

State aid for the closure of lignite plants in Germany

ClientEarth's observations on the Commission's opening decision in case SA.53625 Deutschland Kohleausstieg

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Background

1. ClientEarth¹ welcomes the opening of a formal investigation in case SA.53625 *Deutschland Kohleausstieg*. ClientEarth has an interest in this procedure within the meaning of Article 1(h) Regulation (EU) 2015/1589 given that our previous contributions and the present one conclude that, in addition to breaches of State aid law, the closure compensations violate the ‘polluter pays’ principle protected by Article 191(2) TFEU and environmental law derived therefrom, to the extent the aid covers rehabilitation costs of lignite mines.²
2. From October 2019, ClientEarth published and communicated to the Commission several sets of observations demonstrating why the payments planned for LEAG and RWE under the Closure Law (*Kohleausstieg*) of 8 August 2020 constitute State aid that should be found incompatible with the internal market under Article 107(3)(c) TFEU.³
3. We notably demonstrated and maintain in the present observations that:
 - The closure of lignite plants as scheduled by the Closure Law constitutes a “redefinition of the scope of the lignite operators’ property rights” under Article 14(1) Basic Law that should not be compensated in principle, in contrast to an expropriation that would require a compensation. It is unlikely that national courts would award damages in an amount corresponding to the one promised to the operators by the German authorities. Therefore, the so-called **compensations⁴ should qualify as State aid measures.**
 - There is **no need** for the aid measure. The lignite plants and associated mines would close by themselves and sooner under market conditions (notably because of rising environmental compliance costs and ETS prices). Factoring climate ambitions and power market developments in the profitability and lifespan assessments of the operators⁵ leads to the conclusions that the lignite sector is **structurally non-competitive and non-profitable.**

¹ ClientEarth is a not-for-profit environmental law organisation, comprising legal, scientific, policy, and communications experts working to shape and enforce the law to tackle environmental challenges.

² See Aarhus Convention Compliance Committee Case ACCC/2015/128, EU statement of 7 December 2020 following the Communicant’s 6 November 2020 - Update concerning the judgment of the Court of Justice of the EU in Case C-594/18 P, Commission v Austria, footnote 10: “According to this provision « any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid are to be regarded as an ‘interested party’” and the Court has clarified that that criterion is met where a party “might submit to the Commission comments which might possibly be taken into account by the Commission in the course of the formal investigation procedure provided for in Article 108(2) TFEU” (Judgment in Case T-373/15 Ja zum Nürburging, paragraph 87). **For an environmental NGO, that is the case, because it may submit comments concerning violations of EU environmental law, which the Commission has to assess.**”

³ - Report “No money for old lignite” of October 2019

- Report “Coal phase-out compensations for LEAG” of May 2020, DG Comp Registration: 2020/06158

- Email to DG Comp of 7 May 2020, DG Comp Registration: 2020/082701

- Letter to DG Comp of 25 August 2020, DG Comp Registration: 2020/099243

- Briefing “The German lignite phase-out contract and investment arbitration” of 4 September 2020

- Letter to DG Comp of 11 January 2021, DG Comp Registration: 2021/004161

- Letter to Vice-President Timmermans of 11 January 2021, ref. COMP.B3/MS/FP/kd

⁴ We use the term “compensations” in this document for consistency with the Opening Decision. However, since the measure does not actually compensate LEAG and RWE for damages and go well beyond a compensation for their foregone profits, it amounts to a **grant or payment for closing** rather than a compensation proper.

⁵ See Opening Decision para. 130

- The closure compensations, in paying the lignite operators for closing their installations, on the one hand and allowing them to stay afloat for longer thanks to late closure dates and promises of cost recovery, on the other hand are keeping unviable business on the market with significant distortive impacts on competition.
- The closure compensations would have **no incentive effect** for most of LEAG's units since they were projected to close earlier under business-as-usual scenarios than as scheduled per the law. The phrase "early closure" of the plants is incorrect for most units and misleading for all of them.
- It remains **unclear how the compensation amounts were calculated**. Although there is a formula drawn by the authorities that lead to the compensation amounts, the assumptions chosen for the input parameters look wrong and the authorities defend that the compensations are in fact not based on that formula but were negotiated. We elaborate on this under section 2.2.3. Besides the doubts about the calculation of the foregone profits of the operators and of alleged additional mines rehabilitation costs, the valuation of the investor-state dispute waiver clause in the whole deal is unknown.
- In any case, the compensations look **grossly disproportionate**. The amounts of compensations are reportedly calculated on the basis of the operators' projected foregone profits since they could no longer sell electricity on the market beyond the closure dates. However, it is expected that lignite operators would no longer be profitable much sooner than their legal closure date, so that the planned amounts would massively overcompensate them. **Adjustment parameters** would be necessary to avoid any overcompensation, should any aid be granted.
- It is difficult to conceive **what additional rehabilitation costs** would be incurred for lignite mines resulting from the legal closure. In any case, those rehabilitation costs must be borne by the mine operators in accordance with the '**polluter pays**' principle.
- The distortive effect of the measure on competition **cannot be positively balanced** with its environmental benefits. Enabling, and paying for lignite plants to close later than under a business-as-usual scenario hinders the market development of cleaner alternatives rather than helping them. The reduction of greenhouse gas emissions achieved with the Closure Law is also slower than the one expected with earlier closure driven by market forces.

Our previous observations remain valid subject to marginal factual adjustments, (notably of our first report of October 2019) following the adoption of the Closure Law in its final form on 8 August 2020. Hence, the present observations are complementary to the previous ones and focus on updates and on commenting the Commission's Opening Decision of 2 March 2021.⁶

⁶ OJEU C177, 7 May 2021

1 The compensations measures are State aid

4. ClientEarth fully agrees with the Commission's preliminary assessment that the compensations constitute State aid for the reasons exposed in the Opening Decision, in particular at paragraphs 104 to 108.

The Commission correctly states that because the legal obligation to phase-out coal does not constitute an expropriation, lignite operators could only receive compensations before a German court in the case of exceptional circumstances, namely if the State intervention led to an unreasonable economic burden.

5. What is more, the constitutional property right derived from Article 14(1) Basic Law does not cover:
- Modification, cancellation or expiry of permits under the Emission Control Law (*Bundesimmissionsschutzgesetz*) nor under mining law (*Bundesberggesetz*),⁷
 - Fully amortized investments;⁸
 - Missed sales opportunities and forgone profits or other plans that are based on the expectation that a favourable legal situation remains unchanged.⁹

It implies that the operators could not obtain damages in court for losses or foregone revenues for these items.

In principle, the negative impact of new regulations on assets value cannot be compensated either after the investments have been amortised.¹⁰ Lignite operators would have to argue that they had a legitimate expectation to continue their operation and are suffering an exceptionally harsh undue economic hardship as a consequence of the legal coal phase-out. None of these claims is grounded in the present case.

6. Additionally to the study the Commission refers to in paragraph 105 of the Opening Decision¹¹, the research facility (Scientific Service) of the Bundestag stated that there are **no indications that the phase-out brings about an unreasonable economic burden to coal plants, hence compensations would not be necessary**.¹² A study commissioned by the Environment Ministry (BMU) includes a more detailed assessment on the legal framework for the lignite compensations particularly in view of the constitutional requirements.¹³ This confirms the Commission's assessment that LEAG and RWE are receiving an advantage they would likely not be able to attain in court.

