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The German coal exit law: grounds of incompatibility of the compensations for hard coal plants with State aid law

Observations to the Commission on case
SA.53625 – Deutschland – Kohleausstieg

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Top Lines

- This report demonstrates significant doubts as to the compatibility of the compensations for the closure of hard coal plants (*Steinkohlezuschlag*) provided for in the German Coal Exit Law of 3 July 2020 (Kohleausstiegsgesetz – “KAG”) with State aid law.
- ClientEarth submits that the overarching principles in Articles 7, 9 and 11 TFEU shall be duly and fully taken into account in the assessment of the measures in the KAG, in addition to the Commission’s commitments in the Green Deal and the State aid rules. Not only are those principles legally binding for the Commission and Germany, they obligate to analyse the objective of reducing greenhouse gas emissions allegedly pursued by the hard coal compensations, against its level of ambition and the effectiveness of the measure to achieve it. This analysis must be conducted with regard to interrelating measures that may undermine the planned achievements, namely the funding for combined heat and power (“CHP”).
- It is particularly doubtful that the *Steinkohlezuschlag* can be found compatible with the internal market because:
 - economic analysis shows that hard coal plants older than 25 years are already privy of any residual value and their eligibility to auctions will have the perverse effect of artificially prolonging their life in order to place bids, counter-acting the purpose of the law to exit coal rapidly;
 - for the same reason that they are unprofitable, the older hard coal plants would be overcompensated by any *Steinkohlezuschlag* they receive;
 - in part, the maximum bid values for the *Steinkohlezuschlag* are lower than the aid for converting to CHP and thus do not in all cases incentivise the closure of coal plants by the auction’s schedule, counteracting the objective to reduce greenhouse gas emissions, also given that gas-based CHP is particularly promoted.
- In view of the doubts as to the compatibility of the measures with the internal market, the Commission shall open a formal investigation in this case. This would not only enable the Commission to collect information from interested third parties but also to request information directly from the operators pursuant to Article 7 of Council Regulation (EU) 2015/1589 – and make an informed decision as to the need for, the incentive effect and proportionality of the aid, in particular.

Introduction

1. The coal phase-out law (Kohleausstiegsgesetz – “KAG”¹), a legislative package passed by the German parliament on 3 July 2020 which entered into force (after multiple substantial amendments) on 14 August 2020.² It contains the Kohleverstromungsbeendigungsgesetz (*law to end electricity generation from coal and lignite* – “KVBG”)³ as well as a number of changes to other laws, for instance relating to CHP and proposes an array of State aid measures that appear to be incompatible with the EU internal market. In the face of ever more visible and pervasive consequences of climate change, of the European Parliament having declared a climate emergency⁴ and the Commission itself, seconded by the Council,⁵ having issued numerous policies to fight climate change notably the objective to phase out fossil fuels, there is an urgent need for a swift coal phase-out. The KAG, however, does not follow suit on these mandatory objectives.
2. Whereas one might expect a coal phase-out law to accelerate the shift from a fossil fuel-based to a sustainable, climate-friendly energy system, the KAG instead risks to:
 - (i) extend the life time of unviable lignite- and hard coal-fired power plants and
 - (ii) provide discriminatory support for investments in CHP installations (including fossil fuel-based CHP) in favour of (former) operators of hard coal-fired power plants.
3. The proposed coal exit measures seem detached from the public debate on the need for the increased protection of the environment and global climate as well as from market developments reflected in and post-dating the Coal Commission’s report from January 2019.⁶ In this respect, the overarching principles in Articles 7, 9 and 11 TFEU⁷ provide that environmental protection requirements shall be integrated into the definition and implementation of Union’s policies. ClientEarth submits that they should thus be taken into account in internal market and State aid policies as well – and thus in the

¹ Gesetz zur Reduzierung und zur Beendigung der Kohleverstromung und zur Änderung weiterer Geseze (Kohleausstiegsgesetz – „**KAG**“), as presented in *BT Drucksache 19/20714 (neu)*, in the *Beschlussempfehlung* and the *Bericht des Ausschusses für Wirtschaft und Energie (9. Ausschuss) u.a. über den Regierungsentwurf zum Kohleausstiegsgesetz* (attached as **Annex 1**).

² Pursuant to its Article 11(1), the KAG enters into force one day after its publication in the Federal Law Gazette (Bundesgesetzblatt). It was published on 13 August 2020 (Bundesgesetzblatt Jahrgang 2020 Teil I Nr. 37, p. 1818).

³ Gesetz zur Reduzierung und zur Beendigung der Kohleverstromung (Kohleverstromungsbeendigungsgesetz – „**KVBG**“), as presented in *BT Drucksache 19/20714* (fn. 1 above), as of p. 23. Section symbols (§) refer to Sections of the KVBG

⁴ European Parliament, Resolution of 28 November 2019 on the climate and environment emergency (2019/2930(RSP)), P9_TA(2019)0078, https://www.europarl.europa.eu/doceo/document/TA-9-2019-0078_EN.html

⁵ See section “*Building a climate-neutral, green, fair and social Europe*”, in the EU Council’s proclamation of “*A New Strategic Agenda 2019-2024*” of 20 June 2019 (available at <https://www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024-en.pdf>), p. 5

⁶ Report of the Commission „Growth, Structural Change, Employment“ of January 2019 (available at https://www.bmwi.de/Redaktion/DE/Downloads/A/abschlussbericht-kommission-wachstum-strukturwandel-und-beschaeftigung.pdf?__blob=publicationFile)

⁷ Pursuant to Article 7 TFEU, the „*Union shall ensure consistency between its policies and activities taking all of its objectives into account*“. Article 9 TFEU provides that, “[i]n defining ad implementing its policies and activities, the Union shall take into account (...) the protection of human health”. Article 11 TFEU states that “[e]nvironmental protection requirements must be integrated in the definition and implementation of Union policies and activities, in particular with a view to promote sustainable development.”

assessment of the measures in the KAG, in addition to the Commission's commitments in the Green Deal and the State aid rules.

4. Granted the Government's objective was to avoid judicial challenges of the KAG by introducing generous support measures to coal operators for their phase-out, this reasoning is insufficient to substantiate the compatibility of these State aid measures with the internal market according to Article 107(3)(c) TFEU. Not to mention, this strategy has already failed, as one of the largest hard coal operators STEAG (Steinkohlen-Elektrizität GmbH, Hard Coal Electricity Limited) applied for interim measures to the German Constitutional Court.⁸ The swift legal action from STEAG, even if it was rejected on formal grounds⁹, indicates that the hard coal industry itself is critical of the law. Further legal challenges by other plant operators would not be surprising.
5. ClientEarth already published several analyses of the compensation scheme for German lignite plant operators according to the KVBG.¹⁰ This report assesses the compensations for the closure of **hard coal plants** against State aid law. It also touches upon the new version of the "Coal Substitute Bonus" that supports the conversion of hard coal CHP-plants to other CHP-plants (including fossil fuel-based CHP) and risks distorting the level playing field on the market while slowing down the decarbonisation of Germany and of the EU. We conclude that there are doubts regarding the compatibility of the mentioned schemes with the internal market and therefore ask **the Commission to open a formal investigation**.

