EUROPEAN COMMISSION

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| In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus […] | | PUBLIC VERSION<br><br>This document is made available for information purposes only. |

**Subject: State Aid SA.59974 (2021/C) (ex 2020/N, SA.58053 2020/PN) – Romania Restructuring of Complexul Energetic Oltenia SA**

Excellency,

The Commission wishes to inform Romania that, having examined the information supplied by your authorities regarding public financing in favour of Complexul Energetic Oltenia SA ("CE Oltenia"), it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ("TFEU").

## 1. PROCEDURE

(1) On 24 February 2020, the Commission decided not to raise objections on State aid planned to be granted by Romania to CE Oltenia in the form of a six-month rescue loan amounting to EUR 251 million (ca. RON 1.200 million[1]). In that decision[2] ("the rescue aid decision"), the Commission found that the loan constituted rescue aid to CE

[1] The exchange rate used in this decision is 1 RON= 0.215 EUR and, when applicable, 1 RON = 0.26 USD and 1 USD = 0.83 EUR. Data in EUR is provided for information only.

[2] Commission decision of 24 February 2020 in Case SA.56250, Rescue aid in favour of Complexul Energetic Oltenia SA, web publication available at https://ec.europa.eu/competition/state_aid/cases1/202012/284501_2140447_114_2.pdf

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Oltenia and considered that the aid was compatible with the internal market pursuant to the 2014 Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (the "R&R Guidelines")[3]. Pursuant to the rescue aid decision, the Romanian authorities had committed to provide the Commission, within six months of the loan approval, with a restructuring plan as set out in section 3.1.2 of the R&R Guidelines (see recital (13) of the rescue aid decision).

(2) On 29 June 2020, Romania transmitted a first restructuring plan for CE Oltenia (the "preliminary restructuring plan"), pre-notifying also its intention to grant restructuring aid to CE Oltenia.

(3) On 4 December 2020, the Romanian authorities notified to the Commission the restructuring aid accompanying a restructuring plan.

## 2. THE BENEFICIARY

### 2.1. CE Oltenia's activities

(4) CE Oltenia is a public undertaking active in mining, fossil fuel power generation and local heat supply. The Romanian State controls the company owning 77% of its shares: 21.56% of the shares is owned by the Investment Fund Fondul Proprietatea and the remainder of the shares is owned by other public entities. The company employs 12 350 staff, of which 7 451 in the mining and 3 821 in the power generation.

(5) CE Oltenia was established in 2011 following the merger of four public undertakings, which are now separate business divisions and consist of four power generation plants and one lignite mining division. CE Oltenia operates in South-West Oltenia region.

(6) CE Oltenia sells electricity on all domestic market segments/platforms managed by the market operator (OPCOM[4]) or the Transmission System Operator (Transelectrica): day ahead, intra-day, competitive tender/contracts, regulated or balancing markets. CE Oltenia produced 12.4 TWh in 2019, yielding EUR 682 million turnover and amounting to 23% of electricity production in Romania. CE Oltenia’s main competitors are all State controlled: Hidroelectrica SA (28%) SN Nuclearelectrica (18%) E. Bucuresti SA (13%). These market shares are broadly stable in the past years (i.e. +/- 2% variations), except for Hidroelectrica, whose output depends on weather conditions.

### 2.2. Financial situation of CE Oltenia

(7) CE Oltenia operates at present four aged power plants with total capacity of 3 570 MW that are fuelled with lignite, mined in its nine pits: Rovinari with four units totalling 1320 MW aged more than 40 years, Turceni (four units, 1320 MW, 33 years), Isalnita (two units, 630 MW, 50 years) and Craiova II (two units, 300 MW in

[3] Communication from the Commission – Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249, 31.7.2014, p.1-28.

[4] OPCOM is a Romanian gas and electricity market operator, which manages and administers the electricity trade markets such as day ahead market, intra-day market, organized framework for the competitive trading of bilateral electricity contracts by extended tender (PCCB-LE) and by continuous negotiation (PCCBNC), balancing market, etc.: https://www.opcom.ro/tranzactii_produse/tranzactii_produse.php?lang=en&id=137

cogeneration supplying heat to Craiova, 30 years). The four plants currently operated require costly regular maintenance and environmental compliance investments and Chiscani, a fifth plant with 415 MW capacity is non-functional.

(8) In addition to aged plants, CE Oltenia suffers from marginal production costs that are structurally higher than its main competitors' that do not use fossil fuels. […]*. Competitors can thus easily undercut prices or very profitably align them close to CE Oltenia's. The company posted operating losses every year since 2014 (with the exception of 2017) amounting to EUR 814.5 million cumulated until 2019.

