EUROPEAN COMMISSION

Brussels, 18.12.2017
C(2017) 8186 final

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 […], [*text*] or [numerical range].		PUBLIC VERSION This document is made available for information purposes only.

Subject: State Aid SA.43549 (2017 FC) (2016/NN) (ex 2016/C) – Romania
Alleged aid to CFR Marfa

Sir,

The Commission wishes to inform Romania that, having examined the information supplied by your authorities regarding financing in favour of *Societatea Naţională de Transport Feroviar de Marfă SA* ("CFR Marfa"), it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

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[1]) owed by CFR Marfa to CFR Infrastructure, various social security bodies and tax bodies[2]. 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 Marfa, registered under the State aid case number SA.43549 (2015/CP).

(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 Marfa. Romania responded by letters dated 24 December 2015, 10 and 11 August 2016 and 12 May 2017.

[1] The exchange rate used in this decision 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 the presented in RON. https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/eurofxref-graph-ron.en.html

[2] 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.

Romania has also pre-notified the debt-to-equity swap on 5 October 2016 and Romania's pre-notification was included into the above mentioned State aid case.

(3) On 6 March 2017, the Commission received a formal complaint from the *Association of Private Rail Freight Operators in Romania* ("the complainant")[3], 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 replied on 12 May 2017.

(4) On 29 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.

2. CONTEXT OF THE MEASURES

2.1. The beneficiary

(5) CFR Marfa is a 100% State-owned limited liability company ("State-owned enterprise" or "SOE") providing rail freight services and operating multimodal terminals. Romania, as sole shareholder, supervises the company (e.g. regarding its annual budget) currently via the Ministry of Transport with a notification to the Ministry of Labour, Family and Social Protection and the Ministry of Public Finance.

(6) CFR Marfa was incorporated as a joint stock company on 1 October 1998, following the reorganisation of the Romanian Railways incumbent, *Societatea Naţională Căile Ferate Române* ("SN CFR")[4], 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 Infrastructure"), CFR Marfa, CFR Călători (the rail passenger operator, 100% owned by the State), CFR Gevaro (services linked with restaurants cars and sleeping wagons) and *Societatea de Administrare Active Feroviare* – SAAF (company managing excess rolling stock, which is to be sold, leased or scrapped).

(7) CFR Marfa 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 Marfa's main clients are other SOEs, such as CE Hunedoara, Oltchim, and district heating companies.

(8) In 2016 rail freight accounted for only 17.8% of the freight transport market in Romania[5], down from 21.9% in 2013 and 18.9% in 2007.[6] The share of road transport

---

3 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 Roman 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.

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

5 See also Romanian Competition Council to publish rail market report in 2017 http://www.railwaypro.com/wp/romanian-competition-council-publish-rail-market-report-2017/

was significantly higher, ranging from 71.3% in 2007 to 57.5% in 2013 and 63.4 % in 2016 whereas the share of inland waterways transport increased from 9.8% in 2007 to 20.7% in 2013 and to 18.8% in 2016.[7]

(9) Romania granted access to its rail network to foreign rail freight operators in 1998.[8] Since Romania's accession to the EU in 2007 CFR Marfa's market share in the rail freight sector (measured by volume of goods carried) decreased steadily from [70-80]% in 2007 to [50-60]% in 2014 and to [30-40]% in 2016. CFR Marfa's market share measured in distance carried has also decreased from [60-70]% in 2007 to [40-50]% in 2014 and to only [30-40]% in 2016.[9] This represents a share of [5-10]% of the total freight market in Romania, comparing to the private rail freight operators combined market share of [10-20]%.[10]

Table 1: Market share (rail freight) development CFR Marfa 2007 - 2016

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

Source: Submission by Romania of 24 December 2015; Romania's Reply of 12 May 2017, Annex 2; Submission of complainant of 12 September 2017

(10) Currently, around 24 rail freight operators are active on the Romanian market. CFR Marfa's main competitors are all private operators: SC Group Feroviar Roman SA[11] ("GFR"; market share of [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).[12]

(11) Romania's total rail network of around 20 000 kilometres long[13] is amongst the oldest in Europe[14] and in an advanced state of disrepair due to backlogs in investment and maintenance. No lines have been repaired by CFR Infrastructure in 2015, while the

---

6 See See Romania's reply to question 2, Annex 2 to Romania's Reply of 12 May 2017 and Eurostat data available at http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tsdtr220

7 See Eurostat data available at: http://ec.europa.eu/eurostat/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tsdtr220&language=en

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

9 See Romania's reply to question 2, Annex 2 to Romania's Reply of 12 May 2017.

10 See Romania's reply to question 2, Annex 2 to Romania's Reply of 12 May 2017.

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

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

13 Source, www.crf.ro website, http://www.cfr.ro/index.php/ct-menu-item-81

14 See press article mentioning the average speed of rail freight trains of 19 km/h on average in 2015. http://www.capital.ro/business-urile-pe-calea-ferara-franate-de-infrastructura-deficitara.html

length of the lines to be repaired has steadily increased over the years (from 3 010 km in 1998 to 9 908 in 2015). Similarly, according to public sources, the funds available to repair the Romanian rail infrastructure have steadily diminished since 2005 and were minimal in 2015 (approximately RON 400 000, ca. EUR 87 000).[15] Train speeds remain at very low averages (ca.18 km/hour for freight transport).[16]

(12) In 2016, CFR Marfa had 907 locomotives and a rolling stock of 31 499 freight wagons.[17] According to a 2015 report, the average age of CFR Marfa's fleet was more than 30 years[18] in [2014] and only 65% of the wagons could be used because of their technical state.[19]

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

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

Table 2: CFR Marfa's cargo volume in thousand tonnes in 2007 - 2016

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

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

(14) With the downsizing of CFR Marfa'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 and to 6 155 in 2016 (see Table 3).

Table 3: CFR Marfa's employees in FTE in 2009 - 2016

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

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

(15) The factors described in recitals (9) to (14) above adversely affected the financial situation of CFR Marfa. As presented in Table 4 below, CFR Marfa has been facing financial difficulties for several years.

---

15 CFR S.A. and http://monitorizari.hotnews.ro/stiri-infrastructura_articole-21817821-analiza-cum-ajuns-infrastructura-rutiera-din-romania-paragina-nu-transporta-navetisti-bucuresti.htm dated 13 June 2017.

16 See Submission of complainant of 12 September 2017 – Addendum to Complaint. The Commission notes that indeed, as the complainant submits, passenger and freight transport share most of the rail infrastructure.

17 CFR Marfa Activity report 2016 http://www.cfrmarfa.cfr.ro/images/stories/rapoarteactiv/Raport%20activitate%20CFR%20MARFA%20AN%202016.pdf

18 http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/540376/IPOL_IDA(2015)540376_EN.pdf

19 European Parliament: Romania's general transport master plan and rail system – In-depth analysis, 2015, footnote 13. Available under the following link: http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/540376/IPOL_IDA(2015)540376_EN.pdf,. Romanian Press sources: http://v2.m.zf.ro/companii/doar-65-din-vagoanele-cfr-sunt-in-circulatie-din-cauza-varstei-medii-de-30-de-ani-fata-de-85-90-in-alte-tari-europene-13478445

Table 4: Key financial indicators of CFR Marfa 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
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
Annual result	**-341.96**	**-535.23**	**-93.45**	**-405.09**	**-262.92**	**-27.16**	**-159.19**	**-154.78**
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	2012.12	2012.12
Other equity	-153.69	-591.62	-723.50	-1 168.58	-1 420.20	-1 447.69	-1 606.91	-1 710.13
- *Re-evaluation reserves*	*93.91*	*120.62*	*107.98*	*106.46*	*114.90*	*101.99*	*88.08*	*88.08*
- *Reserves*	*236.22*	*253.62*	*266.15*	*279.17*	*293.50*	*306.36*	*201.05*	*201.05*
- *Accumulated profit/loss*	*-141.84*	*-430.59*	*-1 004.18*	*-1 149.12*	*-1 565.68*	*-1 828.88*	*-1736.85*	*-1844.48*
- *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.

(16) CFR Marfa has been loss making since 2008.[20] The accumulated annual losses in the financial years 2009 to 2012 amounted to RON 1 375.7 million (ca. EUR 299 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[21] of RON 1 669 million (ca. EUR 363 million). This is one of the aid measures under investigation (i.e. Measure 3 below). The steady deterioration of the shareholders' equity resumed in 2013 (due to the 2013 debt-to-equity swap) and continued in 2015 and 2016.

(17) As summarised in Table 5 below, CFR Marfa 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 Marfa's debts increased by around 31%, to reach RON 2 186.56 million (ca. EUR 475 million), i.e. 171% of total assets.

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

[20] In 2007 it still made a profit of RON 6.13 million whereas in 2008 it registered annual losses of RON 169 million.

[21] See recital (1) above, and section 3.2.3 below.

Table 5: Overview of CFR Marfa'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, Deloitte, 29 March 2013; Romania's Reply of 12 May 2017, annex 1.

(19) From 2010 to 2012 CFR Marfa's trade payables increased by 51%, from RON 556.36 million (ca. EUR 121 million) to RON 841.85 million (ca. EUR 183 million). The majority of the outstanding trade payables ([90-100]% out of total trade payables in 2012) can be attributed to SOEs, namely CFR Infrastructure, […][22], […][23], […][24], and […](see Table 6 below).