1 Description of the measures

6. There are **two different mechanisms** for the phase-out of hard coal plants in accordance with Section 4 and 5(1) KVBG¹¹ – that apply to different time periods:
 - Two series of auctions for determining the amount of compensations for the closure of hard coal plants running from September 2020 until 2023¹² and from 2024 until 2027.¹³

⁸ See „*Steag bringt Kohlekompromiss vor Bundesverfassungsgericht*“, Handelsblatt of 29 July 2020, <https://www.handelsblatt.com/unternehmen/energie/energiwirtschaft-steag-bringt-kohlekompromiss-vor-das-verfassungsgericht/26047974.html?ticket=ST-6054378-fwXcCFp0oUijsJwoiT3m-ap1>.

⁹ Because the company is 85.9% state-owned, it cannot invoke fundamental rights, under German law. BVerfG, Order of the First Chamber of the First Senate of 18 August 2020 - 1 BvQ 82/20 -, margins 1-32 (available at http://www.bverfg.de/e/qk20200818_1bvq008220.html).

¹⁰ ClientEarth, "No Money for old Lignite", October 2019 (<https://www.documents.clientearth.org/library/download-info/clientearth-analysis-no-money-for-old-lignite-is-german-coal-compensation-legal/>) and "Coal Phase-out Compensations for LEAG", May 2020 (<https://www.documents.clientearth.org/library/download-info/coal-phase-out-compensation-for-leag-legality-assessment/>).

¹¹ The target levels of reduction of coal capacity according to Section 4 are 30 GW by 31.12.2022, 17 GW by 1.4.2030, 0 GW by 31.12.2038, annually decreasing by an equal amount. Under Section 4(2), the following division between hard coal and lignite is envisaged: 30 GW by 31.12.2022: 15 GW CC, 15 GW CC; 17 GW by 2030: 8 GW CC, 9 GW CC; otherwise determined in accordance with Section 4(1) (Section 4(2)(2), as described there, i.e. combination of lignite and hard coal quantities).

¹² If the bids fall short of the planned capacity this will be considered in the next auction according to Section 6 KVBG.

¹³ There will be auctions according to part 3 of the KVBG from 2024 until 2027 (by the end of which the target values of hard coal capacity reduction will be reached), for organising the closure of plants until the end of 2030. During this period, if bids fall short of the planned auction capacity according to Section 20(3) phase-out by law without compensations for the remaining capacity according to part 4 (Section 5 (1) (2)).

- Phase-out by law without compensations according to part 4 KVBG, from 2031 until 2038 (see Section 5(1) No. 3 KVBG).
7. Alternative to fully ceasing operations, hard coal plant operators can receive aid for conversions to CHP plants as described in section 2.

1.1 Auctions

8. In the auctions, hard coal plant operators submit a bid for their phase-out compensations (hereafter “*Steinkohlezuschlag*” or the “compensations”).

1.1.1 Bid limit values

9. There are defined maximum prices, or bid limit values, for the auctions (Section 19 KVBG). As shown in the chart below, there is a degressive reduction of the price limits over time. Shortly before the KVBG was passed, the bid limits for the auctions from 2024 until 2026 were raised and the auctions were extended by one year to 2027.

Auction year	Bid limits in EUR per MW (net capacity)
2020 (shortened procedure)	165 000
2021 (shortened procedure)	155 000
2022	155 000
2023	116 000
2024	107 000
2025	98 000
2026	98 000
2027	89 000

1.1.2 Auction volume

10. The German Federal Network Agency (Bundesnetzagentur – “BNetzA”) is responsible for determining the volume (in MW auctioned) of the auctions (Sections 4, 6 and 7 KVBG).¹⁴ For the shortened procedure however,¹⁵ the volume of the auctions is legally fixed to 4 GW for 2020 and 1.5 GW for 2021 (Section 6(3) KVBG).

1.1.3 The *Steinkohlezuschlag* (Compensations for hard coal plant closure)

11. The bid is accepted in a two-staged procedure according to Section 18 (3-5) KVBG. The BNetzA determines an index number for each admissible bid according to which it accepts the bids (Section

¹⁴ For certain years (2023, 2024, 2025 and 2027), there are additional derogations as regards the determination of the auction volume.

¹⁵ The shortened procedure includes a tighter schedule. The tender is announced 4 weeks before the start of the auction and the marketing ban takes effect one month after the bid was accepted (Section 52 (2) KVBG). Also, the Federal Network Agency does not determine the tender volume in the first and second tender announcement.

18 (7) und (8) KVBG). For auctions in 2020 and 2027, only one index per bid is determined according to Section 18 (3) KVBG. The index code is subject to the following criteria:

- (i) For auctions in 2020 and 2027: the index code is determined according to
 - (a) the bid
 - (b) divided by the past annual average of CO₂-emissions per MW net capacity of the hard coal plant (the entire documented past CO₂-emissions of the last three years in tons per MW net capacity, of which the BNetzA has knowledge according to Section 14 (1) (10) KVBG divided by three, Section 18 (3) (3) KVBG).
- (ii) The index code for the auction in the years 2021-2026 is modified by the BNetzA adding a factor for plants which it considers necessary for the security of supply (Section 18 (3)-(5) KVBG).

1.1.4 Possible additional participation in the capacity reserve

12. A hard coal plant operator whose bid is accepted in the phase-out auctions may also take part in the auction for the capacity reserve.¹⁶ As a result, the **operators may cumulate the Steinkohlezuschlag with capacity reserve payments.**

1.2 Phase-out by law without compensations

13. From 2031 onwards, hard coal plants remaining on the market will be phased-out by law and will not receive any compensation payments. However, phase-out dates may be prolonged at the request of a plant operator if a situation of undue hardship caused by the closure date can be proven (Section 39 KVBG). Strikingly, such prolongation measures would counteract the objective of the KVBG to reduce greenhouse gas emissions as far as possible.

14. The law defines an exemplary case of hardship for a situation in which the closure of a plant is required by law while the operator has already begun, but not completed, the conversion to CHP according to the Cogeneration Act (Kraft-Wärme-Kopplungsgesetz – “KWKG”) and this conversion has been delayed without this being the operator’s fault.¹⁷ We already indicate that hard coal plants that do not participate in the auctions, so the ones that could close statutorily, are eligible for CHP funding.

15. Furthermore, the law opens the possibility for further compensations or measures to the same effect¹⁸ in cases of undue hardship for hard coal plants that started their operation in 2010 or later and have not received a compensation or coal substitute bonus according to the KWKG. However, the law only creates the possibility to further regulate this in the future and creates the obligation to take these factors into account when evaluating the phase-out measures in general (Section 54 (2) (3), (4)).

¹⁶ Section 13e Energy Industry Act (Energiewirtschaftsgesetz – “EnWG”) in connection with Capacity Reserve Regulation (Kapazitätsreserveverordnung – “KapResV”), Section 25.

¹⁷ Section 54 (2) (3,4) KVBG

¹⁸ This counteracts the objective of the KVBG to reduce greenhouse gas emissions as far as possible.

