



EUROPEAN COMMISSION

Brussels, 12.3.2018
C(2018) 1442 final

PUBLIC VERSION

This document is made available for
information purposes only.

**Subject: State Aid SA.43785 (2018/C) (ex 2015/PN, ex 2018/NN) – Romania-
Restructuring aid to Complexul Energetic Hunedoara**

Sir,

The Commission wishes to inform Romania that, having examined the information supplied by your authorities regarding public financing in favour of Complexul Energetic Hunedoara S.A. ("CE Hunedoara"), 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) On 21 April 2015, the Commission decided not to raise objections on State aid planned to be granted to CE Hunedoara in the form of dedicated loans up to RON 167 million (ca. EUR 37.7 million)¹. In its decision ("the rescue aid decision") Commission found that the loans amounted to rescue aid to CE Hunedoara and considered that the aid was compatible with the internal market pursuant to the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (the R&R aid

¹ Commission decision of 21.4.2015, SA 41 318 (2015/N) – Romania – Notification of the rescue aid to Complexul Energetic Hunedoara, OJ C/203/2015. The exchange rate used for information in this decision is RON/EUR= 0.215 (31.1.2018).

Excelenței Sale Domnului Ministru Teodor-Viorel Melescanu
Ministerul Afacerilor Externe
Aleea Alexandru nr. 31, sector 1
București
România

Guidelines")², taking into account a number of commitments provided by Romania (see recitals (46) and (47) below).

- (2) One day before, on 20 April 2015, the Commission had considered that Electrocentrale Paroseni and Electrocentrale Deva, two electricity generation companies that had been merged into CE Hunedoara in 2012, had received between 2009 and 2011 operating State aid which was incompatible with the internal market. In its decision ("the incompatible aid decision"), the Commission requested Romania to recover the aid and interest from CE Hunedoara as successor company in case the beneficiaries failed to repay³. On 10 June 2015, the Romanian authorities provided information showing that the aid amount of RON 34 785 015.45 (including aid and recovery interest) had been transferred from CE Hunedoara to the Romanian Ministry of Energy, in implementation of the Commission incompatible aid decision.
- (3) On 21 October 2015, six months after the rescue aid decision, Romania transmitted a restructuring plan for CE Hunedoara (the "first restructuring plan"), which was discussed at a meeting with the Romanian authorities on 23 October 2015. The aim of Romania was to extend the period of reimbursement of the rescue loan which was the subject of the rescue aid decision and to grant restructuring aid to CE Hunedoara to finance costs included in the restructuring plan. By letter transmitted on 3 December 2015, Romania communicated its intention to provide information on the restructuring aid four weeks later. The following day, the Commission opened case SA 43 785 (2015/PN) concerning restructuring aid to CE Hunedoara.
- (4) On 8 January 2016, Romania (pre)notified its intention to grant restructuring aid to CE Hunedoara on the basis of a new restructuring plan, modified as compared to the plan transmitted in October 2015 (the "amended restructuring plan") and submitted additional supporting information, further complemented on 11 January 2016. On 12 January 2016, a meeting was held with the Romanian authorities regarding the information submitted.
- (5) On 15 January 2016, Romania was informed that significant modifications of the envisaged restructuring aid and restructuring plan submitted in (pre)notification would be advisable before Romania proceeded with a formal notification in view of a Commission decision raising no objections to the restructuring aid⁴. Romania did not provide any new restructuring plan thereafter. In January 2016, CE Hunedoara entered into formal insolvency proceedings under Romanian law.
- (6) Thereafter, Romania considered that, whilst CE Hunedoara would be eventually liquidated, it would be necessary to temporarily maintain in operation some of the power generation units along with some coal mines and related coal preparation services supported with a compensation for generation costs. Based on those considerations and new plans as to possible future successor(s) of CE Hunedoara operating with part of the latter's assets, on Commission's request, the Romanian authorities submitted information on 12 May 2016, during a videoconference on 18 May 2016, on 9, 25 and 29 August 2016, during a meeting on 12 October 2016, as

² OJ C 249, 31.7.2014, p.1-28.