Table 6: Overview of CFR Marfa's trade payables in 2010-2016

In RON million	Ownership	2010	2011	2012	2013	2014	2015	2016
CFR Infrastructure	SOE	412.67	582.76	716.3	213.47	348.65	505.26	622.03
[…]	SOE	[…]	[…]	[…]	[…]	[…]	[…]	[…]
[…]	SOE	[…]	[…]	[…]	[…]	[…]	[…]	[…]
[…]	SOE	[…]	[…]	[…]	[…]	[…]	[…]	[…]
[…]	SOE	[…]	[…]	[…]	[…]	[…]	[…]	[…]
[…]	SOE	n/a	n/a	n/a	[…]	[…]	[…]	[…]
[…]	SOE	n/a	n/a	n/a	[…]	[…]	[…]	[…]
[…]	SOE	n/a	n/a	n/a	[…]	[…]	[…]	[…]
[…]	SOE	n/a	n/a	n/a	[…]	[…]	[…]	[…]
[…]	SOE	n/a	n/a	n/a	[…]	[…]	[…]	[…]
[…]	SOE	n/a	n/a	n/a	[…]	[…]	[…]	[…]
Other SOEs	SOE	n/a	n/a	n/a	n/a	n/a	[…]	[…]
Sub-total SOEs		***[…]***	***[…]***	***[…]***	***[…]***	***[…]***	***[…]***	***[…]***
[…][25]	Private	[…]	[…]	[…]	[…]	[…]	[…]	[…]

22 CFR IRLU is locomotives and machinery repair and maintenance company 100% owned by CFR Marfa.
23 CFR IRV is 100% owned by the Romanian State and it is a wagon repair company. It was created in 2001 as a split from CFR.
24 Informatica Feroviara is 100% owned by CFR Infrastructure and provides railway IT services and software.
25 […] is a private company active in the wholesale of solid, liquid and gaseous fuels and related products.

Other	Un-known	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Sub-total private and unknown		[…]	[…]	[…]	[…]	[…]	[…]	[…]
Total trade payables		**556.36**	**709.55**	**841.85**	**338.69**	**456.34**	**604.60**	**731.54**

Source: Submission by Romania of 24 December 2015, 11 August 2016 and 12 May 2017; Private Investor Test application, Deloitte, 29 March 2013; and Commission's assessment of the ownership.

(20) CFR Marfa'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) almost doubled, from RON 450.29 million (ca. EUR 98 million) in 2010 to RON 892.31 million (ca. EUR 194 million) in 2012 (see Table 7 below).

(21) At the same time, CFR Marfa's outstanding bank loans decreased from RON 422.1 million (ca. EUR 92 million) in 2010 to RON 306.8 million (ca. EUR 67 million) in 2012.

Table 7: Overview of CFR Marfa's debts towards the State budget 2010-2016

In RON million	2010	2011	2012	2013	2014	2015	2016
ANAF	[…]	[…]	[…]	[…]	[…]	[…]	[…]
CNPP	[…]	[…]	[…]	[…]	[…]	[…]	[…]
ANOFM	[…]	[…]	[…]	[…]	[…]	[…]	[…]
CNAS (social contribution)	[…]	[…]	[…]	[…]	[…]	[…]	[…]
TOTAL debts towards the State budget	**450.29**	**687.68**	**892.31**	**16.15**	**13.42**	**13.44**	**35.45**

Source: Submission by Romania, 12 May 2017, Annex 1, reply to question 6.

(22) According to the Romanian authorities, at the moment of the reply submitted on 12 May 2017, CFR Marfa had no more debts towards the State budget (see further recital (101)).

2.3. The failed privatisation attempts and the 2013 debt-to-equity swap

(23) CFR Marfa is on the list of SOEs monitored by the International Monetary Fund ("IMF") and the World Bank [26] and was also covered by the EU in the second and third Balance of Payments financial assistance programmes[27]. The international creditors

[26] 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.

[27] 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, please see also: https://ec.europa.eu/info/sites/info/files/file_import/ip012_en_2.pdf .

recommended Romania to privatise its majority stakes in several SOEs, including CFR Marfa, in order to reduce the outstanding payments and arrears negatively affecting Romania's State budget.

(24) According to publicly available information, Romania intended to privatise CFR Marfa at least since 2007.[28] In a Letter of Intent dated 16 June 2010 Romania stated that it remained committed to privatising CFR Marfa in 2011.[29]

(25) 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[30], Romania approved the privatisation strategy for the majority stake (51%) in CFR Marfa through Government Decision No 46 of 13 February 2013.

(26) According to publicly available information, on 5 April 2013, the Romanian Ministry of Transport published a notice on the sale of a 51% stake in CFR Marfa with a starting price of RON 797 million (ca. EUR 173 million).[31] By 8 May 2013 Romania received three bids for CFR Marfa's shares from the US based OmniTRAX Inc., GFR, and a consortium of Transferoviar Grup and Donau-Finanz.[32] On 15 May 2013 Romania announced that all three applications were rejected and that it would restart the privatisation process.[33]

(27) On 17 May 2013 Romania published a notice on the sale of CFR Marfa's shares in international, national and local media and on the websites of the Ministry of Transport and CFR Marfa. The potential investors were invited to express their interest in the acquisition of the majority stake (51%) in CFR Marfa by 23 May 2013.

(28) 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.

(29) 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

---

28 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, http://www.railwaygazette.com/news/single-view/view/pointers-november-2008.html?sword_list%5B%5D=CFR&sword_list%5B%5D=Marfa&no_cache=1, http://www.railwaygazette.com/news/single-view/view/freight-for-sale.html?sword_list%5B%5D=CFR&sword_list%5B%5D=Marfa&no_cache=1, accessed on 17 March 2016.

29 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, p.97.

30 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 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.

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

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

by 20 June 2013. According to publicly available information, after prequalified bidders withdrew from the transaction, GFR remained the sole bidder offering ca. EUR 202 million for the 51% stake and promising further investments amounting to ca. EUR 201.4 million.[34]

(30) In the meantime, on 12 June 2013 Romania converted into equity RON 1 669 million (ca. EUR 363 million) of debts of CFR Marfa towards CFR Infrastructure and the State budget (in the form of the social security and tax payables).[35]

(31) 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.

(32) In fact, only two other bidders – OmniTRAX and the consortium of Transferoviar Group and Donau Finanz – expressed their interest in buying CFR Marfa in 2013 besides GFR, and both of them 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).[36]

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

(33) In 2013, CFR Marfa's total debt dropped significantly thanks to the debt-to-equity swap but then increased again immediately afterwards. After CFR Marfa'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 million (ca. EUR 189 million, see Table 4 above). Out of these, CFR's Marfa's debts towards the State budget doubled from RON 16.15 million (ca. EUR 4 million) in 2013 to RON 35.45 million (ca. EUR 8 million) in 2016 (see Table 7 above).

(34) Furthermore, following the failed privatisation, CFR Marfa'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 Marfa'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 Marfa's trade payables towards CFR Infrastructure almost tripled from RON 213.47 million (ca. EUR 46 million) in 2013 to RON 622.03 million (ca. EUR 135 million) in 2016 (see Tables 6 and 7 above).

---

[34] http://www.railwaygazette.com/news/freight/single-view/view/news-in-brief-74.html, accessed on 17 March 2016.

[35] 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.

[36] 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. http://www.mediafax.ro/economic/ministerul-transporturilor-va-plati-1-2-milioane-euro-pentru-consultanta-si-evaluare-la-privatizarea-cfr-marfa-14628198 , article published on 23 July 2015.

(35) 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 Marfa'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 Marfa'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).

(36) The financial difficulties of CFR Marfa need to be seen in a wider context of influencing factors, besides competition from (national and foreign) private rail freight carriers and from other modes of transport. These additional factors include 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.[37] [38]

3. THE COMPLAINT AND THE POTENTIAL STATE AID MEASURES

3.1. The complaint

(37) On 6 March 2017, the Commission received a complaint from the *Association of Private Rail Freight Operators in Romania*, which represents the interests of private companies operating in the field of rail transport in Romania. The complainant represents 13 major private rail freight operators active in Romania, with an estimated aggregate market share of approximately 57% by volume and 58% by value of the Romanian rail freight transport market in 2016. The complaint together with a request for further technical information was sent to Romania on 5 April 2017. Romania submitted its comments on 12 May 2017.

(38) The complaint concerns the non-enforcement of the infrastructure utilisation taxes due by CFR Marfa to CFR Infrastructure for approximately EUR 90 million (until 2015) and a debt cancellation in the form of a debt-into-equity swap (CFR Marfa's own fiscal obligations and those taken over from CFR Infrastructure) of approximately EUR 380 million (in 2013). Accordingly, the complainant estimates than no less than EUR 470 million of State support constitutes aid.[39]

(39) The complainant submits that there is no evidence of any specific restructuring or investment plan showing that the Romanian state acted as a private creditor (and/or equity investor) in such a way as to maximise its prospects of recovering its debt and, in particular, CFR Marfa's outstanding liability for tax and social security payments. In

---

[37] http://www.romaniajournal.ro/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.

[38] http://www.capital.ro/examen-pentru-guvern-faliment-sau-privatizare-pentru-cfr-marfa.html, Article of 3 February 2017.

[39] See "*Complaint concerning illegal State aid granted to the rail freight transport operator CFR Marfa by the Romanian state"* dated 6 March 2017 (hereinafter the "Complaint"), paragraph 5.

the complainant's view, the launching of a court procedure to recover the unpaid taxes/social contributions, as well as the commercial debts, and/or the sale of CFR Marfa's assets through insolvency procedure would have led to a higher yield for the Romanian state.

(40) The complainant also submits that CFR Marfa already competes with private carriers who operate under normal market conditions and that it operates in a market with a substantial number of private operators with sufficient capacity and capability to substitute CFR Marfa's activities. According to the complainant, CFR Marfa's competitive position is artificially enhanced in tenders with regard to the transport of all categories where CFR Marfa competes against private rail freight undertakings.

(41) Specifically, the alleviation of CFR Marfa's fiscal obligations by the State in 2013 and its historical and continued non-payment of the infrastructure utilisation tax (and penalties for late payment) to CFR Infrastructure enable CFR Marfa to set prices when participating in public and private tenders against competing private rail freight operators which do not cover its full operating costs if these were correctly allocated and paid. According to the complainant, CFR Marfa has effectively become a price setter in the Romanian rail freight market and has driven down prices to non-sustainable levels for companies operating upon a market-based cost coverage basis.[40] Therefore, the complainant submits that such State measures considerably distort competition in the liberalised rail freight market in Romania.