1.3 Support for conversions of hard coal plants to CHP

16. The KAG contains comprehensive amendments to the KWKG. To promote the expansion of CHP plants, the new provisions focus on two bonuses: the Coal Substitute Bonus and the South Bonus for converted or new CHP plants constructed in the Southern region of Germany. These bonuses are paid to CHP plant operators additionally to the market premium they receive according to the KWKG (which remains unchanged in its basic structure and is simply prolonged until December 2029 with the current reform). The market premium capacity is limited to 200 MW per year according to Section 8c KWKG.
17. Hard coal plants may receive CHP funding, namely a possible cumulation of the CHP bonuses, the Coal Substitute Bonus and the South Bonus if they chose not to participate in the auctions for compensations.¹⁹
18. With the Coal Substitute Bonus in particular, operators of an existing coal-fired CHP plant receive a one-time payment if they switch to waste, waste heat, biomass, gaseous or liquid fuels. The amount of the aid is the same regardless of the type of chosen fuel and of the actual investment costs of each technology – so for example, future gas-CHP and future biomass-CHP receive the same bonus. However, the bonus varies according to the capacity (in KW) and the age of the converted coal plant.

Amount of Coal Substitute Bonus (EUR per KW)								
Start year of operation (hard coal CHP plant)	Start year of operation (New CHP plant)							
	2022	2023	2024	2025	2026	2027	2028	2029
1975-1984	50	50	35	20	5	0	0	0
1985-1994	225	225	210	195	180	165	150	135
As of 1995	390	390	365	340	315	290	265	240

19. Curiously, the Coal Substitute Bonus is applicable for hard coal plants that have converted to CHP after **1 January 2016** (Section 7c (1) and (2) KWKG) and the South Bonus for plants that started construction by **31 December 2019**, whereas the law entered into force (after multiple substantial amendments) on 14 August 2020. This makes the schemes **retroactive** and raises serious doubts as to their incentive effect (also since even for the South Bonus, the investment decision has also necessarily been taken long before construction started and thus long before 31 December 2019).
20. The South Bonus of 60 EUR/KW can be cumulated with the Coal Substitute Bonus.
21. This report focusses on the compensations for closure of hard coal plants although it analyses elements relating to the conversion of hard coal plants to CHP when that is particularly relevant for the assessment of the scheme for hard coal plants.

2 Economic analysis of hard coal plants

22. ClientEarth has commissioned an economic analysis from the energy consultancy Enervis Energy Advisors (Enervis) regarding the future profitability of hard coal plants. The objective was to analyse whether hard coal plants would be profitable in the future in a scenario without a coal phase-out by

¹⁹ If they chose to receive the compensations pursuant to the auctions, operators must commit in accordance with § 12(1) No. 6 KVBG that they will not request to receive the Coal Substitute Bonus.

auctions, in order to assess if they suffered any particular damage or hardship with the coal phase-out law and the phase-out mechanisms provided therein (**Annex 2**).

23. The modelling of future profits by Enervis was done according to the following parameters: for the development of fuel and CO₂ prices, electricity demand and the expansion of renewable energy sources as well as technologies for flexibility and sector coupling, Enervis relied on official planning documents like the current draft of the scenario framework (*Szenariorahmen*) from the German TSOs as well as ENTSO-E's TYNDP 2020 scenario report.²⁰ Furthermore, Enervis assumed a general calculatory lifetime of hard coal plants of 25 years as this is the usual depreciation period of the plants. This scenario does not take into account certain aspects that might tighten the future economic conditions under which hard coal plants operate, such as investment costs due to stricter environmental or other standards, which are qualitative criteria more difficult to model.
24. In order to systematise its conclusions about the profitability of German hard coal plants, Enervis built typified categories of plants based on their age and size.²¹ The following statements and trends refer to these typified categories of plants, but do not reflect the economic situation of individual plants.²² However, the assessment gives representative indicators for the profitability of hard coal plants that are relevant for the compatibility assessment of the auctioned compensations:
- The results show that despite a dire current economic situation, electricity prices are likely to increase again, due to the parallel and gradual phase-out of both coal and nuclear power.
 - However, this only helps certain categories of coal plants (categories A to C, that started operating less than 25 years ago): their residual value exceeds the maximum price in the auctions (165,000€/MW in 2020). **The tender procedures therefore set no incentive for these plants to close.** These plants rather would take the economic decision not to participate in the auctions and could instead chose to be closed by law after 2031 (with the possibility of further measures to balance undue hardship) or decide to convert to CHP plants before 2030.
 - Older coal plants (categories D to F, that started operating more than 25 years ago) will not have any residual value already by the first tender in September 2020. They are at the end of their calculatory lifetime of 25 years and the assessment of their profitability is negative. Besides, there is no perspective for them to restore profitability in the course of the scheme i.e. by 2027 when the last auctions will take place. This means that **the auctions do not set an incentive for these plants to close**; unprofitable and expected to close for economic reasons, they cannot have a claim for damages or hardship pursuant to the coal phase out law. **Any compensation granted to them pursuant to the auctions would thus be too high.**

²⁰ Available at <https://www.entsos-tyndp2020-scenarios.eu/>.

²¹ Many hard coal plants operate as CHP plants. Their prospects of profitability are more difficult to model, but the same general trends identified in the Enervis study apply.

²² Please note also that the Enervis study has not typified the six hard coal plants with start of operations between 2005 and 2010 (as shown in Abbildung 8 on p. 12 of **Annex 2**, as they did not see a relevant category in them.

3 Qualification of the Steinkohlezuschlag as State aid

25. Since the scheme for CHP has not substantially been modified and was considered by the Commission as an aid measure in 2016, there is no reason to depart from the qualification of State aid for the Coal Substitute and the South Bonus.²³ We particularly emphasise the selectivity of the new Coal Substitute Bonus since only (i) hard coal plants (ii) that do not bid in the auctions are eligible to it, to the detriment of other market players; and of the South Bonus since CHP plants built in the North are ineligible.
26. This section thus focusses on the *Steinkohlezuschlag* and demonstrates that it constitutes a State aid measure.

3.1 Use of State resources and imputability to the State

27. The *Steinkohlezuschlag* is paid out by the BNetzA (Section 61 (1) No. 6 KVBG), a federal agency acting under the supervision of the Federal Ministry for the Economy and Energy (“BMW”). The funding for this is provided directly from the German federal budget,²⁴ so it is given directly through State resources and is imputable to the State.

3.2 Selectivity and advantage

28. The payment of the *Steinkohlezuschlag* is presumptively selective, as it provides benefits only to the undertakings operating hard coal-fired power plants who won the competitive bidding process for the *Steinkohlezuschlag*.
29. The *Steinkohlezuschlag* would not be considered to grant an advantage to the beneficiaries if it could be considered a compensation for damages incurred as a result of State action, as per *Asteris* case law: “*It follows that State aid, that is to say measures of the public authorities favouring certain undertakings or certain products, is fundamentally different in its legal nature from damages which the competent national authorities may be ordered to pay to individuals in compensation for the damage they have caused to those individuals.*”²⁵ In this regard, the Commission stated that “[t]he fact that no selective advantage is conferred upon an undertaking does not depend on the lawfulness or unlawfulness of the measure but rather on the fact that a compensation granted under general principles of national law does not confer a selective advantage on an undertaking.”²⁶
30. In his recent opinion on *Achema AB e.a.*²⁷, Advocate General Wahl clearly recalled (at para. 53) that when “[t]he losses which the State measures in question compensate are [...] not claimed to be the

²³ In its 2016 Decision regarding the reform of CHP support in Germany, the Commission established that the CHP funding mechanism involved resources under the control of the State, in particular. Since the coal phase-out law does not foresee any changes to the underlying systems, in the same manner, the Coal Substitute and South Bonuses will be granted through State resources. Commission Decision of 24 October 2016 in case SA.42393 (2016/C) (ex 2015/N) – *Germany – Reform of support for cogeneration in Germany*.

