of whether it is considered State aid or not, is compatible with Community rules ⁽⁵²⁾.

- (70) In other words, Romania considers that when adopting measures 1-3 and 5 with regard to CFR Marfă with a purpose to ensure the continuity of military shipments and shipments of strategic materials, as well as to perform other obligations related to national security and defence purposes, Romania exercised its public powers, which is why Article 107(1) TFEU would not be applicable by virtue of the provisions of Article 4 TEU and point 17 of the NoA.

3.2.2. *Romania's comments on the observations submitted by the complainant on the strategic importance of CFR Marfă*

- (71) Romania submits that the information provided by the complainant does not prove that private operators have the capacity to replace CFR Marfă in the markets of strategic and military shipments for the following reasons.
- (72) First, Romania considers that the fact that private operators are not in a position to replace the activities of CFR Marfă is supported by the reality on the market. To this end, Romania gives the example of a tender organised in 2014 by Complexul Energetic Oltenia where a bid by the consortium of three private operators (GFR, Unicom Transit and Servtrans Invest) was rejected because its' members did not have the technical and operational capacities required in the specifications of the tender procedure, despite the consortium's more advantageous financial offer. The national court dismissed the consortium's appeal, confirming the correctness of findings about the lack of technical and operational capacities of the consortium members as required by the tender documents.
- (73) Romania further submits that the lack of interest by private operators to engage into military shipment services relates not only to a very low demand for this type of transport services, but also to the fact that military shipments and a respective requirement to respond rapidly to orders for such shipments (having a priority over any private shipment) entail having reserves from various resources (e.g. rolling stock, ferries, etc.) scattered over various points of the national rail network. According to Romania, that reduces the efficiency of use of such resources and this reduction of efficiency is not remunerated by the authorities, which is not attractive for private operators. Moreover, Romania states that CFR Marfă owns ca. 93 % of the national wagon fleet and is the only operator, which may fulfil the obligation of keeping the mobilisation reserves, whereas private operators use mostly wagons rented from foreign companies, which cannot constitute mobilisation reserves.
- (74) Therefore, Romania considers that private operators may not replace CFR Marfă in the market of military shipments, as further corroborated by the provisions of the 2013 Decision by the Supreme Council of National Defence, which requires to include clauses into the privatisation contract of CFR Marfă, that would oblige the acquirer to ensure the fulfilment of all strategic obligations currently laid upon CFR Marfă in the area of national security and defence ⁽⁵³⁾.
- (75) Second, Romania also claims that the supply of transport services in the interest of national defence implies, in many cases, the disclosure of secret information with various levels of secrecy, which means that private operators interested in supplying such transport services have to hold certain industrial security certificates. However, private rail operators with the highest market shares in Romania (members of OPSFPR) would most likely be denied such industrial security certificate for the provision of strategic and defence shipments, because they would fail to meet the stringent requirements for obtaining such certificates. Romania mentions several possible grounds for refusing the certificates to members of OPSFPR:

⁽⁵²⁾ Romania's Comments on the Opening Decision. See also Annex 1 to Romania's submission of 14 August 2018.

⁽⁵³⁾ Annex 9 to the Romania's Comments on the Opening Decision.

- (a) shareholders or other person with decision-making powers in the company:
- (1) have been convicted for corruption by way of a final judgement ⁽⁵⁴⁾;
 - (2) have been indicted on charges of corruption ⁽⁵⁵⁾;
 - (3) were indicted on charges of establishing a criminal group, tax evasion and money laundering ⁽⁵⁶⁾;
 - (4) are foreign citizens or undertakings;
- (b) the operators in question have debts or have recorded significant losses;
- (c) the operators conduct business with entities in states that Romania's national defence strategies approved by means of government decisions describe as posing security risks for Romania (namely, countries in the former Soviet Union).
- (76) Therefore, Romania claims that CFR Marfă is *de facto* the only operator on the market, which has a necessary capacity to carry out shipments of strategic and military materials, as well as to perform other obligations related to national security and defence purposes. Consequently, Romania considers that in the light of the above-mentioned circumstances, and given the reality of recent conflict in proximity to Romanian borders (in Ukraine), due to which the amount of military shipments carried out by CFR Marfă increased more than 5 times as compared to 2013, Romania is entitled to invoke the provisions of Article 4 TEU and point 17 of the NoA to claim that Article 107(1) TFEU is not applicable to CFR Marfă's entire activity.
- 3.2.3. Romania's comments on Measures 1 and 4
- (77) With regard to *Measure 1*, Romania submits that, in order to guarantee the outstanding fiscal debts, ANAF commenced enforcement proceedings. Pursuant to the laws in force since 2004, CNPP (the National public Pension Office), ANOFM (the National Employment Agency) and CNAS (the national Health Insurance Office) do not directly collect the contributions owed by the Romanian economic operators and other persons; the only agency responsible for this task is ANAF, which later distributes to the various authorities the amounts collected in their name ⁽⁵⁷⁾.
- (78) As regards CFR Marfă's above-described debt to the State budget under *Measure 1* (see Table 8), Romania submits that ANAF acted as a private market economy operator because it was calculating interest and penalties for CFR Marfă's overdue debts to the State budget. In particular, Romania submits that the following interest rates were calculated with regard to CFR Marfă's overdue debts towards the State budget: (i) daily interest rate of 0,1 % during the period of 1.1.2006-30.6.2010; (ii) daily interest rate of 0,05 % during the period of 1.7.2010-30.9.2010; (iii) daily interest rate of 0,04 % during the period of 1.10.2010-28.2.2014 ⁽⁵⁸⁾. Romania also explains that the late payment of fiscal liabilities is additionally sanctioned with a late payment penalty, as follows: (i) if the payment of overdue tax liabilities is made later than 30 days from the due date, but before 90 days after the due date, a late payment penalty of 5 % of the principal amount due is added; (ii) after the expiry of 90 days from the due date, a late payment penalty of 15 % of the principal amount is added. The payment of a late payment penalty does not remove the obligation of paying interest ⁽⁵⁹⁾.
- (79) Furthermore, Romania submits that ANAF was actively pursuing the enforcement of CFR Marfă's debts towards the State budget and undertook a number of enforcement measures in the form of injunctions and seizures of bank accounts, movable and immovable property of CFR Marfă.
- (80) In particular, Romania submits that in 2009 ANAF issued 12 injunctions to enforce the outstanding debts of CFR Marfă in the total amount of RON [...] million (ca. EUR [...] million). Romania explains that an injunction is a directly enforceable tax receivable document, meaning that ANAF may continue enforcement proceedings without the involvement of the courts in case the debtor does not pay the outstanding amounts within the period specified in the injunction. In particular, ANAF may then force the execution of outstanding debts by seizing assets and property of the debtor and initiating the sale of such assets and property ⁽⁶⁰⁾.

⁽⁵⁴⁾ Criminal Judgment No 67 of 23 February 2016 handed down by the High Court of Cassation and Justice in Case No 856/2/2014.

⁽⁵⁵⁾ See case by National Anticorruption Directorate No 1036/117/2018 pending before Cluj Tribunal.

⁽⁵⁶⁾ Case No 8056/99/2015 before Iasi Tribunal.

⁽⁵⁷⁾ Romania's Comments on the Opening Decision, point II(1)(D).

⁽⁵⁸⁾ Romania's Reply of 27 June 2019, point 18.

⁽⁵⁹⁾ Idem.

⁽⁶⁰⁾ Romania's submission of 10 August 2016 in Reply to the Commission's request for information, point 2(a); Also Romania's Reply of 27 June 2019, point 14.

- (81) These injunctions were followed by one seizure of CFR Marfă's bank accounts in amount of RON [...] million (ca. EUR [...] million), which was enforced and yielded the recovery of RON [...] million (ca. EUR [...] million) ⁽⁶¹⁾, and 22 seizures imposed on immovable assets of CFR Marfă with total book value of RON [...] million (ca. EUR [...] million) ⁽⁶²⁾. Romania explains that the seizure applied on movable or immovable assets constitutes legal mortgage of such assets, which gives a preferential claim to the proceeds of sale of the seized assets with additional consequences that the debtor may not sell the seized assets and can use the seized assets only with the approval of the competent body (in this case – ANAF) ⁽⁶³⁾.
- (82) Romania further submits that in 2010 and 2011 ANAF issued 24 injunctions to CFR Marfă and explains that seizures and garnishments on the debtors of CFR Marfă (mainly SOEs) were not imposed in 2010 and 2011 to avoid significant social impact ⁽⁶⁴⁾. Romania also submits that by June 2013 ANAF imposed 200 seizures on movable and immovable assets of CFR Marfă with a total book value of RON [...] (ca. EUR [...] million). Romania then elaborates that out of these 200 seizures, 25 seizures were imposed on the movable and immovable assets of SC de Transport Maritim și de Coastă CFR Ferryboat SA ('CFR Ferryboat') with a book value of RON [...] million (ca. EUR [...] million), whereas 84 seizures were imposed on the movable and immovable assets of SC Intreținere și Reparații Vagoane SA ('Wagon Repair and Maintenance SA') with a book value of RON [...] million (ca. EUR [...] million), both of which were the companies merged into CFR Marfă in June 2012 (see recital 27) ⁽⁶⁵⁾.
- (83) Out of the remaining 91 seizures, 10 were imposed on the immovable assets of CFR Infrastructură with a book value of RON [...] million (ca. EUR [...] million), and the remaining 81 seizures were imposed (in November and December 2012) on the movable and immovable assets of CFR Marfă with a book value of RON [...] million (ca. EUR [...] million) ⁽⁶⁶⁾.
- (84) In addition to that, Romania submits that the total of 1 440 notices of garnishment over the funds available in the bank accounts of CFR Ferryboat SA, Wagon Repair and Maintenance SA and CFR Infrastructură, as well as 612 third-party bank account garnishments (for the total amount of RON [...] million, ca. EUR [...] million) were issued by ANAF ⁽⁶⁷⁾.
- (85) Romania also explains that the seizure of movable assets (mainly wagons and locomotives) of CFR Marfă with a book value of RON [...] (ca. EUR [...] million, 95 % of the overall value of 81 seizures) was imposed only on 28 November 2012 and not earlier because 'these movable goods' 'represented rolling stock and locomotives, movable goods used for CFR Marfă's main revenue making activities', and because CFR Marfă 'provides activities of national public interest, in order to supply rail freight public transport and to provide national defence required services' ⁽⁶⁸⁾.
- (86) Romania submits that after the seizures have been imposed on the assets of CFR Marfă, ANAF requested their valuation and the commencement of the procedure for the realisation of assets. However, the realisation of assets never commenced, as the writs of execution on CFR Marfă's debts were settled by the implementation of the 2013 debt-to-equity swap ⁽⁶⁹⁾. Romania also explains that the recovery of CFR Marfă's debts to ANAF by enforcement proceedings, immediate liquidation or opening of the insolvency proceedings was not an acceptable solution because that could have resulted in significant periods of time when the resources required for the country's national security and defence could not be used, which in the light of recent conflicts in the region could potentially threaten the State as such ('[the] Romanian State cannot do without an important instrument and resources, which it was under a legal obligation to supply in order to exercise its role and functions to ensure its territorial integrity, to maintain public order and defend national security and which cannot be replaced under the current circumstances') ⁽⁷⁰⁾.
- (87) With regard to Measure 4, Romania submits that CFR Marfă fully paid its contributions to the State budget between 2013 and 2017 and that fiscal certificates issued by ANAF at various times in this period serve as proof that CFR Marfă did not accumulate any further debt to the State budget in this period ⁽⁷¹⁾.

⁽⁶¹⁾ Romania's Reply of 12 May 2017, point 8.

⁽⁶²⁾ Romania's Reply of 27 June 2019, point 14.

⁽⁶³⁾ Ibid, points 14-15.

⁽⁶⁴⁾ Romania's Reply of 27 June 2019, point 17.

⁽⁶⁵⁾ Annex 4 to Romania's Comments on the Opening Decision; Romania's Reply of 27 June 2019, point 16.

⁽⁶⁶⁾ Annex 4 to Romania's Comments on the Opening Decision.

⁽⁶⁷⁾ Ibid.

⁽⁶⁸⁾ Romania's Reply of 27 June 2019 point 17.2.

⁽⁶⁹⁾ Romania's Comments on the Opening Decision, section II point C.

⁽⁷⁰⁾ Romania's Comments on the Opening Decision, section IV.

⁽⁷¹⁾ Romania's Reply of 19 December 2018, point 21.

- (88) Specifically, Romania explains that Table 7 of the Opening Decision lists, for the period 2013-2016, the fiscal obligations accrued just before the closure of the financial year, for which the due date was in the following year. Romania submits that for all years since June 2013, the respective amounts due by CFR Marfă were paid at the beginning of the following year, meaning by the due date. Romania submits that the respective amounts are listed in the annual balance sheets in accordance with the rules for their preparation, taking into account the starting and payment dates for those fiscal obligations. Romania considers that an assessment of the statement of payment by CFR Marfă of its fiscal obligations based on the balance sheet data is not accurate, and that the documents that should be considered are the tax certificates released regularly by ANAF ⁽⁷²⁾. Accordingly, Romania presented the data corresponding to the fiscal obligations and other debts to the State budget as follows:

Table 9

CFR Marfă' fiscal obligations and other debt to the State budget after the 2013 debt-to-equity swap (million RON)

In RON million	2013	2014	2015	2016	2017
Fiscal obligations and other debt to the State budget	[...]	[...]	[...]	[...]	[...]
Sums to be refunded/ returned by ANAF to CFR Marfă	[...]	[...]	[...]	[...]	[...]
Tax certificate no/date	1042215/ 18.12.2013	1356231/ 5.12.2014	107680/ 16.12.2015	90817/ 12.1.2016	78183/ 14.12.2017

Source: Romania's Reply of 19 December 2018, Section E. point 21.

- (89) Romania explains that fiscal obligations of CFR Marfă for the year 2016 and 2017 have been the subject of legal action by CFR Marfă before the Court of Appeal in Bucharest. By this action CFR Marfă requested the Court of Appeal to annul ANAF's decision by which ANAF refused CFR Marfă's request to set-off the outstanding fiscal debts of CFR Marfă for the years 2016 and 2017 by the amounts (RON [...] million, ca. EUR [...] million), which ANAF was ordered to pay to CFR Marfă by the Civil Judgment No 1011/2015 of the Court of Appeal as upheld by decision No 998/30.3.2016 by the High Court of Cassation and Justice ⁽⁷³⁾.
- (90) Based on the above, Romania considers that between 2013 and 2017 CFR Marfă did not register any debt to the State budget given that ANAF must offset/refund the amounts of RON [...] million and RON [...] million, which would be lower than ANAF's respective debt to CFR Marfă.
- (91) Finally, Romania provided information that CFR Marfă's overdue debt (together with interest and penalties) towards the State budget reached RON [...] million (ca. EUR [...] million) in 2018, and more than tripled to RON [...] million (ca. EUR [...] million) on 28 March 2019 ⁽⁷⁴⁾. Romania emphasised that with regard to this debt ANAF has imposed 16 seizures on CFR Marfă's unencumbered movable assets with a book value of RON [...] million (ca. EUR [...] million) and 66 seizures on CFR Marfă's unencumbered immovable assets with a book value of RON [...] million (ca. EUR [...] million) ⁽⁷⁵⁾.

3.2.4. Romania's comments on Measures 2 and 5

- (92) With regard to Measures 2 and 5, Romania maintains its view that CFR Infrastructură did not exempt CFR Marfă from the payment of debts corresponding to the infrastructure utilisation tax.
- (93) Romania explains that the Romanian law does not allow any rail operator to be exempted from the payment of the IUT and that CFR Infrastructură makes no exception for CFR Marfă either.

⁽⁷²⁾ Idem.

⁽⁷³⁾ Idem.

⁽⁷⁴⁾ Romania's Reply of 27 June 2019, point 21.3.

⁽⁷⁵⁾ Romania's Reply of 27 June 2019, point 12.

- (94) Romania explains that there are three forms of penalty for the non-payment of IUT by the carriers as follows:
- (1) For each service, CFR Infrastructură issues monthly invoices and, when such financial obligations are not met with the terms undertaken in the Railway Infrastructure Access Contract (which is concluded annually), it calculates and invoices on a permanent basis, for each day of delay, interests and penalties for the non-payment of the IUT (the first form of penalty for the non-payment of IUT). The rate of interest and penalties is specified in Table 7 (recital 24). The same penalty applies to all rail freight (and passenger) transport operators, irrespective of their ownership.
 - (2) In addition, due to the delays in the payment of IUT, CFR Infrastructură does not grant the discount of 33 % of IUT for trains circulating within the CFR network, operated by CFR Marfă, as it does for private operators (the second form of penalty).
 - (3) Furthermore, CFR Infrastructură does not accept and does not create additional routes for trains subject to the interests of CFR Marfă and its customers, as it does for private operators (third form of penalty).
- (95) In this context, Romania claims that CFR Infrastructură has also filed legal actions against CFR Marfă with a purpose of enforcing CFR Marfă's debts as of 2015. In particular, Romania submits that CFR Infrastructură initiated arbitration and litigation proceedings regarding the enforcement of CFR Marfă's debts as follows: 2015 arbitration proceedings in amount of RON [...] million (ca. EUR [...] million); 2016 arbitration and litigation proceedings in amount of RON [...] million (ca. EUR [...] million); 2017 arbitration and litigation proceedings in amount of RON [...] million (ca. EUR [...] million); 2018 arbitration and litigation proceedings in amount of RON [...] million (ca. EUR [...] million) ⁽⁷⁶⁾. According to Romania, 100 % of these amounts were adjudged in favour of CFR Infrastructură by the respective and final court and arbitration decisions ⁽⁷⁷⁾.
- (96) According to Romania, after these decisions had been issued in its favour, CFR Infrastructură has used the services of bailiffs for the recovery of adjudged debts, including via freezing of funds in bank accounts and garnishments in respect of amounts due to CFR Marfă by its' customers, as well as by seizures of movable and immovable property of CFR Marfă ⁽⁷⁸⁾.
- (97) Romania also explains that, in 2016, CFR Infrastructură concluded a payment rescheduling agreement with CFR Marfă ('the 2016 Payment Rescheduling Agreement') regarding the payment of the amount of RON [...] million (ca. EUR [...] million), representing principal and interest CFR Infrastructură was awarded in the arbitration proceedings in 2015 and 2016. Romania explains that the amount of RON [...] million was fully recovered via forced execution of the debt after CFR Marfă did not comply with the provisions of the 2016 Payment Rescheduling Agreement ⁽⁷⁹⁾.
- (98) According to Romania, until August 2018 CFR Infrastructură has managed to recover from CFR Marfă – through judicial and extrajudicial measures – over RON [...] million (ca. EUR [...] million) of which RON [...] million (ca. EUR [...] million) in the period March – July 2018. Furthermore, on 6 December 2018 CFR Infrastructură concluded an agreement for the rescheduling of payment of interest and penalties due by CFR Marfă in the amount of RON [...] million (ca. EUR [...] million, 'the 2018 Payment Rescheduling Agreement'). This agreement, inter alia, specifies that on the date of 4 December 2018 a total amount of RON [...] million (ca. EUR [...] million) was overdue by CFR Marfă to CFR Infrastructură, out of which RON [...] million (ca. EUR [...] million) is the amount awarded to CFR Infrastructură by seven civil court judgments in 2017, which are being executed. Out of this amount of RON [...] million (ca. EUR [...] million), RON [...] million (ca. EUR [...] million) represents interest and penalties. The provisions of the 2018 Payment Rescheduling Agreement also specify that the principal amount of RON [...] million (ca. EUR [...] million) shall continue being recovered through realization of seizures imposed on movable and immovable property of CFR Marfă.
- (99) Romania explains that the enforcement through attachments of assets was applied only as long as CFR Marfă complied with the obligations assumed by rescheduling agreements, and submits that the 2018 Payment Rescheduling Agreement is being complied with by CFR Marfă ⁽⁸⁰⁾.

⁽⁷⁶⁾ Annex 4 to Romania's Reply of 27 June 2019. See also Annex 5 to Romania's Comments on the Opening Decision.

⁽⁷⁷⁾ Annex 4 to Romania's Reply of 27 June 2019.

⁽⁷⁸⁾ More specifically, according to Romania, for the recovery of the amounts owed by CFR Marfă as at 31 December 2016 (RON [...], ca. EUR [...] million), further to the legal proceedings, the amount of RON [...] (ca. EUR [...] million) has been collected, whereas in 2017 (and up to Romania's Comments on the Opening Decision), CFR Infrastructură had also recovered the amount of RON [...] (ca. EUR [...] million). See Romania's Comments on the Opening Decision, point II.2.

⁽⁷⁹⁾ Romania's Reply of 27 June 2019, point 37.

⁽⁸⁰⁾ Romania's Reply of 27 June 2019, point 37 and Annex 6.

- (100) In Romania's view, all of the above confirms the fact that CFR Infrastructură applies debt recovery measures and that CFR Marfă has not been exempted from their payment⁽⁸¹⁾.
- (101) Romania considers that 'CFR Marfă does not receive preferential treatment from CFR Infrastructură and is not, and has not been, exempted from any legal obligation'⁽⁸²⁾. Romania submits that '[f]or the non-payment of the infrastructure utilisation taxes by any of the rail operators, CFR SA [CFR Infrastructură] has applied and is applying the same financial penalties', and recalls that '[f]inancial penalties are penalties for late payments calculated and applied for the non-payment of the charges owed at the due date according to the same percentage and without discrimination'⁽⁸³⁾. Romania furthermore submits that '[CFR Infrastructură] applies the same judicial and extrajudicial measures to recover the amounts owed by any of the rail operators'⁽⁸⁴⁾.
- (102) Romania also adds that the non-collection of IUT by CFR Infrastructură from CFR Marfă is an objective circumstance and a consequence of the fact that other SOEs or undertakings in which the State is a shareholders (many of these active in the energy sector) have not, in turn, paid their debts towards CFR Marfă. Romania explains that these debts towards CFR Marfă are in the same order of size of the amounts owed by CFR Marfă to CFR Infrastructură, and any interruption of CFR Marfă's transport services would disturb the activities carried-out by these particular undertakings, to the detriment of people's living standards and of economic activities in various areas. Romania submits that CFR Marfă has taken steps to recover such debts in line with the legal provisions in the field⁽⁸⁵⁾.
- (103) Furthermore, Romania adds that it is not possible to impose stronger measures on CFR Marfă (such as an application for insolvency), as CFR Infrastructură and the Romanian authorities must take account of the importance of CFR Marfă and of its resources for the national system of defence, national security, public safety and order, for the transport of strategic materials, for the national economy, and for the population⁽⁸⁶⁾ (see also subsection 3.2.1. and 3.2.2. above).
- (104) To that end, Romania recalls that the Romanian authorities and CFR Infrastructură must act pursuant to the legal framework applicable to defence⁽⁸⁷⁾ and 'take measures which do not pose the risk of the disposal of certain resources belonging to CFR Marfă (adverse impact on resources considered to be 'State resources') and do not affect the military shipments and the transport of strategic materials by this strategic company or CFR Marfă's response in crisis situations (such as the winter of 2016/2017).'
- (105) Also, in its comments of 14 August 2018 in reply to third party observations, Romania further argues that CFR Infrastructură is obliged to refrain from taking enforcement measures which could block military shipments and reduce the country's defence capabilities by virtue of Article 34 of the Law on National Defence⁽⁸⁹⁾ Romania cites its Transport Minister who says that 'we should not kill the hen laying eggs' when referring to why the State should not enforce all the debts owed by Marfa to CFR Infrastructură.

⁽⁸¹⁾ Romania's Reply to third Party comments, Section C.

⁽⁸²⁾ Romania's Comments on the Opening Decision, point II.2.

⁽⁸³⁾ Romania's Reply to third Party comments, Section C.

⁽⁸⁴⁾ Ibid.

⁽⁸⁵⁾ Romania's Comments on the Opening Decision, Section II, point 2.