(42) In addition, according to the complainant, CFR Marfa's failure to pay the infrastructure utilisation tax was equivalent to CFR Infrastructure acting like a lending "bank" towards CFR Marfa and thus failing to collect a substantial amount of the revenues that were due to it. As a consequence, the investment in rail infrastructures has been insufficient, keeping train speed at very low averages and causing a shift from rail to road transportation and leading to a further reduction in the amount of infrastructure utilisation taxes collected. This deepened even more the competitive disadvantage of the private operators who had to match CFR Marfa's low prices in the bids, while striving to compete on quality.[41]

(43) Lastly, the complainant also submits that any State measure designed to keep CFR Marfa active in the rail freight market could not be deemed to fulfil an objective of common interest, in particular as CFR Marfa is not in charge of any important service difficult to replicate by the private operators and as it does not play an important systemic role in the market. The complainant claims that private players are fully able to transport the different categories of goods transported by CFR Marfa and that there is enough capacity in the market to respond to demand.[42] To that end, the complainant quotes the OECD report providing the main categories of goods transported by rail in Romania[43] which shows that all rail freight operators carry categories of goods transported by CFR Marfa. Furthermore, the complainant specifies that although a special authorization is held by CFR Marfa for military transport, no other operator has applied for the issuance of such authorization due to limited demand. However, the

[40] Submission of Complainant of 12 September 2017 – Addendum to the Complaint, paragraphs 4-12.
[41] Ibid.
[42] See Complaint, paragraphs 119 – 123.
[43] OECD Competition Review – Romania, p.133.

complainant submits that any private operator could apply and be awarded this authorization, which therefore, cannot be considered as "strategic".[44]

(44) The complainant also specifies that should CFR Marfa exit the market and be declared insolvent, this would not have any negative impact for the Romanian consumers, as other rail freight operators, both Romanian and foreign, could easily meet demand from CFR Marfa's current customers.[45]

3.2. Description of the measures

(45) This decision concerns the following support measures taken by the Romanian authorities:

(a) ***Measure 1:*** The non-enforcement of social security debts and outstanding taxes since at least 2010 and until the debt-to-equity swap in 2013;

(b) ***Measure 2:*** The non-enforcement of debts towards CFR Infrastructure and the increase of debts towards CFR Infrastructure as a result of the continued provision of services since at least 2010 and until the debt-to-equity swap in 2013;

(c) ***Measure 3:*** The debt-to-equity swap amounting to RON 1 669 million (ca. EUR [363] million) in 2013;

(d) ***Measure 4*****:** The further non-enforcement of social security debts and outstanding taxes after the debt-to-equity swap in 2013;

(e) ***Measure 5***: The further non-enforcement of debts towards CFR Infrastructure and the increase of debts towards CFR Infrastructure as a result of the continued provision of services after the debt-to-equity swap in 2013;

(46) Insofar as those measures are to be found to involve State aid within the meaning of Article 107(1) of the Treaty, the Commission has doubts whether they could be declared compatible under the provisions of Article 107(3) of the Treaty. It is the Commission's preliminary view that all the above measures may amount to rescue and restructuring aid, since the Commission at this stage considers that CFR Marfa was a company in difficulty since 2009 (see section 5.2 below). However, in the absence of the notification of a viable restructuring plan to the Commission, such measures cannot be deemed compatible (see section 5.4 below).

3.2.1. MEASURE 1: The non-enforcement of social security debts and outstanding taxes until the 2013 debt-to-equity swap

(47) As stated in recital (20) and Table 7 above, CFR Marfa's social security debts and outstanding taxes increased from RON 440.60 million (ca. EUR 96 million) in 2010 to RON 890.81 million (ca. EUR 194 million) in 2012. These debts were subject to the debt-to-equity swap (see Measure 3 below).

---

44 See Complaint, paragraphs 124-128.

45 See Complaint, paragraph 129.

(48) Taxes (VAT, profit tax, and other taxes) are collected by the National Tax Administration Agency[46] (*Agenţia Naţională de Administrare Fiscală*, "ANAF"). The social contribution payments are administered by the National Agency of Public Pensions[47] (*Casa Naţională de Pensii Publice;* "CNPP"), the National Agency for Employment[48] (*Agenţia Naţională pentru Ocuparea Forţei de Muncă*; "ANOFM") and the National Health Insurance Agency[49] (*Casa Naţională de Asigurări de Sănătate*; "CNAS").

(49) These national bodies did not enforce their claims (as regards the outstanding overdue debts plus interest and penalties) towards CFR Marfa. None of those public creditors asked for the reimbursement of its claim by means of initiating an immediate liquidation of CFR Marfa, but instead allowed for further accumulation of debts. According to the Report on the Market Economy Operator Test of 29 March 2013 prepared by Deloitte on behalf of Romania (the "Deloitte Report"), *"the priority of the company [CFR Marfa] was the repayment of bank loans, salaries and liabilities to non-public suppliers"*.[50]

3.2.2. <u>MEASURE 2:</u> The non–enforcement of debts towards CFR Infrastructure and the increase of debts towards CFR Infrastructure as a result of continued provision of services until the 2013 debt-to-equity swap

(50) As indicated in recital (19) and Table 6 above, CFR Marfa's debts towards CFR Infrastructure increased from RON 412.67 million (ca. EUR 90 million) in 2010 to RON 716.30 million (ca. EUR 156 million) in 2012.

(51) CFR Infrastructure did not enforce its debts towards CFR Marfa - i.e. it did not ask for the reimbursement of its claims by means of initiating an immediate liquidation of CFR Marfa, but instead allowed for further accumulation of debts at least until debt-to-equity swap in 2013. According to the Deloitte Report, *"the balance of such payables increased by […]% between 31.12.2010 and 31.12.2012 after the Company [CFR Marfa] postponed the payments to its suppliers and to the State Budget in order to be able to repay the bank loans"*.[51]

3.2.3. <u>MEASURE 3:</u> The 2013 debt-to-equity swap

(52) By Emergency Order No 61/2013 of 12 June 2013 signed by the Prime Minister and countersigned by the Minister for Transport and the Deputy Prime Minister and Minister for Public Finance it was decided first that:

---

[46] ANAF was established by the Romanian Ministry of Finance on 1 October 2003. It is subordinated to the Ministry of Finance. ANAF's task is to ensure State resources (revenue) for public expenditures trough effective and efficient collection and administration of taxes, contributions and other amounts owed to the consolidated State budget.

[47] The National Agency of Public Pensions is a public institution. It administers and operates the public system of pensions, as well as the accidents at work and occupational diseases' scheme.

[48] The National Agency for Employment is a public institution, which administers and operates the unemployment insurance system.

[49] The National Health Insurance Agency is an autonomous public institution, which administers and operates the health insurance system, coordinated by the Ministry of Health.

[50] Deloitte Report, p.12.

[51] Deloitte Report, p. 12.

(a) CFR Marfa would take over certain tax obligations owed by CFR Infrastructure to the State budget,[52] and not paid on the date of the entry into force of the Emergency Order;

(b) in exchange for taking over the tax obligations referred to in (a), CFR Marfa would be partially relieved of its outstanding debts *vis-à-vis* CFR Infrastructure.

(53) As a second step, it was decided by the same Emergency Order No 61/2013 that the following obligations of CFR Marfa would be converted into equity:

(a) The tax obligations assumed by CFR Marfa according to Emergency Government Order No 32/2013[53] of 23 April 2013 regulating certain financial-fiscal measures;

(b) The tax obligations assumed by CFR Marfa referred to in recital (52)(a) above;

(c) The associated principal and ancillary tax obligations, including those whose extinguishment is delayed, payable to the State budget, the social insurance budget and the special funds' budgets and the risk fund, representing taxes, charges, contributions and other budgetary revenues, owed and not paid by CFR Marfa.

(54) According to the information provided by Romania, a total of approximately RON 1 669 million (ca. EUR 363 million) was converted into equity. The converted debts consisted of two parts: (i) RON 1 001 million (ca. EUR 218 million) involving CFR's own liabilities towards the State's budget (see Measure 1 above), and (ii) CFR Marfa's outstanding payables towards CFR Infrastructure amounting to RON 668 million (ca. EUR 145 million), which were transferred to the National Fiscal Administration (see Measure 2 above).

3.2.4. <u>MEASURE 4:</u> The further non-enforcement of social security debts and outstanding taxes after the 2013 debt-to-equity swap

(55) After the debt-to-equity swap in 2013, the outstanding tax payables and social contribution payments owed by CFR Marfa to the State budget increased again. Based on the information at hand (see Table 7 above), the additional debt towards the State after the debt-to-equity swap doubled from RON 16.15 million (ca. EUR 4 million) in 2013 to RON 35.45 million (ca. EUR 8 million) in 2016.

(56) This was due to the fact that, similarly to the situation before the 2013 debt-to-equity swap, public authorities listed in recital (48) did not ask for the reimbursement of outstanding overdue debts plus interest and penalties from CFR Marfa by way of liquidation, allowing for further accumulation of debts. According to Romania's reply, submitted on 12 May 2017, CFR Marfa had no more debts towards the State (see further recital (99)).

3.2.5. <u>MEASURE 5:</u> The further non–enforcement of debts towards CFR Infrastructure and the increase of debts towards CFR Infrastructure as a

[52] And administered by ANAF.
[53] Romanian Official Gazette Part I, No 245, 29 April 2013.

result of continued provision of services after the 2013 debt-to-equity swap

(57) Also, after the 2013 debt-to-equity swap (see Measure 3 above) in which the vast majority of these outstanding debts (almost 85% - that is ca. EUR 145 million out of ca. EUR 173 million total debt in June 2013) were converted into equity, the outstanding payables towards CFR Infrastructure continued to increase again from RON 213.47 million (ca. EUR 46 million) in 2013 to RON 622.03 million (ca. EUR 136 million) in 2016. Again, as in the case of Measure 2 described above, CFR Infrastructure continued to provide services such as the energy supply and the access to the rail network to CFR Marfa despite the non-payment of its increasing debts.

(58) For the purposes of the current decision, given their very similar nature, where relevant, Measures 1 and 4 will be grouped and assessed together. Similarly, Measures 2 and 5 will also be grouped and assessed together. Measure 3 will be assessed separately.

4. OBSERVATIONS PROVIDED BY ROMANIA

(59) Romania is of the opinion that the measures in favour of CFR Marfa do not constitute State aid, because Romania as a sole shareholder of the company and its main creditor acted as a Market Economy Operator ("MEO").