(9) The increase in operating costs of CE Oltenia's due to $CO_2$ allowances (31 % in 2018 and 39% in 2019) exacerbate the structural un-competitiveness of lignite power generation compared with carbon-free alternatives. Already since 2014, with the exception of 2017, the electricity prices charged by CE Oltenia have been failing to pass on to the buyers the increase in the price of $CO_2$ certificates. The situation worsened with allowance costs sizeably increased in the past two years. CE Oltenia financed the higher value of $CO_2$ allowances first with borrowing (2018) and then with rescue aid (2019). Failure to purchase and surrender the allowances due for 2020 that CE Oltenia must redeem by April 2021 would trigger the imposition of a fine of EUR 100 for each allowance not surrendered (equivalent to ton of $CO_2$ emitted), which the company cannot afford.

(10) Whilst the financial situation of CE Oltenia is already critical […], the long-term survival of the business fully depends on restructuring aid, increased prices or external finance (including grants from Union Operational Programmes).

## 3. DESCRIPTION OF THE RESTRUCTURING AID MEASURES

### 3.1. Restructuring plan

(11) Following the Commission's decision of 24 February 2020 approving the rescue loan of EUR 251 million, Romania notified EUR 1.33 billion restructuring aid composed of EUR 0.25 billion rescue aid already granted, additional EUR 0.31 billion in the form of a State-guaranteed loan and EUR 0.77 billion in the form of a State grant. Furthermore, an additional EUR 711 million in State aid is planned to be obtained from the Modernisation Fund[5].

(12) The restructuring plan encompasses the period from 2021 to 2030, however the restructuring aid period covers only the years from 2021 until 2025.

* Confidential information

[5] The Modernisation Fund is a dedicated EU funding programme to support Bulgaria, Croatia, Czechia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia Member States in their transition to climate neutrality by helping to modernise their energy systems and improve energy efficiency. Further detail is available at : https://ec.europa.eu/clima/policies/budget/modernisation-fund_en

(13) The restructuring plan foresees CE Oltenia posting profits in 2022, attaining a return on capital employed ("ROCE") of 4.3% by 2025 and reaching long-term competitiveness in 2030 with 10.5% ROCE by then, as shown in table 1 below.

**Table 1 – Selected financial data according to the restructuring plan from 2020 to 2025 with a perspective until 2030 (in millions EUR)**

| | | Restructuring period | | | | | Post- restructuring period | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | **2020** | **2021** | **2022** | **2023** | **2024** | **2025** | **2026** | **2027** | **2028** | **2029** | **2030** |
| **Operating revenues** | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] |
| **EBITDA** | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] |
| **EBIT** | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] |
| **Net result** | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] |
| **Total equity** | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] |
| **Total capital employed** | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] |
| | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] |
| **ROCE** | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] |
| **ROE** | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] |
| **EBITDA margin** | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] |
| **EBIT margin** | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] | […] |

*Source: Notification form, section 4.3, page 15 Section 8- CE Oltenia business plan, financial forecast for the period 2020-2030, page 183*

(14) The plan includes the following series of measures:

a) Technical and technological measures, encompassing the implementation of the investment plan aimed at diversification of the energy mix. The plan includes replacing 1460 MW of (six) lignite-fuelled units with i) 1325 MW (two) gas-fired units, ii) 109 MW solar and iii) 9.9 MW hydro-power. The plan includes the closure of five mines halving current production by 2025;

b) Organisational and managerial measures improving processes or IT support, avoiding overlaps or inefficiencies, including 41% staff reduction or reallocation;

c) Environmental protection measures, encompassing investments or temporary operating cost support in current and remaining mining and power generation assets, including environmental compliance ($CO_2$ allowances and compliance costs ash, NOx, $SO_2$ etc.);

d) Financial measures, encompassing optimisation of the bank loan costs, disposal or sales of existing secondary assets, excluding, however, any major divestiture of assets that could be operated as a self-standing business and provide sales revenues supporting the plan.

(15) The amount of the financial resources needed to cover the restructuring costs that are expected to be incurred in the five-year restructuring period is EUR 3.5 billion.

**Table 2 – Composition of the restructuring costs (in millions EUR)**

| | **CE Oltenia** | **Prolonged Rescue aid** | **Additional Restructuring aid** | **Total State contribution** | **Modernisation Fund** |
|---|---|---|---|---|---|
| Technical and technological measures | […] | - | 110 | 110 | 711 |
| Organisational and managerial measures | […] | - | - | - | - |
| Environmental protection measures | […] | 187 | 765 | 953 | - |
| Financial measures | […] | - | - | - | - |
| Ensuring the necessary liquidity | - | 64 | 201 | 265 | - |
| **Total** | **1 499** | **252** | **1 076** | **1 328** | **711** |
| CE Oltenia contribution before the Modernisation Fund | 53% | - | - | 47% | **-** |
| CE Oltenia contribution after the Modernisation Fund | 42% | - | - | 38% | 20% |