⁷ Vgl. Urteil des Bundesverfassungsgerichts vom 06.12.2016, 1 BvR 2821/11, 1 BvR 321/12, 1 BvR 1456/23, Rn. 231 für atomrechtliche Genehmigungen, as well as our observations in Fn. **Error! Bookmark not defined.**

⁸ Vgl. m.w.N. Klinski (Fn. **Error! Bookmark not defined.**), S. 4. Jedoch können haushaltsrechtliche Gründe (dazu unter 2) auch bei der verfassungsrechtlichen Betrachtung in Einzelfällen und in der Zusammenschau mit anderen Gründen eine Reduzierung der Entschädigung, z.B. für einen Ausgleich unter dem Verkehrswert, begründen, m.w.N. Schomerus/Franßen (Fn. **Error! Bookmark not defined.**), S. 317f

⁹ Urteil des Bundesverfassungsgerichts vom 06.12.2016, 1 BvR 2821/11, 1 BvR 321/12, 1 BvR 1456/23, Rn. 270; Jarass, in: Jarass/Pieroth, GG, 15. Auflage 2018, Art. 14 Rn. 19

¹⁰ BVerwG NVwZ 2009, S. 1443

¹¹ Stilllegung von Kraftwerken, Ausarbeitung, Wissenschaftliche Dienste, Deutscher Bundestag (WD 3 – 3000 – 360/18)

¹² Stilllegung von Kraftwerken, Kurzinformation, Wissenschaftliche Dienste, Deutscher Bundestag (WD 3 – 3000 – 360/19)

¹³ Schomerus/Franßen: Klimaschutz und die rechtliche Zulässigkeit der Stilllegung von Braun- und Steinkohlekraftwerken. 13.12.2018, https://www.bmu.de/fileadmin/Daten_BMU/Download_PDF/Klimaschutz/wbs_gutachten_bf.pdf

Other studies that appear relevant are not publicly available despite access to information requests; we therefore recommend that the Commission obtain them from the German authorities:

- A constitutional law expertise opinion by Hartmann Pieroth commissioned by the Federal Ministry for Economic Affairs and Energy (BMWi);¹⁴
- A legal study by GK Stockmann of November 2019 on the public contract with lignite operators and could contain relevant information for the compensation payments.¹⁵

7. Furthermore, the fact that the compensations are embodied in a contract between the operators and the government make them **even more advantageous** for the operators.

In this respect, one can refer to the Hinkley Point C case in which the Commission found that securing **by contract** compensations for the legal closure of an economic activity amounted to a selective advantage: “(...) *the general principles underpinning UK and EU law give rise to a right to compensation where there has been deprivation of a property right, however, a special agreement safeguarding a certain company from such risk [the consequences of a political shut down] in a specific manner appears to relieve such company of any spent fees and time lost in the enforcement of its rights deriving from general principles under UK and EU law in court or out of court. Underpinning a legal right with a specific contractual right appears to bring an advantage to the entity enjoying such right especially since it appears to be the only one in this situation. Therefore, the Commission considers that the Secretary of State Agreement entails certain selective advantages to NNBG*”.¹⁶ In the present case, it is clear and acknowledged by Germany that the compensations were negotiated in exchange of a dispute waiver clause^{17;18} **to confer legal certainty** to the operators – whereas it is uncertain that a German court would have granted any or the same amount of damages for the redefinition of their property rights under Article 14(1) Basic Law. The latter is all the more doubtful since the legal basis of the compensations (especially sections 14-16 of the contract relating to additional mines rehabilitation costs) could be legally challenged for being inconsistent with section 44(1) of the Closure Law, which would increase the risks and costs of a contentious battle.

8. **We recommend that the Commission maintain its conclusion that the measures are State aid** in the final decision, even if it were to conclude that they could be found compatible with the internal market. This is because there is no doubt that the measures constitute State aid. Moreover, the Commission shying away from concluding that comparable closure aid measures constitute State aid in previous cases¹⁹ is detrimental to legal clarity (even if the notion of aid is subject to the CJEU’s

¹⁴ FragdenStaat: „Interne Kommunikation zu Fragen zu Kohlegutachten“. 21.05.2021. <https://fragdenstaat.de/dokumente/9828-untitled/> p.9

¹⁵ FragdenStaat: „Interne Kommunikation zu Fragen zu Kohlegutachten“. 21.05.2021. <https://fragdenstaat.de/dokumente/9828-untitled/> p.9

¹⁶ Commission decision of 08.10.2014 on the aid measure SA.34947 which the United Kingdom is planning to implement for Support to the Hinkley Point C Nuclear Power Station, para. 322-323

¹⁷ Bundeswirtschaftsministerium (2020): Antwort auf Kleine Anfrage der Abgeordneten Oliver Krischer, Annalena Baerbock, Lisa Badum, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE Grünen. BT-Drucksache 19/223333. p.4 [https://www.bmwi.de/Redaktion/DE/Parlamentarische-Anfragen/2020/11/19-23333.pdf?blob=publicationFile&v=4](https://www.bmwi.de/Redaktion/DE/Parlamentarische-Anfragen/2020/11/19-23333.pdf?blob=publicationFile&v=4;);

Bundeswirtschaftsministerium (2021): Fragestunde des Deutschen Bundestages am 5. Mai 2021 Antwort auf Frage Nr. 67 der Abgeordneten Lisa Badum

¹⁸ ClientEarth analysed this clause and its loopholes in a detailed briefing in September 2020: <https://www.clientearth.org/media/vu5amwng/the-german-lignite-phase-out-contract-and-investment-arbitration-isds-ce-en.pdf>. Text of the clause available (in German) at <https://www.bmwi.de/Redaktion/DE/Downloads/M-O/oeffentlich-rechtlicher-vertrag-zurreduzierung-und-beendigung-der-braunkohleverstromung-entwurf.pdf?blob=publicationFile&v=4>

¹⁹ Commission decision of 27 May 2016 on State Aid SA.42536 – Closure of German lignite-fired power plants, C(2016) 3124, para. 50; Commission decision of 12 May 2020 on State Aid SA.54537 (2020/NN) – Prohibition of coal for the production of

control) and for solidly establishing the Commission's competence to review such measures under Articles 107 and 108 TFEU.

2 The incompatibility of the compensations with the internal market

9. It is regrettable that the Opening Decision merely expresses doubts about the proportionality of the aid measure. Our opinion is, as demonstrated in previous observations, that the need, appropriateness and incentive effect of the closure compensation are also not met. Overall, ClientEarth argues that the negative effects of the closure compensations on the market cannot be outweighed by positive effects.

2.1 Absence of development of the relevant economic activity

2.1.1 Closure aid is not compatible with Article 107(3)(c) TFEU

10. Firstly, ClientEarth seriously doubts that aid for the closure of an economic activity can be found compatible with the internal market based on Article 107(3)(c) TFEU.

11. The wording of Article 107(3)(c) TFEU is clear that aid should "*facilitate the development of certain economic activities or of certain economic areas*" and the interpretation of this article should not unduly be stretched beyond its wording.²⁰ In the present case, it is obvious that the **closure compensations do not aim at facilitating the development of the beneficiaries' lignite activities since they are meant to fully and definitively close**. This is without prejudice of our analysis of the compatibility of the aid that, in fact, the design of the measure prolongs the operations of the lignite activities and may also help the beneficiaries to develop new (renewable) electricity generation activities if there is no strong mechanism for avoiding a misuse of aid and cross-subsidisation of activities (see section 2.2.5 (c) below).

12. In its recent decisions on aid for the closure of hard coal plants in Germany and for the closure of Fessenheim nuclear power plant in France, the Commission suggested that aid for closing coal or nuclear plants can be deemed to aim at developing other energy sources (notably from renewable energy) and at anticipating the development of plant dismantling activities.²¹ Whilst those developments may be indirect effects *of the lignite plants closure* imposed by law, ClientEarth invites the Commission to analyse carefully and to motivate solidly in its final decision whether:

- (i) the aid measure itself (*the compensations*, rather than the obligation to close) *causes* the development of these other activities since LEAG and RWE's lignite units would have closed anyway earlier than scheduled in the Closure Law (see below on the lack of incentive effect of the measure);

electricity in the Netherlands, C (2020) final 2998, para. 48 (and case T-469/20, in progress); Commission decision of 25 November 2020 on State Aid SA.58181 (2020/N) –Tender mechanism for the phase-out of hard coal in Germany, C(2020) 8065 final, para. 94; Commission decision of 23 March 2021 on State Aid SA.61116 Early Closure of the Fessenheim Nuclear Power Plant in France, para. 108

²⁰ See Judgment of 22 September 2020, C-594/18P, *Austria v. Commission*, para. 20 and 63

²¹ Commission decision of 25 November 2020 on State Aid SA.58181 (2020/N) –Tender mechanism for the phase-out of hard coal in Germany, C(2020) 8065 final, para. 101; Commission decision of 23 March 2021 on State Aid SA.61116 Early Closure of the Fessenheim Nuclear Power Plant in France, para. 123-125

- (ii) the potential development of activities undertaken by other operators than the aid beneficiaries, on different markets (should the development of dismantling activities be considered), falls within the notion of “development of an economic activity” under Article 107(3)(c) TFEU, in light of the literal interpretation of the Treaty applied by the CJEU in the C-594/18P case;
 - (iii) aid that aims at developing renewable energy sources even indirectly should comply with the specific requirements for aid to renewables in the EEAG.
13. Moreover, the Court of Justice also ruled that operating aid can in principle not be authorised under Article 107(3)(c) TFEU: “*First, the General Court correctly pointed out that operating aid cannot, in principle, satisfy the conditions for application of Article 107(3)(c) TFEU as such aid, given that it does no more than maintain an existing situation or lower the usual ongoing operating expenditure which an undertaking would have had to bear in any event in the course of its normal business, cannot be regarded as being intended to facilitate the development of an economic activity and is such as to affect trading conditions adversely to an extent contrary to the common interest (see, to that effect, [case law cited])*”²²

The closure compensations are exactly matching the notion of operating aid mentioned in this quote and cannot be assimilated, contrary to the *Hinkley Point C* case, to investment aid in any way: their purpose is to lower the usual closure expenditures which the operators would have had to bear in the course of a normal business closure. To the extent that the operators can also receive payments for being placed in reserve if they are allegedly necessary for security of supply, they would receive aid for maintaining their operations, even if it would be for a limited extent. Should the Commission nonetheless consider that operating aid can generally be granted when it facilitates the development of an activity without adversely affecting trade conditions in the EU, it should not be approved in the present case: the closure compensations aim at closing, not developing, the operators’ lignite activities.