(60) To support its view, Romania commissioned a study to the Deloitte consultancy (see above recital (49) on the Deloitte Report), to argue that the debt conversion followed by the privatisation of CFR Marfa would have allowed the State as a shareholder and creditor to recover a larger amount (on average RON […] million or ca. EUR […] million) than an immediate liquidation of the company (on average RON […] million or ca. EUR […] million). The results of the various scenarios presented in the Deloitte Report provided by Romania are summarised in Table 7 below.

Table 7: Results of the 2013 Deloitte Report

In RON million	**Minimum**	**Average**	**Maximum**
Amounts to be collected by the State in the liquidation scenario:			
Total	**[…]**	**[…]**	**[…]**
- as shareholder	-	-	-
- as creditor	**[…]**	**[…]**	**[…]**
Amounts to be collected by the State in the privatisation scenario:			
Total	**[…]**	**[…]**	**[…]**
- as shareholder	**[…]**	**[…]**	**[…]**
- Sale of majority stake (51%)	*[…]*	*[…]*	*[…]*
- Sale of minority stake (49%)	*[…]*	*[…]*	*[…]*
- as creditor, out of which:	**[…]**	**[…]**	**[…]**
- trade receivables to CFR Infrastructure	*[…]*	*[…]*	*[…]*
- trade receivables to other public entities	*[…]*	*[…]*	*[…]*
- receivables to the consolidated State Budget not converted into equity	*[…]*	*[…]*	*[…]*

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

(61) According to the Deloitte Report, the estimation of the amounts received by Romania in the event of CFR Marfa's privatisation was based on the two-stage privatisation strategy, i.e. an equity stake of 51% in the company would be sold to a private strategic investor in 2013, while the remaining stake of 49% would be sold between 2015 and 2018. Therefore, the Deloitte Report included a calculation of the market value of the 51% equity stake on 31 December 2012 using the Discounted Cash Flow method ("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 during the period 2015 to 2018, applying the EBIT and EBITDA Multiples valuation method.

(62) According to the Deloitte Report, the DCF method was based on cash flow projections provided by CFR Marfa's management for the period 1 January 2013 to 31 December 2017. The Deloitte Report assumed that prior to the privatisation, a debt-to-equity swap of RON […] million (ca. EUR […] million) would be carried out. A discount rate of 14% was applied.

(63) According to the Deloitte Report, the EBIT and EBITDA Multiples valuation of the 49% stake assumed that 3, 4, 5 or 6 years after the privatisation of the 51% stake in CFR Marfa, the company would reach profitability margins close to the industry average. The EBIT and EBITDA Multiples valuation was based on benchmark companies active in the railway sector in India, China, Brazil, Italy, USA and Canada and the actual EBIT and EBITDA Multiples data from Bloomberg available in 2011.

(64) The calculation of the liquidation alternative under the Deloitte Report took into account the adjusted net value of assets on 31 December 2012 under the assumption of a liquidation of CFR Marfa's assets followed by the repayment of its debts (see Table 8 below). According to the Deloitte Report, the liquidation discount estimates (see Table 8 below) were based on previous experience in similar engagements of the consultant and on its professional judgement.

Table 8: Summary of liquidation value of CFR Marfa's assets and debts

In RON million	Market value	Liquidation discount in %		Liquidation value	
		Minimum	Maximum	Minimum	Maximum
Land	[…]	[…]	[…]	[…]	[…]
Buildings and civil work	[…]	[…]	[…]	[…]	[…]
Operating wagons	[…]	[…]	[…]	[…]	[…]
Wagons for activity expansion	[…]	[…]	[…]	[…]	[…]
Non-operating wagons	[…]	[…]	[…]	[…]	[…]
Locomotives for operations and for activity expansion	[…]	[…]	[…]	[…]	[…]
Non-operating locomotives	[…]	[…]	[…]	[…]	[…]
Other fixed assets [54]	[…]	[…]	[…]	[…]	[…]
Investment in Rolling Stock Company[55]	[…]	[…]	[…]	[…]	[…]
Investment in	[…]	[…]	[…]	[…]	[…]

[54] Other fixed assets are for example vehicles, equipment, furniture, etc.
[55] Rolling Stock Company SA is a joint undertaking CFR Marfa and GFR (majority shareholder). Its main activity is renting locomotives and wagons abroad, especially in Central and South-Eastern Europe.

In RON million	Market value	Liquidation discount in %		Liquidation value	
		Minimum	Maximum	Minimum	Maximum
subsidiaries					
Investment in other companies	[…]	[…]	[…]	[…]	[…]
Other financial investments	[…]	[…]	[…]	[…]	[…]
Inventories	[…]	[…]	[…]	[…]	[…]
Trade receivables	[…]	[…]	[…]	[…]	[…]
Other assets	[…]	[…]	[…]	[…]	[…]
Prepayments	[…]	[…]	[…]	[…]	[…]
Cash & cash equivalent	[…]	[…]	[…]	[…]	[…]
Total assets	**[…]**	[…]	[…]	**[…]**	**[…]**
In RON million	**Book value**	**Adjustments**		**Liquidation value**	
		Minimum	**Maximum**	**Minimum**	**Maximum**
Provisions	61.10	[…]	[…]	[…]	[…]
Long-term debts	223.77	[…]	[…]	[…]	[…]
Deferred revenue	2.23	[…]	[…]	[…]	[…]
Trade payables	841.85	[…]	[…]	[…]	[…]
Short-term debt	83.02	[…]	[…]	[…]	[…]
Other liabilities	974.59	[…]	[…]	[…]	[…]
Obligations: Severance payments	0	[…]	[…]	[…]	[…]
Liquidation fees	0	[…]	[…]	[…]	[…]
Total liabilities	**2 186.55**			**[…]**	**[…]**
Net assets	**[…]**			**[…]**	**[…]**

Source: Submission by Romania, 24 December 2015, Private Investor Test application, Deloitte, 29 March 2013 (see inter alia page 34 out of 47).

(65) According to Romania, at the time of the conversion (i.e. 12 June 2013) there were three expressions of interest for the acquisition of the 51% stake in CFR Marfa, indicating that there were strong chances for an effective privatisation of the company. The final bids were to be submitted shortly after the debt-to-equity swap (see recital (29) above).

(66) Moreover, Romania also submits that CFR Marfa is "of strategic importance for the rail freight transport in Romania", both due to its supply for the defence of Romania itself and its NATO obligations, as well as the services it provides for sectors of major importance for the Romanian economy, for instance the energy sector.

(67) In this context, CFR Marfa has a contract with the Romanian Ministry of National Defence for the supply of capacity as required for defence purposes.[56] According to Romania, CFR Marfa does not receive subsidies from the State and operates on a liberalised, highly competitive freight transport market, despite its strategic role and despite the fact that due to the national interest it must ensure the corresponding

[56] See Annex 2 of Romania's Reply of 12 May 2017 to the Commission's request for information containing Romania's comments on the complaint.

resources and logistics capacity for such defence services, which imply non-recoverable additional substantial costs.

(68) Also, Romania submits that in crisis situations, for operational needs requiring additional quantities of strategic goods (petroleum products, coal, etc.), the state authorities (e.g. the Government) require CFR Marfa to have reserve capacities for transporting such goods, since it considers that "it is the only one to have the resources and organisational capacity required". Such exceptional requests cannot be predicted, and can occur for existing customers of CFR Marfa but also for customers that do not have a contract concluded before the emergence of the crisis situation and must be addressed at maximum speed.[57]

(69) Furthermore, Romania claims that CFR Infrastructure never spared CFR Marfa of its debt, and that for the existing debt it applied penalties of [10-20]% p.a., so that in 2015 the unpaid penalties amounted to no less than [40-50]% of the total debt of CFR Marfa towards CFR Infrastructure.[58] In addition, CFR Infrastructure also imposed on CFR Marfa a series of operational penalties such as circulation restrictions, refusal to program additional routes, and refusal to grant reductions of utilisation tax fees. Romania claims that CFR Marfa has already paid [30-40]% of its debt for CFR Infrastructure (that is, ca. EUR [40-50] million). Last, but not least, Romania claims that CFR Infrastructure took firm steps towards enforcing its claims towards CFR Marfa between 2013-2017 including by way of payment orders and/or arbitration proceedings, and in 2016-2017 by way of seeking judicial enforcement.[59]

(70) Romania submits that the very success that private carriers had in gaining the market share after the market liberalisation is proof that there were no competition distortions due to CFR Marfa acting in the rail freight market.

5. ASSESSMENT

(71) The Commission will first examine whether Measures 1 to 5 in favour of CFR Marfa involve State aid within the meaning of Article 107(1) of the Treaty (see section 5.1 below). The Commission will then assess whether CFR Marfa was an undertaking in difficulty, (see section 5.2 below). Lastly, the Commission will examine whether the aid was already implemented (see section 5.3 below), and consequently, whether such aid might be compatible with the internal market (see section 5.4 below).

5.1. Existence of State aid within the meaning of Article 107(1) of the Treaty

(72) By virtue of Article 107 (1) of the Treaty *"any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."*

[57] See Romania's comments on the Addendum to the complaint submitted on 6 September 2017, pages.8-9.
[58] See Annex 2 of Romania's Reply of 12 May 2017 to the Commission's request for information containing Romania's comments on the complaint".
[59] Ibid.

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

i. the measure must be imputable to the State and financed through State resources;

ii. it must confer an advantage on its recipient;

iii. that advantage must be selective; and

iv. the measure must distort or threaten to distort competition and affect trade between Member States.

5.1.1. Undertaking

(74) CFR Marfa 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 is active in the market for rail freight transport and other related services.

5.1.2. State resources and imputability to the State

(75) As has been stated by the Court[60] 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.[61]

Measures 1 and 4 - The 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

(76) As noted in recital (48), 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.

(77) At this stage, in the light of the considerations in recital (76), Measures 1 and 4 are imputable to the State and involves a transfer of State resources.

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

[60] See Case C-482/99 *France v Commission (Stardust Marine)*, ECLI:EU:C:2002:294.
[61] Case C-248/84 *Germany v Commission*, ECLI:EU:C:1987:437, para. 17.

(78) The Court held in the *Stardust Marine*[62] judgment that the resources of an undertaking incorporated under private law, whose shares are in majority publicly owned, constitute State resources.