³ Commission Decision (EU) 2015/1877 in case (SA. 33 475) on tariffs charged by S.S. Hidroelectrica SA of Romania to S.C. Termoelectrica SA and S.C. Electrocentrale Deva SA, OJ L 275, 20.10.2015, p. 46-67 recitals 117 to 124.

⁴ Article 4(3) of Council Regulation (EU) 2015/1589 of 13.7.2015, OJ L 248. 24.9.2015, p.9.

well as on 9 November 2016 on 17 May 2017 and on 1 September 2017. The information supplied on 17 May 2017 included, in particular, a timeline for the eventual liquidation of CE Hunedoara.

- (7) On 22 February 2012, the Commission had decided not to raise objections on the planned aid totalling RON 1 169 million (ca. EUR 251.3 million) for the closure of three out of the seven coal mines exploited by the National Hard Coal Company JSC Petrosani⁵. In its decision, ("the first aid to coal mines decision") the Commission found that the planned aid was compatible with the internal market pursuant to Council Decision 2010/787/EU on State aid to facilitate the closure of uncompetitive mines ("the Council Decision on aid to coal mines")⁶.
- (8) On 24 November 2016, based on a separate notification, the Commission had decided not to raise objections on RON 447.8 million (ca. EUR 96.2 million) planned to be granted to CE Hunedoara for the closure of two out of the four coal mines still operated by CE Hunedoara which were not the subject of the first aid to coal mines decision⁷. In its decision ("the second aid to coal mines decision"), the Commission found that the planned aid was compatible with the internal market pursuant to the Council Decision on aid to coal mines.
- (9) On 1 February 2018, the Commission informed Romania that the measures which are the subject of the present decision had already been put into effect and, accordingly, it would handle the case as possible non-notified State aid.
- (10) The present decision concerns possible State aid already granted to or benefitting CE Hunedoara for its current electricity generation business (see recital (17)).

2. CONTEXT OF THE MEASURES

2.1. The beneficiary: CE Hunedoara

- (11) CE Hunedoara is a vertically integrated power generation company mining and using indigenous hard coal, headquartered in Petrosani, Hunedoara County. Its shares are fully owned by the Romanian State. CE Hunedoara uses mainly indigenous coal to produce electricity and also co-generates heat for the surrounding cities. Its two power generation plants, Deva and Paroseni have together an installed nominal capacity of 1225 MW. CE Hunedoara produces approximately 4.2% of the electricity consumed in Romania, where it is the only major producer of electricity in the centre and northwest areas. The company employs approximately 6 600 people: 1 750 jobs relate to power generation and 4 700 to mining activities.
- (12) CE Hunedoara was established in November 2012 by merging two previously failing and now liquidated state owned companies. Following the liquidation of the National Hard Coal Company JSC Petrosani, there were four coal mines planned to remain in operation and not planned to receive closure aid under the first aid to coal mines decision. These were merged into CE Hunedoara together with the power generation units and related administrative staff and real estate of Electrocentrale Paroseni and Electrocentrale Deva, since virtually all of the coal supplied by the four coal mines

⁵ OJ C/23/2013.

⁶ OJ L 336, 21.12.2010, p.24-29.

⁷ OJ C/127/2017

was used by Electrocentrale Paroseni and Electrocentrale Deva as fuel for power generation and derived heat supply. In particular:

- CE Hunedoara initially took over Electrocentrale Paroseni and Electrocentrale Deva. Both companies were consistently unable to sell electricity at competitive market prices in Romania and received incompatible operating aid in the amounts of RON 22.62 million and RON 3.65 million between 2009 and 2011 (ca. EUR 5.6 million in total), which the Commission ordered Romania to recover with interest from CE Hunedoara, because of the economic and legal continuity with the beneficiaries⁸.
- Subsequently, in August 2013, CE Hunedoara took over four of the seven coal mines from the National Hard Coal Company JSC Petrosani. By 2011, National Hard Coal Company JSC Petrosani was operating seven mines; three of them received aid to closure. The other four mines later incorporated into CE Hunedoara were allegedly viable. These four coal mines and other productive assets were transferred to CE Hunedoara net of any liability, in particular regarding ca. EUR 1.2 billion debt previously accumulated towards the State or other public bodies, mainly stemming from unpaid taxes and contributions. The debts accumulated had not been taken into account when evaluating the viability of the four mines. The Commission noted the commitment of Romania to notify under State aid rules, if necessary, any State measure concerning the debts towards the State⁹. Romania did not notify the process whereby the four coal mines were transferred free of debt to CE Hunedoara.