²⁴ Draft legislative proposal of the *Bundestag*’s Committee on the Economy and Energy of 2 July 2020, which was then on 3 July approved by the *Bundestag* in plenary session (BT Drucksache 19/20714 (neu), Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Energie (9. Ausschuss) (attached as **Annex 1**), p. 4.

²⁵ CJEU, Judgment of 27 September 1988, Joined Cases 106 to 120/87 *Asteris a.o. v Greece and EEC* EU:C:1988:457, paragraph 23.

²⁶ Commission Decision SA.54537 (2020/NN) – *Netherlands. Prohibition of coal for the production of electricity in the Netherlands*, recital 31.

²⁷ Opinion of AG Wahl of 17 January 2019 in Case C-706/17 *Achema AB a.o. v. VKEKK a.o.* EU:C:2019:38

consequence of any unlawful conduct of the public authorities [but] [t]hose losses are simply costs incurred by the undertakings in question in connection with their economic activities”, a compensation for those losses falls outside the scope of Asteris principles and can grant an advantage to the beneficiaries.

31. The *Steinkohlezuschlag* however cannot be considered to be a compensation pursuant to an unlawful conduct of the German authorities or an expropriation compensation under Article 14 of the German Basic Law.²⁸
32. The German Basic Law (Grundgesetz - “GG”) protects the fundamental right to property. Article 14(1) GG states that “[t]he right to property (...) shall be ensured. [Its] content and limits shall be defined by the laws”. Requiring coal-fired plants to close is considered to be a redefinition of the scope of a property right under Article 14(1) GG rather than an expropriation under Article 14(3) GG.²⁹ An indispensable criterion for an expropriation under Article 14(3) GG is that of a full or partial deprivation of property positions and the ensuing loss of rights and assets.³⁰ The coal phase-out in the KVGB does not result in an expropriation of operators because it does not encompass any transfer of property to the State, neither when the closures are voluntary (until 2030) nor when they are statutory (from 2031).
33. Whilst expropriations must be compensated, redefinitions of the scope of a property right usually do not trigger a right to compensation. However, the German Constitutional Court does grant compensations if the measure leads to a disproportionate, undue burden.³¹ For this reason, the Scientific Service (*Wissenschaftlicher Dienst*) of the German Lower House (*Bundestag*) concluded that a **coal phase-out without compensations for plant operators is lawful and in particular constitutional**³² – subject to a case-by-case examination of whether individual operators would suffer unreasonable economic hardship.³³ Such hardship or burden might be argued to occur with respect to the closure of hard coal plants where the following circumstances (or a combination of them) arise:

²⁸ See Commission Decision SA.54537, recital 32

²⁹ This is demonstrated by arguments of the German authorities and the European Commission in the Lignite Reserve decision (SA.42536) and in the nuclear phase-out cases. See also Däuper, *Die Empfehlungen der Kohlekommission*, EnWZ 2019, 153 (158) (attached as **Annex 3**), as well as Klinski, *Rechtsfragen eines „Kohleausstiegs“: Spielräume des Gesetzgebers und Entschädigungsfragen*, ER 03/19, 104 (105) (attached as **Annex 4**).

³⁰ Schomerus/Franßen, *Klimaschutz und die rechtliche Zulässigkeit der Stilllegung von Braun- und Steinkohlekraftwerken*, im Auftrag des Bundesministeriums für Umwelt, Naturschutz und nukleare Sicherheit, 8 November 2018 (attached as **Annex 5**), pp. 122 f., citing to German Constitutional Court, 9 January 1991 – 1 BvR 929/89, BVerfGE 83, 201, 211 (juris: paragraph 45). See also German Parliament, Scientific Service, Ausarbeitung. Stilllegung von Kohlekraftwerken, WD 3 – 3000 – 360/18, 31 October 2018 (attached as **Annex 6**), p. 5.

³¹ See for example German Constitutional Court, 15 July 1981 1 BvL 77/78 and 6 December 2016 – 1 BvR 2821/11.

³² Klinski (fn 29 above), *ibid.*, stresses in this regard also that there cannot be any serious doubt that, considering the obligation of Germany to protect the climate, also based on international agreements and Article 20a of the German Basic Law, and that the relevant objectives will be impossible to be achieved without a fast, orderly phase-out of coal- and lignite-based electricity production, it is in principle proportionate to give priority to climate protection in the necessary weighing exercise. The only doubts in this regard have been formulated by authors commissioned by a consortium of German coal- and energy companies. Klinski (fn 29 above), pp. 105 f.

³³ **Annex 6**, pp. 10 f. An example for this has been mentioned by the Commission in its letter dated 4 July 2018 to Germany with regard to case SA.51169 (2018/PN) – *16th Atomic Energy Act Amendment Act (16th AtG Amendment Act)* (attached as **Annex 7**): “[The] assessment by the Commission services [that no formal notification under Article 108(3) TFEU is required] relates solely to the content of the statutory compensation scheme. Since the full individual calculation of compensation to individual companies has not yet been carried out, it is not yet possible to determine to what extent this individual calculation also complies with the principles of the Act and therefore does not require notification under the State aid rules.”

- The capital expenditure of a plant (e.g. to build it or substantially improve) has not yet been fully amortised / recouped; it is also relevant, however, that there is no "right to full amortisation", that is, no automatic assumption that there is an undue burden or exceptional hardship simply because the investments are not fully amortised.³⁴
- The plant remains valuable at the time it is forced to shut down (e.g. it is expected to make reasonable profits in the future).³⁵
- The operator could legitimately expect at the time of investment that the regulatory framework would not change.

34. Where these circumstances apply, damages might be payable under German law, to ensure that an operator did not make a net loss on an investment made at a time when they could legitimately expect that the regulatory framework allowing further profits to be made would not change.³⁶ Where, however, one or more of these factors do not apply, it is harder to see how a coal plant operator could claim that they were entitled to compensation – beyond, potentially, costs directly related to closing the plant earlier than planned.

35. The fact that certain groups of hard coal plants are already making losses (categories D to F in Enervis study in **Annex 2**)³⁷ is a strong indication that their operators cannot be considered likely to be exposed to an exceptional burden or undue hardship for being forced to close their plants – noting that closures before the end of 2030 and participation in auctions remain voluntary. To the contrary, closing down the plants potentially averts future losses.

36. *“Also, the Court has clarified that releasing an undertaking from a supposed structural or competitive disadvantage does not enable it to escape the classification as State aid.”*³⁸ Therefore, even if the measure were to aim at alleviating a disadvantage (e.g. limiting the losses hard coal plants are making for continuing to operate on the energy market), this would not preclude it from being categorised as State aid.