(79) CFR Infrastructure is 100% owned by the Romanian State. Therefore, it is clearly a public undertaking within the meaning of Article 2(b) of Commission Directive 2006/111/EC[63]. Since CFR Infrastructure is a public undertaking, its resources constitute State resources.

(80) In view of the above, the Commission considers that the non-enforcement of CFR Marfa's debts towards the CFR Infrastructure and the increase of debts towards this SOE as a result of continued provision of services burden the State resources.

(81) 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.[64] 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, actual exercise of that control in a particular case could not be automatically presumed, since a public undertaking may also act with more or less independence, according to the degree of autonomy left to it by the State.

(82) According to the Court, indicators from which imputability might be inferred, are:[65]

(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.

(83) As regards CFR Infrastructure, the Commission notes that the State, as a sole shareholder, appoints the management of CFR Infrastructure. In addition, since CFR

---

62 Stardust Marine, paragraphs 51 et seq.

63 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, page 17).

64 Stardust Marine, paragraphs 51 et seq.

65 Ibid.

Infrastructure is considered as a public undertaking, its annual budget is ex-ante[66] approved by the Ministry of Transport, with notification to the Ministry of Finance. The same prior approval is required for all changes to the annual budget of CFR Infrastructure, which consists inter alia of trade receivables from CFR Infrastructure's clients, including CFR Marfa.

(84) Furthermore, Romania confirmed[67] that CFR Infrastructure could not refrain from enforcing its claims vis-à-vis CFR Marfa without taking account of the requirements of the public authorities.

(85) Therefore, at the current stage and in the light of these considerations, the Commission considers that there are sufficient indicators to find that the non-enforcement of CFR Marfa's debts towards CFR Infrastructure since at least 2010 and the increase of debts towards this SOE as a result of continued provision of services to CFR Marfa before and after the 2013 debt-to-equity swap are imputable to the State.

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

(86) The debts of RON 1 669 million (ca. EUR 363 million) converted into equity were stemming from State resources, since, as noted in recital (76) and recitals (78) to (80), the converted debts were incurred towards Romanian administration bodies and CFR Infrastructure, which is a public undertaking within the meaning of Article 2(b) of Commission Directive 2006/111/EC.

(87) The decision to convert the debts of RON 1 669 million (ca. EUR 363 million) 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. Therefore, the debt-to-equity swap is imputable to the State.

5.1.3. Economic advantage

(88) In order to verify whether an undertaking has benefited from an economic advantage the Commission applies the criterion of the "*market economy operator principle*" ("MEO principle"). According to this principle, capital put at the disposal of a company, directly or indirectly, by the State in circumstances which correspond to the normal conditions of the market should not be qualified as State aid.[68] The Commission's assessment focuses on the transaction from the perspective of the hypothetical prudent private creditor/investor[69].

Measures 1 and 4 - The non-enforcement of social security debts and outstanding taxes since at least 2010 and until the 2013 debt-to-equity swap

---

[66] See Annex 1 of Romania's reply of 12 May 2017 to the Commission's request for information.

[67] Ibid, see answers to questions 3-5.

[68] 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 of 13.11.1993, p. 3, para. 11. This communication deals with the manufacturing sector, but is applicable to the other economic sectors. See also Case T-16/96, *Cityflyer*, ECLI:EU:T:1998:78, para. 51.

[69] Case C-300/16P *Commission v Frucona Košice*, ECLI:EU:C:2017:706, paragraph 28.

(89) At the current stage, the Commission has doubts whether ANAF, CNPP, ANOFM and CNAS acted as MEOs by non-enforcing CFR Marfa's outstanding tax and social contribution payments since at least 2010. By doing so they granted a payment facility to the undertaking in difficulty (see section 5.2 below). In order to determine whether Measure 1 confers an undue advantage to CFR Marfa, the Commission will assess whether each of the public creditors in question pursued the recovery of its claims with the same due diligence as a private creditor. An MEO is normally seeking to obtain the maximum payment of sums owned to it by a debtor in financial difficulties.[70]

(90) Romania submits that ANAF, CNPP, ANOFM, and CNAS acted as an MEO, because the debt-to-equity conversion followed by a privatisation would be the best option in view of the low degree of recovery in case of liquidation.

(91) The Commission observes that CFR Marfa was facing financial difficulties for several years (see Table 4 further above). Already in 2010 CFR Marfa's total debts accounted for 126% of its total assets. CFR Marfa's total debts towards the State budget amounted to RON 450.29 million (ca. EUR 98 million) and accounted for 27% of CFR Marfa's total debts. At the current stage, 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, CNPP, ANOFM, and CNAS allowed CFR Marfa to increase its debts towards them by more than 100% between 2010 and 2012, and thereby they even further lowered their recovery perspectives.

(92) The Commission has no indications that at the latest in 2010 ANAF, CNPP, ANOFM, and CNAS carried out any assessment of the options for the way forward and for the prospects of privatisation of CFR Marfa.[71]

(93) The Commission further observes that ANAF, CNPP, ANOFM and CNAS were treated differently than private creditors of CFR Marfa. CFR Marfa'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%. Also, the Deloitte Report notes that trade payables increased "*between 31.12.2010 and 31.12.2012 […] the Company [CFR Marfa] postponed the payments to its suppliers and to the State Budget in order to be able to repay the bank loans*".[72] Moreover, the Deloitte Report notes, that *"the priority of the Company [CFR Marfa] was the repayment of bank loans, salaries and liabilities to non-public suppliers"*.[73] This clearly indicates that CFR Marfa was not interested and/or not able to pay social security debts and taxes. Therefore, there were no valid reasons for ANAF, CNPP, ANOFM and CNAS to believe that CFR Marfa 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.[74]

(94) Moreover, the individual decisions of ANAF, CNPP, ANOFM and CNAS not to ask for repayment of debts owed to them by means of the liquidation of CFR Marfa could not be justified by the prospects of privatisation. Even though Romania had intended

[70] See to that effect, Case C-342/96 *Spain v Commission*, ECLI:EU:C:1999:210.
[71] Case C-124/10P *European Commission v Électricité de France (EDF)*, ECLI:EU:C:2012:318, paragraph 85.
[72] Deloitte Report, p. 12.
[73] Ibid.
[74] Case C-480/98, AG Mischio opinion in *Magefesa*, ECLI:EU:C:2000:305, para 37.

to privatise CFR Marfa for several years (see recital (24) above), in 2010 it was still unclear whether CFR Marfa would be privatised in the short-term.

(95) In the case at hand, ANAF, CNPP, ANOFM and CNAS would have obtained almost a 100% recovery of their claims (see Table 9 below), if each of them had pursued its claims in 2010 by way of CFR Marfa's liquidation. In addition, they would have ensured that no further debts were accumulated.

Table 9: Approximation of ANAF, CNPP, ANOFM, and CNAS recovery amount in 2010[75]

In RON million	**31.12.2010**
Book value of assets	[…]
Liquidation value of assets[76]	**[…]**
- Liquidation costs	[…]
- Salaries	[…]
- Guaranteed debts (bank loans)	[…]
Sub-total	***[…]***
- Debts to the State budget (tax payables and social contribution payments)	[…]
- Debts to the State budget from liquidation	[…]
Sub-total	***[…]***
- Trade payables to SOEs	[…]
- Trade payables to other creditors	[…]
Total (difference between the liquidation value of assets and debts to various creditors in case of liquidation)	**[…]**

Source: Submission by Romania, 24 December 2015, Private Investor Test application, Deloitte, 29 March 2013, Financial statements of CFR Marfa for the year 2010, and Commission's calculations.

(96) Romania stated that with regard to CFR Marfa's outstanding obligations to tax administration bodies, the National Agency for the Administration of Large Taxpayers of the Ministry of Public Finance, which administers all obligations towards the State budget and the social insurance budget, imposed a lien on the company's immovable assets, on which mortgages were imposed, and subsequently lifted it after the debt-to-equity swap.[77]

(97) However, not only Romania failed to document the existence of a lien but, most importantly, it also failed to explain the rationale behind putting the lien on CFR Marfa's immovable assets instead of enforcing CFR Marfa's debts.

(98) Furthermore, based on the information at hand (see Table 7 above), CFR Marfa's debt towards the State continued to rise also after the debt-to-equity swap – it doubled from RON 16.15 million (ca. EUR 4 million) in 2013 to RON 35.45 million (ca. EUR 8 million) in 2016.

[75] For the purposes of the approximation of the recovery amount in 2010, the Commission used values of the book debts to the State budget, to banks and trade payables to private undertakings and SOEs from CFR Marfa's Financial Statements as on 31.12.2010. With regard to the liquidation value of assets, the liquidation costs, salaries, debts to the State budget resulting from the liquidation, the Commission had to rely – as estimates – on the values from the Deloitte Report.

[76] Minimum liquidation value of CFR Marfa's assets on 31.12.2012 from the Deloitte Report.

[77] See Romania's submission of 11 August 2016.

(99) According to the latest reply by Romania[78], there were no pending debts by CFR Marfa towards the state budget at the time of the reply. However, not only Romania failed to document this fact, but it also did not explain on what basis and how these debts were extinguished, and did not explain why that was done only in 2017.

(100) Therefore, the Commission considers at the current stage that ANAF, CNPP, ANOFM and CNAS should, in order to comply with the MEO principle, have asked for an immediate repayment of their debts by seeking CFR Marfa's liquidation at the latest in 2010.

(101) The Commission invites Romania to provide comments and information, available at the latest in 2010 that led ANAF, CNPP, ANOFM and CNAS to refrain from an immediate recovery of their claims through an immediate liquidation procedure. The Commission also invites Romania to elaborate (i) on the conditions of and the rationale behind putting the lien on CFR Marfa's immovable assets instead of enforcing CFR Marfa's debts; (ii) on how CFR Marfa's debts towards the State budget were extinguished in 2017; (iii) on why this was done only in 2017; and (iv) to demonstrate that that particular course of action was in line with the rules on State aid. Romania is also invited to clarify its answer to question 7 in Romania's Reply of 12 May 2017 and explain why the due date for all debts of CFR Marfa to ANAF, CNPP, ANOFM and CNAS is 31 December of the respective years, and why the value of some fields in the table is designated as zero.