2.1.2 Absence of incentive effect

14. The compatibility of the aid measure, including its incentive effect, must be assessed in relation to the aid beneficiaries and not to other undertakings (such as cleaner energy producers).
15. ClientEarth reiterates that far from incentivising lignite units to close earlier than in a counterfactual scenario, the Closure Law pathway prolongs the operations of most units (that are structurally unprofitable) in particular LEAG’s.²³
16. The limited number of well-identified aid beneficiaries in this case should give no excuse to Germany nor to the Commission not to undertake a plant-by-plant or mines analysis of their profitability prospects and counterfactual scenarios; which was avoided for the closure of hard coal plants. Since the Opening Decision indicates that Germany had not provided relevant information during the preliminary investigations, the Commission could use its investigation powers under Article 7 Regulation (EU) 2015/1589 to request it from the operators or third parties directly.

²² Judgment of 22 September 2020, C-594/18P, *Austria v. Commission*, para. 119

²³ See ClientEarth’s [Report “No money for old lignite” of October 2019](#) and [Report “Coal phase-out compensations for LEAG” of May 2020](#)

17. In our view, the analysis of the counterfactual scenario should not be limited to assessing whether individual units would have closed or not by their respective legal closure dates²⁴, but how much sooner or later they would have closed; this is also relevant for assessing the appropriateness and proportionality of the aid.

2.1.3 Circumvention of rules on security of supply

18. The closure pathway and in particular the deferred closure mechanism and new security reserve are also concerning insofar as they appear to **circumvent rules for security of supply measures**, which are not complied with. Indeed, Germany justifies the long timeline for plants closure (until 2038) and the deferred closure mechanism by the necessity to preserve security of supply.

19. Firstly, Germany does not seem to have evidenced risks for its security of supply should LEAG and RWE's plants close without any compensation and at earlier dates. Germany's energy market is in overcapacity and there are multiple security of supply measures in place in Germany to prevent any risk; the lignite reserve approved by the Commission in 2016 was never activated.²⁵

20. Secondly, should there be an evidence of a security of supply issue and the need to adopt appropriate measures, this should be done in compliance with the Electricity Market Regulation (EU) 2019/943 and Section 3.9 EEAG. Artificially delaying or postponing the closure of some of LEAG and RWE's units beyond their natural closure date (under a business-as-usual scenario, driven by market forces) to ensure they contribute to security of supply appears like a circumvention of the relevant rules whereas appropriate measures can be put in place for this purpose, should there be a need for them.

21. Thirdly, it is regrettable that the Opening Decision does not assess the compatibility of the new security reserve with the internal market. The Commission indicated in November 2020 that it would carefully analyse this reserve in light of the Electricity Market Regulation and State aid rules.²⁶ Since that reserve is intrinsically linked with the closure schedule and the amount of compensations, the lignite plants would receive, **it should be part of the assessment of the compatibility of the closure compensations.**

22. Lastly, the possibility to cumulate the closure compensations and deferred closure payments is also intrinsically contradictory; at the very least a mechanism should ensure that remunerations received during the deferred closure phase are deducted from the closure compensations.

2.1.4 Breach of environmental law and the 'polluter pays' principle

23. Aid cannot be found compatible with the internal market if the supported activity breaches EU environmental law including the 'polluter pays' principle²⁷, which is the case of the aid to lignite mines operators for covering alleged additional rehabilitation costs.

24. As stated in paragraph 28 of the Opening decision, "*In accordance with the contract, the compensation is to be used to cover the rehabilitation costs for the opencast mines in a timely manner.*" Section 3.1 of the decision does not assess whether this (part of) the compensation qualifies as State aid for the

²⁴ See Opening Decision, table 2

²⁵ See notably ClientEarth Report "[Coal phase-out compensations for LEAG](#)" of May 2020; Letter to DG Comp of 11 January 2021, DG Comp Registration: 2021/004161

²⁶ Letter from Commissioner for Energy Kadri Simson of 11 November 2020, ARES(2020)5803157

²⁷ Judgment of 22 September 2020, C-594/18P, *Austria v. Commission*, para. 44-45 and 100

mines operators (who are legal entities different from RWE and LEAG), but when assessing the proportionality of the compensation, the Commission states: “[additional mines rehabilitation costs] *could in principle constitute a justification for compensation payments*”.²⁸

25. As a preliminary remark, the latter statement **lacks motivation** since the Opening Decision does not explain on which ground or “principle” compensation payments could be justified for additional rehabilitation costs, notably in light of the ‘polluter pays’ principle that is not mentioned anywhere in the Opening Decision, or in light of relevant Union or national legislation implementing that principle.²⁹
26. We also stress that the German authorities should confirm the legality of sections 14 to 16 of the contract allowing using the compensation for mines rehabilitation costs, in light of section 44(1) of the Closure Law that does not foresee this possibility.³⁰
27. On the merits, we agree with the Commission that the alleged “additional “ rehabilitation costs are very unclear and a compatibility assessment cannot be performed until all costs have been very clearly identified and assessed independently by the Commission. Such an assessment should not only compare the costs under a coal phase-out scenario compared with a counterfactual scenario without a regulated coal phase-out, but – due to information asymmetries - also assess **the validity of estimates** put forward by the German government for a counterfactual scenario. Just as one relevant example of flaws, rehabilitation costs for Mühlrose and Welzow-Süd TA 2 are included in the compensations even though the study commissioned by the government indicates that their mining would not have to expand, and such expansions not having been approved.³¹
28. Fundamentally, ClientEarth disagrees that “*this could in principle constitute a justification for compensation payments*”. As already demonstrated to the Commission in previous observations and legal analysis³², compensating lignite mines operators for sites rehabilitation would relieve them from costs they are due to bear and thus would go **against the ‘polluter pays’ principle**. This automatically implies that such aid would be **incompatible** with the internal market.³³ Furthermore, the rehabilitation costs were never independently assessed (even before the adoption of the Closure Law) and are therefore not reliable, so the basis for the calculation is fundamentally flawed.

a. Application of the ‘polluter pays’ principle

29. A preliminary remark on Germany’s response to third parties’ comments appears necessary. Paragraph 88 of the Opening decision reports that according to Germany, “*A compensation does not contradict the polluter pays principle as the proposed measure would be a breach of the property rights of the operators if not sufficiently compensated.*” Germany seems to confuse two very different types of costs and remedies.