37. Operators of newer plants that are still profitable may have decided, absent the KVBG, to continue operating as long as their business needs were satisfied. In this respect, Advocate General Wahl also clearly stated in his opinion on *Achema AB e.a.* (para. 54) that *“it is irrelevant whether decisions with regard to investments or procurements by the beneficiaries have been provoked or encouraged by the authorities’ promise of public support. The fact that, in the absence of the measures in question, some*

³⁴ Klinski (fn 29 above), p. 106, citing to a judgment by the German Federal Administrative Court (Bundesverwaltungsgericht) of 30 April 2009 in case 7 C 14/08 *Nutztierhaltungsverordnung*, DVBl. 2009, 1054 (Rn. 37). This judgment has also been confirmed by the German Constitutional Court, decision of 14 January 2010 in case 1 BvR 1627/09, BVerfGK 16, 473.

³⁵ Expectation of future profit generation was a factor in the Commission approving compensation for mothballing and closure in its Decision in case SA.42536 of 27 May 2016 – *Germany. Closure of German lignite-fired power plants*), in particular recital 43

³⁶ Däuper (fn. 29 above), *ibid*

³⁷ See also Däuper/Michaels/Dietzel/Buller, *Ein Kohleausstieg nach dem Vorbild des Atomausstiegs? Eine juristische Analyse des Urteils des Bundesverfassungsgerichts vom 6. Dezember 2016*, Agora Energiewende, August 2017 (https://www.agora-energiewende.de/fileadmin2/Projekte/2015/Kohlekonsens/Agora_Rechtsgutachten-Kohlekonsens_WEB.PDF), pp. 26-29

³⁸ Commission Decision SA.54537 (fn. 26 above), recital 43; GC, Judgment of 16 September 2013, Joined Cases T-226/09 and T-230/09 *British Telecommunications plc and BT Pension Scheme Trustees Ltd v Commission* EU:T:2013:466, paragraphs 74 f.

economic operators would have made different business choices does not detract from the aid nature of those measures. Most aid schemes have precisely that objective: to promote some specific economic activity which the authorities consider to be in the public interest.” In the case at hand, the fact that the KVBG organises the closure of coal plants for pursuing an objective of public interest, whereas profitable coal plants may have otherwise remained on the market beyond the target closure dates, thus does not exclude that the *Steinkohlezuschlag* grants the eligible plants an advantage.

38. Moreover, the design of the scheme itself excludes the applicability of *Asteris* and clearly provides an advantage to the beneficiaries of the *Steinkohlezuschlag*:

- If plants close statutorily as of 2031, they do not receive any compensation. This means that the bids accepted in the auctions taking place until 2027 would constitute an advantage for the plants participating in the auctions. Hence receiving a *Steinkohlezuschlag* does not depend on the actual level of damage caused to the operators by the coal exit - since all hard coal plants are ultimately ordered to close - but on the decision of the operators to place bids in the auctions or close after 2031.
- The nature of a competitive bidding process indicates that these are not compensations for infringements of property rights under Article 14 GG, in particular because the funds of the auctions are limited.³⁹ On the contrary, the concept of compensations for damages under Article 14 GG implies an indemnification to the extent to which the property right was infringed upon, without a statutory or budgetary limitation.
- The participation in the auctions is voluntary and thus not limited to operators of plants that would, at the time of the auction, still have a residual value that might entitle them to a compensation for an infringement of their property right under Article 14 GG. The design of the auctions thus permits hard coal plants, which would presumably not be entitled to any damages under Article 14 of the Basic Law, to receive a statutory compensation.

3.3 Distortion of competition and trade between Member States

39. As regards the *Steinkohlezuschlag*, “[t]he phase-out of coal-fired electricity generation means that the electricity these plants would have produced will now have to be produced by other generators, which is likely to affect the merit curve and hence the electricity wholesale price.”⁴⁰ Since the German market is “well-connected and coupled with the bidding areas of neighbouring countries, (...) the measure must be assumed to impact competition and trade between Member States.”⁴¹

³⁹ Point 19(43) of the Commission’s Guidelines on State aid for environmental protection and energy 2014-2020 (OJ C 200 of 28 June 2014, p. 1), by analogy, define “competitive bidding process” as “a non-discriminatory bidding process that provides for the participation of a sufficient number of undertakings and where the aid is granted on the basis of either the initial bid submitted by the bidder or a clearing price. In addition, the budget or volume related to the bidding process is a binding constraint leading to a situation where not all bidders can receive aid”.

⁴⁰ Commission Decisions in cases SA.42536 (fn 35 above), recital 47; Commission Decision SA.54537 (fn. 26 above), recital 45

⁴¹ Commission Decisions SA. 42536, recital 48, and SA.54537, recital 46

3.4 Conclusion

40. Only the existence of an advantage is debatable for the qualification of the *Steinkohlezuschlag* as an aid measure, while the other criteria are undoubtedly met. In this respect, the national legal framework might at best require compensations for a relatively small part of hard coal plants: the newer ones, on an individual basis, which do not have an incentive to participate in the auctions and therefore are likely to be forced to close by law from 2031 and that are more likely to be profitable on the market until then. For the large majority of plants, any compensation received under the KVBG would grant them an advantage and would therefore have to be assessed by the Commission with regard to its compatibility with the internal market before being granted.

4 The aid measures appear to be incompatible with the internal market in several respects

4.1 Legal framework for the assessment and the need to assess the aid against Articles 7, 9 and 11 TFEU

41. The compatibility assessment of the *Steinkohlezuschlag* has to be based directly on Article 107(3)(c) TFEU, “because no Guidelines have been adopted that provide guidance as to the Commission’s assessment of similar measures”.⁴² The aid for CHP shall be assessed under section 3.4 EEAG.

42. ClientEarth also submits that Articles 7, 9 and 11 TFEU have to be duly and fully taken into account in State aid control, and in the assessment of the German coal phase-out law in particular. These Articles provide, respectively:

- Article 7: “The Union shall ensure consistency between its policies and activities taking all of its objectives into account (...);”
- Article 9: “In defining and implementing its policies and activities, the Union shall take into account requirements linked to (...) the protection of human health;”
- Article 11: “Environmental protection requirements must be integrated in the definition and implementation of Union policies and activities, in particular with a view to promote sustainable development.”