*Source: Notification form, section 5.1, page 16*

**Table 3 – Yearly breakdown of the restructuring aid measures (in millions EUR)**

| **Specification/year** | **2021** | **2022** | **2023** | **2024** | **2025** | **Total** |
|---|---|---|---|---|---|---|
| **State aid** | | | | | | |
| Technical and technological measures | - | […] | […] | […] | […] | […] |
| Environmental protection measures | […] | […] | […] | […] | […] | […] |
| Ensuring the necessary liquidity | […] | […] | […] | […] | […] | […] |
| **Total restructuring measures** | **241.4** | **416.8** | **189.5** | **97.0** | **131.0** | **1 075.7** |
| **Rescue aid granted in 2020** | | | | | | **251.0** |
| **Total restructuring aid** | | | | | | **1 326.7** |

*Source: Section 4.1 of the notification form, page 13. The table above does not include the funds from the Modernization Fund (EUR 0.71billion).*

(16) CE Oltenia foresees that until 2022 the only source of its electricity production will be lignite. In 2022 and 2023 the company will gradually add other energy production sources like photovoltaic and hydropower, but the real decrease of lignite based energy sales is foreseen to happen as of 2026 only, when two natural gas fired units at SE Turceni and SE Isalnita will be installed. Starting from 2026, the energy produced will consist of 41% from lignite, 53% from gas and the remainder from photovoltaic and hydropower sources.

### 3.1. Own contribution and burden sharing

(17) Out of EUR 3.5 billion of the financial resources needed to cover the restructuring costs that are expected to be incurred in the five-year restructuring period, CE Oltenia will contribute by EUR 1.5 billion from own funds, while the other EUR 1.33 billion is to come from the State budget and EUR 0.711 billion – from the Modernisation Fund. As demonstrated in table 2 above, such own contribution of CE Oltenia amounts to 42 % of the total restructuring costs with the funding from the Modernisation Fund factored in, and to 53% without the funding from the Modernisation Fund.

(18) The funding from the Modernisation Fund is planned to be used for the financing of the technical and technological measures under the restructuring plan, which aim at diversifying the energy mix by replacing lignite with (mostly) gas and renewables (see table 2 above). In addition, Romania states that exceptionally, under certain conditions, the Modernisation Fund may finance, in Romania and Bulgaria, investments in efficient and sustainable district heating systems involving fossil fuels. Moreover, Romania submits that financing from the Modernisation Fund can be granted to CE Oltenia[6].

(19) The restructuring plan includes three main sources of revenue for CE Oltenia's own contribution:

a) revenues based on electricity sales on the centralised OPCOM markets totalling EUR 1.3 billion, which will be generated in the period 2020 - 2025. Due to the insufficient flexibility of Romania's current national legislation, the maximum delivery duration under such sales contracts does not exceed one and a half years[7]. Out of the EUR 1.3 billion there are currently contracts in place for only EUR 200 million. Although Romania indicates that recent changes in the respective legislation have started to be introduced to address this problem, Romania also recognises that such changes in the legislation will not become final earlier than the first half of 2021, provided they are in line with the respective EU internal energy market rules;

b) revenues from long-term bilateral power purchase agreements ("PPAs") amounting to EUR 150 million, which cannot however be lawfully concluded until Romanian national law in that respect changes. As in the case with the longer delivery durations on the centralised OPCOM markets, the legislative changes addressing this issue will not materialise before the first half of 2021. Romania further indicates that CE Oltenia has signed a Memorandum of Understanding with […] with regard to signing such a long-term PPA. Similar discussions were initiated with […] electricity supplier in Romania, where a Memorandum of

[6] See page 144 of the restructuring plan.

[7] For a long period of time, the national legislation limited the conclusion of contracts only through the specialised platform of electricity and natural gas market operator OPCOM. On the segment dedicated to the centralised market of bilateral electricity contracts (PCCB) only standard contracts could be completed at fixed prices and quantities, without a limitation of contract duration. Such rigidity and lack of diversification of the market tools has led to the situation where all market participants, sellers as well as buyers, took a prudent approach in order to manage the price risk in a rather volatile market environment and limited the contract duration to an average of 1-1.5 years.

Understanding is in the final stage of approval by the parties. At the same time, CE Oltenia intends to have the same approach towards all significant players on the market.

c) a sale of assets, […]. Romania acknowledges that the sale procedure of these assets has not yet started.

(20) Romania further expressly acknowledges that out of all shareholders of CE Oltenia only the State shall contribute (either with funds or by absorbing losses) to CE Oltenia's restructuring, and that none of CE Oltenia's creditors shall be involved in respective burden sharing.