²⁸ Opening Decision, para. 136

²⁹ Article 296 TFEU

³⁰ See ClientEarth’s [letter to DG Comp of 25 August 2020](#), DG Comp Registration: 2020/099243, para. 7

³¹ BET et al: Folgekosten des Braunkohletagebaus und Bestimmung der entsprechenden Rückstellungen. 14.12.2019 https://www.bet-energie.de/fileadmin/redaktion/PDF/Studien_und_Gutachten/Gutachten_Folgekosten/Gutachten_Folgekosten_Braunkohleausstieg_Abschlussbericht.pdf

³² Ziehm, Cornlia: Entschädigungen für Kraftwerksstilllegungen nach KVBG: Finanzhilfen zur Erfüllung bergrechtlicher Betreiberpflichten und zum (Weiter)Betrieb von Braunkohletagebauen. <https://www.documents.clientearth.org/wp-content/uploads/library/2020-08-26-entschaedigungen-fuer-kraftwerksstilllegungen-nach-kvbg-ziehm-analyse-ext-de.pdf>

³³ Judgment of 22 September 2020, C-594/18P, *Austria v. Commission*, para. 20, 44-45 and 100

30. A breach of property rights can be constituted if the State's action is either expropriating the operator's assets – which is not the case here – without adequate compensation under Article 14 Basic Law, or redefining its property rights on the assets, in which instance a compensation is only necessary in exceptional cases. The purpose is thus very different from rehabilitation liabilities, that concern remedying the environmental impacts of the construction and use of the said assets. The eligible costs, assuming those costs could be eligible to any aid, are clearly different.
31. **Compliance of the closure compensations with the 'polluter pays' principle is thus an issue in and of itself** that must be dealt with separately from the part of the compensations meant to indemnify the operators for their foregone profits and other losses.
32. As held by the Commission in previous cases, the 'polluter pays' principle, which is enshrined in Article 191(2) TFEU and *"which is also part of EU State aid policy, requires that the costs of pollution are internalised by the polluters."*³⁴ As defined by the Commission in previous instances, *"This is in particular the case for companies that produce waste or companies that pollute land in such a way that land restoration activities are necessary to make the land available again for other uses after they have ceased operations. This implies that any payment by the State of costs linked to pollution management relieves the beneficiary company of costs that it should normally bear."*³⁵
- Breach of the 'polluter pays' principle implies both that the measure constitute a State aid and that it should be found incompatible with the internal market.
33. **As far as the existence of aid is concerned**, relieving an operator from financing decommissioning of its mines, rehabilitation of the sites and associated liabilities, constitutes an advantage for the operator.³⁶ This should be included clearly in the section of the final decision assessing the existence of aid.
34. **As far as compatibility with the internal market is concerned**, paragraph 44 EEAG provides that aid *"cannot be granted insofar as the beneficiary of the aid could be held liable for the pollution under existing Union or national law"*, that is when it can be identified or held liable for financing the remediation in accordance with the 'polluter pays' principle.

In the present case, it is not disputable that the mines operators are identified and legally liable for rehabilitation costs of the opencast mines, throughout their operations and after their closure. In Germany, these obligations stem from Section 55 of the Federal Mining Act (*Bundesberggesetz – BBERG*), that transposes the 'polluter pays' principle and EU environmental legislation derived therefrom:

- Section 55(1) no. 7 of the Federal Mining Act provides that a mining permit can only be granted if sufficient precautions for the later rehabilitation of the mining area are taken. This obligation includes, among other things, renaturation and recultivation measures for the areas used for mining, so that it is in a suitable condition for other sensible or appropriately planned use.³⁷

³⁴ See paragraph 24 of the Environmental Aid Guidelines, Court case C-126/01 GEMO [2003] ECR I13769, and Commission decision on the State Aid which the United Kingdom is planning to implement for the establishment of the Nuclear Decommissioning Authority (2006/643/EC); OJ L 268, 27.9.2006, p. 37, para. 90; Commission decision of 20 February 2013 on SA.31860 – Slovakia Partial financing of decommissioning of two already shut down nuclear plants (A1 and V1), para. 69

³⁵ Commission opening decision of 1 December 2004 on State aid C 39/2004 — Nuclear Decommissioning Agency, OJ C 315, 21.12.2004, p. 4–14

³⁶ See by analogy Commission decision of 20 February 2013 on SA.31860 – Slovakia Partial financing of decommissioning of two already shut down nuclear plants (A1 and V1), para. 72

³⁷ BVerwG, Urt. v. 14. April 2005, 7 C 26.03, BVerwGE 123, 247 ff. (Tongrube II)

- Section 55(1) no. 9 of the Federal Mining Act provides that a permit can only be granted if impacts of the mining activity that would be against common interest (“*gemeinschädliche Einwirkungen*”) are excluded. Harmful effects caused by the mining activity, in particular on the water balance or the water quality of affected water systems must be compensated.
- According to Section 56(2) of the Federal Mining Act, the operator must provide financial securities in order to receive a permit if this is the only way to assure that the above-mentioned requirements are met. What financial securities would be adequate is not defined, though, and seems to have been interpreted by the authorities to the advantage of the operators.

Hence, German law normally ensures that mines operators can be held liable for rehabilitation costs. Relieving the mines operators from their liabilities thus goes against the ‘polluter pays’ principle and cannot in principle be justified under State aid law.

35. There are however two other, complementary issues to examine in this case: the **possible aid already being received** by the mines operators in the form of **low financial securities** for rehabilitation costs, and the **existence and nature of the alleged “additional” rehabilitation costs** for the opencast mines due to the legal closure of the lignite plants.

b. Ongoing aid in the form of low financial securities for rehabilitation costs

36. Aid for covering rehabilitation liabilities that must be borne by the polluters could be found compatible with the internal market only if the polluter cannot be made pay for the relevant costs after all steps have been taken by the State to enforce the polluter’s duties. A prerequisite of the compliance with the polluter pays principle, and for finding that the aid does not unduly distort competition, is to **first ensure that all externalities are duly internalised**.
37. In fact, ClientEarth has strong doubts that the financial securities provided by the mines operators until now, under their current permits and agreements (so-called *Betriebspläne* and *Vorsorgevereinbarungen*) have been proportionate to their *foreseeable* future rehabilitation liabilities; and thus that they have been strictly complying with the ‘polluter pays’ principle and the Federal Mining Act. This is because the level of financial securities have been set by the authorities relying only on data provided by the operators themselves – which have an immediate economic interest in providing low securities – without any independent analysis. Our concerns and the legal actions we undertook in this respect are explained below.

With regard to independent analysis of the amounts set aside for recultivation, authorities and LEAG usually refer to an analysis commissioned in 2018³⁸ and concluding that the “*methodology used by LE-B [LEAG] to determine the nominal amount of financial securities is goal-oriented, transparent, and therefore valid*”. With this, the study confirms that the calculations have been done by LEAG itself. However, this study does not assess the question of the overall amount of recultivation costs or instances that might contribute to raising these costs over time (e.g. unforeseen changes in impacts

³⁸ Tudeshki, P. D.-I. habil. H. (2018): *Vorsorge für die Wiedernutzbarmachung der Oberfläche im Lausitzer Braunkohlebergbau: Validierung und Plausibilitätsprüfung der bergbaubedingten Rückstellungen für die Braunkohlentagebaue der Lausitz Energie Bergbau AG*. Abrufbar unter: https://lbgr.brandenburg.de/media_fast/4055/Gutachten%20R%C3%BCckstellungen.pdf

etc.).³⁹ As noted by others as part of the present consultation⁴⁰, this is confirmed by another recent study commissioned by the Mining Authority of Brandenburg. It notes that certain impacts of LEAG's mines on water bodies have not been fully assessed yet.

38. In the *Iberpotash* case, both the Commission and the General Court held that levels of financial guarantees for mines rehabilitation costs that are lower than required by applicable rules – hence creating an advantage for the operator and a risk on the State to be ultimately held responsible for covering rehabilitation costs instead of the operator – involve State aid.⁴¹ The Commission found the aid incompatible since the aid did not pursue any apparent objective of common interest.⁴² In the same manner in the present case, it is difficult to see how insufficient financial securities provided by the mine operators, as allowed by the State, would not contradict the 'polluter pays' principle and would not distort competition to an extent contrary to the common interest.

The Commission should therefore investigate if there is an unlawful aid, if it can be found compatible and factor this in the assessment of the aid for covering additional rehabilitation costs (in particular their amounts).

39. Similar to the doubts raised in the Opening Decision, there is an important information asymmetry here that raises serious doubts on the adequacy, and therefore legality, of the financial securities provided by the mines operators.

Specifically, for granting the mining permit for the Welzow-Süd mine, the authorities relied solely on data provided by the operator to determine the level of rehabilitation financial securities. This information was never independently verified and in many cases not disclosed to the public (see above).

In July 2019, the mining authority concluded a so-called precautionary agreement (*Vorsorgevereinbarung*⁴³) with LEAG on rehabilitation costs, separate from the permit, based on figures provided by LEAG. This agreement provides for the creation of a separate corporate entity as a "saving box" for future costs of rehabilitation, with a basic amount to be paid by 2021 and annual payments to be provided from the future positive cash flow of mining operations. However, this agreement transfers the risk of low future profitability for lignite from the operator to the public because the coverage by the LEAG is not ensured and its economic profitability is dwindling.⁴⁴ In August 2019, Friends of the Earth Brandenburg (BUND Brandenburg) supported by ClientEarth requested the authority to ensure adequate financial securities for the operation of Welzow-Süd mine.