2.2. The financial performance and situation of CE Hunedoara

(13) As shown in Table 1, in 2012, the first year of operation, CE Hunedoara made a profit (net earnings) of RON 37.9 million (EUR 8.1 million). However, as from 2013 when the four coal mines and related coal preparation unit were transferred, CE Hunedoara started to generate mounting losses up to RON 147.6 million (EUR 31.7 million) in 2013 and RON 352.3 million (EUR 76 million) in 2014, whilst showing deteriorating financial indicators as to operating income, debt to equity and liquidity. At the end of 2015, CE Hunedoara had negative equity around EUR 232.7 million. By 30 June 2017, negative equity had doubled to EUR -465 million, compared to 2015. As from 2013, the revenues from operation (operating profit) were negative, thus leaving the company no free cash flows (EBITDA) to service financial debt reimbursement and payments, not including additional debt owed to State non-commercial bodies.

Table 1 – Financial results of CE Hunedoara 2012-2017

Million RON	2012	2013	2014	2015	2016	2017 (1 st half)
Operating Income (Turnover)	249.4	1,061.1	691.5	574.7	448.4	273.6

⁸ Incompatible aid decision of 20 April 2015, recitals 84, 88 to 90, 98, 117 to 124. Rescue aid decision of 21 April 2015, recitals 13 and 63.

⁹ First aid to coal mines decision of 22.2.2012, recitals 4 to 10.

Operating (EBITDA)	Profit/Loss	20.2	-167.1	-341.7	-1,647.6	-838.2	-79.1
Net Earnings/Loss		37.9	-147.6	-352.3	-1,661.6	-858.4	-88.7
Financial Debt		170.0	269.5	258.7	270.5	245.4	246.1
Equity		678.7	980.1	629.3	-1,082.6	-2,071.3	-2,162.0

Source: CE Hunedoara website www.cenhd.ro, according to publicly available financial reports accessed in February 2018.

- (14) By April 2015 at the latest, CE Hunedoara was meeting the criteria for being subject to collective insolvency proceedings under Romanian law¹⁰. In January 2016, CE Hunedoara was subject to such proceedings¹¹. In March 2016, the insolvency administrator of CE Hunedoara published a report containing information about the liabilities of the company, from which it transpired that CE Hunedoara owed around RON 2 360 million (ca. EUR 507.4 million) to various State bodies. This amount referred among others to loans set out in Table 2 below as well as to fines charged by the Environment Agency for failure to acquire carbon allowances, green certificates and other debts to the State and to the Social Security budget. According to Romania, the Environment Agency recently joined the ongoing insolvency proceedings to request the payment of amounts owed by CE Hunedoara, like other private creditors.
- (15) According to the information provided by Romania, in line with applicable national rules, the process of liquidation of CE Hunedoara could last a minimum of three years if initiated by the Romanian State in its capacity of shareholder and main creditor of CE Hunedoara. In addition, the remaining coal mining business should be legally separated from the electricity generation business to avoid that aid to power generation benefits the coal mines. That was indeed the aim of the commitment that Romania provided to legally separate the coal mines from the power generation in the shortest timeframe possible in line with national legislation as recorded in the rescue aid decision of 21 April 2015 (recital (67) thereof). This commitment remains unfulfilled since the legal separation has not been initiated yet nor have any steps to liquidate CE Hunedoara been taken.