⁽⁸⁶⁾ Romania's Comments on the Opening Decision, Section IV.

⁽⁸⁷⁾ Article 34 of Law No 45/1994 on the national defence of Romania, as amended, and Article 1(8) of the Regulation on rail transport in Romania, approved by Governmental Order No 7 of 20 January 2005, amended by Law No 10 of 27 April 2006.

⁽⁸⁸⁾ Romania's Reply to third Party comments, Section C, page 8.

⁽⁸⁹⁾ Article 34 of Law No 45/1994 on Romania's national defence, as further amended stipulates that: 'Ministries, the State's intelligence services and the other authorities of the central public administration shall be responsible for the implementation of the country's defence measures, each in their area of activity, under the law; their heads shall submit reports on the performance of the tasks related to national defence, as appropriate, to the Parliament, to the Government or to the Supreme Council of National Defence on an annual basis or whenever requested to do so. Upon declaring mobilisation and the state of war, the relevant ministers shall be directly responsible for the allocation of resources concerning: raw materials, industrial products, food, energy, transport, public works and communications. The requests of the defence forces shall be considered a priority and met accordingly.'

Article 1(8) of the Regulation on rail transport in Romania, approved by Government Order No 7 of 20 January 2005, as amended by Law No 10 of 27 April 2006, which provides as follows:

'If national security, the security of railway traffic and public interest so require, the administrator/managers of the rail infrastructure and/or the rail transport operator, pursuant to the orders of the competent authorities, under the law, may decide:

(a) to fully or partially suspend the traffic and services for certain routes;
(b) to exclude certain shipments from transport or to receive them only under certain pre-established circumstances;
(c) **to give priority to certain shipments;**
(d) **to allow for military shipments to be carried out continuously, if necessary.'** (emphasis added)

3.2.5. Romania's comments on Measure 3

- (106) First, Romania contests that the Measure 3 stems from State resources. Specifically, Romania submits that 'the three cumulative conditions [of Article 107(1) TFEU] have not been met so that the debt-to-equity swap in respect of CFR Marfă could be considered State aid, given that the condition under subparagraph (a) has not been fulfilled since no State resources have been spent and no resources have been allotted from the State budget (which would mean that the State has incurred direct budget expenditure). In fact, these amounts no longer represented revenues to the budget, which is beyond the wording of the TFEU text.' Romania claims that it acted as a simple shareholder would act and aimed at consolidating its own interests and **not** at providing a certain economic operator with an economic advantage⁽⁹⁰⁾.
- (107) Second, Romania claims that the debt-to-equity swap was approved by the Council of the European Union in its Council Decision of 22 October 2013 providing precautionary EU medium-term financial assistance to Romania⁽⁹¹⁾ ('the Council Decision of 22 October 2013'), corroborated with the provisions of the precautionary Stand-by Arrangement between Romania and the International Monetary Fund (IMF) in the amount of SDR 1 751,34 million, as agreed upon by the Letter of Intent signed by the Romanian authorities in Bucharest on 12 September 2013, as approved by the Decision of 27 September 2013 of the Executive Board of the IMF⁽⁹²⁾. Romania takes this view on the basis of Annex I of the Stand-By Arrangement⁽⁹³⁾ stipulating the following:

'Last year we made some important reforms related to SoEs and the energy and transportation sectors. For example, [...], through voluntary making a few companies insolvent or liquidating them, **debt swaps**, and restructuring measures'. (emphasis added) [...] Key reforms in the energy and transportation sectors include: [...] 'Transportation sector: we initiated a sale-purchase agreement for the sale of a 51 % stake in the [S]tate-owned freight company [CFR Marfă] for RON 905 million and took a government decision approving the sale-purchase agreement. We also approved an arrears clearance scheme in June whereby CFR Marfă's arrears would be reduced by over 90 % upon conclusion of the sale [...]'⁽⁹⁴⁾

'We also plan to facilitate improved payment of infrastructure access and electricity charges from the [S]tate-owned passenger rail company and CFR Marfă through reforms of those enterprises and to settle off outstanding debts among the three main railway companies. Measures to improve the operating and financial performance of these companies could include: [...] –CFR Marfă: We will fulfil our obligations under the sale purchase agreement for the majority sale of CFR Marfă and close the transaction (exchange of payment for shares) by mid-October 2013. In this context, merger control approval will be sought from the relevant regulatory authority. If the privatisation process encounters insurmountable obstacles, we will reopen the tender for the majority privatisation of Marfa in compliance with a process that follows the best international practices'.

- (108) Romania explains that the above-mentioned Stand-by Arrangement including the Annex quoted in recital 107 above was approved by the Council of the EU under Article 1(1) of its Decision of 22 October 2013, which amongst others mentions specific economy policy conditions laid down in the Memorandum of Understanding which include, inter alia 'the restructuring of [S]tate-owned enterprises (SOEs), including sales of stakes in their capital, and strengthening the corporate governance of SOEs'.
- (109) Romania submits that not only were the CFR Marfă privatisation and the debt-to-equity swap measure in its favour approved by the Council of the EU, but also the privatisation process of CFR Marfă was permanently monitored by the European Commission.
- (110) In particular, in connection with the Commission's monitoring, Romania mentions the Commission's report 'The Balance of Payments Programme. Romania, 2013-2015' which, amongst others presents that status of CFR Marfă's privatisation process, including also the debt-to-equity-swap. In particular, according to the quoted report, 'The privatisation would, inter alia, alleviate concerns with a debt-equity swap performed in June 2013, ahead of the failed privatisation attempt of October 2013.'⁽⁹⁵⁾

⁽⁹⁰⁾ Romania's comments on third party observations submitted on 14 August 2018.

⁽⁹¹⁾ OJ L 286, 29.10.2013, p. 1, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013D0531&from=EN>

⁽⁹²⁾ Romania's Reply to Commission's request for information of 14 November 2018 submitted on 19 December 2018 ('Romania's Reply of 19 December 2018'). Point A.

⁽⁹³⁾ Annex entitled 'Romania – Memorandum of Economic and Financial Policies' to the Letter of Intent of 12 September 2013.

⁽⁹⁴⁾ Ibid, paragraph 36.

⁽⁹⁵⁾ Romania's Comments on the Opening Decision, Section II.

- (111) *Third*, Romania submits that the debt-to-equity swap meets the standard test of the market economy operator and reiterates the findings of the Deloitte study which it produced and submitted to the Commission.
- (112) Romania reiterates that it commissioned the audit and consulting firm Deloitte to carry out a study to perform the market economy operator test. The study was performed by applying a renowned method, more specifically the calculation of the market value of the 51 % stake at 31 December 2012 by using the discounted cash flow method ('the DCF method') and, separately, a calculation of the market value of the residual equity stake (49 %) under the assumption that such equity stake would be sold in the period 2015-2018, applying the CBIT and EBITDA multiples valuation method.
- (113) Romania underlines the findings of the Deloitte report of 29 March 2019, according to which the debt-to-equity swap followed by the privatisation of CFR Marfă would have allowed the State as a shareholder and creditor to recover a larger amount (on average RON 1 079,9 million or approximately EUR 235 million) than an immediate liquidation of the company (on average RON 916,97 million or approximately EUR 199 million).
- (114) Romania points out that the debt-to-equity swap was achieved only after the adoption of a decision in compliance of the recommendations of the Deloitte study, by issuing the Emergency Ordinance 61/2013 of 12 June 2013, that is after the market economy operator test was undertaken.
- (115) Romania also underlines that the aforementioned Emergency Ordinance 61/2013 was issued 'with due regard to the opinions and recommendations of the IMF and the EU' (see also recitals 107 et subsequ. above), because 'all the memorandums of understanding concluded with these international organisations after 2011 provide for structural reforms (including privatisations) intended for a large number of [S]tate-owned undertakings in various fields', including 'transport (CFR Infrastructură, CFR Marfă, Tarom)' ⁽⁹⁶⁾. In particular, Romania highlights the description of one of the reforms contained in one such memorandum endorsed by the Council's decision according to which Romania 'also approved an arrears clearance scheme in June whereby CFR Marfă's arrears would be reduced by over 90 percent upon conclusion of the sale.[...]' ⁽⁹⁷⁾.
- (116) *Fourth*, Romania submits that the 2013 debt-to-equity swap in favour of CFR Marfă is very similar to other measures concerning rail freight incumbents in other Member States in which the Commission's found that no State aid was involved or where aid was declared compatible with the internal market. Romania gives the examples of the following Commission precedents: decision of 16.6.2017 on the State aid SA.32544 (2011/C) implemented by Greece in favour of the Greek Railway Group TRAINOSE ⁽⁹⁸⁾, S.A. decision of 20.7.2018 on the public loan SA.29198 – (2010/C) (ex 2009/NN) granted by Slovakia for Železničná Spoločnosť Cargo Slovakia, a.s. (ZSSK Cargo) ⁽⁹⁹⁾, and decision of 19.6.2017 on State Aid SA.39877 (2017/NN) – Croatia – Aid to HŽ Cargo d. o. o. – Debt cancellation ⁽¹⁰⁰⁾.
- (117) Romania submits that 'the common point is that the rail operators in those states and CFR Marfă encountered financial difficulties and incurred significant losses and the public authorities decided to intervene, considering their importance for the national economies.' Therefore, it considers that 'Romania, Croatia, Greece and Slovakia acted in the same spirit with regard to the national rail operators, which were all faced with financial difficulties.' In Romania's view, the result of the assessment of this particular debt-to-equity swap (as well as for the other measures) should not be different for CFR Marfă.
- (118) In particular, Romania recalls the Commission decision in Case SA.32544 implemented by Greece in favour of the Greek Railway Group Trainose S.A. and in particular, the equity increase of EUR 60 million, which was carried out in 2009 with funds from the State budget.
- (119) Romania notes that although the Greek authorities had considered that the respective measure was not State aid, the measure was nevertheless found to constitute aid and declared compatible with the internal market by the Commission because ⁽¹⁰¹⁾:

⁽⁹⁶⁾ Romania's Reply of 19 December 2018, subsection C.

⁽⁹⁷⁾ Section 36 of the Annex entitled 'Romania: Memorandum on Economic and Financial Problems' to Letter of Intent signed by the Romanian authorities in Bucharest on 12 September 2013, Decision of 27 September 2013 of the Executive Board of IMF.

⁽⁹⁸⁾ See SA.32544 – Restructuring of the Greek Railway Group – TRAINOSE S.A. (OJ L 186, 24.7.2018, p. 25).

⁽⁹⁹⁾ See SA.29198 – Slovakia – Public loan granted by Slovakia for Železničná Spoločnosť Cargo Slovakia, a.s. (ZSSK Cargo) (OJ C 117, 6.5.2010, p. 13).

⁽¹⁰⁰⁾ See SA.39877 – Croatia – Aid to HZ Cargo – Debt cancellation (OJ C 237, 21.7.2017, p. 3).

⁽¹⁰¹⁾ See Romania's Reply of 19 December 2018, point B.

- (a) the measure was aimed at remedying serious disturbances in the economy of Greece. In this respect, Romania recalls that 'the Commission retained and accepted the arguments regarding the economic situation of Greece (economic crisis) and the fact that Trainose has a vital role in the economy of this country. Its liquidation would have engendered difficulties for the rail infrastructure manager, for some of its subsidiaries, for important undertakings in Greece and to the overseas trade performed by the country. Moreover, it would have contributed either directly or indirectly to the increase of unemployment in a country affected by crisis.'
 - (b) the measure was adequate/appropriate, necessary and proportional. In this respect, Romania recalls that 'the Commission upheld that, beyond the situation and benefits of Trainose: the measure was consistent with the purpose of avoiding risks for the Greek railway system and of preventing discontinuation of the supply of rail transport services from the economy and population; [...] was limited in time; [...] was necessary for the privatisation of Trainose, [...] ensured temporary survival until the actual privatisation of the company; [...] was not aimed at increasing the capacity of the company and, for this reason, it did not affect competition and trade among the EU Member States.'
- (120) Romania also submits that 'the cancellation of the debt-to-equity swap after the failed privatisation of 2013 and ordering CFR Marfă to reimburse the swap-related amount would have resulted in major operating difficulties for CFR Marfă, which would have led to the **unacceptable risk that the company could not meet its obligations under the law, agreements and conventions in the field of national defence or arising from Romania's NATO membership**, given the conflict in Ukraine, which erupted in 2014, the major response to this political and military context and the increase in the demand for military shipments by 562,89 %. **The exception raised under Article 107(1) of TFEU and Article 4 of TEU is justified against this background.**' ⁽¹⁰²⁾
- (121) In particular, Romania underlines that 'the sale of assets as part of a potential company liquidation in line with the laws in force could be rather lengthy, which would result in significant periods of time when the resources required for the country's defence system and strategic shipments could not be used and would deteriorate as a result of garaging. During these periods when CFR Marfă could not supply transport services and those resources would not yet become the property of another rail operator, as experienced in 2008 and 2014, conflicts may erupt or reignite, as indicated in the National Defence Strategy ⁽¹⁰³⁾ [...]'. Under these circumstances, Romania fears that 'it would no longer have transport capacity and could no longer properly respond to possible challenges, which is unacceptable.'

4. ASSESSMENT OF THE AID

- (122) The Commission first examines whether Measures 1 to 5 in favour of CFR Marfă involve State aid within the meaning of Article 107(1) TFEU (see subsection 4.1 below), whether CFR Marfă was an undertaking in difficulty, (see subsection 4.2 below), and whether the aid was already implemented (see subsection 4.3 below). Finally, the Commission assesses whether such aid could be compatible with the internal market (see subsection 4.4 below).

4.1. Existence of Aid within the meaning of Article 107(1) of the Treaty

- (123) According to Article 107(1) TFEU, 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the provision of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (124) The criteria laid down in Article 107(1) TFEU are cumulative. The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met:
- (a) the measure must be imputable to the State and financed through State resources;
 - (b) the measure must confer an advantage on its recipient;
 - (c) that advantage must be selective; and
 - (d) the measure must distort or threaten to distort competition and affect trade between Member States.

⁽¹⁰²⁾ Subsection F point 8 of Romania's reply to third party observations.

⁽¹⁰³⁾ The National Defence Strategy was prepared under the coordination of the President of Romania and approved by Government Decision No 33/2015.

4.1.1. Undertaking

- (125) According to settled case law, the Commission must first establish the beneficiary of the measures under assessment. Article 107(1) of the Treaty refers to the concept of undertaking in defining the beneficiary of the aid. The EU Courts define the notion of undertaking as entities engaged in an economic activity regardless of their legal status and the way they are financed ⁽¹⁰⁴⁾. The only relevant criterion is whether it carries out an economic activity, thus, whether it offers goods and/or services in the market.
- (126) CFR Marfă is a 100 % State-owned limited liability company. It was incorporated as a joint stock company on 1 October 1998, following the reorganisation of the Romanian Railways incumbent and provides rail freight transport and other related services in the market.
- (127) Therefore, CFR Marfă is an entity for the purpose of Article 107(1) TFEU. The Commission will next assess whether the activity of providing rail freight transport and other related services on the market by CFR Marfă is an economic activity.

4.1.2. Economic activity

- (128) At the outset the Commission assessed the applicability of the Article 107(1) TFEU in the light of the Romanian's arguments that CFR Marfă exercises public power.
- (129) Romania argues (see recitals 63 to 76 above) that Article 107(1) TFEU is not applicable to CFR Marfă by virtue of the provisions of Article 4(2) TEU ⁽¹⁰⁵⁾ and of point 17 of the NoA, which provides, inter alia, that Article 107(1) TFEU does not apply where the State acts 'by exercising public power' or where public entities act 'in their capacity as public authorities'. Romania claims that it exercised its public powers when adopting measures 1-3 and 5, which were aimed at ensuring the continuity of performance of CFR Marfă's obligations in the areas of national security and defence.
- (130) The Commission observes that this argument is flawed for the following reasons.
- (131) First, this argument misconstrues the way the provisions of point 17 of the NoA are meant to operate. These provisions are part of section 2 of the NoA, which contains rules related to the notion of undertaking and of economic activity. Article 107(1) TFEU is applicable in relation to entities which qualify as undertakings engaged in an economic activity under rules set out in section 2 of the NoA. Therefore, the test for the applicability of Article 107(1) TFEU entails the assessment of whether CFR Marfă is an undertaking engaged in an economic activity.
- (132) On the contrary, Romania suggests that Article 107(1) TFEU is not applicable to CFR Marfă because Romania exercised its public powers when adopting measures 1-3 and 5 in favour of CFR Marfă in order to ensure the continuity of shipments of strategic and military materials, as well as the performance of other obligations related to national security and defence purposes. In other words, Romania suggests that Article 107(1) TFEU is not applicable to CFR Marfă merely because of the capacity in which Romanian State adopted measures 1-3 and 5 in favour of CFR Marfă.
- (133) The Commission notes that this argument relates to the question of whether the market economy operator test is applicable to Romania's actions adopting measures 1-5, and, if applicable, the application of that test (points 76-77 of the NoA) as addressed in recitals 179 to 181 below. The applicability and the application of the market economy operator test, however, does not in any way involve the assessment of whether CFR Marfă is an undertaking engaged in an economic activity for the purpose of applicability of Article 107(1) TFEU. Therefore, the argument by Romania misconstrues the aim of section 2 of the NoA.
- (134) Second, Romania has not provided any evidence that the activity of CFR Marfă is not an economic one. In particular, Romania failed to provide any evidence that Romania has taken the activities of military shipments and shipments of strategic products out of the economic domain for the exercise of its public powers, which could have shown that these activities are indeed non-economic ones ⁽¹⁰⁶⁾.

⁽¹⁰⁴⁾ Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74; Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU:C:2006:8, paragraph 107.

⁽¹⁰⁵⁾ The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

⁽¹⁰⁶⁾ Case C-138/11, *Compass-Datenbank GmbH v Austria*, ECLI:EU:C:2012:449, paragraphs 43-44; also Case T-138/15 – *Aanbestedingskalender and Others v Commission*, ECLI:EU:T:2017:675, paragraphs 38-108.

- (135) Quite to the opposite, it is clear from the Romanian submissions that military shipments are services rendered by CFR Marfă on the basis of annual contracts and are remunerated⁽¹⁰⁷⁾. Romania also admits that the markets for military shipments and related activities are open to all private rail operators with a valid licence, albeit subject to obtaining certain security clearances (see recital 75 above). That is further confirmed by the provisions of protocols, joint orders and agreements⁽¹⁰⁸⁾ concluded between the Ministry of National Defence and the Ministry of Transport, Construction and Tourism, stating that obligations to ensure the continuity of military shipments in times of peace, war, natural calamities, crisis situations or other extraordinary circumstances rest not only on CFR Marfă but also on other licensed rail transport operators, which are to be remunerated on the contractual basis.
- (136) The above clearly shows that these services of military shipments were not taken out of the economic domain by the State and are rendered by CFR Marfă based on market mechanisms, which is why they qualify as economic activities⁽¹⁰⁹⁾.
- (137) The fact that private rail freight operators do not wish to engage in military shipments either because of the limited demand or due to the lack of capacity does not have a bearing on this conclusion – what matters is the sole possibility for these operators to compete for these contracts with CFR Marfă, which is also guaranteed by the spirit and the wording of Directive 2009/81/EC of the European Parliament and of the Council⁽¹¹⁰⁾, transposed into Romanian law by Emergency Governmental Ordinance 114/2011 of 21 December 2011⁽¹¹¹⁾.
- (138) Furthermore, the obligation to establish, maintain and preserve the reserves along various points of the railway network is a prerequisite for CFR Marfă to be able to provide remunerated military shipments on a contractual basis⁽¹¹²⁾, which is why the Commission considers it part of the economic activity of military shipments. The fact that CFR Marfă may use the resources marked as mobilisation reserves for its usual commercial rail freight activities (including military shipments) serves as an additional confirmation of this conclusion. The fact that CFR Marfă may not be receiving adequate remuneration for the costs incurred by establishing, maintaining and preservation of these reserves does not change that conclusion either, as it is settled case-law that any activity consisting in offering goods and/or services on a given market is an economic activity, irrespective of whether it is done without a profit motive or for due compensation⁽¹¹³⁾. Therefore, the fact that CFR Marfă may not be duly compensated for the provision of certain services should not have a bearing on the qualification of services as economic activity.
- (139) The Commission does not accept Romania's argument that only CFR Marfă, owning ca. 93 % of the national wagon fleet, is *de facto* the only operator capable of fulfilling the obligation to keep the mobilisation reserves. Even if this argument would be capable of making a difference to Commission's conclusion in recital 136 (*quod non*, as in principle the domain of military shipments was not taken out of the economic domain by the Romanian State), Romania has not adduced any evidence on why other private operators would not be able to compete for military shipments or fulfil the mobilization requirements with the other 7 % of the wagons or with the wagons additionally purchased from the market for that purpose (*inter alia* from CFR Marfă, either on a normal commercial basis or during CFR Marfă's liquidation). The Commission notes that, although Romania claims that the reserves included in the mobilisation plans may not be disposed of and must be kept operational at the expense of CFR Marfă (recital 64(ii)), Romania could not provide the Commission with the express provision in the laws confirming that⁽¹¹⁴⁾.

⁽¹⁰⁷⁾ Points 1 and 2 of the Romania's Reply of 27 June 2019.

⁽¹⁰⁸⁾ The inter-ministerial protocol No M-86 of 2 July 2003 on the cooperation between the Ministry of National Defence and the Ministry of Transport, Construction and Tourism for the coordination and performance of transports via rail, naval and air channels of communication, the implementing rules of this inter-ministerial protocol approved by Joint Order No M 163/1053/2003 of the Ministry of National Defence and the Ministry of Transport, Construction and Tourism, and the Agreement for the supply of rail transport services for the Ministry of National Defence within the domestic traffic and establishing the military transport documents and means of payment No A 220 of 12 January 2001, submitted as Annex No 9 of Romania's Comments on the Opening Decision.

⁽¹⁰⁹⁾ See, by analogy, judgment of 11 September 2007, *Schwarz and Gootjes-Schwarz*, C-76/05, ECLI:EU:C:2007:492, paragraphs 37 and 38 and the case-law cited.

⁽¹¹⁰⁾ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.8.2009, p. 76).

⁽¹¹¹⁾ Romania's Reply of 27 June 2019, point 1.

⁽¹¹²⁾ Romania's Comments on the Opening Decision; Romania's submission dated 14 August 2018.

⁽¹¹³⁾ Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck*, ECLI:EU:C:1980:248 paragraph 88; Case C-244/94 *FFSA and Others*, ECLI:EU:C:1995:392, paragraph 21; Case C-49/07 *MOTOE* ECLI:EU:C:2008:376, paragraphs 27 and 28.

⁽¹¹⁴⁾ The provisions cited by Romania in point 2.1 of Romania's Reply of 27 June 2019 do not confirm the existence of the prohibition to dispose of resources included in the mobilisation plans and to keep them operational at the expense of CFR Marfă.