### 3.2. Compensatory measures

(21) Romania mentions the following compensatory measures: (i) the outsourcing by transfer to the municipality of cogeneration energy group S.E. Craiova II (mostly producing thermal energy for the city of Craiova)' and (ii) the closure of energy groups or mining pits as showed in table 4 below: Groups 3 Turceni and 8 Ișalnița in 2021; Group 3 Rovinari (together with the Tismana mine) in 2023, Group 7 Turceni (together with the Jilț Sud mine) in 2025; and Group 7 Ișalnița together with Lupoaia mine in 2026. Out of these energy groups, some would still be viable when closed (such as Group 3 Rovinari and Lupoaia mine), while others are underperforming (Group 7 Ișalnița) thus heading towards closure. CE Oltenia's energy capacity closure plan foresees a reduction of lignite-based installed capacity by 1 605 MW (45% of lignite based capacity by the end of 2025).

**Table 4- Closure plan**

| Power unit | Viable | Closure Year | Collateral mining pits | Viable | Closure year |
|---|---|---|---|---|---|
| 3 Rovinari | Y | 2023 | Tismana | ~Y | 2026 |
| 3 Turceni | Y | 2021 | Jilt Sud | Y | 2026 |
| 7 Turceni | Y | 2025 | Pesteana | N | 2022 |
| 7 Isalnita | ~Y | 2026 | Husnicioara | N | 2025 |
| 8 Isalnita | N | 2021 | Lupoaia | Y | 2025 |
| 1 Craiova | ~Y | 2023 | Lupoaia | Y | 2025 |
| 2 Craiova | ~Y | 2023 | Husnicioara | N | 2025 |

*Source:Point 6.2. of the notification form, page 30*

(22) In addition, Romania alleges that certain mining pits would be closed or conserved, mostly for reasons of inefficiency, reduction in demand or depletion of lignite reserves (mining pit Husnicioara by the end of 2025, UMC Lupoaia by the end of 2025, etc.). Mining capacity closure plan counts with the reduction of lignite production by ca. 3 700 thousand tons (26% by the end of 2026).

(23) Moreover, Transelectrica carried out an analysis of the adequacy of the National Energy System (NES) under the assumption of total closure of the energy capacities of CE Oltenia in 2022, while keeping in operation three units at SE Rovinari until 2021. The analysis was performed for the period 2019-2030. Transelectrica assessed the seasonal adequacy and considered three scenarios: (i) a net peak consumption level of winter load for normal weather conditions, (ii) severe weather conditions (harsh winter), and (iii) possible problems in the natural gas transmission network. The

analysis concludes that starting from 2022, given that all units of CE Oltenia will stop, National Electricity Network will have a major adequacy problem as it will no longer have the necessary sources to cover electricity consumption even with the maximum use of cross-border import capacity[8].

(24) Romania also informs that CE Oltenia will abstain from purchasing shareholdings in other enterprises during the restructuring period, except where indispensable to ensure its long-term viability, and from using the aid as publicity when selling its products.

## 4. ASSESSMENT

(25) The Commission first examines whether the measures mentioned in recital (11) involve State aid within the meaning of Article 107(1) of the Treaty. The Commission then examines 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

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

(27) 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.

(28) The Romanian authorities consider that the planned State support for restructuring involves State aid within the meaning of Article 107(1) TFEU.

(29) As regards the presence of State resources, the measures have either been already (i.e., the rescue aid loan) or will be (with respect to the State grant and State guarantee on the loan) granted by the State from the State budget and thus clearly involve State resources. The restructuring plan was prepared by the Romanian authorities, therefore the financing measures funding its implementation are imputable to the State. As regards the resources of the Modernisation Fund, they are mobilised and released on application of Romania for specific projects selected by Romania, thus involving resources under control of Romania the release of which to the benefit of CE Oltenia is also imputable to Romania.

(30) As regards the presence of an economic advantage, the Commission notes that only ca. 40% of the measures (in the form of a prolonged rescue aid loan of EUR 0.25 billion and a new State guaranteed loan of EUR 0.307 billion) will be granted on conditions requiring the payback of such measures. The majority, i.e. almost 60% of the restructuring measures (EUR 0.768 billion) is planned to come in the form of an unconditional grant by the State or resources from the Modernisation Fund not

[8] Section 10 of the Restructuring plan, page 194

requiring any repayment. In the light of that it is doubtful whether any market creditor would have agreed to finance CE Oltenia on the same terms. Therefore, the measures confer an economic advantage for CE Oltenia, which it could not have obtained on market terms.

(31) The measures shall be granted only to CE Oltenia and are thus not part of a general measure available to all undertakings active in the sectors of mining, fossil fuel power generation and local heat supply. As the Union Courts have stated, where individual aid is at issue, the identification of the economic advantage is, in principle, sufficient to support the presumption that a measure is selective[9]. This is so regardless of whether there are operators on the relevant markets that are in a comparable factual and legal situation. Therefore, the planned measures are of a selective nature.