3. DESCRIPTION OF THE POSSIBLE STATE AID MEASURES

- (16) Romania provided the following information about cumulated debts stemming from unpaid loans owed by CE Hunedoara to the Romanian State by 1st half of 2016 and still outstanding by that date (i.e. amounts still owed from the initial amounts lent including accrued interest, risk premium payable to the State and other related costs):

¹⁰ Rescue aid decision of 21 April 2015, recitals 14, 16 and 17.

¹¹ The Romanian law governing the insolvency procedure is the Law no. 85/2014. In the general insolvency procedure, which applies to CE Hunedoara, the debtor enters, after a period of observation, successively in judicial reorganization and bankruptcy proceedings or separately only judicial reorganization or bankruptcy proceedings only. The observation period is considered the period between the date of the opening of the insolvency procedure and the date of the confirmation of the reorganization plan or, as appropriate, the date of entering into bankruptcy. In the case of CE Hunedoara, several challenges and appeals in the procedure have extended the observation period, which is not yet over.

Table 2 – Details on some outstanding bank loans on behalf or for the benefit of CE Hunedoara as of 30.06.2016

Source of debt to State	Outstanding debt to State 30.06.2016 in RON
1/ Loan representing aid granted in accordance with Commission Decision of 21.4.2015 in case SA. 41 318 (2015) and interest.	102,414,814
2/ Loan default for the payment of incompatible aid requested to be recovered by Commission Decision of 20.4.2015 in case SA. 33 475 and interest	36,800,010
3/ BCR credit contracted by the Ministry of Finance for the benefit of CE Hunedoara	87,707,967
4/ BRD credit contracted by the Ministry of Finance and subordinated to CE Hunedoara	58,123,235
5/ IBRD loan guaranteed by the Romanian State through the Ministry of Public Finances	52,061,809
Subtotal bank loans above	337,107,835

Source: Excerpt from Romania's reply to Commission request for information dated 24 August 2016.

4. ASSESSMENT

- (17) The present decision concerns the five publicly financed or supported loans still outstanding portrayed in Table 2 as follows: partly non-repaid rescue aid loan which was the subject of the rescue aid decision of 21 April 2015, non-repaid loan granted to repay State aid set out in the incompatible aid decision of 20 April 2015 and three loans contracted or guaranteed by the Romanian Ministry of Finance for the benefit of CE Hunedoara.
- (18) The present decision is without prejudice of the assessment of any other support granted with State resources to CE Hunedoara. This includes, in particular, the postponement or cancellations of debt by public bodies either to CE Hunedoara's direct benefit, as referred to in recital (14) or other earlier cancellations or abandonment of public debts owed by National Hard Coal Company JSC Petrosani before its liquidation as described in recital (12), second bullet point, should CE Hunedoara be held to be the economic successor of the latter company.
- (19) The Commission will first examine whether the five measures at hand involve State aid within the meaning of Article 107(1) of the Treaty. The Commission will then examine whether the aid was already implemented and whether such aid might be compatible with the internal market.

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

- (20) 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."

- (21) 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

4.1.1. State resources and imputability to the State

- (22) As has been stated by the Court¹², for 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.¹³
- (23) The non-repaid rescue aid loan which was the subject of the rescue aid decision of 21 April 2015, including the prolonged and not repaid portion of it, and the non-repaid loan granted to repay State aid examined in the incompatible aid decision of 20 April 2015 involve the resources of Romania, since they were provided from funds set aside in and stemming from the State budget. As regards the other three loans contracted or guaranteed by the Romanian Ministry of Finance for the benefit of CE Hunedoara, a default in reimbursing them triggers the concomitant liability of the Romanian State vis-à-vis the lenders, since the State has to honour the defaulted payments. The information provided by Romania in Table 2 shows that the Romanian State is now creditor of CE Hunedoara for the loans in question. In all five cases, should CE Hunedoara reimburse the principal and interest of loan amounts owed to the State, the resources of Romania would increase; the opposite is true if the loans are eventually not repaid.
- (24) The various acts by which the Ministry of Finance, whether of its own motion by virtue of the State powers vested on it or instructed by the Council of Ministers of Romania provides, contracts, subordinates or guarantees loans to CE Hunedoara are imputable to the Romanian State.
- (25) It follows that the loans in question involve State resources whose availability to CE Hunedoara is imputable to the Romanian State.