Two responses from the local authority unmistakably show that the authority itself did not have an independent assessment of the actual costs of rehabilitation and only relied on figures generated by Lausitzer Energie Bergbau AG (LE-B):

³⁹ Forum Ökologisch-Soziale Marktwirtschaft (FOES), Braunkohle Folgekosten: Verursachergerechte Finanzierung sicherstellen, Policy Brief 11/2019, p. 1, available at: <https://foes.de/pdf/2019-11-FOES-Braunkohle-Folgekosten-Finanzierung.pdf>

⁴⁰ See for further references submission of NGO Grüne Liga e.V. of 31st May 2021, p. 9, available at: https://www.kein-tagebau.de/images/dokumente/210531_ugc_stellungnahme_beihaelferecht_de.pdf

⁴¹ Commission decision of 31.8.2017 on State Aid SA.35818 (2016/C) implemented by Spain for Iberpotash, in particular para. 82-83 and 93-99, confirmed by judgement of 16 January 2020 in Case C-T-257/18 *Iberpotash v. Commission*, ECLI:EU:T:2020:1

⁴² Commission decision on State Aid SA.35818 to Iberpotash, *ibid*, para. 152

⁴³ This agreement is available at: <https://lbgr.brandenburg.de/cms/detail.php/bb1.c.637241.de>

⁴⁴ Först, Manual: LEAG Kraftwerke in der Verlustzone. Energiezukunft. 4 March 2021, at: <https://www.energiezukunft.eu/wirtschaft/leag-kraftwerke-in-der-verlustzone/>

- Response from local State Office for Mining, Geology and Raw Materials (LBGR), 10 October 2019 (ANNEX 1 p. 1):

“**The LBGR does not have any audit reports** from the state government regarding the LE-B's coverage of the rehabilitation costs of the Welzow-Süd opencast lignite mine.”

- Decision on access to information request from LBGR, 13 November 2019 (ANNEX 2 p. 6):

“With regard to the requested transfer of further audit reports of the state government with regard to the LE-B's coverage of the rehabilitation costs of the Welzow-Süd opencast lignite mine, the request had to be rejected, since a claim only exists to the extent that the body required to provide information within the meaning of Section 2 (1) Environmental Information Act has this information at its disposal. **The LBGR does not have such audit reports.** Forwarding the application in accordance with Section 4 (3) of the Environmental Information Act **requires that the LBGR knows which body has the requested environmental information. However, this is not the case here.** Notwithstanding this, LBGR has addressed an inquiry to the Ministry of Economic Affairs and Energy of the State of Brandenburg (MWE), which has provided the information that no such documents are available there either.”

In addition, BUND Brandenburg and ClientEarth challenged before the courts that parts of the “Vorsorgevereinbarung” are not available to the public, with the argument that they constitute confidential business information about LEAG.

The most recent mining permit from 19 December 2019 covers the operating period from 2020 to 2022. For the first time, this permit included provisions on setting financial securities for the remaining operating time of the mine. In large part, however, the permit only referred to the “Vorsorgevereinbarung” and its potential need to be adapted in light of the changing circumstances and mentioned that potential additional financial securities could be needed in order to cover further costs for rehabilitation to be expected.

40. With the compensations negotiated between the German government and the lignite operators with the only reference being data provided by the operators, **there is a significant risk that the compensations amounts in fact cover existing obligations.** As outlined in our previous submission this would violate the polluter pays principle and German mining law.⁴⁵

c. Alleged additional rehabilitation costs

41. We maintain that in light of the ‘polluter pays’ principle, the mines operators should be liable for all rehabilitation costs, even if they were unforeseen prior to the Closure Law and would exceed the amounts of provisions or financial securities they saved so far. We stress that many of LEAG's mines will not suffer significant changes in their operation due to the Closure Law since they will be able to continue mining according to their current permits.
42. Germany, the operators and the Commission on the contrary, seem to accept that “in principle” additional rehabilitation costs due to State action (the Closure Law) could justify a compensation.
43. ClientEarth argues that in any case, compensation dedicated to the alleged additional rehabilitation costs could be authorised only if (i) the operators have so far provided the right level of financial securities as per their legal obligations and thus did not benefit from past advantages against the

⁴⁵ Cornelia Ziehm, ‘Entschädigungen für Kraftwerksstilllegungen nach KVBG: Finanzhilfen zur Erfüllung bergrechtlicher Betreiberpflichten und zum (Weiter)Betrieb von Braunkohlentagebauen’, <https://www.documents.clientearth.org/library/>

'polluter pays' principle and if (ii) their rehabilitation liabilities indeed cannot cover these additional costs in any event.

Condition (i) is not met, as demonstrated above. At most, the "correct" amount of financial securities the mines operators should have paid should be deducted from the planned compensation preventing them from cumulating aid for rehabilitation costs.

As for condition (ii), Germany would need to demonstrate that the 'polluter pays' principle, EU and German law do not require that the operator pay for additional rehabilitation costs triggered by a legal closure. The Opening Decision does not contain such demonstration. In the case of the decommissioning of Slovak nuclear power plants, the Commission made clear throughout its decision that decommissioning costs could partially be covered by the State because of historical reasons⁴⁶ that do not apply to the opencast mines in Germany that are subject to provisioning obligations under Section 55 of the Federal Mining Act.

44. Furthermore, the German authorities have not demonstrated that the aid would cover not more than the costs necessary to rehabilitate the environmental damages of the mines for which the beneficiaries *are not* responsible.

As said above, this is due first to the fact that the mines operators – the polluters – are well identified and legally responsible for rehabilitating the sites in full.

German and EU laws do not limit liability of polluters to the amounts they have provisioned *ex ante*, or the financial securities they gave to the authorities in the course of their operations; since it would exclude their *ex post* liability for remedying unforeseen pollution due to an accident, for instance. Their liability is also not limited to their operations until the environmental liabilities triggering event occurs, such as closure of the mines in this case. *Any* rehabilitation costs incurred for the mines operations and closure should thus in principle be borne by the operators, regardless of the fact that their closure is imposed by law. In this sense, it is difficult to see any *additional* rehabilitation cost that would go beyond the operators' liability.

45. In any event, as the Commission has rightly identified, the additional mine rehabilitation costs are subject to considerable uncertainties, both in their nature and amount, due to information asymmetries.

Since the original rehabilitation costs (without the coal phase-out) were defined by the operators themselves, they are no reliable basis for the calculation of additional rehabilitation costs caused by the coal phase-out due to the lack of independent data. This can be said for the BET study as well as for further assessments of the German government on the compensation amounts.⁴⁷

⁴⁶ "No adequate provisions were created in times of a centrally-planned economy" for requiring the plant operators (i.e. the State until the market was liberalised) to fully provision rehabilitation costs.

⁴⁷ Gutachten im Auftrag des BMWi: Ermittlung von Folgekosten des Braunkohletagebaus bei einem gegenüber aktuellen Braunkohle- bzw. Revierplänen veränderten Abbau und Bestimmung der entsprechenden Rückstellungen. 14 December 2020. https://www.bet-energie.de/fileadmin/redaktion/PDF/Studien_und_Gutachten/Gutachten_Folgekosten/Gutachten_Folgekosten_Braunkohleausstieg_Abschlussbericht.pdf

2.2 Affect of trading conditions to an extent contrary to the common interest

2.2.1 The compensations are not necessary

46. ClientEarth reiterates its previous observations (see footnote 3). The combined effect of climate policies, increasingly stringent mandatory environmental protection requirements, steady rise of carbon prices and development of cleaner energy sources, naturally drive the market for lignite-based energy production down.
47. Whereas one could consider that aid measures are necessary for making coal plants close in a really shorter term, the closure dates in the Closure Law do not justify paying LEAG and RWE for closing their units.