(32) If 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.[10]

(33) The energy production sector in which CE Oltenia is active is open to competition and trade between Member States and many other undertakings provide electricity throughout the Union and could do so in Romania. Romania currently has direct connections with other Member States and with third countries, which are connected with other Member States. Further direct connections with Bulgaria are being built. Therefore, the measures are liable to affect trade between Member States.

(34) By granting access to funding which CE Oltenia would not have obtained at market conditions, the measures are consequently liable to allow CE Oltenia to remain on the market and improve its competitive position in the internal market. Therefore, the measures distort or threaten to distort competition and affects trade between Member States.

*Conclusion on the presence of aid*

(35) In light of the above, the Commission concludes that the restructuring plan by which Romania plans to grant ca. EUR 1.328 billion to CE Oltenia involves State aid under Article 107(1) TFEU and will therefore assess its lawfulness and compatibility with the internal market.

### 4.2. Lawfulness of the aid

(36) The rescue aid loan on which the Commission raised no objections by its rescue aid decision of 24 February 2020 was not put into effect before the Commission decision and was therefore not unlawful State aid. Also on 29 June 2020, Romania transmitted a first restructuring plan, which was within six months of granting the rescue aid,

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

10 See, in particular, Judgment of the Court of 17 September 1980, *Philip Morris Holland BV v Commission of the European Communities*, Case 730/79, EU:C:1980:209, paragraph.11; Judgment of the Court (Sixth Chamber) of 22 November 2001, *Ferring SA v Agence centrale des organismes de sécurité sociale (ACOSS)*, Case C-53/00, EU:C:2001:627, paragraph 21; Judgment of the Court (Sixth Chamber) of 29 April 2004, *Italian Republic v Commission of the European Communities*, Case C-372/97, EU:C:2004:234, paragraph 44.

hence the prolongation of the rescue aid is not unlawful. For other planned State aid (apart from the prolonged rescue aid), Romania commits not to put it into effect until its approval, thereby respecting the standstill obligation laid down in Article 108(3) TFEU.

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

(37) The Commission must assess if the restructuring aid notified by Romania in the form of the measures identified in recital (11) above can be found compatible with the internal market. According to the case law of the Union Courts, it is up to the Member State to invoke possible grounds of compatibility, and to demonstrate that the conditions for such compatibility are met[11].

(38) The R&R Guidelines 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 and Romania claims that such conditions are met in the present case.

#### *4.3.1. Application of the R&R Guidelines*

(39) Only undertakings in difficulty as defined in point 20 of the R&R Guidelines and not active in the steel sector as defined in point 15 thereof, nor the coal sector as defined in point 16 thereof, can benefit from compatible rescue or restructuring aid.

(40) As noted in the rescue aid decision, since 31 December 2019 CE Oltenia fulfilled the criteria for being qualified as a firm in difficulty according to point 20(c) of the R&R Guidelines (see recital (33) of the rescue aid decision). Furthermore, CE Oltenia is not active in the coal or steel sectors –as defined in footnotes 19 and 20 of the R&R Guidelines-, making it eligible for restructuring aid.

(41) Under point 38 a) of the R&R Guidelines the State has to demonstrate that the aid aims at preventing social hardship or addressing a market failure. In this regard, Romania refers to circumstances mentioned in the second indent of letter a) of point 44 of the R&R Guidelines, i.e., the beneficiary is active in a region (at NUTS level II) with an unemployment rate higher than the national average, persistent and accompanied by difficulty in creating new employment. CE Oltenia operates in South-West Oltenia, which has a regional unemployment rate persistently higher than the national rate of Romania, as the Commission already noted in recital (39) of the rescue aid decision based on the data and assessment portrayed in recitals (18) and (36) thereof, which data from 2019 further corroborates (regional rate of 5.3% vs. national rate of 3.9% in 2019)[12]. The Commission thus concludes that the restructuring aid meets the condition under point 38 a) of the R&R Guidelines.

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

[12] https://ec.europa.eu/eurostat/documents/2995521/10749957/1-24042020-AP-EN.pdf/bc37e8b1-fc14-ae9c-d3cc-6130c98e4d96

(42) As regards the rescue aid loan approved by the rescue aid decision, in line with point 55 (d) of the R&R Guidelines, Romania committed to submitting, within maximum six months from the date of the Commission decision of 24 February 2020, a valid restructuring plan for CE Oltenia, as set out in section 3.1.2 of the R&R Guidelines (see recital (41) of the rescue aid decision).

(43) At this stage, it is doubtful that the restructuring aid planned in support of the submitted restructuring plan meets the compatibility criteria laid down in the R&R Guidelines, mainly for the following reasons:

*Appropriateness*

(44) The R&R Guidelines require that Member States provide restructuring aid through instruments that allow proper remuneration whilst being appropriate to address the beneficiary's solvency and liquidity issues. In that respect, the provision of restructuring aid in the form of a sizeable (non-remunerated) grant of EUR 0.768 billion does not allow the State acting as aid grantor to reap any upsides from a successful restructuring. Yet, after the end of the restructuring period and until 2030, CE Oltenia is expected to post positive net results (table 1).