4.1.2. Economic advantage

- (26) 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. Loans or guarantees provided by the State directly or indirectly, may favour the beneficiary undertaking when they provide funding which the beneficiary would not find on financial markets at the same conditions, if at all. 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

¹² See Case C-482/99 *France v Commission (Stardust Marine)*, ECLI:EU:C:2002:294.

¹³ Case C-248/84 *Germany v Commission*, ECLI:EU:C:1987:437, para. 17.

this principle, the assessment focuses on the transaction from the perspective of a hypothetical prudent private creditor/investor, in a situation as close as possible to that of the State¹⁴.

- (27) In the case at hand, the Romanian State is both a creditor and the main shareholder of CE Hunedoara. In such setting, Romania could have hypothetically provided or guaranteed a MEO-compliant loan or a guarantee on stand-alone basis if the terms at which the loan is granted are in line with market conditions, provided indeed that there is likelihood of repayment. If so, the assessment of the conditions at which the loans were granted may need to take into account the possible returns from the holding that the State may reasonably expect in its capacity as shareholder. In the present case, at this stage, it is manifest from the financial figures of CE Hunedoara portrayed in Table 1 and the history of its predecessors, that the Romanian State or any market investor in a similar position as the State could not expect any possible return in the form of dividends or capital gain from its shareholding in CE Hunedoara as from 2013.
- (28) Moreover, as regards the loans which are the subject of the present proceedings, it is very unlikely that they were granted or prolonged in line with market conditions without unduly favouring CE Hunedoara.
- (29) Firstly, as regards the loan which was the subject of the rescue aid decision of 21 April 2015, the Romanian authorities declared that CE Hunedoara was unable to obtain it from commercial banks and, more generally, they acknowledged that it was providing a (selective) advantage¹⁵. The prolonged and still not repaid portion of the rescue aid loan kept by CE Hunedoara also entails an economic advantage that the company could not possibly obtain at market conditions, e.g. by refinancing and repaying the non-repaid portion with a loan from a commercial bank. An economic advantage of a similar nature was conferred on CE Hunedoara as successor company operating the power generation assets of Electrocentrale Paroseni and Electrocentrale Deva through the State aid which was the subject of the incompatible aid decision of 20 April 2015 and, by way of inference, through the public loan granted to CE Hunedoara to repay it. The latter loan was granted at a time when, according to Romania, CE Hunedoara fulfilled the criteria for being subject to insolvency proceedings under Romanian law and, accordingly, it is very unlikely that the company could have found finance at market terms, if at all.
- (30) Second, for these two loans and also for the other three loans contracted or guaranteed by the Romanian Ministry of Finance for the benefit of CE Hunedoara, the financial situation of the company and the history of its predecessors as portrayed in recitals (12) and (13) must be taken into account for the assessment, as it would have been examined by any prudent market lender or investor. Even before April 2015 when CE Hunedoara was reportedly unable to access finance at market terms, the company was consistently loss making as from its first year of full operation encompassing coal mines and power generation under the same company.
- (31) The predecessor companies having operated the coal mines and the power generation units under similar economic conditions of cost drivers, demand and supply on the Romanian electricity market were unable to honour their liabilities of which more than EUR 1.2 billion were left unpaid in liquidation. As a recently created company, despite

¹⁴ Case C-300/16P *Commission v Frucona Košice*, ECLI:EU:C:2017:706, paragraph 28.

¹⁵ Rescue aid decision of 21 April 2015, recitals 30 and 31.

being cleansed of most of the liabilities of Electrocentrale Paroseni and Electrocentrale Deva and of the National Hard Coal Company JSC Petrosani, CE Hunedoara had no reliable and solid credit history, absent which market lenders are reluctant to finance operations. Indeed, the five loans which are the subject of the present proceedings were all granted by public financial institutions. By contrast, there is no evidence of any private market creditor having provided loans to CE Hunedoara to any comparable extent.