2.2.2 The compensations are not an appropriate form of aid

48. Whilst there may be instances in which the Commission finds that negotiating a compensation by contract to ensure legal certainty and avoid costly judicial procedures is an appropriate form of aid⁴⁸, this is not the case here for four reasons:
- (i) the objective to close the lignite plants to reduce greenhouse gas emissions by 2030 in Germany would have been attained without a compensation since most of the units would have closed driven by market forces alone⁴⁹;
 - (ii) German law does not require such compensation for the redefinition of the operator's property rights in the present case, so the legality of the closure obligation could have been ensured without financial compensation (see above on the notion of aid);
 - (iii) well-designed tenders would be a more appropriate form of aid than lump sum compensations;
 - (iv) should tenders not be an appropriate form of aid in this case, a compensation based on adjustment parameters would be more appropriate (this is also related to the proportionality of the aid).

Since items (i) and (ii) have been addressed above, this section and the next focus on (iii) and (iv).

49. Germany's choice to negotiate the compensations with the operators by contract is not an appropriate form of aid and is far from ensuring that the compensation amount is limited to the minimum, as opposed to well-designed tenders. The Opening decision does not contain any solid motivation why negotiated amounts would be appropriate.

Whilst we can agree that a tender between two operators would not be competitive⁵⁰, it is not obvious why LEAG and RWE could not have participated in the same auctions as the hard coal plants *and the smaller lignite plants*. This discrimination between RWE and LEAG on the one hand, and all other German coal operators on the other hand (including other lignite operators), does not appear justified

⁴⁸ See e.g. the aid for the early closure of Fessenheim nuclear power plant in France

⁴⁹ We recall that the aid measure which appropriateness must be assessed **is the compensations**, not Germany's decision to close the lignite plants, which is a policy decision pertaining to the German authorities. Other Member States made a different choice to close their coal plants without compensating them.

⁵⁰ See Opening Decision para. 14

by objective criteria. At least the Commission's final decision should carefully assess this discrimination.

50. The fact that lignite *mines* operators are concomitantly affected by the closure of the lignite *plants* is relevant for the assessment of potential support to the lignite mines operators themselves; but they can legally be distinguished from the plants operators even if they belong to the same group of companies. Germany could also have designed auctions for all coal operators with some adjustments for the lignite operators such as allowing RWE and LEAG to bid in certain auctions only or with certain caps.

2.2.3 The compensations are disproportionate

a. Uncertainty on whether the compensations result from negotiations or a formula

51. There is contradictory information from the German government, mainly the Federal Ministry for Economic Affairs and Energy (BMWi) on how exactly the compensations were determined and whether they result from a negotiation process⁵¹ or a calculation based on a formula.⁵² The Commission's decision to initiate the formal investigation procedure outlines a method where the reimbursement covers electricity market revenues over a longer period of time, but fixed costs were also deducted from those revenues.

52. Greenpeace and EMBER suggest that the government has used a different method: resulting from an access to information request⁵³, they analysed a formula the German government may have used.⁵⁴

The fact that the calculation with the formula results in the compensation amounts is a strong indication that it was, at least initially, used to determine the amounts. If so, the flaws EMBER identifies are highly relevant for the State aid investigation, mainly:

- Electricity and CO₂ prices were chosen arbitrarily,
- It was assumed that no fixed costs would be saved with the early closures,
- Lignite operators are compensated for a period of 4 to 5 years after the units close, which is too long (the Oeko-Institut recommends a maximum of three years⁵⁵).

The calculation seems to be methodologically and structurally based on the compensation formula for the security reserve ("*Sicherheitsbereitschaft*") agreed in 2015.⁵⁶ At that time, it was stipulated that plant operators would be reimbursed for the duration of the security reserve (4 years). The compensation amounts to the electricity market revenues minus the short-term marginal costs leading

⁵¹ BT-Drucksache 19/23333 - https://www.bmwi.de/Redaktion/DE/Parlamentarische-Anfragen/2020/11/19-23333.pdf?__blob=publicationFile&v=4

⁵² "Formula-based compensation scheme (formelbasierte Entschädigungslogik)" in draft that can be found here:

https://www.bmwi.de/Redaktion/DE/Downloads/G/gesetzentwurf-kohleausstiegsgesetz.pdf?__blob=publicationFile&v=8, p. 160

⁵³ [Verwaltungsstreitsache](#)

[Greenpeace/Bundeswirtschaftsministerium: https://www.greenpeace.de/sites/www.greenpeace.de/files/2021-03-12-verwaltungsgerichtberlin-rae-redecker-entschaedigungslogik_web.pdf](https://www.greenpeace.de/sites/www.greenpeace.de/files/2021-03-12-verwaltungsgerichtberlin-rae-redecker-entschaedigungslogik_web.pdf), p.8

⁵⁴ EMBER: Analysis of German lignite compensation. May 2021, at:

https://www.greenpeace.de/sites/www.greenpeace.de/files/ember-assumption_of_german_ministry_of_economics.pdf

⁵⁵ <https://www.oeko.de/fileadmin/oekodoc/Einordnung-der-geplanten-Entschaedigungszahlungen-fuer-deutsche-Braunkohlekraftwerke.pdf>

⁵⁶ See Section 13g Energy Industry Act/§ 13g Energiewirtschaftsgesetz (EnWG)

to a generalization.⁵⁷ Whereas the plant operator is likely to lose electricity market revenues beyond 4 years after closure, it is also likely that parts of its fixed costs can be reduced in the first 4 years.

53. We also identify two particular risks of undue cumulation of aid:

- In 2015 for the *Sicherheitsbereitschaft*, there was no adaptation payment (*Anpassungsgeld* - APG).⁵⁸ This adjustment payment is now paid directly to workers aged over 58, when they lose their job due to the coal phase out. In the case of the security reserve, the fixed staff costs were not deducted from the electricity market revenues because they were not considered short-term marginal costs. In effect, the companies were also granted payments for the cost of staff adjustments through the payments in the security reserve. However, **since the costs for personnel adjustments are now paid via the APG, they should not be included in the closure compensations for LEAG and RWE.** They represent about 29% of the operators' costs.⁵⁹
- Section 50 KVBG stipulates that there should be a deferred closure mechanism (*Zeitlich gestreckte Stilllegung*), which is based on the model of the security reserve pursuant to Section 13g Energy Industry Act (EnWG).⁶⁰ For the deferred closure mechanism, the electricity market revenues are again reimbursed for the duration of the reserve operation. This compensation is to be paid in addition to the phase-out compensations. However, this is **double compensation because the same contribution margins were already reimbursed as part of the quantification of the €4.35 billion.** The operators should thus not be compensated for the deferred closure mechanism in addition to the closure mechanism.

54. As a reaction to the leaked formula, the German government has insisted that it was not used and instead the payment amount were the result of a negotiation process.⁶¹ It makes the whole calculation even less transparent and uncertain, as the Commission confirms in the Opening Decision.

b. Investment costs for the upgrade of the installations

55. In paragraphs 126 and 127 of the Opening Decision, the Commission raises doubts as to the investment costs (e.g. for retrofits) notably in order to comply with dynamically evolving environmental law (including on emissions control) requirements. The Commission refers to coal plants that close 2020-2021, notably the lignite unit Niederaußem D. We welcome this, as it concomitantly means that units that close before they have to comply with new standards are saving mandatory expenses.

56. The Conclusions on the Best Available Techniques for Large Combustion Plants (BATc LCP)⁶² that regulate emissions of pollutants and heavy metals originating from coal and lignite power plants are transposed in Germany by ordinance as General Binding Rules.⁶³ The regulation that governs lignite

⁵⁷ See Section 13g EnWG (5) Sentence 1

⁵⁸ See Section 57 KVBG

⁵⁹ Öko-Institut (2017): Die deutsche Braunkohlenwirtschaft. Historische Entwicklungen, Ressourcen, Technik, wirtschaftliche Strukturen und Umweltauswirkungen. Studie im Auftrag von Agora Energiewende und der European Climate Foundation. <https://www.agora-energiewende.de/projekte/die-deutsche-braunkohlenwirtschaft/>. Table 8-3, p.112

⁶⁰ The compensation formula from the Annex to the EnWG largely correspond to the compensation formula of Annex 2 to the KVBG.