- (140) The Commission equally does not accept Romania's argument that none of the other rail freight operators in Romania can qualify to obtain the necessary industrial security certificates. Even if this argument would be capable of making a difference to Commission's conclusion in recital 136 (*quod non*, as in principle the domain of military shipments was not taken out of the economic domain by the Romanian State), the Commission notes that it is up to the respective private rail operators to make the necessary changes to obtain the respective certificates. The Commission also notes the fact that even a former Minister of Transport ⁽¹¹⁵⁾ and a former CEO of CFR Marfă have been convicted by Romanian national courts on criminal activities tantamount to corruption (see recital 41 above), which would equally disqualify CFR Marfă from being a provider of military shipment services.
- (141) With regard to Romania's argument that CFR Marfă's ferryboat activity is not of economic nature, the Commission takes note of Romania's argument that these ferryboats were not used for commercial purposes because other ferry lines operating through Constanta harbour were not economically viable (recital 64(vi)). The Commission considers that as a clear indication that CFR Marfă's ferryboat activity falls within the economic remit, as it is settled case-law that any activity consisting in offering goods and/or services on a given market is an economic activity, irrespective of whether it is done without a profit motive or for due compensation ⁽¹¹⁶⁾.
- (142) As concerns the shipments of strategic goods, the Commission notes that these shipments are carried out by CFR Marfă on the basis of the contracts usually concluded following tenders, in which other private operators participate and compete with CFR Marfă (see recital 65 above). Services rendered under these contracts are remunerated under the conditions of the respective contract (recital 66). Therefore, the contracts for the shipments of strategic goods are awarded and respective services under those contracts are clearly rendered on market terms, and, thus are economic in nature.
- (143) Although Romania claims that in certain crisis conditions these services may be required by public authorities outside the existing contracts, Romania admits that such shipments were remunerated at prices stipulated in the contracts awarded through procurement procedures prior to the occurrence of the respective difficult weather conditions ⁽¹¹⁷⁾.
- (144) With regard to CFR Marfă's unremunerated participation in various public exercises and provision of freight transport resources without any monetary compensation in the interest of/for certain public authorities or public institutions (as mentioned in recital 67), the Commission fails to see how that may have a bearing on defining CFR Marfă's activities in carrying out strategic shipments on the basis of contracts awarded on market terms as clearly economic. Furthermore, the Commission observes that Romania has not provided any evidence on whether the provision of CFR Marfă's resources without any monetary compensation in the interest of certain public authorities or public institutions was mandated by the applicable laws and in any case has not provided any quantification of the costs incurred for such activities.
- (145) Therefore, CFR Marfă is undoubtedly an undertaking carrying out economic activity with regard to all of its freight activities, to which Article 107(1) TFEU is applicable.
- (146) *Third, and in the alternative*, the Commission recalls that the fact that an entity exercises, for the purposes of part of its activities, prerogatives of public authority does not, on its own, prevent it from being classified as an undertaking within the meaning of the provisions of Article 107(1) TFEU relating to the competition rules for the rest of its economic activities ⁽¹¹⁸⁾. According to case law, if the economic activity of the entity concerned is separable from the exercise of its prerogatives of public authority, that entity must be qualified as an enterprise for that part of its activities ⁽¹¹⁹⁾.

⁽¹¹⁵⁾ <http://www.pna.ro/comunicat.xhtml?id=4618>, press release of the Anticorruption National Directorate dated 30 January 2014 referring to the criminal Court Decision Number 18 issued on 30 January 2014.

⁽¹¹⁶⁾ Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck*, ECLI:EU:C:1980:248 paragraph 88; Case C-244/94 *FFSA and Others*, ECLI:EU:C:1995:392, paragraph 21; Case C-49/07 *MOTOE* ECLI:EU:C:2008:376, paragraphs 27 and 28.

⁽¹¹⁷⁾ Point 7.2 of Romania's Reply of 27 June 2019.

⁽¹¹⁸⁾ Case C-82/01 *P, Aéroports de Paris v Commission*, ECLI:EU:C:2002:617, paragraph 74, of 1 July 2008; Case C-49/07 *MOTOE*, ECLI:EU:C:2008:376, paragraph 25.

⁽¹¹⁹⁾ See, to that effect the judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, ECLI:EU:C:2017:496, paragraphs 44 to 63.

- (147) The Commission considers that, even if CFR Marfă's activity of military shipment services and maintenance of mobilisation reserves were to be considered as non-economic activities, Romania has adduced no evidence to show that the economic activities of commercial rail freight carried out by CFR Marfă could not be separated from the prerogatives of public authorities in the military area. The mere fact that there can be an economic link between those activities, in that the economic activities of CFR Marfă make it possible to finance, in whole or in part, CFR Marfă's non-economic activities, is not sufficient to demonstrate the inseparability of these activities, within the meaning of the case-law⁽¹²⁰⁾.
- (148) Furthermore, the Commission considers that, although Article 346(2) TFEU, which is applicable to the production of or trade in arms, munitions and war material, does not apply in relation to transportation services (and Romania does not invoke it), certain principles derived in the jurisprudence from the application of Article 346(2) TFEU are applicable by analogy to the issue of separation of economic and non-economic activities for the purpose of application of Article 107(1) TFEU. In particular, the Commission considers that undertakings which engage in both non-economic and economic activities cannot invoke the provisions of point 18 of the NoA by arguing that economic activities are necessary for the viability of the military/defence activity to claim that they are inseparably linked⁽¹²¹⁾.
- (149) What is more, CFR Marfă's commercial activity in the rail freight sector is clearly separable from the exercise of such non-economic activities, first and foremost due to the fact that, as admitted by Romania (see recital 64 above), military shipments are governed by separate rules and are carried out under separate contracts concluded between the Ministry of Defence and CFR Marfă, among others.
- (150) Furthermore, while initially Romania refused to provide figures on the percentage of resources reserved for national defence purposes (because of State secrecy) and claimed that it was impossible to reflect the costs incurred by CFR Marfă due to such reservation of resources because public authorities did not prepare any methodologies in that regard (see recital 64 above), Romania has nevertheless pointed out that military shipments are ordered in a discontinuous manner and account for a 'much smaller share than other transport operations' and indicated that they range around 2 % of CFR Marfă's total turnover⁽¹²²⁾. Moreover, Romania has also provided an estimation of the costs incurred by CFR Marfă due to establishing and maintaining the mobilisation reserves (see recital 64 above).
- (151) The Commission considers that to be an additional indication that CFR Marfă's activity of military shipments and the adjacent obligation of establishing and maintaining the mobilisation reserves, even if qualified as non-economic (*quod non*, see recital 145), would indeed be separable from the economic activities of CFR Marfă.
- (152) However, and without prejudice to the conclusion in recital 151, the Commission considers that the estimation of the costs incurred by CFR Marfă due to establishing and maintaining the mobilisation reserves as provided by Romania is not substantiated, for the following reasons.
- (153) First, the Commission considers that the estimation of costs incurred by CFR Marfă due to establishing and maintaining the mobilisation reserves, provided by Romania, is clearly exaggerated. Romania indicates as costs all annual expenditure for the amortisation of all idle locomotives and wagons of CFR Marfă, as well as annual expenditure for the maintenance and repair of such wagons. The Commission considers that the need for the mobilization reserves is not (and should not be) determined by the amount and the variations in the rolling stock owned by a railway transport company (variations which depend on a multitude of factors such as the history and commercial decisions of the railway incumbent itself), but by the actual need for such reserves, which should be determined by the Ministry of Defence. However, Romania did not provide any evidence to sustain that all the idle rolling stock of CFR Marfă serves as mobilization reserves.
- (154) The same is also true in relation to the costs of maintenance of ferryboats owned by CFR Marfă. Romania simply presents all the costs of maintenance and other expenditures related to these ferryboats as costs incurred by CFR Marfă due to its obligation to keep the mobilization reserves. However, Romania fails to substantiate that these ferryboats are indeed marked as mobilisation reserves, as well as fails to elaborate on whether these costs have been paid by the Ministry of Defence, notably for certain military shipment services provided by CFR Marfă for defence purposes in the framework of the contract with the Ministry of Defence which involved ferry transportation and for which invoices were issued by CFR Marfă according to its tariff policy.

⁽¹²⁰⁾ Case T-747/17, *Union des Ports de France – UPF v Commission*, judgment of 30 April 2019, ECLI:EU:T:2019:271, paragraph 84.

⁽¹²¹⁾ Case C-246/12P, *Ellinika Nafpigeia v Commission*, ECLI:EU:C:2013:133.

⁽¹²²⁾ See Romania's Comments on the Opening Decision and page 2 of the Minutes of the meeting of Romania and Commission of 24 July 2019.

- (155) *Second*, Romania did not provide the Commission with the documents allowing the Commission to check the accuracy of the expenditures for the amortisation, maintenance and repair of such idle rolling stock submitted by Romania, as well as other expenditures (for staff, fuel, ferryboats, non-IUT fees etc.).
- (156) *Third*, Romania took as a proportion for the allocation of other costs (including for instance expenditures on personnel, as well as on diesel for special movement of the rolling stock corresponding to the mobilisation reserves, and non-IUT fees for such movements) a factor equal to 2 %, but did not explain on what basis this particular allocation factor was chosen. This percentage seems to correspond to the proportion of military shipments in the total turnover of CFR Marfă (see point (v) of recital 64). However, Romania did not explain whether this is truly the reason why it chose 2 % for the allocation of costs. In any case, it is highly unlikely that an activity of 2 % turnover of CFR Marfă would require the exact % of assets or personnel for the maintenance of mobilisation reserves.
- (157) Therefore, the Commission considers that Romania did not substantiate to the requisite standard the estimations of the costs incurred by CFR Marfă due to its obligation to keep and maintain the necessary reserves and capacities for the performance of the mobilisation tasks.
- (158) On the basis of the foregoing the Commission concludes that CFR Marfă is an undertaking carrying out an economic activity with regard to all its rail freight activities, which is why Article 107(1) TFEU is applicable to CFR Marfă's entire activity. Even if the activity of military shipments and maintaining the mobilization reserves were to be recognized as a non-economic activity, it is clearly separable from the main economic activity of CFR Marfă, namely commercial rail freight, in which case Article 107(1) TFEU is applicable to the economic activity of CFR Marfă.

4.1.3. State origin (resources and imputability to the State)

- (159) As has been stated by the EU Courts ('the Court') ⁽¹²³⁾, for the measures to be qualified as State aid within the meaning of Article 107(1) of the Treaty, (a) they have to derive from the State's resources, either indirectly or directly by any intermediary body acting by virtue of powers conferred on it and (b) they have to be imputable to the State. The notion of Member State includes all levels of public authorities, regardless of whether it is a national, regional or local authority ⁽¹²⁴⁾.

4.1.3.1. Measures 1 and 4 – Non-enforcement of social security debts and outstanding taxes (i) since at least 2010 until the 2013 debt-to-equity swap and (ii) after the debt-to-equity swap

- (160) As noted in recital 77, ANAF, CNPP, ANOFM and CNAS are part of the public administration subordinated to the Romanian Government. Therefore, the non-enforcement of the overdue debt (i.e. tax payables and social contribution payments, plus interest and penalties) by those bodies and the further accumulation of debts that should have been normally paid to them burdens the State budget and involves State resources. Romania did not contest imputability in the case of the aforementioned public creditors.
- (161) In the light of the considerations in recital 160 above, the Commission concludes that Measures 1 and 4 are imputable to the State and involve a transfer of State resources.

4.1.3.2. Measures 2 and 5 – the non-enforcement of debts towards CFR Infrastructură and the increase of debts towards CFR Infrastructură as a result of the continued provision of services (i) since at least 2010 until the 2013 debt-to-equity swap and (ii) after the debt-to-equity swap

- (162) According to *Stardust Marine* ⁽¹²⁵⁾ case law, the resources of an undertaking incorporated under private law, whose shares are in majority publicly owned – a public undertaking, constitute State resources.
- (163) Article 2 lit. b) of the Commission Directive 2006/111/EC ⁽¹²⁶⁾ stipulates that 'public undertaking' means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking:

⁽¹²³⁾ See Case C-482/99 *France v Commission (Stardust Marine)*, ECLI:EU:C:2002:294.

⁽¹²⁴⁾ See Case C-248/84 *Germany v Commission*, ECLI:EU:C:1987:437, paragraph 17.

⁽¹²⁵⁾ Case C-482/99, *France v Commission (Stardust Marine)*, ECLI:EU:C:2002:294, paragraphs 34, 51 et seq. See also Case C-278/00, *Greece v Commission* ECLI:EU:C:2004:239, paragraphs 53 and 54; Joined Cases C-328/99 and C-399/00, *Italy and SIM 2 Multimedia SpA v Commission*, ECLI:EU:C:2003:252, paragraphs 33 and 34.

⁽¹²⁶⁾ Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17).

- (a) hold the major part of the undertaking's subscribed capital: or
 - (b) control the majority of the votes attaching to shares issued by the undertaking: or
 - (c) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body".
- (164) CFR Infrastructură is an infrastructure manager 100 % owned by the Romanian State. The Ministry of Transport has all the votes attached to the shares issued by CFR Infrastructură. In addition, the Ministry of Transport is the only body that appoints the administrative, managerial and supervision body of CFR Infrastructură. Therefore, at least one of the alternative conditions is met and CFR Infrastructură is clearly a public undertaking within the meaning of Article 2(b) of Directive 2006/111/EC. Furthermore, CFR Marfă's debt towards CFR Infrastructură puts State resources at risk, as this debt directly affects the State budget. Namely, CFR Infrastructură receives funds for infrastructure management directly from the State budget and in addition uses funds received from fees for the use of infrastructure for its maintenance. In case CFR Infrastructură's own funds do not suffice, it will have to receive more funds from the State budget. For this very reason, CFR Marfă's debt towards CFR Infrastructură involves State resources.
- (165) In view of the above, the Commission considers that the non-enforcement of CFR Marfă's debts towards the CFR Infrastructură and the increase of debts towards this SOE as a result of a continued provision of services (see Table 7 above) burden the State resources.
- (166) Concerning imputability, in its *Stardust Marine* judgment the Court furthermore held that the fact that the State or a State entity is the sole or majority shareholder of an undertaking is not sufficient to find that a transfer of resources by that undertaking is imputable to its public shareholders ⁽¹²⁷⁾. According to the Court, even if the State was in a position to control a public undertaking and to exercise a dominant influence over its operations, the actual exercise of that control in a particular case could not be automatically presumed, since a public undertaking may also act more or less independently, according to the degree of autonomy left to it by the State.
- (167) According to the Court, indicators ⁽¹²⁸⁾ from which imputability might be inferred, are (hereinafter 'the Stardust indicators'):
- (a) the fact that the undertaking in question could not take the contested decision without taking account of the requirements of the public authorities;
 - (b) the fact that the undertaking had to take account of directives issued by public authorities;
 - (c) the integration of the public undertaking into the structures of the public administration;
 - (d) the nature of the public undertaking's activities and the exercise of these activities on the market in normal conditions of competition with private operators;
 - (e) the legal status of the undertaking;
 - (f) the intensity of the supervision exercised by the public authorities over the management of the undertaking;
 - (g) 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 compass of the measure, its content or the conditions which it contains.
- (168) As regards CFR Infrastructură, the Commission notes that the State, via the Ministry of Transport, as a sole shareholder, appoints the management of CFR Infrastructură (point (f) of the Stardust indicators listed above). In addition, since CFR Infrastructură is considered as a public undertaking, its annual budget is approved *ex-ante* ⁽¹²⁹⁾ by the Ministry of Transport, with notification to the Ministry of Finance (point (c) of the Stardust Marine indicators listed above). The same prior approval is required for all changes to the annual budget of CFR Infrastructură, which consists, inter alia, of trade receivables from CFR Infrastructură's clients, including CFR Marfă.

⁽¹²⁷⁾ Case C-482/99, *France v Commission (Stardust Marine)*, ECLI:EU:C:2002:294, paragraphs 34, 51 et seq.

⁽¹²⁸⁾ Ibid.

⁽¹²⁹⁾ See Annex 1 of Romania's Reply of 12 May 2017 to the Commission's request for information.

- (169) Furthermore, Romania confirmed ⁽¹³⁰⁾ that CFR Infrastructură could not refrain from enforcing its claims vis-à-vis CFR Marfă without taking account of the requirements of the public authorities (points (a), (b) and (g) of the Stardust indicators listed above). Indications for such enforcement steps being taken further to instructions from the Government are also transparent from various press articles ⁽¹³¹⁾.
- (170) More than that, Romania claims that CFR Infrastructură acted as a state authority towards CFR Marfă because it is under obligation to allow CFR Marfă's commercial activities to continue and cannot take measures that might block these activities, by virtue of the provisions of Article 34 of the Law No 45/1994 on the National Defence of Romania, as amended ⁽¹³²⁾ (points (a) and (b) of the Stardust indicators listed above).
- (171) Therefore, the Commission takes the above as a clear indication by Romania that CFR Infrastructură adopted measures 2 and 5 in a manner imputable to the State.
- (172) In the light of these circumstances, the Commission concludes that there are sufficient indicators to find that the non-enforcement of CFR Marfă's debts towards CFR Infrastructură since at least 2010 and the increase of debts towards this SOE as a result of continued provision of services to CFR Marfă before and after the 2013 debt-to-equity swap are imputable to the State.

4.1.3.3. Measure 3 – the debt-to-equity swap amounting to RON 1 669 million (ca. EUR 363 million)

- (173) The debts of RON 1 669 million (ca. EUR 363 million) converted into equity of CFR Marfă were stemming from State resources, since, as noted in footnote 27 and recitals 24, 77, and 86, the converted debts were incurred towards Romanian administration bodies and towards CFR Infrastructură, the latter being a public undertaking within the meaning of Article 2(b) of Directive 2006/111/EC.
- (174) The decision to convert the debts of RON 1 669 million (ca. EUR 363 million) into equity was subject to the Emergency Order 61/2013 issued by the Romanian Prime Minister and countersigned by the Minister for Transport and the Deputy Prime Minister and Minister for Public Finance.
- (175) Romania's claim that the debt-to-equity swap does not stem from State resources (see recital 106 above) is unconvincing. The simple fact that the amounts of debt were not a direct budget expenditure is irrelevant, because the transfer of State resources can take many forms, including forgone revenues. In the debt-to-equity swap, the Romanian State actually renounced to collect funds it should have obtained from the beneficiary via the enforcement of debt claims by public creditors and by CFR Infrastructură. The Commission notes that there is a substantial overlap between the State resources concerned by *Measures 1 and 2* and the State resources concerned by *Measure 3*, insofar that the full amount of non-enforced debt corresponding to *Measure 1* as well as 85 % of the non-enforced debt corresponding to *Measure 2* were written off by means of the debt-to equity swap corresponding to *Measure 3* (see footnote 27). In other words, the State resources concerned by *Measure 3* were no different than the State resources concerned in *Measures 1* and (a major part of) the state resources concerned in *Measure 2*.
- (176) In the light of the above, contrary to the view of Romania, the Commission concludes that the debt-to-equity swap stems from State resources and is imputable to the State.

4.1.4. Selectivity of the measures granted

- (177) The measures under assessment are clearly selective since they are provided exclusively to CFR Marfa. As the Court has stated, where individual aid is at issue, the identification of the economic advantage is, in principle, sufficient to support the presumption that a measure is selective ⁽¹³³⁾. This is so regardless of whether there are operators on the relevant markets that are in a comparable situation. In any event, other undertakings in a comparable legal and factual situation, in the light of the objective pursued by the measures, with the rail freight transport business or other transport sectors, did not receive the same advantage.

⁽¹³⁰⁾ Ibid, see answers to questions 3-5.

⁽¹³¹⁾ See article of 1 July 2018 available at <https://www.capital.ro/cfr-marfa-se-pregateste-de-insolventa-ministrul-transporturilor.html> in which former Minister of Transport admits the difficult situation of CFR Marfă and acknowledges that the firm recovery steps to enforce CFR Marfă's debts towards CFR Infrastructură via sale of assets started a couple of month earlier and that he requested the company to pay its debts. See also article of 26 March 2018 available at <https://www.capital.ro/lucian-sova-la-conferinta-capital-despre-datoria-cfr-marfa-catr.html> [in which the former Minister of Transport CFR is quoted (during the Capital Conference on Transport and Infrastructure 2018) saying that 'CFR Marfă has accumulated too big, much too big of a debt towards CFR Infrastructură. I believe that, should one have talked about a private company, we would not have gotten into such a situation.'

⁽¹³²⁾ See Romania's submission of 14 August 2018 in reply to the complainant's comments on the Opening Decision.

⁽¹³³⁾ See judgment of 4 June 2015 *Commission v MOL*, C-15/14 P, ECLI:EU:C:2015:362, paragraph 60.

4.1.5. Economic advantage of the measures granted

- (178) As per recitals 77 to 87, 95 to 102, and 111 above, Romania submits that the measures, in particular the debt-to-equity swap did not confer any economic advantage to CFR Marfă, because they respected the MEO test as presented in the Deloitte Report and that the public authorities and the public company CFR Infrastructură acted in the same way as any private creditor or investors would have acted, in order to minimize their losses and maximize their profits.

4.1.5.1. Non-applicability of the market economy operator test in the case at hand

- (179) Firstly, the Commission considers that the market economy operator test ('MEO' test) cannot be applied to the measures at stake. The Commission recalls that the Court previously considered that the applicability of the 'market economy investor principle' ultimately depends on the State having conferred, in its capacity as a shareholder and not in its capacity as a public authority, an economic advantage to an undertaking belonging to it⁽¹³⁴⁾. In the same vein, the MEO test could have not been applicable for the State in its capacity of creditor of CFR Marfă via ANAF and other public creditors, or via the infrastructure manager CFR Infrastructură, because the 'private creditor test' does not apply to the measures the State undertook in its capacity as a public authority when considering that CFR Marfă was a strategic enterprise for which liquidation could not be envisaged due to security and other non-economic reasons⁽¹³⁵⁾.
- (180) In this case, Romania acted just as an opposite to a market economy investor. Instead of taking firm steps towards enforcement of accumulating debts, the Romanian State acted steadily and clearly in its capacity as a public authority to save CFR Marfă from bankruptcy. Nor did it act as a creditor or, as in the case of the debt-to-equity swap, as a shareholder investing in a company. This is even more so as Romania submits, inter alia, that public creditors were not enforcing debts in order to keep CFR Marfă away from insolvency/halting of its activities because of Marfa's strategic importance for the country's national security and defence purposes. By this, Romania admits that the main reason for not bringing CFR Marfă into liquidation via judicial enforcement was not economic. Last, but not least, the Commission notes that the non-enforcement of debts owed by CFR Marfă was decided in the absence of any prior studies on whether leniency in enforcement could have resulted in more revenues as opposed to strict enforcement, which also indicates that the main motive of the Romanian State was not an economic one. Therefore, the Commission considers that the MEO test is not applicable in the case at hand⁽¹³⁶⁾.
- (181) Given that CFR Marfă's activity is economic (see recital 158) and given that the State acted towards CFR Marfă differently from the way it would have acted against any other non-strategic carrier, as already shown above in recitals 179 and 180, the measures are selective and constitute aid.

4.1.5.2. Hypothetical application of the MEO Test in the case at hand

- (182) However, for the sake of completeness, the Commission has also checked what would be the outcome should an MEO test be applied in the case at hand. According to this hypothetically applied test, the capital put at the disposal of a company, directly or indirectly, by the State under circumstances, which correspond to the normal conditions of the market, would not be qualified as State aid⁽¹³⁷⁾. To determine whether a transaction is carried out in line with normal market conditions, the behaviour of a public body must be compared to that of a

⁽¹³⁴⁾ See Judgment of the Court of 5 June 2012 *European Commission v Électricité de France (EDF)*, ECLI:EU:C:2012:318, paragraphs 79-82 and 87.

⁽¹³⁵⁾ Romania's Comments on the Opening Decision, section IV, Romania's Reply of 19 December 2019, section D. points 1 and 2.

⁽¹³⁶⁾ See Judgement of 16 January 2018 in Case T-747/15, *EDF v Commission*, ECLI:EU:T:2018:6. See also Judgment of the Court of 5 June 2012 *European Commission v Électricité de France (EDF)*, ECLI:EU:C:2012:318, paragraphs 79-82 and 87.

⁽¹³⁷⁾ Communication of the Commission to the Member States: application of Articles 92 and 93 of the EEC Treaty and of Article 5 of the directive 80/723/CEE of the Commission to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3), paragraph 11. This communication deals with the manufacturing sector, but is applicable to the other economic sectors. See also Case T-16/96, *Cityflyer Express Ltd v Commission*, ECLI:EU:T:1998:78, paragraph 51.

hypothetical private economic operator being in a similar situation (MEO test). The Union courts have developed specific types of MEO test for different types of economic transactions, in particular the 'private creditor test', in cases of transactions involving debt ⁽¹³⁸⁾, and the 'market economy investor principle', to identify the presence of an economic advantage in cases of public equity investments ⁽¹³⁹⁾.