- (32) Moreover, the productive assets in the form of coal mines and power units merged into CE Hunedoara in November 2012 were also those operated by the predecessor companies before without any significant productive or technological improvement allowing stakeholders to reasonably expect better or more remunerative sales of electricity and heat on the Romanian electricity market. All these facts influence the creditworthiness of CE Hunedoara and make it implausible that without State intervention, CE Hunedoara would have found willing lenders at market terms trusting that CE Hunedoara would repay the loans. Likewise, it is unlikely that Romania could anticipate returns from its shareholding in CE Hunedoara and, in particular, from revenues foregone when granting loans or guarantees to CE Hunedoara below market terms.
- (33) On that basis, the loans in question appear to have favoured CE Hunedoara. Indeed, CE Hunedoara was a borrower with a poor credit history of its insolvent and liquidated predecessors, and had no credit history in 2012-2013 when the company was established. CE Hunedoara had increasing operating losses not allowing to meet debt service as from 2013-2014 and actually defaulted in meeting liabilities causing the company to be potentially subject to insolvency proceedings as from 2015. Moreover, there is no indication that the Romanian authorities have taken any timely steps that a diligent creditor would take to recover its claims, such as summoning the borrower to repay the loans or requesting forced execution of payments for defaulted reimbursements. Although in January 2016, the claim for insolvency against CE Hunedoara was filed (see recital (14)), this came very late and has not produced any effective recovery to date. Owing to the difficult financial situation of the company and the low likelihood of repayment when the loans were granted or prolonged, the loans in question conferred an economic advantage to CE Hunedoara in the form of finance and funds which it would not have been able to obtain at market conditions.
- (34) The General Court has considered that in circumstances where the borrower is in a delicate financial situation characterised notably by decreasing turnover, negative equity, and inability to reimburse loans from its own funds, the economic advantage embedded on a loan may equal the total amount of the funds borrowed, even if the State only guarantees the loan.¹⁶ At this stage, on the basis of the information available notably showing the inability of CE Hunedoara to reimburse its loans and liabilities as well as the disappearance of its company capital and subject to the clarifications to be provided by Romania (see section 5 below), the overall assessment of the five consecutive loans granted to CE Hunedoara allows identifying an economic advantage equalling the total amount of funds lent.

¹⁶ Case T-423/14, *Larko Geniki Metalleftiki kai Metallourgiki AE v European Commission*, ECLI:EU:T:2018:57, para. 193 and case law cited.

4.1.3. *Selectivity*

- (35) Article 107 (1) TFEU 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 five loans were provided on an ad hoc basis and were not part of a broader measure of general economic policy providing loans available to undertakings active in the same or other economic sectors. Therefore, these loans are selective within the meaning of Article 107 (1) TFEU.

4.1.4. *Effect on trade and distortion of competition*

- (36) 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.¹⁷ It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition.¹⁸
- (37) CE Hunedoara supplies electricity and heat in Romania. Pursuant to the applicable Union rules on the internal electricity market¹⁹, electricity suppliers can freely establish operations and seek customers in Romania and, indeed a variety of competitors from Romania (e.g. SN Nuclearelectrica, SN Hidroelectrica) or other Member States (e.g. CEZ, Alpiq) have actually done so. Moreover, the Romanian electricity system is at present interconnected with the electricity systems of Bulgaria and of Hungary, so that flows of electricity are produced in and traded between those Member States.
- (38) Therefore, the Commission considers that the loans under scrutiny are liable to affect EU trade and to distort or threaten to distort competition in the internal market.

4.1.5. *Conclusion on the presence of aid*

- (39) At this stage, the Commission considers that the rescue aid loan, including the prolonged and not repaid portion of it, the loan granted to repay earlier incompatible aid, the BCR and BRD loans contracted for the benefit of CE Hunedoara and the IBRD to CE Hunedoara loan guaranteed by the Romanian State constitute State aid within the meaning of Article 107(1) of the Treaty.