43. ClientEarth respectfully asks the Commission to make explicit references to these articles in the decision⁴³ and precisely assess the following items:

- for hard coal compensations:
 - a. to make sure that the individual economics of each plant are taken into account in order to assure that the objective of the measure (CO₂-reduction) is met and the lifetime of plants is not prolonged by the auctions; and

⁴² Commission Decisions in cases SA.42536, recital 53, and SA. 54537, recital 55

⁴³ For a more detailed legal analysis of the reasons why these articles shall be taken into account explicitly, see : ClientEarth and Agora Energiewende webinar on “The role of State aid for a Green recovery”, at: <https://www.agora-energiewende.de/en/events/the-role-of-state-aid-in-the-eus-green-recovery/>

- b. that what is paid reflects the actual damages, where any, incurred by a plant due to an earlier closure date;
- for CHP support (Coal-Substitute and South Bonuses): whether the eligible fuel sources (gas, waste, biomass) are in line with both the decarbonisation objectives and protection of the environment given the high level of greenhouse gas emissions and unsustainability of the combustion of those energy sources.⁴⁴

4.2 Doubts as to the effective pursuit of the objective of reducing greenhouse gas emissions

44. In order to be compatible with Article 107(3)(c) TFEU, an aid must contribute to a well-defined objective of common interest. In the Communication on the Sustainable Europe Investment Plan, which is part of the European Green Deal, the Commission has recognised that the closure of coal-fired power plants is crucial to achieve the transformation to a climate-neutral economy. Furthermore, the Communication stressed that future State aid policy should facilitate the phasing out of fossil fuels, in particular those that are most polluting.⁴⁵
45. The primary objective of the measure is allegedly to reduce greenhouse gas emissions in Germany. In this regard, Section 2(1) KVBG states that its purpose is “*to reduce and end the generation of electrical energy through the use of coal in Germany in a socially acceptable, gradual and as steady manner as possible in order to reduce emissions, while at the same time guaranteeing the supply of the general public with electricity in a safe, inexpensive, efficient and climate-friendly manner.*”⁴⁶ In previous decisions, the Commission recognised that measures incentivising the mothballing or closure of lignite and coal plants contributed to the objective of common interest to reduce greenhouse gas (or CO₂) emissions.
46. However, ClientEarth argues that this assessment criterion can only be met if it is not contradicted or undermined either by the design of the measure itself or by other interrelated aid measures. In the present case, there are significant doubts on whether the provisions incentivise a CO₂ reduction, in particular in view of the funding for conversions of hard coal plants to CHP plants based on a different energy source.
47. Firstly, it is doubtful whether the objective of reducing greenhouse gas emissions is met if operators of coal-fired power plants convert, thanks to the funding for CHP, to other forms of unsustainable

⁴⁴ The assumption of carbon-neutrality of biomass combustion is demonstrably false and is based on flawed carbon accounting assumptions. Moreover, there is strong evidence that large-scale biomass projects can nonetheless have serious detrimental impacts on biodiversity and the carbon storage potential of land used to source the fuel (Duncan Brack, Chatham House, Woody Biomass for Power and Heat: Impacts on the Global Climate (2017), <https://www.chathamhouse.org/publication/woody-biomass-power-and-heat-impacts-global-climate>; and Sterman, et al., Does Replacing Coal with Wood Lower CO₂ Emissions? Dynamic Lifecycle Analysis of Wood Bioenergy (2018), <http://iopscience.iop.org/article/10.1088/1748-9326/aaa512/meta>).

⁴⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Sustainable Europe Investment Plan. European Green Deal Investment Plan, COM(2020) 21 final, 14 January 2020, pp. 12-15

⁴⁶ While the motivation of the draft law of 2 July 2020 (see fn. 1 above) refers (at p. 1) only to reductions of CO₂-emissions, § 2(1) of the KVBG refers to reduction of „emissions“.

energy source combustion with high emissions such as natural gas and biomass.⁴⁷ Strikingly, the German government argues that expanding CHP is needed to meet the climate targets without distinguishing between the level of emissions of the different combustion fuels.

48. Secondly, the use of CHP funding enables hard coal plants to prolong their operations and still receive a high level of funding.
49. At present, the closure compensation amount for the first round of auctions is set at a maximum bid of EUR 165,000/MW, which is significantly lower than the CHP funding.⁴⁸ Indeed, the subsidy for CHP plants is approx. 1,235-1,880 EUR/KW,⁴⁹ whereby the investment costs of approx. EUR 1,000-1,500 EUR/KW must be taken into account.⁵⁰
50. It is therefore clearly advantageous for the hard coal plants to apply for CHP funding rather than participating in the first rounds of auctions for closure. This poses the risk that the hard coal phase-out will be delayed for some plants (as not all will be able to be successful in the annual CHP auction, which will be limited to 200 MW pursuant to Section 8c KWKG), at least up until 2024. Modelling has shown that sufficient older power plants would be incentivized to participate in the first auction round to meet the auctioned GW-volumes.⁵¹ For the subsequent rounds of 2021, 2022 and 2023, however, participation is expected to be low and therefore decommissioning is, for up to 200 MW per year pursuant to Section 8c KWKG, likely to be delayed until after 2024 because of the possibility to obtain the considerably more attractive CHP funding.⁵²

⁴⁷ In application of Articles 7, 9 and 11 TFEU and the EU's announced project to "[assess and minimise] *the risk of unintended incentives for using unsustainable biomass (...) through appropriate safeguards*"⁴⁷, the **Commission should enquire what safeguards against aid to unsustainable biomass combustion will be put in place by Germany under the CHP Bonuses**. Indeed, whilst the draft law limited the use of biomass, there is no limitation in the final version of §7c (4) KVBG.

⁴⁸ Koenig, Hanns, Aurora Energy Research: Statement on the Draft of the Coal Exit Law and further Laws (*Stellungnahme zum Entwurf eines Gesetzes zur Reduzierung und zur Beendigung der Kohleverstromung und zur Änderung weiterer Gesetze*) (*Kohleausstiegsgesetz, BT-Drucksachen 19/17342, 19/18472*) ("**Stellungnahme Koenig, Aurora**"), Public Hearing, 25.5.2020, Ausschussdrucksache 19(9)619, 20 May 2020 (available at <https://www.bundestag.de/resource/blob/697120/d4ba6081d9a2f1d38afd946d1c13e436/sv-koenig-data.pdf>), p. 5.

⁴⁹ These values have been calculated on the basis of the calculation in Matthes, Felix: Position Paper Coal Exit Law (*Stellungnahme Kohleausstiegsgesetz*) 19. May 2020, available at <https://www.bundestag.de/resource/blob/697412/ff1b408f05f7070851d73affc6797f60/sv-matthes-data.pdf>, p.17, and updated according to the changes to the draft of the coal exit law. Previously, the draft read that the coal substitute bonus would amount to 180 EUR/KW, so Matthes calculated the CHP funding on that basis resulting in a minimum value of 1.410 EUR/KW and in a maximum value of 1.670. This calculation includes the CHP premium, the South bonus as well as CO₂ prices and avoided grid fees. Since the adopted law includes a minimum Coal Substitute Bonus of 5 EUR/KW, we subtracted 180 EUR/KW from 1.410 EUR/KW and then added 5 EUR/KW to determine the minimum value of 1.235 EUR/KW, and a maximum Coal Substitute Bonus of 390 EUR/KW, we subtracted 180 EUR/KW from 1.670 EUR/KW and then added 390 EUR/KW to determine the maximum CHP funding value of 1.880 EUR/KW.

⁵⁰ Stellungnahme Koenig, Aurora (fn. 48 above), p. 5.

⁵¹ *Ibid.*, p. 5.

⁵² *Ibid.*, p. 5. In addition to the annual auction limit of Section 8c KWKG, the risk of delay due to the more attractive CHP funding compared to the hard coal award is limited solely by the fact that for the target dates 2024 to 2026, phase-outs will be conducted by law according to age of the plants (the older having to decommission first) if not enough plants participate in the tenders. From 2027 onwards, the remaining hard coal plants will continue to be decommissioned by law according to the age list. This does not include plants up to 150 MW and those that are absolutely necessary for the safety and reliability of the grid. The list of plants deemed necessary will only be published on 1 July 2021 (see Section 29 (4), (5) (1) KVBG).