(183) The Commission's assessment therefore focuses on the transaction from the perspective of the hypothetical prudent private creditor/investor ⁽¹⁴⁰⁾.

(184) In the case at hand, the Commission performed the MEO test in the form of a market economy creditor principle for each of the *Measures 1, 2, 3 and 5*, and in the form of a public investor test for the debt-to-equity swap measure, by requesting the Romanian authorities for additional contemporaneous information on the various actors involved and their decisions, by collecting information from all available public sources, and by performing its own assessment based on available evidence at the time of the measures assessed.

4.1.5.3. (i) Measures 1 and 4 – The non-enforcement of social security debts and outstanding taxes before and after the 2013 debt-to-equity swap

(185) Firstly, in the Opening Decision, the Commission expressed its doubts on whether ANAF, the State agency responsible for the enforcement of unpaid debts to various State agencies, acted as an MEO by not enforcing CFR Marfă's debts to those respective State agencies and allowing for their increase. By doing so, it granted the undertaking in difficulty (see section 4.2 below) a payment facility.

(186) During the investigation, Romania provided revised figures with respect to the overdue debts of CFR Marfă towards the State budget, including the principal amount, the interest invoiced as well as the corresponding penalties. These updated figures were presented in the Table 8 above.

(187) In order to determine whether *Measure 1* confers an undue advantage to CFR Marfă, the Commission will assess whether the public creditors in question, in this particular case ANAF, as the State agency responsible for the collection of debts, pursued the recovery of its claims with the same diligence as a private creditor. A private creditor is normally seeking to obtain the maximum payment of sums owed to it by a debtor in financial difficulties ⁽¹⁴¹⁾.

(188) As mentioned in recitals 78-86 above, Romania considers that ANAF acted as an MEO because it has taken the necessary steps towards an enforcement of the debt, namely by calculating interest and penalties, imposing seizures on the movable and immovable assets of CFR Marfă and imposing garnishments on third parties. The Commission does not share this view.

(189) First, Romania failed to provide any contemporaneous study or any internal document of ANAF explaining the reasons why the debts accumulated by CFR Marfă to the State budget were not enforced already between 2010 and 2012.

(190) The Commission notes that CFR Marfă was facing financial difficulties for several years (see Tables 4 and 5 and recitals 20 to 22 above, see also section 4.2 below). Already in 2010, CFR Marfă's total debts accounted for 126 % of its total assets (Table 5). CFR Marfă's total debts towards the State budget amounted to RON 376,21 million (ca. EUR 81,78 million, Table 8) and accounted for 22,5 % of CFR Marfă's total debts. The Commission believes that any private creditor would have assessed the expected options available to maximise the recovery at the latest at that moment. Instead, ANAF allowed CFR Marfă to increase its debts towards the State budget by more than 100 % between 2010 and 2012 (Table 8 above), and thereby even further lowered their recovery perspectives.

⁽¹³⁸⁾ Judgment of the Court of Justice of 22 November 2007, *Spain v Commission*, C-525/04 P, ECLI:EU:C:2007:698; Judgment of the Court of Justice of 24 January 2013, *Frucona v Commission*, C-73/11 P, ECLI:EU:C:2013:32; Judgment of the Court of Justice of 29 June 1999, *DMTransport*, C-256/97, ECLI:EU:C:1999:332.

⁽¹³⁹⁾ See, for instance, Judgment of the Court of Justice of 21 March 1990, *Belgium v Commission (Tubemeuse)*, C-142/87, ECLI:EU:C:1990:125, paragraph 29; Judgment of the Court of Justice of 21 March 1991, *Italy v Commission ('ALFA Romeo')*, C-305/89, ECLI:EU:C:1991:142, paragraphs 18 and 19; Judgment of the General Court of 30 April 1998, *Cityflyer Express v Commission*, T-16/96, ECLI:EU:T:1998:78, paragraph 51; Judgment of the General Court of 21 January 1999, *Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Commission*, Joined Cases T-129/95, T-2/96 and T-97/96, ECLI:EU:T:1999:7, paragraph 104; Judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission*, Joined Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57.

⁽¹⁴⁰⁾ Case C-300/16P *Commission v Frucona Košice*, ECLI:EU:C:2017:706, paragraph 28.

⁽¹⁴¹⁾ See, to that effect, Case C-342/96 *Spain v Commission*, ECLI:EU:C:1999:210, paragraph 46, and C-256/97 *DM Transport*, ECLI:EU:C:1999:332, paragraph 24.

- (191) *Second*, the Commission also notes that ANAF (and the other public creditors it represented – CNPP, ANOFM and CNAS) were treated differently from private creditors of CFR Marfă. In particular, CFR Marfă's bank loans decreased by 27 % and trade payables towards private undertakings decreased by 11 % between 2010 and 2012, while the payables to the State budget increased by more than 100 % ⁽¹⁴²⁾. Also, the Deloitte Report notes that trade payables increased 'between 31.12.2010 and 31.12.2012 [...] the Company [CFR Marfă] postponed the payments to its suppliers and to the State Budget in order to be able to repay the bank loans' ⁽¹⁴³⁾. Moreover, the Deloitte Report mentions that 'the priority of the Company [CFR Marfă] was the repayment of bank loans, salaries and liabilities to non-public suppliers' ⁽¹⁴⁴⁾. This clearly indicates that CFR Marfă was not interested and/or not able to pay social security debts and taxes. Therefore, there were no valid reasons for ANAF to believe that CFR Marfă would start paying its social security debts and taxes in the short term. The Commission considers that it is not acceptable for public creditors to allow debts to run up over long periods without the slightest prospect of improvement ⁽¹⁴⁵⁾. In this respect, the Commission also notes that the non-enforcement of debt towards the State budget is not *pari passu* with debts towards private creditors, such as the banks and private suppliers and other creditors mentioned above.
- (192) The decision of ANAF not to ask for repayment of debts owed to it by means of liquidation of CFR Marfă could not be justified by the prospects of privatisation. Even though Romania had intended to privatise CFR Marfă for several years (see recital 28 et subseq. above), in 2010 it was unreasonable to expect that such a privatisation would take place – at least not for the whole of CFR Marfă, and not in the form of a majority stake sale of the company; such a privatisation never materialised later anyway.
- (193) In the case at hand, ANAF would have most likely obtained 100 % of the public creditors' claims (including ANAF itself and the other public creditors CNPP, ANOFM and CNAS) if it had pursued the collective claims by way of CFR Marfă's liquidation. That is because in such case ANAF's claims (line F in Table 10 below, encompassing both overdue debt and debt not yet due) would have preference over the claims of other non-secured creditors of CFR Marfă (lines H and I in Table 10) ⁽¹⁴⁶⁾.

Table 10

Approximation of ANAF, CNPP, ANOFM, and CNAS recovery amount in 2010

In RON million	31.12.2010
Book value of assets (A)	[...]
Liquidation value of assets(B)	[...]
— Liquidation costs (C)	[...]
— Salaries (D)	[...]
— Guaranteed debts (bank loans) (E)	[...]
Sub-total	[...]
— Debts to the State budget (tax payables and social contribution payments) (F)	[...]
— Debts to the State budget from liquidation (G)	[...]
Sub-total	[...]
— Trade payables to SOEs (H)	[...]

⁽¹⁴²⁾ Private Investor Test application, Deloitte, 29 March 2013, page12.

⁽¹⁴³⁾ Private Investor Test application, Deloitte, 29 March 2013, pages 12–13.

⁽¹⁴⁴⁾ Ibid.

⁽¹⁴⁵⁾ Case C-480/98, AG Mischio opinion in *Magefesa*, ECLI:EU:C:2000:305, paragraph 37.

⁽¹⁴⁶⁾ Romania's Reply of 27 June 2019, point 15.

In RON million	31.12.2010
— Trade payables to other creditors (I)	[...]
Total (difference between the liquidation value of assets and debts to various creditors in case of liquidation) (J)	[...]

Source: (A) Financial statements of CFR Marfă for the year 2010; (B) Minimum liquidation value of CFR Marfă's assets on 31.12.2012 from the Private Investor Test application, Deloitte, 29 March 2013 ⁽¹⁾; (C) 5 % from the liquidation value of assets, as used in the Private Investor Test application, Deloitte, 29 March 2013; (D) Private Investor Test application, Deloitte, 29 March 2013; (E) Private Investor Test application, Deloitte, 29 March 2013; (F) Romania's Reply of 27 June 2019, point 39; (G) Private Investor Test application, Deloitte, 29 March 2013; (H) Romania's Reply of 27 June 2019, point 39; (I) Romania's Reply of 27 June 2019, point 39; (J) Commission's calculations.

⁽¹⁾ Given that the book value of CFR Marfă's assets on 31.12.2012 was RON [...] million (Financial statements of CFR Marfă for the year 2012), i.e. lower than in 2010, the Commission considers it justified and conservative to use the liquidation value of these assets for 2012 also for 2010. It is highly unlikely that the liquidation value of assets increased dramatically in 2012 compared to 2010. Rather to the opposite, the liquidation value in 2012 was most likely lower than in 2010, given the depreciation in the meantime.

(194) Therefore, the Commission considers that ANAF should have started the forced execution of CFR Marfă's debts to the State budget via initiation of CFR Marfă's liquidation in 2010 at the latest. That is even more so, given the fact that ANAF did not even need to go to the national courts for the forced execution of its debts, as this particular State body is entitled to impose seizures based on its own injunctions and then can go directly to the bailiffs to realize the seizures imposed (see recital 80).

(195) The Commission disagrees with Romania's view that ANAF's behaviour was MEO conform because ANAF issued injunctions and imposed seizures on CFR Marfă's movable and immovable assets. The Commission notes that none of these seizures ended up in the realization of the assets seized by ANAF, whereas CFR Marfă's overdue debt towards the State budget in the years 2009-2011 more than doubled (Table 8). The Commission considers that in such circumstances imposing seizures on CFR Marfă's assets was clearly not enough and that the market economy creditor would have started the forced execution of CFR Marfă's debts to the State budget via initiation of CFR Marfă's liquidation in 2010 at the latest. Romania's arguments that such forced execution of CFR Marfă's debts was not a viable solution because of CFR Marfă's strategic importance to the country (see recitals 85 and 86) is not the reason a private market economy creditor would have taken into account, which signals that ANAF did not act as a market economy creditor towards CFR Marfă's debts to the State budget.

(196) In addition, the Commission observes that until 2012 ANAF imposed only 22 seizures on CFR Marfă's immovable assets with a book value of RON [...] million (ca. EUR [...] million) (see recital 81), which is a mere 14 % from the total amount of CFR Marfă's overdue debt towards the State budget in 2009 (RON 309,41 million, ca. EUR 67,26 million), when those 22 seizures were imposed (see Table 8). What is more, despite the fact that CFR Marfă's overdue debt to the State budget increased more than twice over the years 2010 and 2011 and reached RON 627,4 million (EUR 136,4 million, table 8), ANAF did not impose any more seizures or other measures on CFR Marfă's assets to safeguard its claims. Romania explains that seizures and garnishments on the debtors of CFR Marfă (mainly SOEs) were not imposed in 2010 and 2011 to avoid significant social impact (recital 82). The Commission notes that such considerations are not the ones, which a private market economy creditor would have taken into account when enforcing its claims towards its debtors. This again signals that ANAF was not acting as a market economy creditor towards CFR Marfă's overdue debts to the State budget.

(197) Romania's argument (recital 82 that in 2012 ANAF imposed 200 seizures on movable and immovable assets of CFR Marfă with a book value of RON [...] (ca. EUR [...] million) is not convincing either, as none of these seizures were actually realized. Romania states that ANAF requested the valuation of assets seized with the aim to start the procedure for the realisation of assets, but then the writs of the execution for the overdue debts of CFR Marfă were settled by the implementation of the June 2013 debt-to-equity swap (recital 86). The Commission considers that the realization of seized assets by ANAF was not likely given Romania has admitted that the reason of non-enforcing CFR Marfă's debts via CFR Marfă's liquidation procedure and sale of assets was CFR Marfă's status of strategic company (see recitals 85 and 86).

- (198) The Commission is also not convinced by Romania's explanation that 81 seizures on CFR Marfă's movable and immovable assets were imposed only in November-December 2012 because the seized assets represented mainly wagons and locomotives, that is, movable assets destined to carry out activities that constitute the primary income source of CFR Marfă (see recital 85). The Commission fails to see how this particular aspect could have resulted in ANAF abstaining from imposing seizures on CFR Marfă's movable goods earlier, especially since the further use of such seized movable goods in CFR Marfă's activity would have been possible with ANAF's consent (see recital 81).
- (199) Finally, CFR Marfă's overdue debt before the debt-to-equity swap reached RON 1 001,2 million (ca. EUR 217,65 million, Table 8), whereas the book value of assets subject to 200 seizures was RON [...] (ca. EUR [...] million). Out of these 200 seizures 10 were imposed on the assets of CFR Infrastructură with a book value of RON [...] million (ca. EUR [...] million, see recital 83). Romania argues that these seizures should be treated as seizures on CFR Marfă's assets because CFR Marfă took over the underlying debt of CFR Infrastructură by virtue of June 2013 debt-to-equity swap. The Commission disagrees and considers that these 10 seizures are clearly not related to *Measure 1*, as *Measure 1* strictly concerns the non-enforcement by ANAF of accumulated debt by CFR Marfă. The fact that a certain amount of CFR Infrastructură's debt towards the State budget (RON [...] million) was converted into CFR Marfă's debt towards the State budget in 2013 as part of the debt-to-equity swap is irrelevant for the assessment of whether the behaviour ANAF towards CFR Marfă was in line with the MEO test.
- (200) The same is true with regard to the garnishment notices on CFR Infrastructură's assets and assets of its debtors for the total amount of RON [...] million (ca. EUR [...] million, recital 84) ⁽¹⁴⁷⁾, as these relate to the debts of CFR Infrastructură which were taken over by CFR Marfă as part of the debt-to-equity swap, and not to *Measure 1*.
- (201) Accordingly, the overdue debt to the State budget of CFR Marfă of RON 1 001,2 million in 2013 (ca. EUR 217,65 million, Table 8) was only partially secured by enforcement measures with a total book value of RON [...] million (ca. EUR [...] million), comprised of 190 seizures on CFR Marfă's assets in amount of RON [...] million (ca. EUR [...] million) ⁽¹⁴⁸⁾, and garnishments of bank accounts of CFR Ferryboat SA, Wagon Repair and Maintenance SA (and their respective debtors) for a value of RON [...] million (ca. EUR [...] million, recital 84) ⁽¹⁴⁹⁾. The Commission considers this as an additional indication that ANAF did not behave like a market economy creditor in enforcing the debts of CFR Marfă.
- (202) In the light of the above, the Commission considers that *Measure 1* constitutes aid. In particular, the Commission considers that ANAF should have enforced CFR Marfă's debts via liquidation of CFR Marfă already in 2010, and by abstaining from that, ANAF granted CFR Marfă (a company in difficulty – see section 4.2 below) an advantage, which lasted until the June 2013 debt-to-equity swap (see recital 292 and Table 14).
- (203) The Commission also notes that, considering the company's financial situation and history, obtaining a long term financing from the market for the payment of overdue debt in the years under assessment for *Measure 1* was not possible. The latest long-term loan that CFR Marfă signed dates back to 28 November 2007, when the company concluded a EUR [...] million syndicated loan for 10 years with a number of banks ⁽¹⁵⁰⁾. The initial interest for the loan was EURIBOR 6 months + [...] % per year, later increased to [...] % starting from 1 July 2009. The loan was initially secured by a pledge of 276 locomotives and certain receivables of CFR Marfă. No other long-term financing was registered by the company afterwards. The Commission also notes that in 2007, the year when the syndicated loan was concluded, CFR Marfă was still making profits (see footnote 15), and its market share was considerably high ([70-80] % in terms of volume of good carried and [60-70] % in terms of tonnes-km) ⁽¹⁵¹⁾.

⁽¹⁴⁷⁾ Annex 4 to Romania's Comments on the Opening Decision.

⁽¹⁴⁸⁾ Out of which 109 seizures were originally imposed on the assets (with a total book value of RON [...] million, ca. EUR [...] million) of CFR Ferryboat SA and Wagon Repair and Maintenance SA, which were merged into CFR Marfă in June 2012 (recital 27).

⁽¹⁴⁹⁾ Annex 4 to Romania's Comments on the Opening Decision.

⁽¹⁵⁰⁾ Raiffeisen Zentralbank Österreich AG, Raiffeisenlandesbank Niederösterreich AG, Bank Austria Creditanstalt AG in Austria, Alpha Bank AE in the United Kingdom, Ceylan in France, MKB Bank ZRT and Commerzbank ZRT in Hungary and EFG Private Bank Luxembourg in Luxembourg, Raiffeisen Bank SA, MKB Romasterra Bank SA, Piraeus Bank Romania SA, Emporiki Bank Romania SA in Romania. See page 41 of CFR Marfă's International Financial Reporting Standard compliant Report on the Yearly Financial Situation for year 2016 available at: <http://www.cfrmarfa.cfr.ro/images/stories/financiar/Situatii%20financiare%20anuale%202016%20conform%20IFRS.pdf>

⁽¹⁵¹⁾ Romania's Reply of 25 August 2015.

- (204) Given CFR Marfă's financial difficulties in the years under assessment under *Measure 1*, and the fact that CFR Marfă could not have received a long-term financing from the market to cover its overdue debts⁽¹⁵²⁾, the Commission considers that the amount of advantage is the whole accumulated principal amount of overdue debt of CFR Marfă before June 2013 debt-to-equity swap (RON 437,68 million, ca. EUR 95,15 million, Table 8) plus the corresponding interest based on the market interest rate.
- (205) The market interest rate should be calculated in accordance with the Communication from the Commission on the revision of the method for setting the reference and discount rates ('the 2008 Communication')⁽¹⁵³⁾. However, the Commission notes that ANAF has already charged interest and penalties on overdue debts of CFR Marfă (recital 78), which before June 2013 debt-to-equity swap amount to RON [...] million (ca. EUR [...] million)⁽¹⁵⁴⁾. The Commission therefore considers that if the interest and penalty rate applied by ANAF to the overdue principal is equal to or higher than the market interest rate which should have been charged on overdue debts of CFR Marfă based on the 2008 Communication, then the amount of interest and penalties actually charged by ANAF should be added to the amount of the principal.
- (206) As mentioned in recital 78, the following interest rates were calculated by ANAF with regard to CFR Marfă's overdue debts towards the State budget: (i) daily interest rate of 0,1 % during the period of 1.1.2006-30.6.2010; (ii) daily interest rate of 0,05 % during the period of 1.7.2010-30.9.2010; (iii) daily interest rate of 0,04 % during the period of 1.10.2010-28.2.2014. On top of that ANAF calculated a late payment penalty, as follows: (i) if the payment of overdue tax liabilities is made later than 30 days from the due date, but before 90 days after the due date, late payment penalty of 5 % of the principal amount due is added; (ii) after the expiry of 90 days from the due date, late payment penalty of 15 % of the principal amount is added.
- (207) Accordingly, the annual interest rate applied by ANAF until 30.6.2010 was 36 % (0,1 % daily rate × 360), the one applied during the period of 1.7.2010-30.9.2010 was 18 % (0,05 % × 360), and the one applied from 1.10.2010 until June 2013 debt-to-equity swap was 14,4 % (0,04 % × 360). Also, as is evident from Table 8, in the years 2011-2012 penalties for late payment were applied by ANAF on top of interest charged on overdue principal debt, which means that the effective interest rate charged in these years was even higher.
- (208) At the same time, given CFR Marfă's financial situation since 2010, as portrayed in CFR Marfă's financial data in Table 4, CFR Marfă's creditworthiness (rating) must be considered the lowest of the five possible ratings provided for in the 2008 Communication, namely 'Bad/Financial difficulties (CCC and below)'⁽¹⁵⁵⁾. Furthermore, the overdue debt in question was virtually not collateralized up until very late in 2012 when ANAF imposed 81 seizures on CFR Marfă's assets with a book value of RON [...] million (ca. EUR [...] million, recital 84) and therefore has to be qualified as 'low collateral' in the three step scale provided for in the 2008 Communication. The market interest rate must therefore be calculated for the respective accumulated debt as the result of the sum of the 1-year ROBOR at the time the loan was granted⁽¹⁵⁶⁾ plus 1 000 basis points as defined in the 2008 Communication.
- (209) According to the calculations of the Commission, the relevant ROBOR + 1 000 points in the years 2010-2012 was not always below the interest rates applied by ANAF. Therefore, the amount of advantage is the whole amount of the overdue principal (RON [...] million, ca. EUR [...] million, Table 8) plus charged interest and penalties by ANAF for the periods of time when such interest and penalties exceeded the ROBOR + 1 000 points; for the years when the charged interest by ANAF was lower than the ROBOR + 1 000 points, the amount of advantage is the

⁽¹⁵²⁾ Private Investor Test application, Deloitte, 29 March 2013, point 4.1.

⁽¹⁵³⁾ OJ C 14, 19.1.2008, p. 6.

⁽¹⁵⁴⁾ Total overdue debt towards the State budget of RON 1 001,2 million (ca. EUR 217,65 million) minus the principal amount of RON [...] million (ca. EUR [...] million).

⁽¹⁵⁵⁾ Also, based on the various scenarios presented in the Deloitte report, and the analysis of the financial models according to which the case flow expected to be generated by the company during the prognosis period of the study was by far insufficient to meet the overdue debts towards CFR Infrastructură and the State budget within a reasonable time frame, without considering future overdue penalties. Therefore, as acknowledged in the Deloitte report, considering the financial situation of the company [at that time], obtaining a long term financing from banks for the payment of overdue debt was not possible (see subsection 4.1 in page 16 of the Deloitte report).

⁽¹⁵⁶⁾ See rates for Romania as published on European Commission's website at https://ec.europa.eu/competition/state_aid/legislation/reference.html

whole amount of the overdue principal (RON [...] million, ca. EUR [...] million, Table 8) plus the ROBOR + 1 000 points. In any case, **the overall amount of aid corresponding to Measure 1 is at least RON 1 001,2 million (ca. EUR 217,65 million)**, consisting of the principal amount of debt of RON [...] (ca. EUR [...] million) plus at least the interest and penalties charged by ANAF in June 2013 of RON [...] million (ca. EUR [...] million)). The granting of the aid starts in 2010 and the granting dates of the aid are the dates when invoices issued by ANAF (and by the other State creditors represented by ANAF) were due to be paid by CFR Marfă.

- (210) With regard to *Measure 4*, the Commission notes that, indeed, the term for the payment of debt to the State budget does not necessarily coincide with the end of the fiscal year, and hence, the corresponding amount of debt to the State budget reflected in the balance sheet of CFR Marfă might not be accurately representing the actual accumulated debt.
- (211) In this context, the Commission considers that ANAF's Fiscal Certificates are a reliable source of information and accurately describe the debt situation of CFR Marfă towards ANAF (including overdue debt to the budget corresponding to the other public creditors). Specifically, the payment obligation reported in these ANAF Fiscal Certificates concerns the due fiscal debt including both (i) payment obligations consisting of the principal and the ancillary due amounts (including penalties and other due debt established by other competent agencies and transferred for recovery to ANAF); and (ii) amounts to be returned to CFR Marfă.
- (212) The Commission observes that the various documents stemming from ANAF and representing snapshots of the debt situation of CFR Marfă towards the State budget (see recital 88 and Table 9) show that no debts were pending towards ANAF until 2015 inclusively (see recital 88 and Table 9) ⁽¹⁵⁷⁾.
- (213) As concerns the outstanding debts of CFR Marfă to the State budget for the years 2016 and 2017, the Commission considers that abstaining from the forced execution of such debts by CFR Marfă to the State budget is within the realms of what private market creditor would have done, as these debts could potentially be set-off with the counterclaims by CFR Marfă towards ANAF (a matter to be resolved by Romanian courts at that time, see recital 89).
- (214) As concerns the outstanding debts of CFR Marfă to the State budget for the year 2018 and until 28 March 2019 (RON [...] million (ca. EUR [...] million) in total, see recital 91), the Commission takes note of the fact that the value of safeguarding measures undertaken by ANAF so far (seizures on unencumbered movable and immovable property of CFR Marfă with a book value of RON [...] million, ca. EUR [...] million, see recital 91) exceeds the amount of overdue debt almost twice, which indicates that ANAF pursues the enforcement of its claims more diligently than before June 2013. Therefore, and having due regard to a relatively long streak of absence of CFR Marfă's overdue debts to the State budget (from June 2013), the Commission considers that ANAF's behaviour towards the enforcement of above mentioned overdue debts of CFR Marfă is market conform for the period in question.
- (215) In the light of the above, the Commission considers that the further non-enforcement of debts towards the State budget after the June 2013 debt-to-equity swap until 2017 is not demonstrated, whereas ANAF's behaviour in enforcing the debts for 2018 is MEO conform. The Commission therefore concludes that *Measure 4* does not constitute aid.