4.2. **Lawfulness of the aid**

- (40) The rescue aid loan on which the Commission raised no objections by its rescue aid decision of 21 April 2015 was not put into effect before the Commission decision and was therefore not unlawful State aid. However, the Commission preliminarily considers that the loan granted to repay earlier incompatible aid, the BCR and BRD loans contracted for the benefit of CE Hunedoara and the IBRD to CE Hunedoara loan guaranteed by the Romanian State constitute State aid within the meaning of Article 107(1) of the Treaty and, if so, constitute unlawful State aid, since they have been disbursed in violation of Article 108(3) of the Treaty.

¹⁷ 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.

¹⁸ Case T-214/95 *Het Vlaamse Gewest v Commission*, ECLI:EU:T:1998:77.

¹⁹ Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, OJ L 211, 14.8.2009, p. 55–93.

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

- (41) The Commission must assess if the aid measures 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.²⁰ Except initially for the rescue aid loan and its prolongation after six months from the Commission decision of 21 April 2015 Romania has not notified the other four loans nor invoked possible grounds of compatibility with the internal market.
- (42) The R&R Guidelines²¹ provide rules and conditions for the purposes of the compatibility assessment of rescue and restructuring aid to undertakings in difficulty pursuant to Article 107(3)(c) of the Treaty.

4.3.1. *The applicability of the 2014 R&R Guidelines*

- (43) According to points 137 and 138 of the 2014 R&R aid Guidelines now in force, "*[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*" and "*[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*".
- (44) The rescue aid loan which was the subject of the rescue aid decision of 21 April 2015, including the prolonged and not repaid portion of it, and the non-repaid loan granted to repay State aid which was declared incompatible with the internal market on 20 April 2015 were granted after the entry into force of the 2014 R&R aid Guidelines on 1 August 2014. In addition, none of the other three loans were formally notified (see recital (40)). It follows that even if the three loans contracted or guaranteed by the Romanian Ministry of Finance for the benefit of CE Hunedoara had been granted before 1 August 2014, the 2014 R&R aid Guidelines apply to all the loans covered by the present proceedings.

4.3.2. *Application of the 2014 R&R Guidelines*

- (45) Only undertakings in difficulty as defined in point 20 of the R&R aid Guidelines and not active in the coal sector as defined in point 16 thereof can benefit from compatible rescue or restructuring aid. As noted in the rescue aid decision, CE Hunedoara fulfilled already in April 2015 the criteria for being placed in collective insolvency proceedings set out in point 20 (c) and, indeed, in January 2016, the company entered into such proceedings (see recital 14).
- (46) As regards the rescue aid loan, in line with point 55 (d) of the R&R aid Guidelines, Romania committed to submitting, within maximum six months from the date of the Commission decision of 21 April 2015, the proof that the loan was reimbursed, a valid restructuring plan or a substantiated liquidation plan setting out the steps leading to the

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

²¹ 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.

liquidation of CE Hunedoara within a reasonable time frame, without further aid. At this stage, it is doubtful that this commitment is met, for the following reasons:

- The loan has not been fully reimbursed yet, as shown in Table 2.
- The restructuring plan submitted by Romania in October 2015 as amended in January 2016 did not ensure that CE Hunedoara could reach long term viability without further aid.
- The timeline for the liquidation of CE Hunedoara with a minimum duration of three years, as submitted by Romania in May 2017, (that is seven months after the deadline of October 2016, i.e. six months after granting the rescue aid), is unreasonably long and the term is not yet predictable since the State, in its capacity of shareholder or main creditor has not initiated it yet. As regards the judicial proceedings prompted by other creditors and started in January 2016, they are still in observation phase, with no clear date for deciding on the reorganisation or liquidation of CE Hunedoara.

(47) In that respect, to date, Romania has also failed to meet its commitment of April 2015 to legally separate the coal mines from power generation within CE Hunedoara. Whilst two coal mines are receiving operating aid pursuant to the second aid to coal mines decision (recital 8 above), it cannot be excluded at this stage that some of the loans covered by the present decision have benefitted directly or indirectly the coal mines of CE Hunedoara, in contravention of point 16 of the R&R aid Guidelines.