4.3 Need for State intervention

51. The next question is whether the measure is targeted towards a situation where aid can bring about a material improvement that the market alone cannot deliver, e.g. in the presence of a market failure.
52. It thus needs to be considered whether the market alone would not have achieved the same savings of greenhouse gas emissions. It is not possible to conclude that in general all hard coal plants that are now phasing-out in the course of the auctions would have phased-out due to the market situation within the same time frame.
53. There are, however, strong indications that coal-fired power plants in Germany are already unviable. According to the electricity market modelling study prepared by Enervis (**Annex 2**) already mentioned under section 2, older hard coal-fired power plants in Germany (which started operating from 1995 or earlier) will already be privy of any residual value at the time of the upcoming first bidding round (planned for September 2020). These plants have reached their calculated operation lifetime, the exceedance of which is not profitable.⁵³ Main drivers for this result are the considerable increase of (i) electricity production from renewable energy sources and (ii) prices for CO₂-emissions certificates (“ETS-certificates”).⁵⁴
54. Coal plants that do not yield profits and have no prospect of operating profitably in the future can be expected to phase-out sooner than later, driven by market considerations alone. This indicates that there is **no market failure and there is no need for State intervention**. Therefore any form of compensation for the phase-out, let alone a compensation of up to EUR 165,000 per MW of net capacity (which the law stipulates as the highest bid for the first auction in September 2020) leads to an **overcompensation** and represents an **incompatible aid**.⁵⁵
55. Newer coal plants, which have been in operation for less than 25 years, would not necessarily phase-out without a financial incentive but are also not likely to participate in the auctions as the bid limit value might be lower than what they expect in profits in the future.⁵⁶
56. The reason for this is that those newer plants, despite exceptions, appear to still have a prospect for future profitability though it is uncertain how the market will develop. For instance, should the price for ETS-certificates continue to rise as sharply as in the past two years,⁵⁷ due to environmental law

⁵³ **Annex 2**, p. 4

⁵⁴ *Idem*, p. 4.

⁵⁵ Suggesting this also Däuper (fn. 29 above), p. 158.

⁵⁶ While for lignite-fired power plants in general, experts see a risk of overcompensation, for younger hard coal plants, it appears that experts expect compensations to remain below the level at which operators would phase out voluntarily: “(...) According to our modellings so far, in the first round of auctions, we would expect a market clearance below the maximum bid of 165 EUR/kW, because sufficient older plants would in the current market environment find bidding below this level acceptable. However, as of the second bidding round, the price for market clearance could possibly lay significantly above the degressive maximum bid.” (own translation) Stellungnahme Koenig, Aurora (fn. 48 above), p. 5.

See on this also <https://www.klimareporter.de/deutschland/kommt-der-kohleausstieg-ohne-gesetz-schneller>, <https://carbontracker.org/post-covid-economic-stimulus-risks-locking-in-future-for-costly-coal/>.

⁵⁷ The price for ETS certificates has increased from around EUR 5 per ton of emitted CO₂ in early 2017 to over EUR 25 per ton of emitted CO₂ in early 2019; it remained above EUR 20 in 2020 (see Dr. Matthes/Hermann/Dr. Mendelewitsch/Cook (Öko-Institut e.V.), *Einordnung der geplanten Entschädigungszahlungen für die Stilllegungen deutscher Braunkohlekraftwerke im Kontext aktueller Entwicklungen*, Berlin, 29 June 2020 (available at <https://www.oeko.de/fileadmin/oekodoc/Einordnung-der-geplanten-Entschädigungszahlungen-fuer-deutsche-Braunkohlekraftwerke.pdf>), Abbildung 2-1 (S. 11)). We note that ETS prices have temporarily reduced significantly due to the coronavirus crisis. That crisis has also had a significant impact on the MWh generated by coal plants

requirements to invest into new pollution abatement technologies and increasing price competitiveness of other generation technologies, more and more of the newer coal-fired power plants will become unprofitable. It is therefore impossible to assess whether the need criterion would still be satisfied for those coal-fired power plants in a few years from now.

57. To avoid the risk of approving an aid measure that may objectively turn out to be incompatible, the German legislator should commit to ensure that the intermediate assessments provided by Section 54(2) of the KVBG can also lead to a **downwards adaptation of any compensations** foreseen in the future (thus, relating to the bidding procedures from 2022 to 2027), and possibly even to an outright cancellation of any still foreseen bidding procedures.
58. To conclude, there does not appear to be a need for State intervention with regards to coal-fired power plants with 25 years and more of operation. Finally, there are doubts as to whether the need criterion will be met throughout the proposed duration of the scheme for the newer coal-fired power plants, i.e. those with an operating start date from 2010. A case-by-case assessment would be more appropriate to determine whether a state intervention is needed at all rather than a highly complex auctioning procedure as stipulated by the KVBG.

4.3.1 Appropriateness of the aid measure

59. There are also doubts as to whether the criterion of appropriateness is met, in particular since many Member States are phasing out coal without planning compensations for the plants.⁵⁸
60. In this regard, the legislative statement in regard to the KVBG says that the following regulatory measures had been considered as alternatives to achieve the same reduction of greenhouse gas emissions, without State aid:
1. Using the existing ETS system and the targets for expanding the use of renewable energy sources;
 2. National minimum price for CO₂ for sectors which are already regulated by the ETS, in addition to the ETS; and
 3. Statutory closure plan without competitive bidding procedures.
61. The legislative statement claims that the implemented option of “*competitive bidding procedures combined with a statutory reduction until the year 2027, and as of the year 2027 exclusively statutory closures*”⁵⁹ was with regards to the legislative objective of reducing and terminating the burning of hard coal the “most effective, most cost efficient and proportionate legislative alternative.” While Option 1 would ensure that European emissions trading was achieved at European level, it would neither ensure the achievement of the national climate target for 2030 (at least 55 % greenhouse gas reduction compared to 1990) nor of the 2030 sector target for the energy industry. In addition, no reliable reduction path would be created that would allow regionally targeted and timed structural measures.

across Europe – as coal is flexible, it can easily be ramped down, and so has been called upon less than would be expected. Given the contradictory impacts on profitability of these two factors, and the uncertainty of medium to long-term impacts from the coronavirus crisis, for the purposes of this analysis we assume that coronavirus will have a neutral impact on profitability (taking into account ETS price, actual generation from coal plants, etc).

⁵⁸ Belgium (phased-out in 2016), Sweden and Austria (phased-out by in 2020), France (phase-out by 2022), Portugal, Ireland, Italy and the United Kingdom (phase-out by 2025),⁵⁸ Greece (phase-out by 2028), Finland (phase-out by mid-2029) as well as Denmark and the Netherlands⁵⁸ (phase-out by 2030).⁵⁸

⁵⁹ Own convenience translation.

Pursuant to the motivation in the draft legislative proposal of 2 July 2020,⁶⁰ Option 2 would involve significantly higher costs for the energy sector and the (producing) industry.