4.1.5.4. (ii) Measures 2 and 5 – The non-enforcement of debts towards CFR Infrastructură and the increase of debts towards CFR Infrastructură as a result of the continued provision of services (i) since at least 2010 and until the 2013 debt-to-equity swap and (ii) after the debt-to-equity swap

- (216) Firstly, as already detailed in subsection 4.1.5.1, also with respect to Measures 2 and 5, the Commission considers that the MEO test is not applicable.
- (217) This is obvious from Romania's submissions, according to which 'it is not possible to impose stronger measures (such as an application for insolvency), as shown in the previous correspondence, as CFR Infrastructură and **the Romanian authorities must take account of the importance of CFR Marfă and of its resources for the national system of defence, national security, public safety and order, for the transport of strategic materials, for the national economy, and for the population.**' (emphasis added)

⁽¹⁵⁷⁾ See Annexes 2 and 3 to Romania's Reply of 19 December 2018 – copies of ANAF certificates issued for CFR Marfă on various dates (18 December 2013, 5 December 2014, 16 December 2015, 12 January 2016, 25 April 2018).

- (218) The determination of the Romanian authorities to keep CFR Marfă afloat and avoid triggering by way of debt enforcement any bankruptcy procedure is obvious from various public statements, such as the Minister for Transport speech delivered at the press conference of the Ministry of Transport of 2 August 2018:

‘Of course, enforcement is possible, but on assets which do not affect the current activity of CFR Marfă. Let us not kill the hen that lays eggs, let such enforcement actions be performed under fair and coherent conditions’;

‘The activity of CFR Marfă can and must continue, including under these circumstances, because this company is important for the energy system’ ⁽¹⁵⁸⁾.

- (219) That is even more evident from the remarks of the former Minister of Transport made during the Capital Conference on Transport and Infrastructure 2018, who was quoted saying that:

‘CFR Marfă has accumulated too big, much too big of a debt towards CFR Infrastructură. I believe that, should one have talked about a private company, we would not have gotten into such a situation.’ ⁽¹⁵⁹⁾

- (220) As explained in recital 103 Romania has maintained that it was not possible to impose stronger measures on CFR Marfă (such as an application for insolvency), as CFR Infrastructură and the Romanian authorities must take account of the importance of CFR Marfă and of its resources for the national system of defence, national security. In this respect, the Commission finds that there is clear evidence from various presentations/reports of the Board for the Shareholders General Assembly (and subsequent approval by the Ministry of Transport as the only shareholder of CFR Infrastructură of the various proposals in those reports) that CFR Infrastructură took into account non-market considerations when deciding to abstain itself from restricting the access on its rails to CFR Marfă as a possible debt-enforcement measure, despite overdue debt for more than 60 days. Such decisions to refrain from enforcement were taken despite the fact that the imposition of restrictions was recognised by CFR Infrastructură itself (in some of the aforementioned reports) as a more efficient way to recover overdue debts from the carriers ⁽¹⁶⁰⁾.

- (221) In the light of the above, the Commission considers that CFR Infrastructură acted as a public authority exercising its public powers in consideration of CFR Marfă’s strategic role as a provider of, inter alia, defence and national security rail transport services, rather than a market operator. As a result, the Commission considers that the non-enforcement of debts by CFR Infrastructură grants an economic advantage on CFR Marfă.

- (222) However, for sake of completeness, the Commission also performs the MEO test as explained below.

Application of the MEO test with respect to Measures 2 and 5

- (223) In the Opening Decision, the Commission expressed its doubts on whether CFR Infrastructură acted as an MEO by not enforcing CFR Marfă’s trade payables and allowing for the increase of debts through the continued provision of services to CFR Marfă. By doing so, it granted the undertaking in difficulty (see section 4.2) a payment facility.
- (224) As stated in recitals 92 to 105 above, Romania submits that CFR Infrastructură did not favour in any way CFR Marfă compared to other operators. Romania furthermore submits that CFR Infrastructură acted as an MEO, seeking enforcement of CFR Marfă’s debt by going into arbitration and court proceedings.

Application of the MEO test to Measure 2

- (225) In order to determine whether *Measure 2* confers an undue advantage to CFR Marfă, the Commission will assess whether CFR Infrastructură pursued the recovery of its claims with the same diligence as a private creditor. An MEO is normally seeking to obtain the maximum payment of sums owed to it by a debtor in financial difficulties ⁽¹⁶¹⁾.
- (226) When applying the MEO principle the Commission has to take into account available data and information at the time when the individual decisions to refrain from an immediate recovery of debts and to continue to provide services to CFR Marfă were taken ⁽¹⁶²⁾.

⁽¹⁵⁸⁾ Romania’s Reply of 19 December 2018, Section A.

⁽¹⁵⁹⁾ See article of 26 March 2018 available at <https://www.capital.ro/lucian-sova-la-conferinta-capital-despre-datoria-cfr-marfa-catr.html>

⁽¹⁶⁰⁾ See Annex 1.2 to Romania’s Reply of 12 May 2017 containing internal documents of CFR Infrastructură such as the various Presentations of the Board to the General Shareholders Assembly dated 8.12.2015, 8.4.2014, 7.3.2016.

⁽¹⁶¹⁾ See to that effect, Case C-342/96 *Spain v Commission*, ECLI:EU:C:1999:210.

⁽¹⁶²⁾ Case C-124/10P *European Commission v Électricité de France (EDF)*, ECLI:EU:C:2012:318, paragraph 85.

- (227) As noted in recitals 20 to 22 above, CFR Marfă was facing financial difficulties for several years. Already in 2010, CFR Marfă's total debts accounted for 126 % of its total assets. CFR Marfă's total debts towards CFR Infrastructură amounted to RON 412,67 million (ca. EUR 90 million) and accounted for 25 % of CFR Marfă's total debts. The Commission believes that any private creditor would have assessed the expected options available to maximise the recovery of its claim at the latest at that moment, that is in 2010. Instead, CFR Infrastructură continued to provide services to CFR Marfă and allowed it to further increase its trade payables by 74 % between 2010 and 2012, and thereby it even further lowered its recovery perspectives.
- (228) First, Romania failed to provide any study or any contemporaneous information based on which CFR Infrastructură decided not to seek liquidation of CFR Marfă in court already in 2010. Thus, there are no indications that CFR Infrastructură carried out any assessment of the options for the way forward and for the prospects of privatisation of CFR Marfă, which it should have done at the latest in 2010. The only documentation made available by Romania in this respect contains only the decisions of the Board relating to the non-application of alternative sanctions to CFR Marfă by CFR Infrastructură, such as the restriction or suspension of CFR Marfă's access to railway infrastructure of certain trains of CFR Marfă⁽¹⁶³⁾, but not the various scenarios or assessment of liquidation as possible step for the effective enforcement of CFR Marfă's debts.
- (229) Second, the Commission further observes that CFR Infrastructură was treated differently than private creditors of CFR Marfă. CFR Marfă's trade payables towards private undertakings increased by 12 % between 2010 and 2012, while the trade payables to CFR Infrastructură increased by 74 % (based on data presented in Table 6). Also, as acknowledged in the Deloitte Report, 'between 31.12.2010 and 31.12.2012 [...] the Company [CFR Marfă] postponed the payments to its suppliers and to the State Budget in order to be able to repay the bank loans'⁽¹⁶⁴⁾. This particular Deloitte Report was commissioned by Romania for assessing the prospects of privatisation of CFR Marfă in 2013, so it cannot be considered 'contemporaneous' information for the assessment of Measure 2. However, it is of relevance *ex post* in that it describes the history and situation of CFR Marfă, during the period corresponding to Measure 2. In particular, when referring to the period between 2010 and 2012, the Deloitte Report explains that, that 'the priority of the Company [CFR Marfă] was the repayment of bank loans, salaries and liabilities to non-public suppliers'⁽¹⁶⁵⁾. This clearly indicates that CFR Marfă was not interested and/or not able to pay debts towards CFR Infrastructură. In any case, there were no valid reasons for CFR Infrastructură to believe that CFR Marfă would start paying its debts in the short term. The Commission considers that it is not acceptable for public creditors to allow debts to run up over long periods without the slightest prospect of improvement⁽¹⁶⁶⁾.
- (230) Third, the Commission considers that the individual decision of CFR Infrastructură not to ask for repayment of debts owed to it by means of liquidation of CFR Marfă could not be justified by the prospects of privatisation. As noted in recital 192, in 2010 it was unclear whether CFR Marfă would be indeed privatised in the short-term. Against this background, the Commission considers that an MEO would have carried out an assessment of the possible options for the way forward, including the prospect of liquidation of CFR Marfă. Romania failed to provide any document proving that such assessment was conducted by CFR Infrastructură in 2010.
- (231) In order to carry out such an assessment and estimate the liquidation value of CFR Marfă's assets in 2010 itself, the Commission expressly asked Romania to provide it with the contemporaneous statutory liquidation factors. Romania confirmed that no such statutory liquidation factors exist (see recital 287. Therefore, the Commission relied on the liquidation values provided in the Deloitte Report (see recital 193 and Table 10 therein).
- (232) The Commission considers that CFR Infrastructură should have asked for an immediate repayment of its trade payables at the latest in 2010. In the case at hand, CFR Infrastructură would have obtained the recovery of approximately 44,4 % of its claims (see Table 11 below), if it had pursued its claims in 2010 by way of CFR Marfă's liquidation. In addition, such a liquidation would have ensured that no further debts were accumulated.

⁽¹⁶³⁾ See Annexes 1.2 and 1.3. to Romania's Reply of 12 May 2017. See in particular the Decision of the CFR Infrastructură Board No 15 of 18 November 2010 and corresponding proposal No 11/1a/221 of 9 November 2010 on which it was based, Board Decision No 11 of 8 July 2010 and corresponding proposal No 11/3a of June 2010 on which it was based. In particular, in the latter internal document, it is mentioned that 'based on previous experience, the only efficient measure in order to ensure payment of overdue amounts corresponding to the TUI from the carriers was suspending the access on the network.' See also Decision No 47 of 10 June 2010 of the General Shareholders Assembly and corresponding presentation of the Board No 1/3205/2010.

⁽¹⁶⁴⁾ Deloitte Report, page 12.

⁽¹⁶⁵⁾ Ibid.

⁽¹⁶⁶⁾ Case C-480/98, AG Mischo opinion in *Magefesa*, ECLI:EU:C:2000:305, paragraph 37.

Table 11

Overview of approximated recovery amounts for CFR Marfă's trade payables in 2010 ⁽¹⁶⁷⁾

	In 2010 (RON million)	Fraction from total (%)	Approximated recovery amounts for trade payables in 2010 (RON million)	Fraction from total (%)
Trade payables towards CFR Infrastructură	412,68	73,35	183,19	44,4
Total trade payables	562,6	100	249,75 ⁽¹⁾	44,4

⁽¹⁾ Based on the same approximated recovery amounts in 2010 in Table 10 above.

Source: Submission by Romania, 24 December 2015, Private Investor Test application, Deloitte, 29 March 2013, Romania's Reply of 27 June 2019, point 39, Commission's calculations.

(233) *Fourth*, Romania's argument that 'the [...] measures taken by CFR Infrastructură have aimed at minimising the negative effects on national security and on the defence system of the country [...]. Any other measure (for example, liquidation or insolvency) would have led to the risk of losing significant resources and competences' ⁽¹⁶⁸⁾ constitutes an admission by Romania that CFR Infrastructură's true motive of non-enforcement of debts was a non-economic one (see recitals 179-181) above).

(234) *Lastly*, the Commission considers that CFR Infrastructură could not be considered to be a captive supplier to CFR Marfă, and therefore, fully dependant on the existence of CFR Marfă as a main source of its revenues. As it is clear from Table 12 below, although in terms of rail freight traffic CFR Marfă was close to half of the market during the period under assessment for *Measure 2*, it only accounted for roughly one fifth of CFR Infrastructură's revenues. Also, in terms of dynamics, the Commission notes that the proportion of revenues accounted by CFR Marfă in the total rail freight traffic steadily decreased, similar to the fraction of CFR Infrastructură's revenue stemming from CFR Marfă. Therefore, the substantial dependence of CFR Infrastructură on supplies towards CFR Marfă's is hard to sustain.

Table 12

The relative importance of CFR Marfă as a proportion of CFR Marfă's activities in the overall rail traffic and in CFR Infrastructură's revenue since 2009 until 2018 (based on tonnes-kilometre figures)

	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
% of the rail freight traffic corresponding to CFR Marfa	[50-60]	[40-50]	[40-50]	[40-50]	[40-50]	[40-50]	[30-40]	[30-40]	[30-40]	[30-40]
% of CFR Infrastructura's revenues represented by CFR Marfa	[10-20]	[10-20]	[20-30]	[10-20]	[10-20]	[10-20]	[10-20]	[10-20]	[10-20]	[10-20]

Source: Romania's Reply of 27 June 2019, point 29.

(235) Even in a case of liquidation of CFR Marfă following an enforcement of debts via litigation triggered by CFR Infrastructură in 2010, it was highly unlikely that the traffic corresponding to CFR Marfă would have completely disappeared, as the transport contracts and CFR Marfă's assets would have remained in the market and in all likelihood be served by its competitors, carriers who already served more than half of the market ([60-70] % in tonnes-km) and which, on average, accounted for the rest of [80-90] % of CFR Infrastructură's revenues in the period after 2010 and until the debt-to-equity swap in June 2013.

⁽¹⁶⁷⁾ See the calculation of the approximated recovery amounts in 2010 in Table 10 above.

⁽¹⁶⁸⁾ Romania's Comments on the Opening Decision, point 2 (page 6).

- (236) Based on the considerations above, the Commission concludes that *Measure 2* gives CFR Marfă a selective advantage by way of non-enforcement and, correspondingly, by offering a payment facility towards CFR Marfă, since 2010 until the 2013 debt-to-equity swap under conditions that it would have not otherwise found in the market.
- (237) As already explained extensively under recitals 203 and 204 above, and as acknowledged *ex-post* in the Deloitte Report, it was impossible for CFR Marfă to find long term financing in the period under assessment for *Measure 2*. Therefore, the Commission considers that the amount of the advantage linked to the funding granted by the State-owned CFR Infrastructură in the form of the non-enforced, accumulated debts by CFR Marfă towards it equals the amount of the overdue principal debt (RON [...] million (ca. EUR [...] million) at the moment of the 2013 debt-to-equity swap ⁽¹⁶⁹⁾, plus the amount of overdue debt which was not written off by the 2013 debt-to-equity swap (see Table 14), plus the corresponding market interest. The market interest should be determined by applying the market interest rate to the principal amount overdue. The granting of the aid starts in 2010 and the granting dates of the aid are the dates when invoices issued by CFR Infrastructură were due to be paid by CFR Marfă.
- (238) The Commission notes that CFR Infrastructură has already charged interest and penalties on overdue debts of CFR Marfă (see Table 7 above), which at the moment of the 2013 debt-to-equity swap amounted to RON [...] million (ca. EUR [...] million, see Table 14 and footnote 179). The market interest rate therefore is the maximum between (i) the interest rate calculated in accordance with the 2008 Communication for the relevant period to *Measure 2* and (ii) the interest rate and penalties charged and applied by CFR Infrastructură in the same period. As a result, if the interest and penalty rate applied by CFR Infrastructură to the overdue principal is equal to or higher than the market interest rate which should have been charged on overdue debts of CFR Marfă based on the 2008 Communication, then the amount of interest and penalties actually charged by CFR Infrastructură should be added to the amount of the principal. If the interest and penalty rate applied by CFR Infrastructură were lower than the market interest rate based on the 2008 Communication, then the market interest rate based on the 2008 Communication must be applied.
- (239) In any case, the amount of aid corresponding to *Measure 2* is at least RON 783,78 million (ca. EUR 170,39 million) – corresponding to the principal debt which was written off in June 2013 (RON [...] million, ca. EUR [...] million) plus the overdue debt not written off in June 2013 (RON 115,79 million, ca. EUR 25,17 million), plus at least the interest actually charged by CFR Infrastructure of RON [...] million (ca. EUR [...] million) (see Table 14 below).

Application of the MEO test to Measure 5

- (240) Similarly to *Measure 2* (see recitals 225 et subseq.), in order to determine whether *Measure 5* confers an undue advantage to CFR Marfă, the Commission assesses whether CFR Infrastructură pursued the recovery of its claims with the same due diligence as a private creditor after the June 2013 debt-to-equity swap until 2018 included. The Commission recalls the 2013 debt-to-equity swap included an amount of RON 667,99 million (ca. EUR 145,21 million) of CFR Infrastructură's overdue liabilities, out of which RON [...] million (ca. EUR [...]) principal and RON [...] million (ca. EUR [...] million) interest and penalties. This overall amount represented 85 % of CFR Marfă's overdue liabilities towards CFR Infrastructură. *Measure 5* therefore refers to the continued accumulation of CFR Marfă's overdue debt after the 2013 debt-to-equity swap but not including the 15 % of CFR Marfă's debt to CFR Infrastructură in amount of RON 115,79 million (ca. EUR 25,17 million, see recital 239), which was not written off by the 2013 debt-to-equity swap and is already included in the aid amount of *Measure 2* (see recital 239 above).
- (241) From the outset, the Commission notes that, despite an improvement in the accounts of the company in terms of equity thanks to the debt-to-equity swap in June 2013, the financial situation of CFR Marfă continued to indicate its difficulties: further accumulating losses, mounting debts and a deteriorating market position (see Tables 1 and 4 and subsection 2.4). After the debt-to-equity swap of 2013, CFR Marfă's trade payables towards CFR Infrastructură continued to accumulate and almost tripled from RON 213,47 million (ca. EUR 46 million) at the end of 2013 to RON 622,03 million (ca. EUR 135 million) in 2016 reaching RON 860,93 million (ca. EUR 187 million) in 2018 (see Table 7 above). CFR Marfă's overdue liabilities also steadily increased after the debt-to-equity swap (by 72 % in 2014, by 46 % in 2015, by 21 % in 2016 and by 39 % in 2017 (based on figures presented in Table 7)).

⁽¹⁶⁹⁾ Annex 4 to Romania's Comments on the Opening Decision, page 3.

- (242) Given that the Deloitte Report was based on the planned privatisation being successful, Romania could not justify the subsequent continuous support to CFR Marfă in the form of continuous provision of infrastructure and other ancillary services by CFR Infrastructură after the privatisation failed in October 2013.
- (243) Romania failed to provide any study or internal report of CFR Infrastructură based on which CFR Infrastructură decided to abstain from requesting the liquidation of CFR Marfă in court immediately after the failed privatisation in October 2013 or from enforcing the recovery of debts via litigation. In the same vein as for *Measure 2*, the Commission therefore undertook the evaluation of the prospects of CFR Marfă's liquidation versus the continuation of the leniency in the enforcement of debt towards CFR Marfă. To that end, the Commission expressly asked Romania to provide the contemporaneous statutory liquidation factors in order to be able to estimate the liquidation value of CFR Marfă's assets in 2014 itself. Romania confirmed that no such statutory liquidation factors exist (see recital 287). Therefore, the Commission relied on the liquidation values provided in the Deloitte Report (see recital 193 and Table 10 therein).
- (244) First, the Commission considers that a prudent market operator in the situation of CFR Infrastructură would have sought the enforcement of its debt immediately after the failed privatisation, when it was clear that the prospects of a *one block* sale of the company or a fraction of its shareholding was highly unlikely in the short run. Even more so, at the end of 2013, CFR Marfă had no more overdue liabilities towards the State budget, mainly as a result of the debt-to-equity swap. Furthermore, at the end of 2013, the amount of trade payables owed to CFR Infrastructură by CFR Marfă were small enough to be covered via the receipts from a liquidation (see Table 13 below).

Table 13

Overview of approximated recovery amounts for CFR Marfă's trade payables in 2014 (beginning of the year)

	1 January 2014 (RON million)	Fraction from total (%)	Approximated recovery amounts for trade payables in 2014 (RON million)	Fraction from total (%)
Trade payables towards CFR Infrastructură	213,47	67	213,47	100
Total trade payables	318,72	100	318,72 ⁽¹⁾	100

⁽¹⁾ The calculation of the approximated recovery amounts is similar to that for 2012 in Table 11. The amount of liabilities for the ANAF and the other State creditors was equal to zero, as all debts have been written off during the debt-to-equity swap and no further overdue debts were reported for the subsequent year. Even under a conservative scenario, allowing for a 10 % reduction in the liquidation value of assets (to account for the 3,4 % drop in the book value of assets compared to 2012), and keeping unchanged all other costs (despite a fall in the number of employees and a reduction of the debts towards banks), the remaining amount after payment of priority categories (RON [...] million) would still largely be sufficient for the repayment of the trade payables.

Source: Submission by Romania of 24 December 2015, Private Investor Test application, Deloitte, 29 March 2013, Romania's Reply of 27 June 2019, point 39, Commission's calculations.

- (245) As reflected in Table 13 above, CFR Infrastructură would have recovered fully its liabilities from CFR Marfă via a liquidation in the form of an asset sale (individually or in bundles, such as to ensure maximising the receipts from the sale). Instead, by waiting, it allowed the debt to accumulate even further, thus diminishing the likelihood of successful recovery. In 2013 CFR Marfă's overdue debt towards CFR Infrastructură amounted to RON 155,99 million (ca. EUR 33,91 million) and in 2014 – to RON 166,94 million (ca. EUR 36,3 million). By contrast, CFR Marfă's overdue debt to CFR Infrastructură more than doubled in 2015 (reaching RON 452,42 million, ca. EUR 98,35 million).