(48) It is also doubtful at this stage that the conditions for compatibility for restructuring aid set out in the R&R aid Guidelines would be met if all loans examined in the present proceedings, namely the BCR and BRD loans contracted for the benefit of CE Hunedoara and the IBRD loan to CE Hunedoara loan guaranteed by the Romanian State, were to be assessed jointly with the non-repaid portion of the rescue aid loan and the non-repaid loan granted for earlier incompatible aid and were considered altogether as restructuring aid: the restructuring plan of October 2015 as amended in December 2016 was not valid at the outset and has not been pursued; no discernible contribution of CE Hunedoara in line with points 62 to 64 of the R&R aid Guidelines nor measures limiting distortions of competition in line with points 74 to 86 thereof can be identified at this stage.

(49) Although points 99 to 103 of the R&R aid Guidelines allow specific conditions for aid to providers of services of general economic interest (SGEI) in difficulty, it is doubtful that the possible State aid which is the subject of these proceedings can be assessed or taken into account as a compensation for the provision of such services as referred to in point 100 of the R&R Guidelines. Indeed, in the first place, it is not claimed nor established that CE Hunedoara has been operating on the basis of valid entrustment acts singling out any justifiable difference with the production of electricity by other electricity generators active in Romania. Secondly, the loans at issue were ad hoc loans for specific purposes meeting operating costs. The loans in question have not been granted with regard to identifiable and justified extra costs of service provision. Thirdly, the loan amounts have not been set, individually or cumulatively, on the basis of objective parameters set out in advance and calibrated specifically for the determined costs of the SGEI taking into account all revenues and costs of Hunedoara. It is therefore doubtful that the Commission could, under points 100 and 101 of the R&R aid Guidelines, consider that the loans in question should be regarded as valid

compensations under potentially applicable legal basis, such as the SGEI Decision²² or the SGEI Framework²³. Nor has Romania claimed so.

- (50) Finally, it is worth noting that the non-repaid loan granted to repay earlier incompatible aid remains available to CE Hunedoara. In light of the *Deggendorf* principle²⁴, it is doubtful that the accumulation of a non-repaid loan granted to repay earlier incompatible aid with the other four loans, allows considering that the possible restructuring aid to CE Hunedoara is compatible with the internal market on the basis of the R&R aid guidelines, pursuant to point 94 thereof. Yet, whilst benefitting from possible State aid in the form of the five loans at issue, CE Hunedoara continues to sell electricity and heat in Romania at the detriment of other competitors.
- (51) Consequently, at the present stage, the Commission has doubts whether the BCR and BRD loans contracted for the benefit of CE Hunedoara and the IBRD loan to CE Hunedoara loan guaranteed by the Romanian State, assessed in accumulation with the non-repaid part of the rescue aid loan and the loan granted to repay earlier incompatible aid considered altogether or in isolation could be deemed to be compatible with the internal market.

5. 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 within one month of the date of receipt of this letter to submit its comments and to provide all such information as may help to assess the five loans which are the subject of the present proceedings, and, in particular:

- which were the initial amounts, at which conditions of maturity, interest rate, fees and conditions as set out in the loan contracts and any other supporting evidence etc.;
- the considerations as to creditworthiness, market benchmarks and ratings of CE Hunedoara which the Romanian authorities took into account in order to set and establish the conditions of their support, as documented by evidence contemporary with the dates of granting, subordinating or guaranteeing each loan;
- evidence of offers of loans to CE Hunedoara made by market financial institutions or banks between 2012 and 2016, specifying whether a State or public guarantee was requested and
- a schedule of instalments due, repayments, defaults and possible penalties for each of the five loans, allowing to quantify the total amount of economic advantage embedded in them when granted and the amount still available to CE Hunedoara.

The Commission requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

²² Commission Decision of 20 December 2010 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L7, 11.01.2012, p. 3-10.

²³ Communication from the Commission, European Union framework for State aid in the form of public service compensation (2011), OJ C8, 11.01.2012, p. 15-22

²⁴ T-244/93 and T-486/93 TWD Deggendorf v Commission (1995) ECLI:EU:T:1995:160, para 56.

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