(45) As indicated in recital (4) above, the State is a majority shareholder of CE Oltenia with a 77% stake, whereas 21.56% of the shares are owned by the investment fund Fondul Proprietatea SA, and the rest by various State entities and public companies. Therefore, a grant by the State to CE Oltenia would result in minority shareholders of CE Oltenia also indirectly benefitting from the grant via a potential increase in the value of their shareholding, without contributing to the costs of restructuring. Other shareholders do not provide for similar non-reimbursable financial instruments. The planned grant does not remunerate the State nor allows the State alone appropriating the related upsides of the grant funding the restructuring plan. Therefore, in the circumstances, the sizeable grant envisaged does not appear to be an appropriate financial instrument.

*Own contribution and burden sharing*

(46) According to point 62 of the R&R Guidelines, a significant contribution to the restructuring costs is required from the own resources of the aid beneficiary, its shareholders or creditors or the business group to which it belongs, or from new investors. Such own contribution should normally be comparable to the aid granted in terms of effects on the solvency or liquidity position of the beneficiary. In addition, the own contribution must, according to point 63 of the R&R Guidelines, be real, that is to say actual, excluding future expected profits such as cash flow.

(47) However, according to the restructuring plan submitted by the Romanian authorities, it appears that out of purported own contributions of EUR 1.5 billion, at most EUR 200 million could be real and actual (as stated in recital 19a)). For the rest, Romania relies only on expected revenues from electricity sales in OPCOM centralised markets in 2021-2025, which are neither real nor actual. For example, the projected revenues for 2021 amount to EUR 569.2 million (see Table 1), out of which only EUR 200 million could be real and actual. There are, however, no firm commitments for 2022, 2023, 2024 and 2025. The current maximum duration of the sales contracts concluded in OPCOM centralised markets is 1.5 years only. Although Romania indicated that it was in the process of updating its legislation to enable the players in the OPCOM markets

to conclude contracts for a longer duration, the compatibility of such changes with the Union legislation in the field of electricity supply is yet to be assessed (see recital (19)a)). Moreover, Romania admits that these changes may not necessarily lead to the desired results of increased duration of electricity sales contracts concluded on OPCOM centralised markets.

(48) Likewise, Romania relies on the potential conclusion of bilateral PPAs, which are being discussed with energy intensive users such as, […]. Romania expects such contracts to result in EUR 150 million of revenues during the restructuring period, after the respective changes in legislation, enabling the conclusion of such contracts, come into force. However, Romania does not present any evidence that would confirm the existence of any firm and final contractual documents that would ensure actual financing of the restructuring plan. Rather, CE Oltenia expects the signing of binding term sheets with potential clients to take place only in the first half of 2021, and the signing of bilateral PPAs after March 2021 for the existing capacities and from 2022 onwards for the new capacities. The terms allowing the predictability of sales revenues with near certainty over the time span of the restructuring plan are thus not firmly settled and agreed by the respective long-term buyers. Furthermore, in a similar vein as for contracts on centralised OPCOM markets (see recital (47) above), the changes in legislation needed for the conclusion of such bilateral PPAs are not yet in force.

(49) In this regard, Romania failed to explain why future profits should be considered as actual sources of own contribution in light of point 63 of the R&R Guidelines, which excludes future expected profits such as cash flow.

(50) Furthermore, based on the information submitted by Romania, no market investor or lender is backing the plan at this stage:

a) no letter of intent was provided from banks that would accept to pre-finance payments relating to future supplies of electricity from CE Oltenia, the expected revenues from which account for almost all own contribution by CE Oltenia;

b) no bank or market investor(s) have expressed interest to support or finance part of the investments in fuel switching from lignite to natural gas or to renewable power generation, which would have shown market trust in this new activity;

c) although Romania refers to potential external investors or banks supporting the plan, it did not provide any documents to support this potential contribution and that any such negotiations would materialise in a reasonable timeframe;

d) Romania also puts forward another source of financing – the sale of CE Oltenia's assets. However, Romania acknowledges that the sale procedure of these assets has not even started and itself estimates that the revenues from such sale would bring […].

(51) In addition, points 65-67 of the R&R Guidelines require that aid to cover losses should only be granted on terms which involve adequate burden sharing by existing investors, which would normally mean that incumbent shareholders and subordinated creditors must absorb losses in full, before any State intervention has taken place.

(52) However, Romania expressly acknowledges that neither minority shareholders of CE Oltenia (and first and foremost – Fondul Proprietatea SA) nor its creditors shall

provide adequate burden sharing in any form (see recital (20) above). Romania also does not provide any arguments justifying any exceptions to the rules on adequate burden sharing (point 68 of the R&R Guidelines).