- (246) *Second*, Romania explains that CFR Infrastructură has undertaken certain steps to enforce its claims towards CFR Marfă in 2013-2018, including by way of payment orders and/or arbitration proceedings, and after 2016, by way of judicial enforcement ⁽¹⁷⁰⁾. However, the Commission is of the view that these steps only concerned parts of the debts and were clearly insufficient for the full debt recovery.
- (247) More specifically, CFR Infrastructură did not take any such enforcement steps in 2014, the year following the debt-to-equity swap and the failed privatisation in 2013. In the subsequent years, the amounts for which CFR Infrastructură initiated arbitration and litigation proceedings as firm steps towards the enforcement of CFR Marfă's debts constituted only small fractions out of the total trade payables owed by CFR Marfă as follows: in 2015, the arbitration proceedings for RON [...] million (ca. EUR [...] million) represented only 4,74 % of the trade payables; in 2016, the arbitration and litigation proceedings for RON [...] million (ca. EUR [...] million) represented only 15,5 % of the total trade payables owed by CFR Marfă.
- (248) Only later on, in the second part of 2017, did CFR Marfă intensify its enforcement efforts by way of the arbitration and litigation proceedings. In 2017, these proceedings covered an overall amount of RON [...] million (ca. EUR [...] million) and represented 49,34 % of the trade payables. In 2018 arbitration and litigation proceedings amounted to of RON [...] million (ca. EUR [...] million), thereby covering 42,61 % of the trade payables owed by CFR Marfă towards CFR Infrastructură. Romania claims that full amounts corresponding to these arbitration and litigation proceedings have been adjudged in favour of CFR Infrastructură by the respective final court and arbitration decisions.
- (249) The Commission notes, however, that based on the information provided by Romania (see recitals 98 et subseq.), until August 2018 CFR Infrastructură managed to recover from CFR Marfă only part of its debts through judicial and extrajudicial measures (ca. RON [...] million (ca. EUR [...] million), leaving CFR Infrastructură still with a substantial overdue debt of around RON [...] million (ca. EUR [...] million), as reflected in Table 7 above. Out of this amount, only ca. RON [...] million (ca. EUR [...] million) was covered by court judgments (see recital 98 above). Therefore, a substantial amount of CFR Marfă's overdue debt was not covered by judicial and extrajudicial measures initiated by CFR Infrastructură, and an even lesser amount was actually recovered (see recital 96).
- (250) Moreover, as regards the part of the overdue debts covered by court judgments, the 2018 Payment Rescheduling Agreement only covered the rescheduling of payment of interest and penalties on the principal debt of CFR Marfă, whereas no evidence was submitted by Romania regarding the steps undertaken for the recovery of the principal. Although the provisions of the 2018 Payment Rescheduling Agreement specify that the principal amount of RON [...] million (ca. EUR [...] million) shall continue being recovered through realization of seizures imposed on movable and immovable property of CFR Marfă, Romania did not provide any evidence on the number and types of these seizures, their value as well as the degree of their realization, despite express requests by the Commission.
- (251) *Third*, Romania did not document, nor substantiate why the above-mentioned steps for enforcement carried out by CFR Infrastructură started so late after the failed privatisation in 2013. Romania neither explained nor documented why the arbitration and court enforcement proceedings initiated did not cover the full debt that CFR Marfă still owed to CFR Infrastructură.
- (252) Therefore, the Commission considers that such leniency in enforcement of CFR Marfă's debts indicates that even in 2017 and 2018, long time after the failed privatisation of CFR Marfă in 2013, CFR Infrastructură did not act as MEO in enforcing CFR Marfă's debts.
- (253) *Fourth*, Romania submits that CFR Infrastructură could not have asked for enforcement that would have led to a liquidation of CFR Marfă due to the strategic character of the company (see recital 233 above) Again, as it was the case for *Measure 2*, also for *Measure 5*, this argument is an admission by Romania that CFR SA's true motive of non-enforcement of debts was a non-economic one (see recitals 179-181).
- (254) In addition to the above arguments, the Commission considers, also for the following reasons that a prudent private market operator placed in the situation of CFR Infrastructură would not have continued to supply CFR Marfă for years without seeking recovery of its debt and instead limiting itself to the simple calculation of interest and calculation of penalties for years.

⁽¹⁷⁰⁾ See Annex 2 to Romania's Reply of 12 May 2017 and Romania's submission of 6 October 2017 in reply to the Addendum to the Complaint dated 19 September 2017.

- (255) First, the Commission notes that the difficult and steadily deteriorating financial situation of CFR Marfă was well known to CFR Infrastructură since 2010 already. Therefore, CFR Infrastructură had enough time to prepare, internally assess and implement steps to recover its claims in case of another failed privatisation in 2013. Instead of taking immediate enforcement steps, including by seeking recovery of the debt owed to it by CFR Marfă in court, only as of 2017 did CFR Infrastructură started such proceedings for a substantial amount of debt, that is only at a stage when it was facing an imminent opening of formal proceedings by the Commission. Specifically, in May 2017, the Competition Commissioner visited Romania and informed the Romanian authorities that a decision to open investigation proceedings was likely in CFR Marfă's case. The Commission therefore considers that no prudent private market operator would have awaited for such a long period of time to recover its debts.
- (256) Second, at the request of the Commission, Romania provided a number of internal documents, such as minutes of the relevant Shareholders' meetings of CFR Infrastructură and the underlying presentations/reports from the Board whereby CFR Infrastructură took note of the accumulation of debts by CFR Marfă and decided not to undertake forced execution measures or to restrict access on its rails to CFR Marfă⁽¹⁷¹⁾. Romania nevertheless failed to provide any studies (produced internally or commissioned to external consultants) based on which the decisions regarding the enforcement or, rather, the non-enforcement of CFR Marfă's debts towards CFR Infrastructură have been taken in the period after the 2013 debt-to-equity swap, and justifying from an economic point of view a very lenient approach of CFR Infrastructură towards recovery of debts owed to it by CFR Marfă.
- (257) Third, as already explained in relation with *Measure 2* above (see Table 12 and recitals 234 and 235), the Commission finds that CFR Infrastructură could not be considered to be a captive supplier to CFR Marfă, and therefore, to depend on the existence of CFR Marfă as a main source of its revenues in the period after the 2013 debt-to-equity swap. Although in terms of rail freight traffic CFR Marfă was close to half of the market, it only accounted for less than one fifth of CFR Infrastructură's revenues from 2013 debt-to-equity swap onwards. Also, in terms of dynamics, the proportion of revenues accounted by CFR Marfă into the total rail freight traffic continued to steadily decrease from 2013 debt-to-equity swap onwards. Lastly, even in a case of liquidation of CFR Marfă following an enforcement of debts via litigation triggered by CFR Infrastructură in the period after the 2013 failed privatisation, it was highly unlikely that the traffic corresponding to CFR Marfă would have completely disappeared, as the transport contracts and CFR Marfă's assets would have been entered the market and in all likelihood be served by its competitors.
- (258) Based on all the considerations above, the Commission concludes that *Measure 5* gives CFR Marfă an advantage by way of non-enforcement of its debts and, correspondingly, by offering CFR Marfă aid in the form of a payment facility that it would have otherwise not obtained from the market in the period after the 2013 debt-to-equity swap and for as long as the aid measure is in force.
- (259) In order to establish the advantage linked to the funding granted by the State-owned CFR Infrastructură to CFR Marfă in the form of non-enforced, accumulated debts, the Commission recalls that the difficult situation of CFR Marfă was well known to private banks and other financing institutions well before the debt-to-equity swap in 2013 and after the subsequent failed privatisation. While the financial situation shortly improved following this significant debt write-off, CFR Marfă nevertheless continued to accumulate further debt, in particular towards its main supplier – CFR Infrastructură – and to register losses with no exception in the subsequent years (see recital 241 above). There were, therefore, no reasons to believe that following the failed privatisation the creditworthiness of CFR Marfă would have changed. On the contrary, it was rather certain that the company would not have able to obtain long-term financing from the market.
- (260) Therefore, in the same vein with the methodology for *Measures 1 and 2* (see recitals 203-209 and 237-239 above), the amount of the advantage linked to the funding granted by CFR Infrastructură in the form of non-enforced, accumulated debts owed to it by CFR Marfă after the 2013 debt-to-equity swap under *Measure 5* equals the principal amount of CFR Marfă's overdue debt to CFR Infrastructură until 2018 (inclusively) reduced by the amount of RON 115,79 million (ca. EUR 25,17 million), which corresponds to the 15 % of *Measure 2* not written-off by the 2013 debt-to-equity swap (see recital 240), and increased by corresponding market interest until 2018 (inclusively). The granting of the aid starts immediately after the June 2013 debt-to-equity swap and the granting dates of the aid are the dates when invoices issued by CFR Infrastructură were due to be paid by CFR Marfă.

⁽¹⁷¹⁾ See Annex 1.2 to Romania's Reply of 12 May 2017 containing internal documents of CFR Infrastructură such as the various Presentations of the Board to the General Shareholders Assembly dated 8.12.2015, 8.4.2014, 7.3.2016.

- (261) The market interest should be determined by applying the market interest rate to the principal amount overdue.
- (262) The Commission notes that CFR Infrastructură has already charged interest and penalties on overdue debts of CFR Marfă (see Table 7 above), which amounted to RON [...] million (ca. EUR [...] million) for the year 2018 alone. As regards the interest, this cannot be smaller than the interest calculated in accordance with the 2008 Communication. The market interest rate therefore is the maximum between (i) the interest rate calculated in accordance with the 2008 Communication for the relevant period to *Measure 5* and (ii) the interest rate and penalties charged and applied by CFR Infrastructură for the relevant period after the 2013 debt-to-equity swap and until 2018 included. As a result, if the interest and penalty rate applied by CFR Infrastructură to the overdue principal is equal to or higher than the market interest rate which should have been charged on overdue debts of CFR Marfă based on the 2008 Communication, then the amount of interest and penalties actually charged by CFR Infrastructură should be added to the amount of the principal. If the interest and penalty rate applied by CFR Infrastructură were lower than the market interest rate based on the 2008 Communication, then the market interest rate based on the 2008 Communication must be applied.
- (263) In any case, **the aid amount for Measure 5 is at least RON 834,29 million (ca. EUR 181,37 million)** ⁽¹⁷²⁾, which is the amount of total overdue debt owed by CFR Marfă to CFR Infrastructură at the end of 2018, reduced by the amount of RON 115,79 million (ca. EUR 25,17 million), corresponding to the 15 % of *Measure 2* not written-off by the 2013 debt-to-equity swap (see recital 240).

4.1.5.5. (iii) *Measure 3 – The debt-to-equity swap amounting to RON 1 669 million (ca. EUR 363 million)*

Preliminary considerations about the alleged approval of the debt-to-equity swap as claimed by Romania

- (264) Romania considers (see recital 107 above) that the debt-to-equity swap was approved by the Council Decision of 22 October 2013. However, as explained further below in recital 322 et subsequ., the Commission is of the view that the afore-mentioned Council Decision does not substitute itself to State aid scrutiny; on the contrary, the Memorandum of Understanding endorsed by the Council Decision explicitly requires the respect of the State aid rules for the restructuring measures to be undertaken by Romania ⁽¹⁷³⁾.
- (265) In this respect, the Commission also notes that indeed, the privatisation process for several SOEs referred to in the Memorandum of Understanding with Romania was monitored and reflected in various Commission's reports, including the report on *'The Balance of Payments Programme. Romania, 2013-2015'*. However, contrary to Romania's view (see recitals 107 to 110 above), the Commission considers that the quoted report actually emphasised the very existence of concerns from the State-aid perspective with respect to the 2013 debt-to-equity swap in favour of CFR Marfă. This can be clearly seen from the way the Commission explains in the report that such State-aid concerns 'would be alleviated' by the promised and long awaited privatisation. In any case, despite Romania's promises contained in the various Memoranda of Understanding with the EU, the privatisation process of CFR Marfă was never actually officially launched after the failed attempt of privatisation in 2013, let alone successfully completed, even 6 years after the 2013 debt-to-equity swap. In particular, the Commission recalls that the Council's decisions authorising a Member State to introduce a (tax) exemption do not have the effect of preventing the Commission from examining whether that exemption constitutes State aid ⁽¹⁷⁴⁾. In the same vein, the existence of the Council Decision mentioned by Romania cannot be invoked by Romania for legitimate expectations (see also recital 323 below).
- (266) In the light of the above, the Commission considers that the claim by Romania according to which the debt-to-equity swap was approved for the purposes of State aid by the Council Decision of 22 October 2013, is unfounded.

⁽¹⁷²⁾ See Romania's Reply of 27 June 2019, point 36 and 37 and corresponding Annex 6 containing the 2018 Payment Rescheduling Agreement. The Commission notes that CFR Marfă's overdue liabilities towards CFR Infrastructură presented by Romania in point 36 significantly differ from the overdue debt figures presented in point 39. The Commission compared these figures with the ones mentioned in the 2018 Payment Rescheduling Agreement and considers that the closest amounts to the reality of the liabilities situation in the end of 2018 are those in point 36 of Romania's reply.

⁽¹⁷³⁾ Section B point 9 of Annex 1 to the Memorandum of Understanding.

⁽¹⁷⁴⁾ See *Eurallumina* judgement by the Court in Case C-272/12 P *Commission v Ireland and Others*, ECLI:EU:C:2013:812 of 10.12.2013.

Non-applicability of the MEO test

- (267) Furthermore, as explained in recitals 179 to 181 above, also with respect to *Measure 3*, the Commission considers that the MEO test is not applicable.
- (268) Nevertheless, it is recalled that the Commission performed such an MEO test in the Opening Decision. Specifically, the Commission had doubts that, by approving the EUR 363 million debt-to-equity swap, CFR Marfă's public creditors (that is ANAF and CFR Infrastructură) acted in the same way an MEO would also have done and therefore granted an advantage to CFR Marfă. More specifically, the Commission had doubts that the Emergency Order No 61/2013 (as described in footnote 27 above) to convert RON 1 669 million (ca. EUR 363 million) of CFR Marfă's debts into equity in June 2013, and thereby to substantially reduce CFR Marfă's debts, satisfied the MEO test.
- (269) In the light of the above, although it considers that the MEO test is not applicable, the Commission will nevertheless verify the outcome of a hypothetical MEO test also with respect to *Measure 3*.

Hypothetical application of the MEO Test

- (270) In order to determine whether *Measure 3* confers an undue advantage on CFR Marfă, the Commission assesses whether ANAF, also the representative of each of the other public creditors CNPP, ANOFM, CNAS, and CFR Infrastructură, pursued the recovery of the public debt with the same diligence as a private creditor seeking to maximize recovery of the debt owed to it ⁽¹⁷⁵⁾.
- (271) In this regard, when a firm faced with a substantial deterioration of its financial situation proposes an agreement or series of agreements for debt arrangements to its creditors with a view to remedying the situation and avoiding liquidation, each creditor must make a decision having regard to the amount offered to it under the proposed agreement, on the one hand, and the amount it expects to be able to recover following possible liquidation of the firm, on the other. Its choice is influenced by a number of factors, including the creditor's status as the holder of a secured, preferential or ordinary claim, the nature and extent of any security it may hold, its assessment of the chances of the firm being restored to viability, as well as the amount it would receive in the event of liquidation ⁽¹⁷⁶⁾. In addition, the MEO test requires a realistic assessment of bankruptcy vis-à-vis restructuring, which means that 'the amount it would receive in the event of liquidation' must be compared to 'the assessment of the chances of the firm being restored to viability' ⁽¹⁷⁷⁾.
- (272) As described in recitals 116 and 117, Romania submitted that there were strong similarities between the measures in favor of CFR Marfă and those previous cases involving State-owned railway companies where the Commission performed the MEO test and found that the measures did not constitute aid.
- (273) The Commission notes that the ZSSK Cargo decision quoted by Romania (see recital 116 above) concerns a loan of EUR 166 million granted by Slovakia to the freight railway operator Železničná Spoločnosť Cargo Slovakia the Slovak railway company. In that particular case, the Commission found that: (1) there were similar indicative bank offers made at the same time; (2) based on a benchmarking exercise, the interest charged was broadly in line with interest rates paid by companies in a comparable financial situation; (3) the loan was granted based on a study showing that the company would be able to reimburse the loan.
- (274) The Commission recalls that the MEO Test is performed on a case-by-case basis, with due attention to the specificities of each situation. The assessment and finding of loan as market conform in the Slovak case is very different from the situation in CFR Marfă where the measures take the form of non-enforcement of debts for years and a significant debt write-off for usual commercial activities. Therefore, the MEO assessment of this particular case is based on a different setting and does not necessarily lead to the same conclusion.
- (275) The Commission notes that the debt-to-equity swap was based on previously accumulated liabilities of CFR Marfă towards ANAF ⁽¹⁷⁸⁾ and CFR Infrastructură ⁽¹⁷⁹⁾, as presented in the table below.

⁽¹⁷⁵⁾ Case C-342/96 *Tubacex*, ECLI:EU:C:1999:210, paragraph 46; Case C-256/97 *DMT*, ECLI:EU:C:1999:332, paragraph 21; Case C-480/98 *Magefa*, ECLI:EU:C:2000:559; Case T-152/99 *Hamsa*, ECLI:EU:T:2002:188, paragraph 167.

⁽¹⁷⁶⁾ Case T-152/99 *Hamsa*, ECLI:EU:T:2002:188, paragraph 168.

⁽¹⁷⁷⁾ Commission decision of 5 July 2005 in State aid case C 20/04 (ex NN 25/04) – Poland – State aid in favour of Huta Częstochowa (OJ L 366, 21.12.2006, p. 1), recital 118.

⁽¹⁷⁸⁾ Consisting of RON [...] million (ca. EUR [...] million) principal and RON [...] million (ca. EUR [...] million) interest and penalties. See Annex 4 to Romania's Comments on the Opening Decision, page 3.

⁽¹⁷⁹⁾ Consisting of total of RON [...] million (ca. EUR [...] million) principal and RON [...] million (ca. EUR [...] million) interest and penalties. See Annex 4 to Romania's Comments on the Opening Decision, page 3.

Table 14

Details on the amounts of debt written off via the 2013 debt-to-equity swap

Liabilities subject to the debt-to-equity swap	Before June 2013 debt-to-equity swap		June 2013 Debt-to-equity swap		
			Amount of debt converted into equity		Proportion of debt converted into equity (%)
	RON million	EUR million	RON million	EUR million	
I. Liabilities towards the State budget out of which	1 001,2	217,65	1 001,2	217,65	100
(i) principal debt	[...]	[...]	[...]	[...]	
(ii) interest and penalties	[...]	[...]	[...]	[...]	
II. Outstanding payables towards CFR Infrastructură out of which:	783,78	170,39	667,99	145,22	85
under OUG 32/2013 out of which:			527,20	114,61	67
(iii) principal debt			[...]	[...]	
(iv) interest and penalties			[...]	[...]	
under OUG 61/2013 out of which:			140,79	30,61	18
(v) principal debt			[...]	[...]	
(vi) interest and penalties			[...]	[...]	
TOTAL	1 784,98	388,04	1 669,19	362,87	94

Source: Commission's calculations based on Annex 4 to Romania's Comments on the Opening Decision, page 3 and Romania's Reply of May 2017 of point 17.

- (276) In its submissions during the investigation, despite the express invitation from the Commission in the recital 132 of the Opening Decision, Romania failed to provide new relevant information on, and in addition to the Deloitte Report about the appropriateness of the 2013 debt-to-equity swap and the manner in which it was implemented. Rather, Romania reiterated the conclusions of the Deloitte Report, which had already been criticized in the Opening Decision.
- (277) Romania also failed to provide any available contemporaneous information that led it to approve the 2013 debt-to-equity swap, inter alia, information available during due diligence process and reports about the value of the CFR Marfă assets that were prepared for a subsequent privatisation to the failed privatisation in 2013, details on the hypotheses and benchmarks supporting the discount rates used in the Deloitte Report, the value and justification of the liquidation factors used to determine the maximum possible proceeds from a sale of CFR Marfă's assets in the context of a bankruptcy procedure and any other information allowing it to account for additional depreciation in a delayed bankruptcy scenario.

- (278) Despite the express request from the Commission in recital 132 of the Opening Decision, Romania did not provide any estimation of the return expected by the Romanian State from investing even more into a heavily indebted company such as CFR Marfă at the time of the 2013 debt-to-equity swap, nor a proper justification to this.
- (279) *First and foremost*, the Commission considers that the scenario of the debt-to-equity swap was only viable in case of CFR Marfă's immediate subsequent privatisation, which however did not happen. The difficult financial situation of CFR Marfă was known to the State creditors and to CFR Infrastructură for years, and the prospects of a privatisation of the company were risky, also in view of the previous failed attempts to privatize the company. Moreover, in the period right before the debt-to-equity swap, it was clear that very few potential buyers manifested interest in the company and that the likelihood of the successful privatisation was not warranted. The Commission considers that no sensible MEO would have agreed to write-off such significant debts of a company in difficulty as CFR Marfă at the time, without securing the reinstatement of those debts in case of unsuccessful privatisation (e.g. via a claw-back mechanism and with additional guarantees for the amounts owed to them by CFR Marfă in case of a liquidation following a failed privatisation). In this case, the Romanian authorities did the swap without any such precautions, which confirms that the 2013 debt-to-equity swap was not MEO-conform.
- (280) *Second*, the Commission also considers that the decision of the State to undergo the debt-to-equity swap took into consideration factors that are not normally determining the behavior of a market operator. As acknowledged by Romania in its various submissions during the investigation period, a liquidation of the company was never a valid option for the various State creditors. As a matter of fact, any enforcement steps that would have resulted in blocking the activity of CFR Marfă was considered to undermine the national security, national economy and have considerable social implications (see recitals 78, 82, 169 and 170 above).
- (281) *Third*, and in addition to the write-off without any securitization of those debts, the Commission also considers that, even though the Deloitte Report was produced in March 2013, just a few months before Romania decided to convert its debts into equity of CFR Marfă (i.e. June 2013), the study itself was not a sufficient basis for Romania's decision.
- (282) Specifically, the Commission first notes that the main input into the revenue estimation method was actually provided by CFR Marfă itself, and was not independently verified by any independent consultant. As explained in recent jurisprudence, the burden of proof lies with the Member State that claims it has acted as a private investor, to furnish all the necessary evidence to show that it acted as a private investor pursuing long-term profit. Studies based on non-verified estimates coming from the undertaking itself are not reliable in this regard⁽¹⁸⁰⁾. Furthermore, the Commission also notes that, despite being aware of the weaknesses of such forecasts and estimations, the Romanian authorities have not undertaken the burden of carrying out a sensitivity assessment of the forecasts and of the underlying assumptions, nor have they evaluated the likelihood of the results and events. For example, the forecasts in the privatisation scenario were based on the overly optimistic assumption that CFR Marfă's operating income would increase by [...] % from 2013 to 2017 resulting primarily from an increase by [...] % in tonnes-kilometres. However, the past data clearly showed that CFR Marfă had been consistently reducing its activity in the decade before the planned privatisation (see evolution of CFR Marfă's market shares in Table 1 and a steady, significant decrease in CFR Marfă's revenues in Table 4 above).
- (283) In this context, the Commission further observes that the positive result of the Deloitte Report supporting the debt-to-equity swap was predicated on a subsequent successful privatisation. The Deloitte Report confirms that 'considering the economic situation of the company [CFR Marfă] and the evolution of the CFR Marfă budgetary debts, it would result that such debt would continue to rise as a result of the continuation of CFR Marfă's activity without liquidation or privatisation, with even lower recovery perspectives than the present ones [2013]'.
- (284) However, the Deloitte Report does not contain any assessment of the prospects of a two-stage privatisation of CFR Marfă (i.e. 1st stage in 2013 with the privatisation of 51 % majority share, 2nd stage in 2017 with the privatisation of 49 % minority share). At the point in time when the debt-to-equity was irrevocably decided (i.e. 13 June 2013), no binding bids had been submitted and it was still not clear whether the privatisation would be successful. According to publicly available information, the first attempt to privatise CFR Marfă in 2013 was cancelled and republished (see recital 31 to 33 above). Even though there were three prequalified bidders, those bidders just submitted their non-binding expressions of interest, without any firm commitment. In addition, according to publicly available information, all prequalified bidders, except GFR, withdrew from the transaction in June 2013 (see recital 37 above). Moreover, even though GFR submitted a binding bid, the privatisation failed.

⁽¹⁸⁰⁾ See Case T-93/17 *Duferco Long Products SA v Commission*, ECLI:EU:T:2018:558, paragraphs 54-55. '54. Pris collectivement, il apparaît ainsi que ces documents sont, pour l'essentiel, des documents internes au groupe Duferco, se limitant à des études de l'activité du groupe ou à la présentation de chiffres, dont certains ne sont pas datés. S'agissant des rapports d'expertise externes, ceux-ci ont été réalisés, à la demande du groupe Duferco, sans aucun contrôle des comptes ni aucun audit de l'entreprise en cause et ne contiennent que des estimations fondées sur des documents communiqués par le groupe Duferco, dont la fiabilité n'est à aucun moment éprouvée par l'expert concerné.'