Option 3 would come with greater interference in the rights of plant operators. The possibility of the operators of hard coal plants to take part in the tendering process to obtain a compensation is the milder means than the option of a purely legislative reduction of hard coal-based power generation.

62. It is telling that these very considerations as regards alternatives to the hard coal compensations in the 2 July 2020 draft legislative proposal of the *Bundestag's* Committee for the Economy and Energy correspond word for word to the motivation of the Government provided in January 2020, regardless of a number of meaningful changes to the legislative proposal in the meantime, in particular a considerable increase of the maximum price for the last four bidding rounds pursuant to Section 19 KVBG (including the inclusion of an entirely new tender for 2027). The following table shows the significance of those increases. It puts a big question mark over the claim in the legislative motivation that the tender procedure was the “*most cost efficient*” legislative alternative – we doubt that this statement can still hold true with price caps having in the meantime increased by 23% for 2024, by over 50% for 2025, by over 81% for 2026 and even from zero to EUR 89,000 for 2027 without taking this into account for the reflections on different alternatives.

Significance of price cap increases between draft legislative proposals of January and July 2020			
Tender year	Price cap January draft	Price cap July draft	Increase
2024	EUR 87,000 per MW	EUR 107,000 per MW	+23%
2025	EUR 65,000 per MW	EUR 98,000 per MW	+50.1%
2026	EUR 49,000 per MW	EUR 89,000 per MW	+81.6%
2027	-	EUR 89,000 per MW	N/A

63. It is also striking that the only argument against choosing Option 2 (national minimum price for CO₂ for sectors which are already regulated by the ETS, in addition to the ETS) is that this option “*would involve significantly higher costs for the energy sector and the industry.*” This consideration is flawed in two respects. First, it is doubtful if State aid can be granted in substitution to the adoption of regulatory measures that could tackle the market failures, even if costs are increased for the undertakings, at least as long as it is not established that the cost increase in question makes certain industries uncompetitive towards world market competition. Second, this statement is by far too general. In fact, it suggests that the operators of coal-fired power plants *are* the “energy sector” and some of their customers, namely the energy-intensive manufacturing companies (such as steel or aluminium producers) *are* the “industry”. None of this is the case. The Commission should, at the very least, require Germany to provide a more specific justification, namely by setting out how much higher which costs would be for exactly which undertakings of the energy sector and for exactly which undertakings of the “industry” (at least by sectors). This analysis, should, however, also take into account possible

⁶⁰ Annex 1, p. 3.

positive effects on other undertakings in the energy industry, e.g. competitors of hard coal plant operators, as well as in terms of positive effects on the industry and its energy consumption and CO₂ emissions. On this basis, the appropriateness of the measure could be re-considered.

64. Also the first objection against Option 3, that it would “*come with greater interference in the rights of plant operators,*” is by far too unspecific – also in this regard, the Commission should require Germany to provide a more detailed account. Further, the last sentence, which states that “[t]he possibility of the operators of hard coal plants to take part in the tendering process to obtain a hard coal surcharge is the milder means than the option of a purely legislative reduction of hard coal-based power generation” also only applies the appropriateness criterion from one perspective, namely the plant operators’. Furthermore, the third alternative would have been the only one to assure that damages suffered due to regulatory closures would have been invoked and assessed on a case by case basis.

4.4 Incentive effect

65. There are also doubts as to whether the planned aid measures have the required incentive effect.

66. To establish whether the measure has an incentive effect, it must be demonstrated that it changes the behaviour of the undertakings concerned to the effect that they would engage in an activity which they would not carry out without the aid or which they would carry out in a restricted or different manner.⁶¹

67. This would be the case if all concerned plants were profitable, so would continue to operate beyond the phase-out date in the KVBG under current market conditions.⁶² As already stated above, this is not the case for the older coal-fired power plants (which started operating more than 25 years ago), because they will already be privy of any residual value by the time of the first auctions (September 2020). Indeed, for those plants, the possibility to obtain a compensation may even provide a misguided incentive to artificially prolong their operation only in order to participate in the tender process and win the bid for closure.⁶³

68. With regard to future market developments, an incentive effect is also doubtful with regards to newer coal-fired power plants, i.e. with an operating start date as of 2010, for which later phase-outs are foreseen. The measure could only be approved if there would still be an incentive effect at the relevant closure date in the future. Also, this would need to be assessed for each plant individually and Germany should then be required to notify the Commission of individual aid paid under the scheme (if the latter is to be authorised) since market conditions would have evolved by that time.

69. As regards the newer plants, the presence of an incentive effect of the hard coal bid is also questioned by the existence of the alternative option of obtaining CHP funding, which, as shown above, provides much higher possible payments and can dis-incentivise them to participate in the auctions.

⁶¹ Commission Decision SA.54537 (fn. 26 above), recital 77

⁶² *Ibid.*, recital 78 and Commission decision on SA.42536, recital 75

⁶³ Däuper (fn. 29 above), p. 156

4.5 Proportionality of the aid

70. Under Article 107(3)(c) TFEU, the aid amount must be limited to the minimum needed to incentivise the desired outcome. Also the Communication on the Sustainable Europe Investment Plan has highlighted that the Commission would examine the proportionality of support for coal closures in particular.⁶⁴ In the present case, it therefore needs to be assessed whether there is a risk of overcompensating the possible beneficiaries.⁶⁵

71. In line with what has already been assessed above, there certainly would be overcompensations for the oldest category of coal-fired power plants (25 years and older). As regards future market developments, it is also doubtful whether there could not be overcompensations for newer coal-fired power plants as well, i.e. with an operating start date as of 2010, for which later phase-outs are foreseen. Regarding this last group of plants, the measure can only be approved if it is ensured that any aid provided to those plants would not lead to overcompensations whilst taking into account the market situation at the relevant time. An individual assessment, plant by plant, shall be conducted.

4.6 Avoidance of undue negative effects on competition and trade between Member States

72. In order for the aid to be compatible with the internal market, the negative effects of the measure on competition and trade must be sufficiently limited, so that the overall balance of the measure is positive.⁶⁶

73. It has been demonstrated above that the *Steinkohlezuschlag* would not have an incentive effect for the older hard coal plants that would be exiting the market in any case now or in the coming years. For those plants, the impact of the aid measure on competition and trade between Member States seems neutral. However, awarding State aid to the newer hard coal plants (that would perhaps not close as early under market consideration than if incentivised by the KVBG schemes) could be distorting competition on the market in an undue manner.

5 General conclusion

74. The hard coal compensation scheme as well as the CHP-related funding measures raise considerable doubts as to their compatibility with the internal market pursuant to Article 108(2) TFEU. The Commission should thus open the formal investigation procedure pursuant to Articles 108(2) and (3) TFEU and 4(4) of the Procedural Regulation.⁶⁷ In this procedure, should the present analysis be

⁶⁴ See fn. 45 above, Section 4.3.4 (pp. 14 f.).

⁶⁵ Commission Decision SA.54537 (fn. 26 above), recital 79.

⁶⁶ Commission Decision SA.54537 (fn. 26 above), recital 83.

⁶⁷ 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 (codification), OJ L 248 of 24.9.2015, p. 9 ff.

confirmed, the Commission should issue a negative decision pursuant to Articles 108(2) TFEU and 9(5) of the Procedural Regulation.



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