⁶¹ Plenarprotokoll 19/231, Deutscher Bundestag – 19. Wahlperiode – 231. Sitzung. Berlin, Freitag, den 21. Mai 2021

⁶² Commission Implementing Decision (EU) 2017/1442

⁶³ This possibility is prescribed by Art. 6, 17 of Directive 2010/75/EU

plants will be finalized soon as an update of the 13th Federal Emission Control Ordinance (13. BImSchV).⁶⁴

According to the final draft of the 13. BImSchV⁶⁵, lignite-fired power plants using lignite with mercury contents below 0.1 mg/kg must comply with an annual mercury emission limit value of 7 µg/Nm³, and 4 µg/Nm³ after a transitional period of 4 years after the ordinance comes into force. For a lignite mercury content between 0.1 and 0.15 µg/Nm³, an annual emission limit value of 7 µg/Nm³ applies, and 6 µg/Nm³ must be complied with after a transition period of four years. According to analysis data of the past years, a large proportion of the lignite in the Rhenish mining area shows a lignite mercury content below 0.1 mg/kg as dry matter (DM). Approximately 80% of the analysis values of lignite burnt between 2012 and 2014 at the Neurath power plant (located a few kilometres from the Niederaußem plant) were below 0.1 mg/kg DM. For lignite burnt at the Weisweiler power plant between 2012 and 2014, the percentage of samples below 0.1 mg/kg DM between 2010 and 2013 was about 21%. This means that both power plants would have to comply with a limit value of 4 µg/m³ at least temporarily after the transition period of four years. In order to be on the safe side, the respective responsible approval authority would have to set a limit value of 4 µg/m³.

Data on mercury emissions from lignite-fired power plants in the Rhenish coalfield are available from emission declarations of 2012 and 2016. If an annual limit value of 4 µg/m³ is implemented as a general rule four years after the ordinance comes into force, **unit D of the Niederaußem power plant would need retrofit** in order to continue operating four years after the ordinance came into force. **Unit C would also have to be retrofitted** in order to continue operating in the longer term, also reporting emission values in past years were 25 % above 4 µg/Nm³. **Units A, B, D and E of the Neurath power plant** showed emissions of 3.7 (2012) µg/Nm³ and 4.1 µg/m³ (2016). To safely comply with an annual average value of 4 µg/m³, retrofits would be required in Neurath as well. Unit E of the Weisweiler power plant was below an emission value of 4 µg/m³ in both years 2012 and 2016, and would therefore probably not require retrofitting. **Unit F of the Weisweiler power plant** showed mercury emission concentrations 62.5% above 4 µg/m³ in 2016 and would therefore also need retrofitting to ensure compliance with the limit value after the transition period of 4 years.

Techniques for retrofitting include in particular the use of sulfidic precipitants in the scrubber, the injection of activated coke or activated carbon upstream of the electrostatic precipitator. Alternatively, the installation of Gore SPC modules after the scrubber or the addition of bromine (e.g. in the furnace or on the lignite) to increase mercury oxidation and to ease precipitation in the scrubber. The effectiveness of the activated coke injection was tested successfully at the Niederaußem plant; the other techniques were tested at other lignite plants.

57. Against this backdrop, we recommend to broaden the scope of the Commission's doubts regarding avoided investments costs through closure in order to include:

- Niederaußem D as the only plant to have **closed in 2020** regarding potential investment costs resulting from otherwise needed retrofits with regard to emissions of mercury (Hg), nitrogen oxides (NOx), and sulphur dioxide (SO₂).⁶⁶

⁶⁴ See most recent version, that will be amended still with regard to mercury (see footnote 70).

⁶⁵ BT-Drucksache 178/3/21

⁶⁶ For the purposes of determining the applicable emission limit value under the BATc LCP, the plant is > 300 MWth.

- Plants closing until the **end of 2021**⁶⁷ for potential investment costs resulting from otherwise needed retrofits with regard to NO_x and SO₂ emissions: Under Directive 2010/75/EU (IED), the new emission limit values will have to be complied with on a plant level by August 2021. Those plants that close only about 4 months later, for reasons of proportionality, are not likely to be ordered to retrofit for the short period⁶⁸ or could use other means by which to avoid breaching the emission limit values.
 - Plants closing **until the end of 2025**⁶⁹, particularly Neurath A, D, E and Weisweiler F, for potential investment costs resulting from otherwise needed retrofits with regard to mercury emissions: The political compromise⁷⁰ that is now finalized for entry into force will implement emission limits below the maximum allowed emission limit value after a transitional period of four years (i.e. coming into force in 2025). **All coal plants named in Annex 2 of the Closure Law closing before 2025 will be spared potential investment costs for taking the necessary steps to comply with these lower emission limit values.**
- c. The compensation should include variable parameters to eliminate the risk of overcompensation

58. The fact that the same compensations would be paid if the plants close earlier than the scheduled dates⁷¹ already demonstrate that there is **no mechanism to adapt the compensations to the actual foregone profits and closure costs**, which would necessarily vary depending on the closure date – especially if the plants would close significantly earlier.
59. It can be anticipated that an operator would chose to close earlier than scheduled in the law because market conditions are no longer favourable and it no longer expects profits. In such case, maintaining the same amount of compensations would increase the discrepancy between the negotiated amounts and the actual foregone profits of the operators. Germany's argument that enabling the plants to close earlier for the same compensations would incentivise them to close earlier and thus contribute to its decarbonisation objective should not be balanced against the proportionality assessment.
60. Since the closure dates are so far in future (until 2038) and since the compensations are planned to be paid in 15 yearly instalments for each operator⁷², the instalments and the global amount of aid can and **should be adjusted to the actual expected foregone profits of the plants updated as market conditions evolve, with a capped amount.**

⁶⁷ According to Annex 2 of the German Coal Phase-Out Act, these are: Niederaußem C, Neurath B, Weisweiler E or F (all > 300 MWth in the sense of the BATc LCP).

⁶⁸ The fact that the German Government has been by far missing the national deadline of one year (see § 7 para. 1a no. 1 of the Emissions Control Act – BImSchG) ending in August 2018 for implementation of the new rules by almost three years now also plays into this. Recently, a political compromise has been reached on the text, but the legislative process has yet to be finalized.

⁶⁹ According to Annex 2 of the German Coal Phase-Out Act, these are: Neurath A, D, E, Frechen/Wachberg, Weisweiler E or F (all > 300 MWth in the sense of the BATc LCP).

⁷⁰ A request by the Federal State of Baden-Württemberg embodies the compromise between the Federal Government and the Federal States, available at: https://www.bundesrat.de/SharedDocs/drucksachen/2021/0101-0200/178-21.pdf;jsessionid=AF9AA5639191F9110A6D6122600A9617.1_cid339?__blob=publicationFile&v=1. It will shortly be transposed in a new draft of the regulation (13. BImSchV) in order to be passed by the Government and the Parliament.

⁷¹ Opening Decision, para. 23

⁷² See Opening Decision para. 27

61. It would have been more appropriate to **define a formula with adjustable parameters** – for example as agreed between France and EDF for the early closure of Fessenheim nuclear power plant⁷³ – taking into account the evolution of market prices, the probability of continuation of operation beyond relevant periods, the actual cost of social measures for workers re-evaluated at the time these costs arise and the absence of cost exposure for making new investments or upgrades (since the units would close), amongst others.

62. A clause requiring LEAG and RWE to reimburse compensation exceedances at the end of the payment period would also be relevant. In fact, adjusting the parameters overtime was also suggested by some in the legislative process.⁷⁴ ClientEarth does not identify any exceptional circumstance that would make the adjustment of the compensation amounts overtime inadequate in this case. Mere practical difficulties or additional administrative burden should not qualify as exceptional circumstances.

We stress that providing for adjustments and variable parameters in a compensation formula is not undermining legal certainty for the beneficiaries – should it weight in the balance despite not being strictly a compatibility assessment criterion – since such formula can be set in a law or in a contract.

2.2.4 Transparency requirements are not met

63. By analogy with the transparency requirements in the EEAG, Germany failed so far to comply with transparency requirements, which also count towards the compatibility of the aid with the internal market: the contract with the operators was negotiated in secret and made public at a late stage; it does not indicate how the compensation amounts were calculated; the BET study on additional mines rehabilitation costs was made public very late and is incomplete; Germany did not even reply to interested parties' access to information requests (see above). Furthermore, neither civil society nor market participants had any insight on the negotiation process and were excluded to a much higher extent than it would have been in the case in a full legislative process.

The Commission should therefore require that Germany complies with transparency requirements by publishing relevant information on the calculation of the compensations for the closure of the plants and for rehabilitation costs of the mines.

2.2.5 The negative impacts of the measure on competition cannot be outweighed by positive impacts

64. Assuming that the Commission can authorise the closure compensations on the ground of Article 107(3)(c) TFEU and that they can be considered to developing an economic activity, which is questionable as demonstrated in section 2.1, the compensations seriously distort competition in the internal market to an extent contrary to the common interest.