- (285) The Commission further notes that with the planned privatisation of the 51 % majority stake in CFR Marfă in 2013 in the average scenario the State expected to gain RON [...] million (ca. EUR [...] million), and the remainder of RON [...] million (ca. EUR [...] million) was expected to be achieved from a second stage of privatisation in 2017 (see recitals 30 to 34 above). This has to be compared to the results of a rather certain outcome of the liquidation scenario, which (in the best case) were only RON 88,22 million (ca. EUR 19 million) lower than in the very uncertain two-stage privatisation scenario ⁽¹⁸¹⁾.
- (286) In addition, in the liquidation scenario a discount on the market value of assets (RON [...] million) between [...] % and [...] % on average was applied ⁽¹⁸²⁾. If a lower discount on the market value of assets had been applied, the results of the liquidation scenario would have been even higher. However, as mentioned above, Romania failed to provide any justification of the liquidation factors chosen, or any benchmark that the auditing companies were actually using during the relevant period for similar estimations.
- (287) The Commission reiterated its request, asking Romania to provide the levels of the applicable statutory liquidation factors during the period under assessment. In reply, Romania submitted that '[w]ith regard to the valuation of the debtor's assets either in the enforcement proceedings or in the insolvency proceedings, irrespective of whether they are movable and/or immovable, the law does not explicitly provide for a reduction in liquidation, but this is dictated by different elements, such as: the valuation method approved by the creditors, individually or in block; the nature of the assets; market attractiveness; degree of wear; the interest of potential bidders, etc. Therefore, given that, in such a hypothesis, there are a multitude of variable elements, [...] it is not possible to estimate the outcome of the valuation.' ⁽¹⁸³⁾
- (288) Against this background, the Commission considers that the results in the liquidation scenario appear to be rather certain, given that the success of a liquidation procedure does not depend on the availability of one single buyer and in view of the restrictive assumptions concerning the sale price of the individual assets in the privatisation scenario.
- (289) As regards the claims of ANAF (and other State creditors – CNPP, ANOFM, and CNAS) and CFR Infrastructură towards CFR Marfă, the Commission considers that the 2013 debt-to-equity swap was not the best available option for the recovery of the sums owned to them. Under the liquidation scenario in the Deloitte Report, ANAF would have been able to recover [90-100] % of the State creditor's claims, whereas in 2010 ANAF could have recovered 100 % of the State creditors' claims under a liquidation scenario. Under the 2012 liquidation scenario of the same Deloitte Report, CFR Infrastructură would have no recovery perspective (see Table 15 below), whereas in the 2010 liquidation scenario CFR Infrastructură could have expected a [40-50] % recovery of its claims (see Table 11 above). It must be noted, however, that between 2010 and 2012 ANAF (and other State creditors) and CFR Infrastructură allowed CFR Marfă to increase its debts towards it by [90-100] % (based on Table 7 above).
- (290) It is the Commission's view that this very increase of the debt over time rendered the 2013 MEO test of the debt-to-equity swap as described in the Deloitte Report positive ⁽¹⁸⁴⁾, albeit based on the unrealistic assumption of a short-term privatisation. The higher debt level of CFR Marfă towards the State's consolidated budget (namely ANAF, CNPP, ANOFM and CNAS) and CFR Infrastructură until 2013 resulted in a lower recovery rate under the 2012 liquidation scenario than in the debt-to-equity swap scenario. Consequently, this higher debt towards the State's consolidated budget and CFR Infrastructură increased the amount to be recovered under the debt-to-equity swap followed by privatisation under the MEO test as carried out in the Deloitte Report by RON [...] million (ca. EUR [...]million), since under this scenario it was assumed that CFR Marfă would pay back all its remaining outstanding debts (i.e. debts not subject to the debt-to-equity swap).

⁽¹⁸¹⁾ RON [...] million (results of the average privatisation scenario) – RON [...] million (results of the maximum liquidation scenario) = RON 88,22 million.

⁽¹⁸²⁾ Deloitte Report, pages 32-34 presents the various liquidation factors minimum and maximum values for the various categories of assets.

⁽¹⁸³⁾ See point 45 subpoints (a) and (b) of Romania's Reply of 27 June 2019.

⁽¹⁸⁴⁾ Case T-11/95 *BP Chemicals Ltd v Commission*, ECLI:EU:T:1998:199, paragraphs 170 – 179; See also for example Commission decision of 10 March 2009 in State aid case C43/2007 – Poland – Change of restructuring plan of Huta Stalowa Wola (OJ L 81, 26.3.2010, p. 1), recital 105.

Table 15

Overview of recovery amounts under the liquidation scenario in the Deloitte Report

In RON million	31.12.2012	Approximated recovery amounts in 2012	Recovery % in 2012
Book value of assets	[...]		
Liquidation value of assets ⁽¹⁾	[...]		
— Liquidation costs	[...]	[...]	100
— Salaries	[...]	[...]	100
— Guaranteed debts (bank loans)	[...]	[...]	100
Sub-total	[...]	[...]	[...]
— Debts to the State budget (tax payables and social contribution payments)	[...]	[...]	[90-100]
— Debts to the State budget from liquidation	[...]	[...]	[90-100]
Sub-total	[...]	[...]	[...]
— Trade payables to SOEs	[...]	[...]	[0-5]
— Trade payables to other creditors	[...]	[...]	[0-5]
Total of debt not covered by the liquidation value of assets	[...]		

⁽¹⁾ Minimum liquidation value of CFR Marfă's assets on 31.12.2012 as established in the Deloitte Report.

Source: Submission by Romania, 24 December 2015, Private Investor Test application, Deloitte, 29 March 2013.

- (291) Based on the considerations above, the Commission concludes that *Measure 3* gives CFR Marfă an advantage by way of non-enforcement and write-off of accumulated debt granted at the moment of the debt-to-equity swap. The value of this aid corresponds to the full amount of the debt written-off via the debt to equity swap of RON 1 669 million (ca. EUR 363 million). The Commission notes that the aid under *Measure 3* stems from the same resources corresponding to *Measures 1* and from 85 % of resources corresponding to *Measure 2*, which is factored in accordingly in the determination of the overall amount of aid as to avoid double-counting.

4.1.5.6. (iv) Overall assessment of economic advantage of *Measures 1, 2, 3 and 5*

- (292) Having assessed the presence of economic advantage with regard to each *Measure* separately, the Commission shall also perform a more general assessment of whether the *Measures* may be treated as one continuing State intervention into CFR Marfă.
- (293) The Commission notes that CFR Marfă has made no profits since 2008 and has been subject to multiple failed privatisation attempts, none of which has resulted in CFR Marfă's liquidation, despite its constantly deteriorating financial situation. Furthermore, *Measures 1, 2, 3 and 5* described above appear to be intrinsically linked and are part of the same main objective to support and maintain CFR Marfă in the market for years, as well as securing jobs for CFR Marfă's employees, by way of non-enforcement of debts, debt write-off and continuous provision of infrastructure services.

- (294) This strategy by the State to keep CFR Marfă afloat by all means appears even clearer when taking into account (i) the same identity of the grantors of the measures, all of them State agencies or bodies; (ii) the chronology of the measures in question (*Measures 1 and 2* were granted in the period 2010-2013 whereas *Measure 3* was granted in June 2013 as a mere consequence of the decision to allow for massive debt accumulation in the previous period) (iii) their purpose, that is keeping CFR Marfă active in the market at all cost and avoid liquidation; and (iv) the undertaking's (financial and risk) situation during all this period of time lasting for more than 8 years.
- (295) In addition, *Measure 3* would not have existed without *Measures 1 and 2*. The accumulated debts directly towards the State budget under *Measure 1* (direct intervention) and towards CFR Infrastructură as a result of continued supplies under *Measure 2* (indirect intervention) were later on transformed into *Measure 3*. *Measure 3* leads to an enhanced advantage in favour of CFR Marfă further to *Measures 1 and 2* combined which is not severable from the advantage under *Measures 1 and 2*.
- (296) Since *Measure 3* stems from *Measures 1 and 2*, and since *Measure 5* is merely a continuation of *Measure 2*, all those measures constitute a series of interdependent interventions⁽¹⁸⁵⁾ related by a common goal of the State to keep CFR Marfă afloat, and thus, imputable to the State. The Commission also notes that there was a shift after 2013 whereby CFR Marfă no longer registered debts towards the State budget, and instead registered considerably higher increases of debt towards CFR Infrastructură. That is explained by the fact that in order to participate in calls for tenders for supplying transport services for certain State companies, all bidders were conditioned by a lack of outstanding debts towards ANAF.
- (297) Overall, also in consideration of the past failures of a privatisation, an MEO in a situation closest to that of the State would have first tried to maximise its debt recovery from CFR Marfă by exhausting all possible means available to it, including by ways of requesting from the Court an enforcement of its various claims in due time, and, subsequently, triggering CFR Marfă's liquidation.
- (298) The total aid granted by the State to CFR Marfă is therefore equal to the total amount of the debt (including principal, interest and penalties) owed by CFR Marfă under *Measures 1, 2 and 5* plus the difference between the interest and penalties charged by ANAF and CFR Infrastructură and the market interest rate calculated in accordance with the 2008 Communication. The aid granted to CFR Marfă under *Measure 3* in the form of the ca. EUR 363 million debt-to-equity swap in 2013 is already contained in the amount of aid under *Measures 1 and 2* and, therefore, it will not be added to the amount to be recovered in order to avoid double-counting.

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

- (299) Public support is liable to distort competition even if it does not help the recipient undertaking to expand and gain market share. It is enough that the aid allows it to maintain a stronger competitive position than it would have had if the aid had not been provided. In this context, for aid to be considered to distort competition, it is normally sufficient that the aid gives the beneficiary an advantage by relieving it of expenses it would otherwise have had to bear in the course of its day-to-day business operations⁽¹⁸⁶⁾.
- (300) Public support to undertakings only constitutes State aid under Article 107(1) TFEU insofar as it 'affects trade between Member States'. In that respect, it is not necessary to establish that the aid has an actual effect on trade between Member States but only whether the aid is liable to affect such trade. In particular, the Union Courts have ruled that 'where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-[Union] trade, the latter must be regarded as affected by the aid.'⁽¹⁸⁷⁾

⁽¹⁸⁵⁾ See Case T-11/95 *BP Chemicals v. Commission*, ECLI:EU:T:1998:199, paragraphs 171 et subseq.

See also the Commission's Decision in Case SA.33926 Concerning the State aid measures by Belgium in favour of Duferco, recitals 345-353, available at: http://ec.europa.eu/competition/state_aid/cases/250264/250264_1739911_271_2.pdf

⁽¹⁸⁶⁾ Judgment of the Court of Justice of 3 March 2005, *Heiser*, C-172/03, ECLI:EU:C:2005:130, paragraph 55.

⁽¹⁸⁷⁾ Judgment of the Court of Justice of 14 January 2015, *Eventech v The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 65; Judgment of the Court of Justice of 8 May 2013, *Libert and others*, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 76.

- (301) Public support can be considered capable of having an effect on trade between Member States even if the recipient is not directly involved in cross-border trade. For instance, the subsidy may make it more difficult for operators in other Member States to enter the market by maintaining or increasing local supply ⁽¹⁸⁸⁾.
- (302) CFR Marfă is active in the rail freight transport, i.e. on competitive markets in Europe (see recitals 13-16 above). The Commission considers that, by granting CFR Marfă the possibility to continue its activities and to write-off public debts by way of a debt-to-equity swap, *Measures 1, 2, 3 and 5* are liable to improve CFR Marfă's competitive position compared to its national and international competitors in the internal market.
- (303) Therefore, the Commission concludes that *Measures 1, 2, 3 and 5* have the potential to distort or threaten to distort competition and affect trade between Member States.

4.1.7. Conclusion on the existence of aid

- (304) Given that all conditions for the existence of State aid within the meaning of Article 107(1) TFEU (see subsections 4.1.2 to 4.1.6 above) are met for four out of five measures, the Commission concludes that:

- (1) *Measure 1* constitutes State aid equal to the principal amount of overdue debt of CFR Marfă towards ANAF (and the other public creditors) between 2010 and before the 2013 debt-to-equity swap (RON [...] million, ca. EUR [...] million, see Table 8) plus the corresponding market interest (and penalties). In any case, the total amount of aid under *Measure 1* is at least RON 1 001,2 million (ca. EUR 217,65 million), consisting of the principal amount of debt of RON [...] (ca. EUR [...] million) and the interest and penalties charged by ANAF until June 2013 of RON [...] million (ca. EUR [...] million, see recital 209), which may be increased further by the market interest rate (recital 209). The granting of the aid starts in 2010 and the granting dates of the aid are the dates when invoices issued by ANAF (and the other State creditors represented by ANAF) were due to be paid by CFR Marfă, until the debt-to-equity swap in June 2013.
- (2) *Measure 2* constitutes State aid equal to the principal amount of overdue debt of CFR Marfă towards CFR Infrastructură right before the 2013 debt-to-equity swap (ca. RON [...] million, ca. EUR [...] million, see footnote 179, plus the principal amount of overdue debt not written off) and the corresponding market interest (and penalties). In any case, the total amount of aid under *Measure 2* is at least RON 783,78 million (ca. EUR 170,39 million) – corresponding to the principal debt which was written off in June 2013 (RON [...] million, ca. EUR [...] million) plus the overdue debt not written off in June 2013 (RON 115,79 million, ca. EUR 25,17 million), plus at least the interest actually charged by CFR Infrastructură of RON [...] million (ca. EUR [...] million, see recital 239), which may be increased further by the market interest rate (recital 238). The granting of the aid starts in 2010 and lasts until the June 2013 debt-to-equity swap and the granting dates of the aid are the dates when invoices issued by CFR Infrastructură were due to be paid by CFR Marfă, until the debt-to-equity swap in June 2013.
- (3) *Measure 3* constitutes State aid to the overall amount of the 2013 debt-to-equity swap of RON 1 669,19 million (ca. EUR 363 million); as explained above (see recital 291) the aid under *Measure 3* is already encompassed by aid under *Measure 1* and *Measure 2*, which is why the aid under *Measure 3* is not added to an overall aid amount to avoid double-counting of the principal amounts and interest pertaining to *Measures 1 and 2* and written off under *Measure 3*.
- (4) *Measure 4* does not constitute State aid since the June 2013 debt-to-equity swap until 2018 included.
- (5) *Measure 5* constitutes State aid equal to the principal amount of the overdue debt since the 2013 debt-to-equity swap at the end of 2018 reduced by the remaining amount of CFR Marfă's overdue debt to CFR Infrastructură not covered by the 2013 debt-to-equity swap (in total amount of RON 115,79 million, ca. EUR 25,17 million, which is part of *Measure 2*) plus the corresponding market interest (and penalties). In any case, **the aid amount for Measure 5 is at least RON 834,29 million (ca. EUR 181,37 million), which is** the amount of

⁽¹⁸⁸⁾ Judgment of the Court of Justice of 14 January 2015, *Eventech v The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 66; Judgment of the Court of Justice of 8 May 2013, *Libert and others*, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 77; Judgment of the General Court of 4 April 2001, *Friulia Venezia Giulia*, T-288/97, ECLI:EU:T:2001:115, paragraph 41.

the total overdue debt owed by CFR Marfă to CFR Infrastructură at the end of 2018, reduced by the amount of RON 115,79 million (ca. EUR 25,17 million), corresponding to the 15 % of Measure 2 not written-off by the 2013 debt-to-equity swap (see recitals 240 and 263), which may be increased further by the market interest rate (recital 262). The granting of the aid starts immediately after the June 2013 debt-to-equity swap and the granting dates of the aid are the dates when invoices issued by CFR Infrastructură were due to be paid by CFR Marfă.

4.2. Undertaking in difficulty

- (305) The 2004 and 2014 R&R Guidelines⁽¹⁸⁹⁾ provide a definition of undertakings in difficulty for the purposes of the compatibility assessment of rescue and restructuring aid pursuant to Article 107(3)(c) of the Treaty.

4.2.1. The applicability of the 2004 and 2014 R&R Guidelines

- (306) According to the point 137 of the 2014 R&R Guidelines, '[t]he Commission will examine the compatibility with the internal market of any rescue or restructuring aid granted without its authorization and therefore in breach of Article 108(3) of the Treaty on the basis of these guidelines **if some** or all of the aid is granted after their publication in the *Official Journal of the European Union*'. (emphasis added)
- (307) Furthermore, according to the point 138 of the 2014 R&R Guidelines, '[i]n all other cases it will conduct the examination on the basis of the guidelines which applied at the time the aid was granted'.
- (308) As explained in footnote 27 and in recitals 24, 77, and 86, *Measures 1 and 2* (CFR Marfă's debts to the State budget and to CFR Infrastructură) were largely converted into equity by *Measure 3* in June 2013. Therefore, the Commission considers that the *Measures 1, 2 and 3* were granted before the publication of the 2014 R&R Guidelines. As regards *Measure 5*, it took place after the implementation of *Measure 3* in 2013 and continued after the publication of the 2014 R&R Guidelines (i.e. 31 July 2014). Given that *Measures 1, 2, 3 and 5* constitute State aid, the aid was not subject to the Commission's approval. Therefore, they constitute unlawful aid (see section 4.3, recitals 319-320).
- (309) In the light of the above considerations, the Commission reiterates its conclusion in the Opening Decision and considers that the 2004 R&R Guidelines apply for the assessment of *Measures 1, 2 and 3*, and that the 2014 R&R Guidelines apply for the assessment of *Measure 5*.
- (310) In any case, the conclusion on CFR Marfă being a company in difficulty would be the same under either the 2004 and the 2014 R&R Guidelines.

4.2.2. Assessment of CFR Marfă's financial situation under the 2004 and the 2014 R&R Guidelines

- (311) As mentioned above, the 2004 R&R Guidelines are applicable to *Measures 1, 2 and 3*. According to point 10(a) of the 2004 R&R Guidelines an undertaking is in difficulty when 'in the case of a limited liability company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months'.
- (312) CFR Marfă is a limited liability company⁽¹⁹⁰⁾ (see recital 11) further above). As summarised in Table 4, since 2009, CFR Marfă's reserves were not sufficient to absorb its losses. In 2009, CFR Marfă lost 62 % of its subscribed share capital due to accumulated losses of RON 141,84 million (ca. EUR 31 million) and an annual loss of RON 341,98 million (ca. EUR 74 million). In 2012 and 2013 CFR Marfă lost 443 % and 71 % of its subscribed share capital due to accumulated losses of RON 1 149,12 million (ca. EUR 250 million) and RON 1 565,68 million (ca. EUR 340 million) respectively, and an annual loss of RON 405,09 million (ca. EUR 88 million) and RON 262,92 million (ca. EUR 57 million) respectively.

⁽¹⁸⁹⁾ Community guidelines on State aid for rescuing and restructuring firms in difficulty ('2004 R&R Guidelines') (OJ C 244, 1.10.2004, p. 2); Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (2014 R&R Guidelines) (OJ C 249, 31.7.2014, p. 1).

⁽¹⁹⁰⁾ See footnote 1 corresponding to point 10(a) of the 2004 R&R Guidelines. See also footnote 25 of the 2014 R&R Guidelines. This refers in particular to the types of company mentioned in Annex I of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19). For Romania, this is the case for: societate pe acțiuni, societate cu răspundere limitată, societate în comandită pe acțiuni.

- (313) In addition, CFR Marfă appears to be in difficulty also under the provisions of point 11 of the 2004 R&R Guidelines. Specifically, as shown in Table 4 above, CFR Marfă incurred (i) steadily heavy losses since at least 2009 (losses of RON 141,84 million (ca. EUR 30,83 million) in 2009, RON 535,27 million (ca. EUR 116,36 million) in 2010, RON 405 million (ca. EUR 88,04 million) in 2012, and RON 263 million (ca. EUR 57,17 million) in 2013), leading to a negative equity (RON – 343,5 million (ca. EUR – 74,67 million) in 2010 and RON – 904,6 million (ca. EUR – 196,65 million) in 2012), (ii) mounting debt (from RON 1 261,6 (ca. EUR 274,26 million) in 2009 steadily increasing to RON 2 186,6 (ca. EUR 475,35 million) in 2012) and (iii) declining revenues (turnover steadily decreasing from RON 1 097,3 million (ca. EUR 238,54 million) in 2009 to RON 1 020,6 million (ca. EUR 221,87 million) in 2012). Therefore, CFR Marfă has been, pursuant to points 10(a) and 11 of the 2004 R&R Guidelines, an undertaking in difficulty since 2009.
- (314) As mentioned above (see recital 309), the 2014 R&R Guidelines are applicable to *Measure 5*. According to point 20(a) of the 2014 R&R Guidelines an undertaking is in difficulty when ‘in the case of a limited liability company, where more than half of its subscribed share capital has disappeared as a result of accumulated losses. This is the case when deduction of accumulated losses from reserves (and all other elements generally considered as part of the own funds of the company) leads to a negative cumulative amount that exceeds half of the subscribed share capital’. In addition, according to point 20(c) of the 2014 R&R Guidelines ‘an undertaking is considered to be in difficulty when, without intervention by the State, it will almost certainly be condemned to going out of business in the short or medium term’.
- (315) Romania submitted that CFR Marfă was not and is not in difficulty in the sense of the R&R Guidelines (Communication 2014/C 249/01) after 2014 ⁽¹⁹¹⁾.
- (316) However, the Commission notes that, in 2014, the year after the 2013 debt-to-equity swap, CFR Marfă’s financial situation continued to deteriorate. CFR Marfă lost 73 % of its subscribed share capital due to accumulated losses of RON 1 828,88 million (ca. EUR 398 million) and an annual loss of RON 27,16 million (ca. EUR 5,9 million). In any case, in 2014 and subsequent years, the situation of CFR Marfă would have been significantly worse in the absence of the 2013 debt-to-equity swap, which wrote-off most of CFR Marfă’s debts and artificially ‘improved’ its financial situation.
- (317) The Commission also notes that, according to Romania, CFR Marfă fulfils the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors (i.e. encountering overdue liabilities of above RON 40 000 and exceeding more than 60 days) ⁽¹⁹²⁾. The Commission underlines that CFR Marfă has indeed fulfilled the criteria under its domestic law for being subject to collective insolvency proceedings not only since at least 2009 (see recitals 22 to 25), but also since 2014 onwards. Contrary to Romania’s view, it is not necessary for an enterprise to be in insolvency in order for it to be considered in difficulty. Rather, it is sufficient that the conditions for triggering insolvency under the national law are met by the company in question. That was surely the case for CFR Marfă even after the debt-to-equity swap. CFR Marfă’s substantial amount of overdue liabilities with respect to CFR Infrastructură (see recitals 23 and 24 and corresponding Table 7 further above) show that the RON 40 000 (ca. EUR 8 695,7) threshold exceeding more than 60 days was largely met. Therefore, CFR Marfă has been, pursuant to point 20(a) and (c) of the 2014 R&R Guidelines, an undertaking in difficulty from 2014 with regard to *Measure 5*.
- (318) Consequently, the Commission concludes that CFR Marfă is, pursuant to points 10(a) and 11 of the 2004 R&R Guidelines and pursuant to points 20(a) and 20(c) of the 2014 R&R Guidelines, an undertaking in difficulty. Specifically, CFR Marfa has been in difficulty since at least 2009, that is also between 2010 and June 2013 included, for the period when Measures 1, 2 and 3 were granted, as well as after the June 2013 debt-to-equity swap when Measure 5 was granted. As mentioned above, the Romanian rail freight market was liberalised only in 2008 ⁽¹⁹³⁾; hence the effects of new operators challenging CFR Marfă’s position in the national market could only be seen starting with 2009.

⁽¹⁹¹⁾ See also Romania’s Comments on the Opening Decision, section III, point 2.

⁽¹⁹²⁾ Article 5(1) points 20 and 72 of the Romanian Insolvency Law 85 of 21 April 2006 as modified in 2014. The threshold was even lower before 2014, namely RON 10 000 (ca. EUR 2 173,9) for a period of 30 days.