(102) Also, given that the Deloitte Report conclusion was based on the privatisation being successful, the Commission invites Romania to explain why it did not seek liquidation of the company soon after the failed privatisation in 2013. Romania is therefore invited to justify the support measures in favour of CFR Marfa by non-enforcement of debts toward the State budget before 2013 (for Measure 1) and after 2013 (for Measure 4) and to provide any contemporaneous study on which such decisions were based. These studies can also include (and should not be limited to) contemporaneous business reports on CFR Marfa, asset value reports, including those made available to the tax authorities, tax declarations, industry reports, notifications by CFR Marfa to the National Trade Register Office, to the Romanian Chamber of Commerce and Industry, or to any other relevant state agency or body to which CFR Marfa submits information, as well as any available contemporaneous internal documents of the state bodies involved (ANAF, CNPP, ANOFM and CNAS) explaining the reasons why the debts accumulated by CFR Marfa to the state budget were not enforced.

Measures 2 and 5 - The non-enforcement of debts towards CFR Infrastructure and the increase of debts towards CFR Infrastructure 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

(103) At the current stage, the Commission has doubts whether CFR Infrastructure acted as an MEO by not enforcing CFR Marfa’s trade payables and allowing for the increase of debts through the continued provision of services to CFR Marfa. By doing so, it granted the undertaking in difficulty (see section 5.2 below) a payment facility. In order to determine whether Measure 2 confers an undue advantage to CFR Marfa, the Commission will assess whether CFR Infrastructure pursued the recovery of its claims

[78] See Romania's Reply of 12 May 2017.

with the same due 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.[79]

(104) As stated in recital (90), Romania submits that CFR Infrastructure acted as an MEO, because, given the low degree of recovery in case of liquidation, the debt-to-equity conversion followed by a privatisation would be the best option.

(105) 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 and to continue to provide services to CFR Marfa were taken.[80]

(106) As noted in recital (91), CFR Marfa was facing financial difficulties for several years. Already in 2010 CFR Marfa's total debts accounted for 126% of its total assets. CFR Marfa's total debts towards CFR Infrastructure amounted to RON 412.67 million (ca. EUR 90 million) and accounted to 25% of CFR Marfa's total debts. At the current stage, 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. Instead, CFR Infrastructure continued to provide services to CFR Marfa and allowed it to further increase its trade payables by 74% between 2010 and 2012, and thereby it even further lowered its recovery perspectives.

(107) The Commission has no indications that CFR Infrastructure carried out any assessment of the options for the way forward and for the prospects of privatisation of CFR Marfa, which it should have done at the latest in 2010.[81] The documents submitted by Romania[82] contain only a discussion on applying alternative sanctions to CFR Marfa, such as the prohibition of access to railway infrastructure of certain trains of CFR Marfa, but not the enforcement of CFR Marfa's debts.

(108) The Commission further observes that CFR Infrastructure was treated differently than private creditors of CFR Marfa. CFR Marfa's trade payables towards private undertakings decreased by […]% between 2010 and 2012, while the trade payables to CFR Infrastructure increased by […]%. Also, the authors of the Deloitte Report note that "*between 31.12.2010 and 31.12.2012 […] the Company [CFR Marfa] postponed the payments to its suppliers and to the State Budget in order to be able to repay the bank loans"*.[83] Moreover, the authors of the Deloitte Report noted, that *"the priority of the Company [CFR Marfa] was the repayment of bank loans, salaries and liabilities to non-public suppliers"*.[84] This clearly indicates that CFR Marfa was not interested and/or not able to pay debts towards CFR Infrastructure. Therefore, there were no valid reasons for CFR Infrastructure to believe that CFR Marfa 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.[85]

(109) Moreover, the individual decision of CFR Infrastructure not to ask for repayment of debts owed to it by means of liquidation of CFR Marfa could not be justified by the

79 See to that effect, Case C-342/96 *Spain v Commission*, ECLI:EU:C:1999:210.
80 Case C-124/10P *European Commission v Électricité de France (EDF)*, ECLI:EU:C:2012:318, paragraph 85.
81 Case C-124/10P *European Commission v Électricité de France (EDF)*, ECLI:EU:C:2012:318, paragraph 85.
82 See Annex 1.2 and 1.3. to Romania's reply of 12 May 2017.
83 Deloitte Report, p. 12.
84 Ibid.
85 Case C-480/98, AG Mischo opinion in *Magefesa*, ECLI:EU:C:2000:305, para 37.

prospects of privatisation. As noted in recital (94), in 2010 it was unclear whether CFR Marfa 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 prospects of privatisation of CFR Marfa. At the current stage the Commission has no indication that such assessment was conducted by CFR Infrastructure in 2010.

(110) In the case at hand, CFR Infrastructure would have obtained the recovery of approximately [40-50]% of its claims (see Table 10 below), if it had pursued its claims in 2010 by way of CFR Marfa's liquidation. In addition, it would have ensured that no further debts were accumulated.

Table 10: Overview of approximated recovery amounts for CFR Marfa's trade payables in 2010.

	In 2010 (RON million)	**Fraction from total (%)**	**Approximated recovery amounts for trade payables in 2010 (RON million)**	**Fraction from total (%)**
CFR Infrastructure	[…]	[70-80]	[…]	[40-50]
Total trade payables	**[…]**	**100**	**[…]**[86]	**[40-50]**

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

(111) Furthermore, even after the debt-to-equity swap of 2013, CFR Marfa's trade payables towards CFR Infrastructure continued to accumulate and almost tripled from RON 213.47 million (ca. EUR 46 million) in 2013 to RON 622.03 million (ca. EUR 135 million) in 2016 (see Tables 6 and 7 above).

(112) According to the reply by Romania in May 2017[87], CFR Infrastructure has undertaken certain steps to enforce its claims towards CFR Marfa in 2013-2016, including by way of payment orders and/or arbitration proceedings, and after 2016 by way of judicial enforcement. However, these steps until 2016 (included) only concerned parts of the debts and were clearly insufficient for the full debt recovery. Romania has not documented these facts and did not substantiate why the enforcement carried out did not cover the full debt that CFR Marfa still owed to CFR Infrastructure.

(113) In May 2017, the Competition Commissioner visited Romania and informed the Romanian authorities that a decision to open investigation proceedings was likely in CFR Marfa's case. Subsequently, according to Romania's latest submission of October 2017, between May and September 2017, CFR Infrastructure has requested in Court the enforcement of debt repayment of RON [500-600] million (ca. EUR [110-130] million) by CFR Marfa, representing utilisation taxes, other (non-utilisation) taxes and penalties. Romania claims that CFR Infrastructure applied penalties and interest, which increased the total debts owed towards it by CFR Marfa. At the time of the latest submission of Romania, the total debt of CFR Marfa towards CFR Infrastructure was RON [700-800] million (ca. EUR [150-170] million) out of which RON [200-300]

[86] See the calculation of the approximated recovery amounts in 2010 in Table 9 above.

[87] See Annex 2 to Romania's reply of 12 May 2017 and Romania's reply to the Addendum to the Complaint submitted on 6 October 2017.

million (ca. EUR [40-60] million) represented penalties (ca. [20-30]% of the total amount) [88].

(114) Against this background, the Commission has doubts whether a prudent private market operator placed in the situation of CFR Infrastructure would have continued to supply CFR Marfa for years without seeking recovery of its debt and instead limiting itself to the simple calculation of interest and calculation of penalties.

(115) In view of the above, the Commission takes the preliminary view that CFR Infrastructure should have asked for an immediate repayment of its trade payables at the latest in 2010. At the same time it should have discontinued the provision of services to CFR Marfa.

(116) Therefore, the Commission invites Romania to provide comments and information, available at the latest in 2010 that led CFR Infrastructure to refrain from an immediate recovery of its claims through an immediate liquidation procedure.

(117) The Commission also invites Romania to specify the debt amount sought in each of the enforcement procedures referred to in Annex 2 to Romania's reply of 12 May 2017, as well as the start dates of these procedures, their current status and the reasons why these procedures were not started earlier. Finally, Romania is also invited to explain the reason for the differences between the records of CFR Infrastructure and the records of CFR Marfa regarding the debts of CFR Marfa to CFR Infrastructure, as indicated in Romania's reply of 12 May 2017 (answers to questions 12 and 13).

(118) More generally, given that the Deloitte Report was based on the privatisation being successful, the Commission also invites Romania to justify the continuous support (after the privatisation failed in 2013) to CFR Marfa in the form continuous provision of infrastructure and other ancillary services to CFR Marfa by CFR Infrastructure made available to CFR Marfa after 2013 (Measure 5).

(119) Romania is invited to provide, for each of Measures 2 and 5 (i.e. in the period before the 2013 debt-to-equity swap for Measure 2 and after the debt to equity swap for Measure 5), all available contemporaneous studies, assessments, reports, as well as any instructions from the government justifying the lack of firm steps undertaken by CFR Infrastructure towards recovery of debts owed to it by CFR Marfa. Furthermore, for each of Measures 2 and 5, Romania is invited to provide any additional internal documents, such as minutes of the relevant meetings[89], presentations to the Board of Directors or any other body, as well as reports and studies (produced internally or commissioned to external consultants) based on which decisions regarding the enforcement or the non-enforcement of CFR Marfa's debts towards CFR Infrastructure have been taken.

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

(120) Romania argues that the debt-to-equity swap of 12 June 2013 does not confer any undue advantage to CFR Marfa, because any private creditor in a situation similar to the one of the public creditors, namely ANAF, CNPP, ANOFM, CNAS and CFR

---

[88] See point 4 of Romania's reply to the Addendum to the Complaint submitted on 6 October 2017.

[89] Other than those provided in Annex 1.1 and Annex 1.2 (part 1 and part 2) to Annex 1 of Romania' reply of 12 May 2017.

Infrastructure, would have chosen that method of debt recovery rather than the liquidation of the company. It was expected that the debt conversion followed by the privatisation of CFR Marfa[90] would allow the public creditors, namely ANAF, CNPP, ANOFM, CNAS and CFR Infrastructure, to recover a larger part of the debt than if CFR Marfa was liquidated (see Table 7 further above).

(121) The Commission has doubts whether the decision by means of the Emergency Order No 61/2013 (as described in recitals (52) to (54) above) to convert RON 1 669 million (ca. EUR 363 million) of CFR Marfa's debts into equity in June 2013, and thereby to substantially reduce CFR Marfa's debts, satisfies the MEO test.