⁷³ Commission decision of 23 March 2021 on State Aid SA.61116 Early Closure of the Fessenheim Nuclear Power Plant in France, section 2.6. ClientEarth does not express any views on the compensation for the closure of Fessenheim nuclear power plant. This case is simply taken as an example to show that closure compensation formulas can be designed with adjustable parameters to tending towards proportionality of the aid and avoiding overcompensation.

⁷⁴ Matthes, Felix: Stellungnahme zur Anhörung des Ausschusses für Wirtschaft und Energie des 19. Deutschen Bundestages am 25. Mai 2020. <https://www.bundestag.de/resource/blob/697412/ff1b408f05f7070851d73affc6797f60/sv-matthes-data.pdf>

a. Distortion of competition

65. The Closure Law and the contract do not appear to contain strict safeguards against LEAG and RWE using any excess amount of compensation for cross-subsidising other activities, notably energy production from cleaner energy sources. The fact that the planned compensation amount appear disproportionate increase that risk of windfall profits and misuse of aid. This would certainly give the operators a competitive advantage, either because they could directly invest into cleaner energy production directly or get an competitive advantage for bidding for support in renewables support auctions, in Germany or abroad.
66. The delay of the plants closure created by the Closure Law pathway also inherently creates a competitive disadvantage for cleaner energy sources, which will enter the market with more difficulties, or slower than they would have should the lignite plants have closed per normal business conditions and facing all their closure costs.

b. Absence of significant environmental benefits to balance distortions of competition

67. Should the Commission seek to balance the negative effects of the compensations on the market with their expected environmental benefits, **this balance should end up being negative.**
68. Whilst closing coal plants is a critical driver for decarbonising the energy market, the design of the Closure Law does not significantly contribute to decarbonising Germany's energy market, mainly because of the long timeline for the closures that go beyond business-as-usual scenarios. We refer to our previous observations in this respect.
69. Furthermore, the so-called "climate ruling" of the Bundesverfassungsgericht, the German constitutional court, of 24 March 2021⁷⁵ casts further doubts to whether Germany's objective of reducing greenhouse gas emissions is effectively pursued by the measure. Section 2(1) Closure Law states that the primary objective of the coal phase-out is to reduce greenhouse gas emissions in Germany. The constitutional court however ruled that with its current measures in place, amongst which the Closure Law, Germany is not fulfilling its obligation to reduce emissions and take effective measures to prevent climate change. The inherent inconsistencies in the Closure Law between the different objectives pursued (closing coal plants to reduce emissions while delaying their closure to ensure security of supply) contribute to the lack of ambition of Germany and of adoption of adequate and ambitious measures as criticised by the Constitutional Court.

In reaction to this ruling, the German environmental ministry has suggested a national reduction target of 65% by 2030; this would require a coal phase-out not by 2038 but **by 2030**.⁷⁶ If adopted by the Bundestag, which could be as early as in summer 2021, this new target and its consequences for the coal sector would necessarily imply that the legality of the lignite closure calendar until 2038 would be called into question and likewise, that the compensations calculated on this closure calendar are not

⁷⁵ BVerfG, decision of the First Senate of March 24, 2021 - 1 BvR 2656/18 -, Rn. 1-270, at http://www.bverfg.de/e/rs20210324_1bvr265618.html

⁷⁶ Prognos, Öko-Institut, Wuppertal-Institut (2020): Towards a Climate-Neutral Germany. Executive Summary conducted for Agora Energiewende, Agora Verkehrswende and Stiftung Klimaneutralität https://static.agora-energiewende.de/fileadmin/Projekte/2020/2020_10_KNDE/A-EW_193_KNDE_Executive-Summary_EN_WEB_V111.pdf

adequate. The dates for evaluating the impact of the coal phase out on greenhouse gas emissions reductions, currently in 2022, 2026, 2029 and 2032, should also be accelerated.⁷⁷

70. In light of these new developments, Germany's aid notification and the Opening Decision are based on outdated assumptions. Besides the fact that the closure dates go well beyond 2030 and thus that the Closure Law only partially contributes to the 2030 target, the target itself shall be raised – and concomitantly, the actual contribution of the Closure Law and of the compensations to the updated decarbonisation target must be drastically minored.
71. In addition, considering market developments, namely the rise in CO₂ prices, there are doubts that the aid incentivizes reduction of CO₂ emissions. As stated before, the lignite operator LEAG had already planned to close down installations at similar points in time without the Closure Law.⁷⁸ In March 2021, LEAG had announced it would temporarily shut down its open pit mine Jänschwalde apparently due to the decreased energy demand. However, recent data suggests the contrary: lignite generation has been 35% higher than in 2020 and with a capacity utilization of 73-87% in 2021 Lusatian power plants are in high demand.⁷⁹ As stated in an internal newsletter, the real reason seems to be lacking profitability due to the high costs in CO₂ certificates.⁸⁰ Now, according to LEAG's most recent announcement, the operation of Jänschwalde will be resumed but in an alternating mode with Welzow-Süd from January 2022 forward with employees only needed for one mine.⁸¹

c. Conditions for approval and compensatory measures

72. Should the Commission consider that the closure compensations meet all other compatibility assessment criteria, or deems that a certain degree of uncertainty in the evaluation of foregone profits and/or rehabilitation costs is acceptable and does not affect the proportionality assessment of the aid (which ClientEarth strongly disagrees with), the aid beneficiaries should at the very least implement compensatory measures.
73. These compensatory measures should target precisely the mechanisms by which the aid could be detrimental to LEAG's and RWE's competitors. In particular, compensatory measures in this case should aim at ensuring that LEAG and RWE will not use the closure aid for unduly increasing their energy generation portfolio (including investing in renewable energy sources) or gaining market shares.
74. A **risk of misuse of aid and cross-subsidisation** of lignite and renewable energy production activities exists for LEAG especially (but cannot be excluded for RWE too). The documents that reveal how LEAG can use the money (*Anlagerichtlinie zur Vorsorgevereinbarung*) remain unknown to the public and are withheld by the authorities for being business and trade secrets, despite access to information requests by BUND Saxony.⁸²

⁷⁷ Opening Decision, para. 15

⁷⁸ ClientEarth, "Coal phase-out compensation for LEAG", May 2020: <https://www.documents.clientearth.org/wp-content/uploads/library/2020-06-16-legality-of-compensation-for-leag-under-german-coal-phase-out-ce-en.pdf>

⁷⁹ <https://www.bloomberg.com/news/articles/2021-03-17/record-carbon-not-enough-to-curb-germany-s-dirtiest-power-plants>

⁸⁰ Rbb24: Leag schickt Tagebau-Mitarbeiter erneut in Kurzarbeit. 17.03.2021 - <https://www.rbb24.de/studiocottbus/wirtschaft/2021/03/lausitz-leag-kurzarbeit-tagebau-jaenschwalde-kohlestrom.html>

⁸¹ Rbb24: Tagebau Jänschwalde fördert im Juni wieder Kohle. 28.05.21 - <https://www.rbb24.de/studiocottbus/index.htm/doc=%21content%21rbb%21r24%21studiocottbus%21wirtschaft%212021%2105%21kurzarbeit-endet-tagebau-jaenschwalde-leag.html>

⁸² ANNEX 3

75. Based on the *British Energy plc restructuring aid* case for example, the Commission should forbid both operators from:

- **Cross-subsidising** their different business activities (lignite generation, non-lignite generation, sales to the wholesale market, direct business supply etc.), to avoid misusing the closure aid to develop new activities. Practically, to the extent that it is not already the case, each activity should be separated into different legal entities with separate accounts;
- **Increasing the scope of their activities** in the energy market. In the *British Energy plc* case, that prohibition was ordered for six years on the ground that it “is roughly twice the time necessary for the construction of a combined cycle gas turbine power plant”;
- **Offering direct business supply prices below wholesale prices.** Likewise, in the *British Energy plc* case, a duration of six years was deemed appropriate.

Conclusion

ClientEarth’s assessment is that the closure compensation should be found incompatible with the internal market under Article 107(3)(c) TFEU, both for breaching State aid law and environmental law – the ‘polluter pays’ principle in particular. This incompatibility, in particular the negative balance between the severe distortion of competition and the relatively limited environmental effects of the measure, is aggravated by Germany’s need to adopt more ambitious climate policies and measures to reach greenhouse gas reductions objectives, as called for by the Constitutional Court in March 2021.

The Commission should thus not authorise the measure.

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