⁽¹⁹³⁾ See Communication from the Commission Community Guidelines on State aid for railway undertakings published on 22 July 2008 available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:1840013:0031:EN:PDF>

4.3. Lawfulness of the aid

- (319) The Commission notes that *Measures 1 and 2* have been granted since at least 2010, *Measure 3* was granted in June 2013, *Measure 5* has been granted since at least 2014, and they all constitute aid. This aid was not subject to Commission's approval, and therefore Romania has not respected the standstill obligation of Article 108(3) of the Treaty.
- (320) The State aid was granted and disbursed, without notification, since 2010, with a significant amount of the total aid being granted during the debt-to-equity swap in June 2013, and is therefore unlawful.

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

4.4.1. Preliminary considerations with regard to the compatibility assessment

- (321) As explained above under recital 107, Romania claims that the debt-to-equity swap was approved by the Council of the European Union in its Council Decision of 22 October 2013.
- (322) The Commission however notes that the Council Decision of 22 October 2013 does not rule on the compatibility under State aid rules of the measures proposed by Romania in the Annex I to the Memorandum of Understanding as such; therefore it does not rule on the 2013 debt-to-equity swap in favour or CFR Marfă either. As already explained in recitals 265-266 above, the jurisprudence of the Court in the *Eurallumina* case made it clear that the Council Decision on a tax exemption does not constitute a State aid authorisation and, by analogy, the Council Decision of 22 October 2013 cannot be invoked for legitimate expectations by Romania with respect to the debt-to-equity swap either ⁽¹⁹⁴⁾.
- (323) Even more so, the Commission underlines that the Memorandum of Understanding between the EU and Romania based on which the Council Decision of 22 October 2013 was taken explicitly requires the respect of the State aid rules for the restructuring measures to be undertaken by Romania. Concretely, Annex I (Section B point (9) of the Memorandum of Understanding lists, amongst other specific economic policy measures the following: 'reduce arrears for State-owned enterprises through restructuring **to be undertaken in line with the EU State aid rules and prevention of future losses** [...]' (emphasis added). In the Commission's view, this provision refers specifically to cases such as CFR Marfă's restructuring.
- (324) Therefore, the Commission concludes that Romania's claim according to which the Council Decision of 22 October 2013 approved the debt-to-equity swap is unfounded.

4.4.2. Compatibility with the 2004 & 2014 Rescue and Restructuring Guidelines

- (325) As demonstrated in subsection 4.2.1. above, CFR Marfă was beyond any doubt a company in difficulty and therefore the compatibility of the aid identified by the Commission in this present decision must be assessed in line with the conditions of the Guidelines on Rescue and Restructuring aid.
- (326) It is settled case-law that a Member State which seeks to be allowed to grant aid by way of derogation from the Treaty rules has a duty to collaborate with the Commission. In pursuance of that duty, it must in particular provide all the information to enable the Commission to verify that the conditions for the derogation sought are fulfilled ⁽¹⁹⁵⁾.
- (327) In this case, the Romanian authorities did not explicitly claim any legal basis for the compatibility assessment, as in their view the measures under assessment do not constitute aid. Romania nevertheless claimed similarities with previous Commission cases in which aid was found compatible, in particular the restructuring aid in form of a debt-to-equity swap in favour of the Greek railway company Trainose, cleared by the Commission under Article 107(3)(c) of the TFEU (see recitals 116-121). The applicability of this legal basis is discussed in recital 332 below.
- (328) Given that CFR Marfă qualifies as undertaking in difficulty (see recital 318 above), the only ground for compatibility identified by the Commission in the Opening Decision ⁽¹⁹⁶⁾ was rescue and restructuring aid based on the 2004 R&R Guidelines for *Measures 1, 2 and 3*, and the 2014 R&R Guidelines for *Measure 5*. According to the point 137 of the 2014 R&R Guidelines, '[t]he Commission will examine the compatibility with the internal market of any rescue or restructuring aid granted without its authorisation and therefore in breach of Article 108(3) of the Treaty on the basis of these guidelines if some or all of the aid is granted after their publication in the Official Journal of the European Union'. Furthermore, according to the point 138 of the 2014 R&R Guidelines, '[i]n all other cases it will conduct the examination on the basis of the guidelines which applied at the time the aid was granted'.

⁽¹⁹⁴⁾ See Case C-272/12 P *Commission v Ireland and Others*, ECLI:EU:C:2013:812 of 10.12.2013, paragraph 53.

⁽¹⁹⁵⁾ See Case C-364/90, *Italian Republic v Commission of the European Communities*, ECLI:EU:C:1993:157, paragraph 20.

⁽¹⁹⁶⁾ See Opening Decision in SA.43549 – Romania –Alleged aid to CFR Marfă, recitals 154-159, available at http://ec.europa.eu/competition/state_aid/cases/272427/272427_1987287_50_2.pdf

- (329) As explained in recital 275 and footnote 27, *Measures 1 and 2* (CFR Marfă's debts to the State budget and to CFR Infrastructură) were largely converted into equity by *Measure 3* in June 2013. Therefore, the Commission considers that the *Measures 1, 2 and 3* were granted before the publication of the 2014 R&R Guidelines. As regards *Measure 5*, this took place after the implementation of *Measure 3* in 2013 and continued after the publication of the 2014 R&R Guidelines (i.e. 31 July 2014). Lastly, given that *Measure 4* was found not to constitute aid (see recitals 215 and 304 above), the compatibility for this particular *Measure 4* is not being assessed.
- (330) Romania claims that there are strong similarities between the measures for CFR Marfă and other cases involving restructuring of rail carriers in the EU for which the Commission considered the aid compatible (see recitals 117 and subseq. above).
- (331) In this respect, however, the Commission considers that there are a number of significant differences between the situation of CFR Marfă and that of the Greek and Slovak rail companies, which does not warrant the compatibility of the aid to CFR Marfă as in the case of the Greek and Slovak rail incumbents. The specificities of these particular cases are summarized below.
- (332) The Commission's positive decisions approving the restructuring aid under TFEU Article 107(3)(b) to TRAINOSE and OSE in excess of EUR 15 billion were adopted on 16 June 2017. Both precedents have to be seen in the context of the ongoing macroeconomic recovery program for Greece, which identified OSE (manager of railway infrastructure) and TRAINOSE (railway operator) as being in need of restructuring. In the context of the Greek economic adjustment program, Greece had to restructure its public-owned railway infrastructure manager OSE. In February 2011, Greece notified three measures in favour of OSE. As it concerns TRAINOSE, the Memorandum of Understanding with the Troika required the privatisation of TRAINOSE since 2010. Greece has restructured and reorganised TRAINOSE in order to increase its efficiency. Given the fact that, in contrast to CFR Marfă, TRAINOSE is the sole rail operator and that OSE is the sole rail infrastructure manager, the risk of discontinuation which could ensue from TRAINOSE not being able to continue providing rail transport services would in turn put at risk the continuity of the supply of rail transport services for passengers and freight in Greece and, in turn, OSE's ability to maintain the rail infrastructure.
- (333) With the privatisation of TRAINOSE to TRENITALIA, Greece has definitely cut the links between its rail infrastructure manager and the rail operator. Moreover, the Commission considered that in light of the extraordinary and specific circumstances in the Greek railway sector, the aid to TRAINOSE was appropriate to remedy a serious disturbance of the Greek economy. Namely, TRAINOSE was a very important direct and indirect employer in Greece, where over 99 % of companies are SMEs. Unemployment rates were at historical highs in Greece and represented the most challenging variable to solve (ranging from 17,9 % in 2011 to 27,5 % in 2013 and being constantly above 20 % between 2010 and 2017) ⁽¹⁹⁷⁾. In Greece SMEs face abnormal risks of economic volatility as a result of the unstable economic environment of the country and, in particular, the effect that has on access to finance, which is crucial for SMEs.
- (334) The situation of the Greek economy and the role of the incumbent rail freight company in Greece as described in the TRAINOSE case is entirely different from the economic situation of Romania and CFR Marfă's role in the country's economy in the present case for several reasons. As the Commission noted when it applied Article 107(3)(b) of the TFEU to measures addressing the situation in Greece, the scale and duration of the economic contraction which Greece is experiencing goes well beyond the challenges experienced by Member States' economies in the context of the standard business cycle, in which economic slowdowns must be accepted as a part of the normal pattern of growth and development. The Commission recognized exceptional effects of the crisis to different sectors of economy. In that context the Commission viewed the prolongation of State aid support provided to the Greek financial sector until 30 June 2017 as necessary to remedy a serious disturbance of the Greek economy, in application of Article 107(3)(b) of the TFEU. These conclusions regarding the situation of the Greek economy since December 2011 remained still valid for the purposes of application of State aid rules. This situation has had its effects on the Greek railway sector, causing a number of disturbances, such as decrease in the demand for rail transport services for both passengers and freight due to the cessation of certain undertakings and reductions in the economic activity (such as FYROM or EBZ) as well as the inability of certain businesses to pay their bills and the ensuing liquidity problems of TRAINOSE. The Commission observed that between 2008 and 2012 the served passenger-kilometers decreased by 49 % and the freight tonnes-kilometre dropped even by 64 %.

⁽¹⁹⁷⁾ Ibid.

- (335) To the contrary, more than half (ca. 64 % in tonnes-km) of the rail freight transport market in Romania is already served by competitors. Romania's unemployment situation is very different from that of Greece, with unemployment rates below the EU average without exception for the past 10 years (the highest yearly unemployment rate in Romania since 2009 was 7,2 % in 2011 and decreased steadily reaching 4,9 % in 2017 and 4,2 % in 2018) ⁽¹⁹⁸⁾. In this context, the position of CFR Marfă cannot be considered paramount either in terms of direct or indirect employment in Romania. Furthermore, it is also highly unlikely that the SMEs as a category of economic agents would be particularly hit by a potential exit from the market of CFR Marfă as such, given that more than 50 % of the market is already being serviced by CFR Marfă's competitors and given that a significant part of CFR Marfă's customers is represented by big SOEs.
- (336) An additional case cited by Romania (see recital 116) concerns an aid to HŽ Cargo d. o. o. in way of a HRK 975 million debt cancellation of the national rail operator HZ Cargo and a corresponding swap into equity dating back in 2015, which also entailed the increase of HZ Cargo's capital. Romania recalls that, in the HZ Cargo case, the State aid was found unlawful but nevertheless compatible with the internal market pursuant to Article 107(3)(c) of the TFEU and therefore, HZ Cargo did not have to return the amount aid. However, the HZ Cargo situation is also very different from that of CFR Marfă. In particular, the measure granted to HZ Cargo had served to offset clearly determined and individualised debts incurred prior to the date of the accession of Croatia to the European Union (i. e. 1 July 2013), which is clearly not the case of CFR Marfă, with Romania acceding to the EU in 2007, three years before the period under assessment in the present case.
- (337) For the sake of completeness, the Commission recalls that there was an additional case approving aid to a railway incumbent company and concerning a EUR 96,5 million grant to the Slovak 100 % State-owned incumbent rail operator for the building of new light maintenance workshops for passenger trains (e.g. cleaning of vehicles, refilling of the water supply or other small repairs). In that particular case, the Commission found that the grant constituted aid but declared the aid compatible on the justification that the measure would contribute to objectives of common interest of the Union, in particular a shift in transport from road to rail, fostering environmental protection and decongestion of roads. The Commission recalls that the commitments offered by Slovakia (in particular open and non-discriminatory access), combined with the contribution of the aid to objectives of common interest of the Union, were decisive factors for its conclusion that that measure would not cause undue distortions of competition, and therefore cleared it under Article 93 TFEU.
- (338) It is clear that the above mentioned cases are substantially different from the present case involving CFR Marfă.
- (339) Romania did not notify any meaningful restructuring plan raising to the standards required by the *R&R Guidelines*.
- (340) Romania merely referred *ex-post*, in May 2017 to various 'restructuring measures' to improve CFR Marfă's financial situation, including a list of measures for the period 2017-2020. Additionally, in its comments to the Opening Decision Romania provided a document entitled 'Restructuring and reorganisation plan' for CFR Marfă as adopted by the company's Shareholders Meeting in June 2014 ⁽¹⁹⁹⁾, and an accompanying yearly list of measures to improve revenues and reduce costs for the years 2014-2017 ⁽²⁰⁰⁾. However, these documents altogether do not meet the standard required by the *R&R Guidelines* to be considered a 'feasible, coherent and far-reaching restructuring plan'. Indeed, all future profitability and return rate indicators, forecast for the next 3-5 years, estimations of future demand, comparison of various restructuring scenarios (base-line, pessimistic), SWOT analysis, detailed information on the State aid involved, own contribution etc., are missing. Last, but not least, the various measures of restructuring foreseen in the 2014 document (whether implemented or not) do not appear to have brought the company to either stability or profitability even in 2018, a year in which the company continued to accumulate debt towards CFR Infrastructură and registered losses.
- (341) More specifically, in 2018, CFR Marfă incurred losses of RON 158,05 million (ca. EUR 34 million) and registered considerable overall (short-term) debts of around RON [...] million (ca. EUR [...] million). Out of this, more than 70 % was debt towards CFR Infrastructură (total debt at the end of the year of RON 884,3 million (ca. EUR 192 million), out of which and outstanding debt of RON 792,33 million (ca. EUR 172 million) ⁽²⁰¹⁾.

⁽¹⁹⁸⁾ Eurostat data as available online at: https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=une_rt_a&lang=en

⁽¹⁹⁹⁾ Romania's Comments on the Opening Decision, subsection III.4 and Annex 10.

⁽²⁰⁰⁾ Romania's Comments on the Opening Decision, subsection III.4 and Annex 12.

⁽²⁰¹⁾ Romania's Reply of 27 June 2019, point 39.

- (342) Thus, Romania did not provide any significant and convincing information proving that restructuring measures have been put in place in order to ensure that the company's viability has been restored. Very late in the proceedings (during a meeting with the Commission services on 24 July 2019), the Romanian authorities mentioned that the company was working on a report on the Development Strategy of CFR Marfă. In any case, any hypothetical updated list of measures that could have been designed after the Opening Decision would be by default forward looking, whereas the Decision assesses the State measures in the past, since at least 2010.
- (343) In this particular context in which CFR Marfă has been loss-making since 2009, the compatibility conditions of the R&R Guidelines are not met. In particular, given the substantial amount of aid of at least RON 2 619,27 million (ca. EUR 569,41 million), and the current financial situation of the company, with an outstanding debt of at least RON 792 million (ca. EUR 172 million) ⁽²⁰²⁾ towards CFR Infrastructură, there is no prospect for CFR Marfă to raise a real and actual own contribution; in the same vein, there is no prospect of viability without additional State aid.
- (344) Lastly, given the leading position of CFR Marfă in the rail freight sector in Romania, and its significant market shares in the various product markets where it is active, and pursuant to Section 3.6.2 of the R&R Guidelines, CFR Marfă ought to have implemented measures in order to limit distortions of competition created by the aid. In this context, the Commission notes that Romania failed to propose any structural or behavioural compensatory measures.
- (345) Therefore, in light of the above, after the investigation phase, the Commission concludes that the criteria for compatible rescue or restructuring aid laid down in the R&R Guidelines are not complied with by any of the measures.
- (346) As regards point (c) of Article 107(3) TFEU, the Commission cannot see any framework or guidelines concerning the application of Article 107(3), which could apply to the measures under assessment as explained below.
- (347) Article 107(3)(c) of the Treaty stipulates that 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest', may be considered to be compatible with the internal market. In this regard, the Section 4 of the Railway Guidelines ⁽²⁰³⁾ provides a framework for assessing whether aid to railway undertakings for the cancellation of debts may be declared compatible pursuant to Treaty rules on State aid. Point 53 of the Railway Guidelines provides that in specific cases (where the debts cancelled exclusively concern transport coordination, compensation of public services obligations or the setting of accounting standards) the compatibility of the aid is to be assessed under Article 93 of the Treaty.
- (348) According to point 54 of the Railway Guidelines, 'In the light of Article 9 of Directive 91/440/EEC, the Commission also considers that, under certain circumstances, it should be possible to authorise [State] aid without financial restructuring if the cancellation concerns old debts incurred prior to the entry into force of Directive 2001/12/EC, which lays down the conditions for opening up the sector to competition.'
- (349) The Commission notes that, according to point 56 of the Railway Guidelines, in the case of Member States, which acceded to the Union after the entry into force of the Directive 2001/12/EC on 15 March 2001, the date of accession should be considered as the relevant date. In this regard, the relevant date in the present decision is the date of Romania's accession to the EU, which is 1 January 2007.
- (350) The Commission further notes that it is not necessary to assess whether the cumulative conditions laid down in points 55 to 60 of the Railway Guidelines are met in order for the aid that CFR Marfă incurred to be regarded as compatible on the basis of Article 107(3)(c) of the Treaty, because all the measures under assessment in the present decision occurred later than the accession date.
- (351) In light of the above, the Commission concludes that the State aid measures granted to CFR Marfă are not compatible with the internal market.

⁽²⁰²⁾ See latest figures from Romania's Reply of 27 June 2019, point 39.

⁽²⁰³⁾ Community guidelines on State aid for railway undertakings (OJ C 184, 22.7.2008, p. 13).

5. RECOVERY

- (352) According to the TFEU and the established case law of the Union Courts, the Commission is competent to decide that the Member State concerned shall alter or abolish aid when it has found that it is incompatible with the internal market⁽²⁰⁴⁾. The Union Courts have also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is aimed at re-establishing the situation prior to the granting of aid⁽²⁰⁵⁾.
- (353) In this context, the Union Courts have established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid along with the recovery interest, thus forfeiting the advantage which it had enjoyed over its competitors on the internal market⁽²⁰⁶⁾.
- (354) In line with the case law, Article 16(1) of Council Regulation (EU) 2015/1589⁽²⁰⁷⁾ states that 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.'
- (355) Thus, given that the measures 1, 2, 3 and 5 were implemented in breach of Article 108(3) Treaty on the Functioning of the European Union, and are to be considered as unlawful and incompatible aid, they shall be recovered in order to re-establish the situation that existed on the internal market prior to their granting. Recovery shall cover the time from the date when the aid was put at the disposal of the beneficiary until its effective recovery. The amount to be recovered shall bear interest until the effective recovery.
- (356) As demonstrated in recitals 326 to 351, the aid granted to CFR Marfă under the four Measures (1, 2, 3 and 5) together and amounting to at least RON 2 619,27 million (ca. EUR 569,41 million), that is the amount of aid under Measure 1 of at least RON 1 001,2 million (ca. EUR 217,65 million), plus the amount of aid under Measure 2 of at least RON 783,78 million (ca. EUR 170,39 million), plus the amount of aid corresponding to Measure 5 of at least RON 834,29 million (ca. EUR 181,37 million), plus corresponding difference in interest – up to the market interest – for all the overdue debts (calculated according to the methodology described in recitals 204-209, 237-238, and 260-262 above), was implemented in breach of Article 108(3) TFEU, and is to be considered as unlawful and incompatible aid, and shall be recovered in order to re-establish the situation that existed on the internal market prior to its' granting.
- (357) In accordance with the established case-law, the insolvency of the beneficiary and its inability to repay the aid do not constitute a valid reason for exempting it from its obligation to reimburse the aid⁽²⁰⁸⁾. In this case, restoring the situation prior to the payment of the aid and removing the distortion of competition can in principle be achieved by registering the liability relating to the repayment of the aid in the schedule of liabilities as part of the court-supervised liquidation procedure. Where the Member State is unable to recover the full amount of aid, the registration of the liability can meet the recovery obligation provided that the insolvency proceedings result in the winding up of the undertaking which received the unlawful aid, that is to say, in the definitive cessation of its activities⁽²⁰⁹⁾.

6. CONCLUSION

- (358) The Commission finds that Measures 1, 2, 3, and 5 taken together and separately constitute State aid to CFR Marfă within the meaning of Article 107(1) TFEU.
- (359) The Commission finds that Measure 4 does not constitute State aid to CFR Marfă.
- (360) The Commission finds that Romania has unlawfully implemented the Measures 1, 2, 3 and 5 in breach of Article 108(3) of the Treaty on the Functioning of the European Union.
- (361) The Commission concludes that the aid elements under measures 1, 2, 3 and 5 are incompatible with the internal market, because the relevant conditions of the 2004 and 2014 R&R Guidelines were not met, and no other compatibility grounds were identified. The unlawful and incompatible aid must therefore be recovered from the beneficiary, together with the recovery interest,

⁽²⁰⁴⁾ Judgment of 12 July 1973, *Commission v Germany*, C-70/72, ECLI:EU:C:1973:87, paragraph 13.

⁽²⁰⁵⁾ Judgment of 21 March 1990, *Belgium v Commission*, C-142/87, ECLI:EU:C:1990:125, paragraph 66.

⁽²⁰⁶⁾ Judgment of 17 June 1999, *Belgium v Commission*, C-75/97, ECLI:EU:C:1999:311, paragraphs 64 and 65.

⁽²⁰⁷⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

⁽²⁰⁸⁾ Judgment of the Court of Justice of 29 April 2004, *Germany v Commission*, C-277/00, ECLI:EU:C:2004:238, paragraph 85; Judgment of the Court of Justice of 15 January 1986, *Commission v Belgium*, C-52/84, ECLI:EU:C:1986:3, paragraph 14; Judgment of the Court of Justice of 21 March 1990, *Belgium v Commission*, C-142/87, ECLI:EU:C:1990:125, paragraphs 60 to 62.

⁽²⁰⁹⁾ Judgment of the Court of Justice of 11 December 2012, *Commission v Spain*, C-610/10, ECLI:EU:C:2012:781, paragraph 104.

HAS ADOPTED THIS DECISION:

Article 1

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

- (a) the non-enforcement and further accumulation of debts owed by CFR Marfă to the State budget between 2010 and the 2013 debt-to-equity swap;
- (b) the non-enforcement and further accumulation of debts owed by CFR Marfă to CFR Infrastructură between 2010 and the 2013 debt-to-equity swap;
- (c) the 2013 debt-to-equity swap;
- (d) the non-enforcement and further accumulation of debts owed by CFR Marfă to CFR Infrastructură after the 2013 debt-to-equity swap until 2018 included.

Article 2

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

- (a) the non-enforcement and further accumulation of debts owed by CFR Marfă to the State budget after the 2013 debt-to-equity swap until 2018 included.

Article 3

The State aid under Measure 3 is already encompassed by the aid under *Measure 1* and *Measure 2*, which is the reason why the aid under *Measure 3* is not added to the overall aid amount as to avoid double-counting of aid. The State aid amounting to at least RON 2 619,27 million (ca. EUR 569,41 million), that is the amount of aid under *Measure 1* (at least RON 1 001,2 million, ca. EUR 217,65 million), plus the amount of aid under *Measure 2* (at least RON 783,78 million, ca. EUR 170,39 million), plus the amount of aid corresponding to *Measure 5* (at least RON 834,29 million, ca. EUR 181,37 million), plus, for each and all the overdue debts under *Measures 1, 2 and 5*, the corresponding market interest (to be determined according to the calculation methodology described), all unlawfully granted by Romania, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of CFR Marfă, is incompatible with the internal market.

Article 4

1. Romania shall recover the aid referred to in Article 1 from the beneficiary.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽²¹⁰⁾ and to Commission Regulation (EC) No 271/2008 ⁽²¹¹⁾ amending Regulation (EC) No 794/2004.
4. Romania shall stop any further non-enforcement of debts referred to in Article 1 with effect from the date of adoption of this decision.

Article 5

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. Romania shall ensure that this decision is implemented within six months following the date of notification of this Decision.

Article 6

1. Within two months following notification of this Decision, Romania shall submit the following information to the Commission:
 - (a) the total amount (principal and recovery interests) to be recovered from the beneficiary;

⁽²¹⁰⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).

⁽²¹¹⁾ Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

- (b) a detailed description of the measures already taken and planned to comply with this Decision;
- (c) documents demonstrating that the beneficiary has been ordered to repay the aid.

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

Article 7

This Decision is addressed to Romania.

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

Done at Brussels, 24 February 2020.

For the Commission
Margrethe VESTAGER
Executive Vice-President

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