(122) In order to determine whether Measure 3 confers an undue advantage to CFR Marfa, the Commission assesses whether each of the public creditors, namely ANAF, CNPP, ANOFM, CNAS and CFR Infrastructure, pursued the recovery of the public debt with the same diligence as a private creditor seeking to maximise recovery of the debt owed to it.[91]

(123) 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.[92] 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*'.[93]

(124) 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 Marfa (i.e. June 2013), the Commission has doubts whether it was a sufficient basis for Romania's decision. First, even the authors of the Deloitte Report consider that due to *"[…] the limited scope of the engagement, information and time constraints, this document should not be regarded as comprehensive and exhaustive"*.[94] Secondly, the authors of the Deloitte Report note that the data and information provided by CFR Marfa, Romania and publicly available, was not independently verified by the consultant. Thirdly, the authors of the Deloitte Report state that *"to the extent to which this document [the Deloitte Report] relates to forecasts and estimates, it should be noted that usually there are differences between such forecasts or estimates and the actual results, as the events and circumstances do not occur as expected and these differences may be*

---

90 Under the assumption of a privatisation of a 51% share in 2013 and of a 49% minority share in 2017.

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

92 Case T-152/99 *Hamsa*, ECLI:EU:T:2002:188, para. 168.

93 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.

94 Deloitte Report, p. 1.

significant",[95] but they have neither carried 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 assumption that CFR Marfa's operating income would increase by […]% from 2013 to 2017 resulting primarily from an increase by […]% in tonnes-kilometres while CFR Marfa had been consistently reducing its activity in the past decade (see Table 2 above).

(125) In this context, the Commission further observes that the positive result of the Deloitte Report supporting the debt-to-equity swap is predicated on a subsequent privatisation. This is also confirmed by the authors of the Deloitte Report that *"considering the economic situation of the company [CFR Marfa] and the evolution of the CFR Marfa budgetary debts, it would result that such debt would continue to rise as a result of the continuation of CFR Marfa's activity without liquidation or privatisation, with even lower recovery perspectives than the present ones [2013]"*.

(126) However, the Deloitte Report does not contain any assessment of the prospects of a two-stage privatisation of CFR Marfa (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 Marfa in 2013 was cancelled and republished (see recital (26) above). Even though there were three prequalified bidders, those bidders just submitted their non-binding expressions of interest, without any firm commitment and without being able to carry out due diligence. In addition, according to publicly available information, all prequalified bidders, except GFR, withdrew from the transaction in June 2013 (see recital (29) above). And even though GFR submitted a binding bid, the privatisation failed.

(127) The Commission further notes that with the planned privatisation of the 51% majority stake in CFR Marfa 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 Table 7 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.[96]

(128) In addition, in the liquidation scenario a discount on the market value of assets (RON […] million) between […]% and […]% on average was applied (see Table 8 above). If a lower discount on the market value of assets would have been applied, the results of the liquidation scenario would have been even higher. Against this background, 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.

[95] Deloitte Report, p. 2.

[96] RON 1 079.9 million (results of the average privatisation scenario) – RON 991.68 million (results of the maximum liquidation scenario) = RON 88.22 million.

(129) As regards the claims of ANAF, CNPP, ANOFM, CNAS and CFR Infrastructure to CFR Marfa, the Commission has doubts whether the 2013 debt-to-equity swap was the best available option for the recovery of the sums owned to them. Under the liquidation scenario in the Deloitte Report ANAF, CNPP, ANOFM and CNAS would have been able to recover [90-100]% of their claims, whereas in 2010 ANAF, CNPP, ANOFM and CNAS could have recovered 100% of their claims under a liquidation scenario. Under the 2013 liquidation scenario CFR Infrastructure would have no recovery perspective (see Table 11 below), whereas in the 2010 liquidation scenario CFR Infrastructure could have expected a [40-50]% recovery of its claims (see Table 9 and Table 10 further above). It must be noted, however, that between 2010 and 2012 ANAF, CNPP, ANOFM, CNAS and CFR Infrastructure allowed CFR Marfa to increase its debts towards them by [80-90]%.

(130) It is the Commission's preliminary view that this increase of the debt over time rendered the 2013 MEO test of the debt-to-equity swap as described in the Deloitte Report positive.[97] The higher debt level of CFR Marfa towards the State's consolidated budget (namely ANAF, CNPP, ANOFM and CNAS) and CFR Infrastructure in 2013 resulted in a lower recovery rate under the 2013 liquidation scenario than in the 2010 liquidation scenario. Consequently, this higher debt towards the State's consolidated budget and CFR Infrastructure 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 Marfa would pay back all its remaining outstanding debts (i.e. debts not subject to the debt-to-equity swap).

Table 11: 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	**1 281.94**		
Liquidation value of assets[98]	**[…]**		
- Liquidation costs	[…]	[…]	100%
- Salaries	[…]	[…]	100%
- Guaranteed debts (bank loans)	[…]	[…]	100%
Sub-total	***[…]***	***[…]***	
- Debts to the State budget (tax payables and social contribution payments)	[…]	[…]	[…]%
- Debts to the State budget from liquidation	[…]	[…]	[…]%
Sub-total	***[…]***		
- Trade payables to SOEs	[…]	-	[…]%
- Trade payables to other	[…]	-	[…]%

[97] Case T-11/95 BP Chemicals Ltd v Commission, ECLI:EU:T:1998:199, para. 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, 26.03.2010, p. 1, recital 105.

[98] Minimum liquidation value of CFR Marfa's assets on 31.12.2012 as established in the Deloitte Report.

In RON million	31.12.2012	Approximated recovery amounts in 2012	Recovery % in 2012
creditors			
Total of debt not covered by the liquidation value of assets	**[…]**		

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

(131) Therefore, the Commission at this stage considers that by approving the debt-to-equity swap, the public creditors acted in a different way than an MEO, and therefore, it granted an advantage to CFR Marfa.

(132) In view of the above, the Commission invites Romania to provide comments and any available contemporaneous information that led it to approve the 2013 debt-to-equity swap. Such information should include (but not be limited to), information available during due diligence proceedings and reports about the value of the CFR Marfa assets that were prepared for any subsequent privatisation to the failed privatisation in 2013, details on the hypothesis 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 Marfa'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. Romania is also invited to explain what was the return expected by the Romanian state from investing even more into a heavily indebted company such as CFR Marfa at the time of the 2013 debt-to-equity swap and to justify its reply.

Overall assessment of economic advantage of Measures 1 to 5

(133) 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 Marfa.

(134) The Commission notes that CFR Marfa has made no profits since 2008 and has been subject to multiple failed privatisation attempts, none of which have resulted in CFR Marfa's liquidation, despite its constantly deteriorating financial situation. Furthermore, Measures 1 to 5 described above appear to be intrinsically linked and are part of the same main objective to support and maintain CFR Marfa in the market for years, as well as securing jobs for CFR Marfa's employees, by way of non-enforcement of debts, debt write-off and continuous provision of infrastructure services.

(135) This strategy by the State to keep CFR Marfa 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 2009-2013 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 Marfa 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.

(136) 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 Infrastructure as a result of continued supplies under Measure 2 (indirect intervention) were later on transformed into Measure 3. Measure 3 leads to an even higher advantage in favour of CFR Marfa than Measures 1 and 2 combined which is not severable from Measures 1 and 2.

(137) In conclusion, since Measure 3 stems from Measures 1 and 2, and since Measure 4 and 5 are merely a continuation of Measures 1 and 2, respectively, all those measures seem to constitute a series of interdependent interventions[99] related by a common goal of the State to keep CFR Marfa afloat by all means, and thus, imputable to the State.

(138) Overall, also in consideration of the numerous 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 Marfa by exhausting all possible means available to it, including by ways of requesting from the Court an enforcement of its various claims, and, subsequently, trigger CFR Marfa's liquidation.

(139) The total aid granted by the State to CFR Marfa potentially exceeds EUR 400 million.[100]

5.1.4. *Selectivity*

(140) Article 107 (1) of the Treaty requires that a measure, in order to be defined as State aid, favours "*certain undertakings or the production of certain goods*". The Commission notes that the Measures 1 to 5 have been granted only to CFR Marfa. Therefore, these measures are selective within the meaning of Article 107 (1) of the Treaty.

5.1.5. *Distortion of competition*

(141) The Commission has analysed whether the measure distorts or threatens to distort competition.

(142) In this respect, the Commission first observes that Romania has opened the market for rail freight transport in 1998 to other domestic and foreign operators (i. e. operators established in Romania and operators established outside Romania).[101] The EU rail freight market was first opened to competition on 15 March 2003 on the trans-European rail freight network with the first railway package.[102] The second railway

[99] 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 ,

[100] Only the debt-to-equity swap amounts for EUR 363 million.

[101] See recital (9).

[102] Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways, OJ L 75 of 15.03.2001, p. 1., Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings, OJ L 75 of 15.03.2001, p. 26, Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, OJ L 75 of 15.03.2001, p. 29, Directive as last amended by Directive 2007/58/EC, OJ L 315 of 03.12.2007, p. 44.

package liberalised all international freight transport on 1 January 2006, and national rail freight from 1 January 2007.[103] However, several EU Member States had unilaterally liberalised their national markets prior to that date.

(143) CFR Marfa's market share (measured in distances carried) on the Romanian rail freight market amounted to [40-50]% in 2014 (see Table 1) and to [30-40]% in 2016. CFR Marfa directly competes on this market with currently more than 20 other rail freight operators (see recital (10) further above).

(144) Furthermore, rail freight transport is in competition with other modes of transport, in particular transport by road, and on certain routes also by airplane and by inland waterway and short-sea shipping (see recital (42) further above).

(145) Due to the non-enforcement of increasing amounts of debts both towards the State budget and towards CFR Infrastructure, CFR Marfa was consistently advantaged vis-à-vis its competitors. Contrary to what the Complainant contends (see recital (41)), it is doubtful that CFR Marfa was indeed a price-setter during the past years[104]. CFR Marfa's market share decreased steadily since 2007 and, according to industry reports, other carriers are known to have adopted aggressive pricing strategies to gain market share. Nevertheless, the non-imposition of debts was sufficient to provide CFR Marfa with a considerable advantage over all other carriers in the market.