(53) Finally, point 64 of the R&R Guidelines provides that the own contribution will normally be considered as adequate if it amounts to at least 50% of the restructuring costs. However, as is evident from recital (15) and table 2 above, CE Oltenia's own contribution would at most be only 42% of the restructuring costs, even assuming, contrary to point 63 of the R&R Guidelines, that future expected profits from regular sales and expected profits amount to a source of real and actual own contribution – *quod non*-, because the potential funds from the budget of the Modernisation Fund qualify as State aid[13] and, thus, cannot be qualified as CE Oltenia's own funds free of aid. Romania has not put forward any arguments showing a particular hardship or exceptional circumstances which would justify the proportion of CE Oltenia's own contribution being lower than 50% of the restructuring costs.

(54) In the light of the above, the Commission preliminarily concludes that the sources of financing as proposed by Romania do not constitute a significant, real and actual, free of aid own contribution of at least 50%, and that there is no adequate burden sharing by the existing shareholders and creditors foreseen in the restructuring plan. The Commission therefore considers that the restructuring plan as it currently stands does not correspond to the basic requirements of the R&R Guidelines as regards the own contribution and burden sharing.

*Restoration of long-term viability*

(55) According to point 45 of the R&R Guidelines, in case of restructuring aid the Commission will require that the Member State concerned submit a feasible, coherent and far-reaching restructuring plan to restore the beneficiary's long-term viability. The restructuring plan must restore the long-term viability of the beneficiary within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions that should exclude any further State aid not covered by the restructuring plan. According to point 52 of the R&R guidelines, long-term viability is achieved when an undertaking is able to provide an appropriate projected return on capital after having covered all its costs including depreciation and financial charges.

(56) First, while the formal duration of the restructuring plan is for years 2020-2025, the first significantly positive net results of approximately EUR 938.5 million cumulated are foreseen only after the restructuring period, in 2026-2030 (table 1). In effect, the restructuring plan has a total duration of 10 years to produce its expected effects. According to point 47 of the R&R Guidelines, the restructuring plan must restore the long-term viability of the beneficiary within a reasonable timescale and the restructuring period should be as short as possible. Romania failed to provide a restructuring plan that would be as short as possible (maximum five years).

13 The budget of the Modernisation Fund is formed from State resources, whereas the imputability criterion is also met, as, in the same vein as in the case with European structural and investment funds, the investments are selected by the Member States and after the selection procedure the Member States are free to proceed or not with the project, also through other financing. The advantage and other criteria of State aid are clearly also met. See *inter alia* Art. 10d of the Directive 2003/87/EC of 13 October 2003, OJ L 275 25.10.2003, p. 32, as amended.

(57) Second, Romania failed to provide any solid information confirming the return to viability of CE Oltenia by 2025 as evidenced by a market-conform ROCE. According to the restructuring plan, CE Oltenia could attain a ROCE of 4.3% by 2025 (see recital 0 and table 1), which is however much lower than the market-conform remuneration or opportunity cost of equity injected into Romanian companies in general, which is around 12.5% at present[14]. Furthermore, a ROCE of 4.3% is also lower than the one demonstrated by CE Oltenia's peers, which is around 7-9%. The ROCE is even lower than the regulated rate of return (5% in 2020) set by Romanian National Authority for Domestic Energy ("ANRE") for the suppliers of last resort to the final customers that is portrayed in the restructuring plan and which is *prima facie* a less risky business activity than CE Oltenia's. Again, it is only after the end of the restructuring period, by 2027-2029 that CE Oltenia is expected to reach a ROCE in line with peers (table 1). Therefore, it is doubtful that the restructuring plan is in line with point 52 of the R&R Guidelines. A mere and hypothetical low profit at the end of the restructuring period is by no means an indication of long term-viability.

(58) Third, CE Oltenia's already low profitability until 2025 (4.3% ROCE) is artificially inflated by the operating subsidies from State aid, in particular subsidies for acquiring $CO_2$ certificates, amounting to EUR 610.2 million during the restructuring period[15] as well as subsidies related to ensuring necessary liquidity and amounting to EUR 200.7 million (see table 3 above). If such operating subsidies were to be excluded from the projected results, CE Oltenia would not be in a position to expect any profits and positive returns at all by 2025.

(59) Finally, CE Oltenia's projected results are premised on optimistic assumptions about external factors such as prices of the $CO_2$ allowances remaining relatively the same during the restructuring period[16], despite the fact that the difficulties of CE Oltenia began precisely after such prices sharply increased in 2018-2019, as compared to 2017[17] (see recital 7(c) of the rescue aid decision). According to point 51 of the R&R Guidelines, the return to viability must not depend on optimistic assumptions about external factors such as variation in prices. Thus, the Commission doubts that this point of the R&R Guidelines is fulfilled.

(60) At this stage, the Commission has doubts that the proposed restructuring plan is of appropriate duration and would lead to the restoration of viability of CE Oltenia at the end of the restructuring period because it is not apparent that CE Oltenia will provide a sufficient return and will be capable of remaining on the market without further aid.

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[14] A 8.46% equity risk premium in Romania is added to Government 10 year bond yields of 4.06% in July 2020 (http://pages.stern.nyu.edu). The estimate of cost of equity is a market estimate for all Romanian companies based on the capital asset pricing model, disregarding the volatility of individual shares. A more refined estimation for CE Oltenia should be based on a company-specific ($\beta$) indicator of volatility. The remuneration of volatile shares, i.e. with $\beta > 1$, should normally be higher than 12.5% (e.g. 16.25% with $\beta = 1.3$) and the remuneration of less volatile shares should be lower, with $\beta > 1$.

[15] P. 177 of the restructuring plan.

[16] P. 169 of the restructuring plan.

[17] In its projections regarding the $CO_2$ allowance prices, CE Oltenia points out that the $CO_2$ allowance price will range from 25.3 EUR in 2020 to 31.2 EUR in 2030. As of 24 January 2021 the price already amounted to 33 EUR (https://ember-climate.org)

*Compensatory measures*

(61) According to point 76 and following of the R&R Guidelines, when restructuring aid is granted, measures must be taken to limit distortions of competition, so that adverse effects on trading conditions are minimised as much as possible and positive effects outweigh any adverse ones. In particular, measures limiting the distortion of competition should usually take the form of structural measures, i.e., clear-cut divestitures of non-loss making activities that can carry on as a stand-alone business and which would not need to be abandoned anyway to preserve viability.

(62) In this regard, the Commission considers that it is doubtful that real structural compensatory measures are envisaged, for the following reasons.

(63) First, as regards the "outsourcing" of the S.E. Craiova units, the Commission notes that the form and scope of such "outsourcing" is still unclear. Furthermore, even if such "outsourcing" of cogeneration units as a capital contribution by CE Oltenia to the joint-venture between CE Oltenia and the company owned by the local council of the city of Craiova were to materialise, that would allow CE Oltenia and the State to keep control in such a joint-venture. That would frustrate the meaning of the divestiture as a compensatory measure as it would neither strengthen competition nor favour the entry of new competitors, the expansion of existing small competitors nor the cross-border activity, as required by point 79 of the R&R Guidelines. That would also bring much less (if any) proceeds than the revenue from the market-based sale of the S.E. Craiova units or respective assets which could reduce the amount of restructuring aid, whilst ideally creating market opportunities to increase competition on the Romanian electricity market.

(64) Second, as regards the reduction of CE Oltenia's production capacity (in terms of closing lignite burning units) by 1 605 MW by the end of 2025, as well as the closures of lignite mines (see recital (21) and table 4), the overall corresponding loss in the production capacity of CE Oltenia will to a large extent be compensated by the instalment of the new photovoltaic and hydropower energy units (MW 119 by the end of 2025) as well as gas fired units (MW 1 325 as of 2026)[18]. Therefore, the overall production capacity of CE Oltenia will not materially change.

(65) Furthermore, as is evident from table 5 above, despite the formal closures of lignite mines the extraction of lignite will actually increase until the end of 2024, and will fall below the 2020 level only as of 2026. As mentioned in recital (64), the gas fired units will be operational by 2026, thus rendering the decrease in lignite extraction volumes meaningless in terms of capacity reduction.

(66) Finally, apart from withholding CE Oltenia from purchasing shareholdings in other enterprises during the restructuring period, except where indispensable to ensure its long-term viability, and from using the aid as publicity when selling its products, Romania did not propose any other behavioural measure.

(67) For the reasons mentioned above, the structural compensatory measures proposed so far by Romania appear insufficient. In the absence of meaningful and clear structural

[18] P. 161 of the restructuring plan.

and behavioural measures, it is doubtful that the negative effects of the aid on competition are mitigated to a satisfactory extent.

*Conclusion on the compatibility under the R&R Guidelines*

(68) In light of the findings of the preliminary assessment above, the Commission has doubts at this stage about the compatibility of the restructuring plan with the principal requirements of the R&R Guidelines.

(69) In particular, the Commission has doubts regarding: (i) the presence of real and actual own contribution free of aid from the beneficiary, (ii) the presence and effectiveness of burden sharing, (iii) the restoration of long-term viability and restructuring within a reasonable timescale, and (iv) the presence and effectiveness of meaningful compensatory measures.

(70) In the present case, the Commission has doubts at this stage whether the planned restructuring aid to CE Oltenia meets the principal conditions of the R&R Guidelines and, accordingly, whether it could be declared compatible with the internal market pursuant to Article 107(3) c) TFEU.

## 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 restructuring aid which is the subject of the present proceedings.

The Commission 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:

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Yours faithfully
For the Commission

Margrethe VESTAGER
Executive Vice President