(146) Also, as regards Romania's claim that CFR Marfa has an important task for transporting military goods, as well as for transporting coal and oil, which are relevant for energy security of supply, the Commission notes that it has not been presented with any entrustment act designating this task as a public service, which would confirm Romania's arguments. Furthermore, the Commission doubts that these transport services could in principle be designated as public services due to the fact that these services are being rendered in a liberalized market, where other carriers are capable and willing to carry out that task. In any case, the Commission invites Romania to clarify this aspect and to demonstrate the extent to which the rail transport services of CFR Marfa for such military goods, coal and oil could fall under the public service compensation.[105]

[103] Regulation (EC) No 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European Railway Agency, OJ L 164 of 30.04.2004, p. 1, Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, OJ L 164 of 30.04.2004, p. 44, Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 96/48/EC on the interoperability of the trans-European high-speed rail system and Directive 2001/16/EC of the European Parliament and of the Council on the interoperability of the trans-European conventional rail system, OJ L 164 of 30.04.2004, p. 114 and Directive 2004/51/EC of the European Parliament and of the Council of 29 April 2004 amending Council Directive 91/440/EEC on the development of the Community's railways, OJ L 164 of 30.04.2004, p. 164.

[104] See also Reports by the OLFR (Romanian Freight Licencing Agency) stating that there are more than 20 carriers in the rail freight market out of which many have adopted aggressive pricing strategies to increase their market share. See also Romania's comments on to the Addendum to the Complaint submitted on 6 October 2017.

[105] See Article 93 of the TFEU according to which "*Aids shall be compatible with the Treaties is they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service*".

(147) At this stage, in the light of the above, the Commission considers that the Measures 1 to 5 distort or threaten to distort competition in the internal market.

5.1.6. *Effect on trade*

(148) When aid granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid.[106] It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition.[107]

(149) In the present case, the beneficiary is in competition with other undertakings providing transport services in the EU, as shown above in recitals (142) to (144). By granting CFR Marfa the possibility to continue its activities and to convert its overdue debts to equity, the measures are liable to improve CFR Marfa's competitive position compared to its competitors on the internal market.

(150) That is so irrespective of Romania's arguments (see recitals (66) to (70)) that CFR Marfa's market share is diminishing and of the fact that CFR Marfa may be disadvantaged by its engagements with the Ministry of Defence.

(151) Therefore, at this stage, the Commission considers that the measures under scrutiny are liable to affect EU trade.

5.1.7. Conclusion on the presence of aid

(152) At this stage, the Commission considers that Measures 1 to 5 are likely to constitute State aid within the meaning of Article 107(1) of the Treaty, and invites observations from Romania and the interested parties on its preliminary views.

5.2. Undertaking in difficulty

(153) The 2004 and 2014 R&R Guidelines[108] 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.

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

(154) 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".* (emphasis added)

---

[106] See, in particular, Case 730/79 *Philip Morris v Commission*, ECLI:EU:C:1980:209, para. 11; Case C-53/00 *Ferring*, ECLI:EU:C:2001:627, para. 21; Case C-372/97 *Italy v Commission*, ECLI:EU:C:2004:234, para. 44.

[107] Case T-214/95 *Het Vlaamse Gewest v Commission*, ECLI:EU:T:1998:77.

[108] Community guidelines on State aid for rescuing and restructuring firms in difficulty ("2004 R&R Guidelines"), OJ C 244, 01.10.2014, p. 2; Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (2014 R&R Guidelines), OJ C 249, 31.07.2014, p. 1.

(155) 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"*.

(156) As explained in recitals (52) to (54), Measures 1 and 2 (CFR Marfa's debts to the State budget and to CFR Infrastructure) were largely converted into equity by Measure 3 in June 2013. Therefore, the Commission considers that the Measures 1, 2 and 3 would have been granted before the publication of the 2014 R&R Guidelines. As regards Measures 4 and 5, these took place after the implementation of Measure 3 in 2013 and continue after the publication of the 2014 R&R Guidelines (i.e. 31 July 2014). If proven that Measures 1 to 5 constitute State aid, the aid was not subject to the Commission's approval. Therefore it would constitute unlawful aid (see section 5.3).

(157) Accordingly, at the current stage and in the light of these considerations, the Commission considers that the 2004 R&R Guidelines would apply for the assessment of Measures 1, 2 and 3, and that the 2014 R&R Guidelines would apply for the assessment of the Measures 4 and 5. In any case, the conclusion on CFR Marfa being a company in difficulty would be the same under either the 2004 and the 2014 R&R Guidelines.

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

(158) 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*".

(159) CFR Marfa is a limited liability company (see recital (6) further above). As summarised in Table 4, since 2009 CFR Marfa’s reserves were not sufficient to absorb its losses. In 2009 CFR Marfa 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 Marfa 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.

(160) In addition, CFR Marfa 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 Marfa incurred (i) increasing losses since at least 2009 (losses of RON 141.84 million in 2009, RON 535.27 million in 2010, RON 405 million in 2012, and RON 263 million in 2013), leading to a negative equity (RON -343.5 million in 2010 and RON -904.6 million in 2012), (ii) mounting debt (from RON 1 261.6 in 2009 steadily increasing to RON 2 186.6 in 2012) and (iii) declining revenues (turnover steadily decreasing from RON 1 097.3 million in 2009 to RON 1 020.6 million in 2012). Therefore, CFR Marfa has been, pursuant to points 10(a) and 11 of the 2004 R&R Guidelines, an undertaking in difficulty since 2009.

(161) As mentioned above (see recital (157)), the 2014 R&R Guidelines are applicable to Measures 4 and 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"*.

(162) In 2014, the year after the 2013 debt-to-equity swap, CFR Marfa's financial situation continued to deteriorate. CFR Marfa 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. In any case, in 2014 and subsequent years, the situation of CFR Marfa would have been significantly worse in the absence of the 2013 debt-to-equity swap, which wrote-off most of CFR Marfa's debts and artificially "improved" its financial situation.

(163) Furthermore, according to Romania, CFR Marfa 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).[109] The Commission notes that CFR Marfa has indeed fulfilled the criteria under its domestic law for being subject to collective insolvency proceedings since at least 2009 (see Table 4-6 further above). Therefore, CFR Marfa has been, pursuant to point 20(a) and (c) of the 2014 R&R Guidelines, an undertaking in difficulty from 2014 with regard to Measures 4 and 5.

(164) Consequently, the Commission considers on a preliminary basis that CFR Marfa 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 since 2009. As mentioned above, the Romanian rail freight market was liberalised only in 2008[110]; hence the effects of new operators challenging CFR Marfa's position in the national market could only be seen starting with 2009.

5.3. Lawfulness of the aid

(165) The Commission notes that Measures 1 to 5 have been granted since at least 2010. If proven that Measures 1 to 5 constitute State aid, the aid was not subject to Commission's approval, and therefore Romania has not respected the stand-still obligation of Article 108(3) of the Treaty.

(166) If the Commission comes to the conclusion that Measures 1 to 5 should be found to be State aid within the meaning of Article 107(1) of the Treaty, they would constitute unlawful State aid.

[109] Law no. 85/2006 on Insolvency proceedings, Romanian Official Gazette No 944, 22/11/2006.

[110] 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:2008:184:0013:0031:EN:PDF .

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

(167) The Commission must assess if the aid identified above can be found compatible with the internal market. According to the case law of the Court, it is up to the Member State to invoke possible grounds of compatibility, and to demonstrate that the conditions for such compatibility are met.[111]

(168) In this case Romania claims that aid to CFR Marfa meets the objective of common interest due to the fact that CFR Marfa has a strategic importance in the railway transportation in Romania, both because of its obligations to the defence needs of the country and membership of NATO, and of the transport services which it provides to certain sectors of economy (recital (66)).

(169) However, given that CFR Marfa qualifies as an undertaking in difficulty (see section 5.2 further above), the only ground for compatibility could be rescue and restructuring aid based on the 2004 and 2014 R&R Guidelines, and at this stage the criteria for compatible rescue or restructuring aid laid down in the 2004 and 2014 R&R Guidelines do not seem to be complied with by any of the measures.

(170) In particular, Romania did not notify any restructuring plan[112]. The Commission cannot therefore evaluate the components of a possible restructuring of CFR Marfa, including investment and modernisation measures, nor can it evaluate whether the measures would restore long-term viability and would be kept to a minimum, while the company would provide a substantial contribution to its restructuring, so that undue distortions of competition would be avoided. Neither can the Commission evaluate whether there are any (structural or behavioural) competition measures to limit the distortion of competition. In any event, because CFR Marfa was loss making since 2008, a restructuring plan would presumably need to cover the period of applicability of the Measures.

(171) In addition, at the current stage, the Commission takes the view that the *"one time last time principle"* has not been complied with, because, if confirmed that Measures 1 and 2 constituted State aid, Measure 3 would have been granted in breach of this principle. The same reasoning applies further, in the case of Measures 4 and 5 vis-à-vis Measure 3.

(172) Consequently, at the present stage, the Commission has doubts whether the Measures 1 to 5 could be deemed to be compatible with the internal market.

---

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

112 Romania has merely referred in May 2017 to various "restructuring measures" to improve CFR Marfa's financial situation, including a list of measures for the period 2017-2020, in its reply to the Commission's Request for information in May 2017. That list of measures foresees stabilising the company in 2017 and bringing it to profit in 2018 in view of its privatisation in 2021. In any case, this list of measures is forward looking, whereas the Decision assesses the State measures since 2009. Moreover, a considerable number of measures appear to be linked to further forms of State aid and changes in legislation, for instance favouring rail transport to the detriment of road transport. See Romania' reply of 12 May 2017, Annex 3.

6. DECISION

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Romania to submit its comments and to provide all such information as may help to assess the aid/measure, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind Romania that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 16 of Council Regulation (EU) No 2015/1589, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Romania that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one (1) month of the date of such publication.

If this letter contains confidential information, which should not be published, please inform the Commission within fifteen (15) working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Fax: +32 2 296 12 42
Stateaidgreffe@ec.europa.eu

Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION