

Legal briefing: The Commission's doubts on the State aid compensations for the closure of LEAG and RWE lignite plants in Germany

On 21 April 2021¹, the Commission published its decision to open formal investigations on the compensations for the closure of lignite plants in Germany that are provided for in the German Coal Exit Law of 3 July 2020 (the Opening Decision).

At this stage, **the Commission doubts that the compensations comply with Article 107(3)(c) TFEU** under which State aid can be found compatible with the internal market if they support the development of an economic activity or an economic sector (*first criteria*) and do not distort competition and trade to an extent contrary to the common interest (*second criteria*). The assessment is done directly under Article 107(3)(c) TFEU because there are no Commission's guidelines on State aid for the closure of coal plants.

The Opening Decision only expresses the Commission's *preliminary* analysis. The final assessment and conclusions can end up being different. Interested parties can comment on the Opening Decision.

This legal briefing includes a basic description of the planned compensations, the next procedural steps of the State aid procedure and our preliminary analysis of the Commission's reasoning. It does not constitute legal advice but is meant to inform stakeholders about the legal doubts the Commission expresses on the compensations and what elements still need to be substantiated by the German authorities for demonstrating that the aid can be compatible with State aid law.

1 The compensations for lignite operators

The German Coal Exit Law plans to compensate lignite operators for the closure of their plants by 2038.

Contrary to the compensations for the closure of hard coal plants that are allocated by tenders², the compensations for the lignite plants have been **negotiated and enshrined in a legal provision as well as in a contract with the operators**.³ According to Section 44 of the Coal Exit Law, the compensations are **EUR 2.6 billion to RWE** for the closure of the lignite installations in Rhineland and **EUR 1.75 billion to LEAG** for the closure of the installations in Lusatia.

¹ The opening decision was adopted on 2 March 2021 but the full text was released on 21 April in [German](#) and in [English](#).

² The Commission raised no objections to these compensations in a decision of 25 November 2020 ([case SA.58181](#)), notably because the tendering scheme would globally ensure the absence of overcompensation of the operators, even though Germany and the Commission acknowledge that a few individual operators could be overcompensated.

³ Under the closure law, lignite installations with a net capacity of up to and including 150 MW are treated in the same way as small hard-coal installations and bid for compensations. This is why the focus of the Opening Decision is on RWE and LEAG.

The compensations are intended to cover **foregone profits** of the operators as well as additional **rehabilitation costs** for the closure of the opencast mines.⁴ The latter results from the contract with the operators although Section 44(1) of the Coal Exit Law provides that the compensations would only be for the plants and that mines should continue bearing their rehabilitation costs.

The closure dates vary for each installation between 2020 and 2038.⁵ For certain installations, RWE can choose between two blocks for a specific closure date. In addition, three blocks⁶ will be transferred to the deferred closure mechanism (that the draft law called security reserve before being adopted), by which they would leave the market but operate in case needed for security of supply, before they close down on a permanent basis.

The operator of a lignite installation may temporarily or permanently close the installation before the closure date envisaged in the closure law whilst receiving the same amount of compensation. If the regulatory authority prevents the closure because the plant is considered necessary for the security of supply, the installation would be required to run in the network reserve, but no longer than until the closure date that was initially foreseen. The Opening Decision remains silent on the current validity of the network reserve though: the Commission's approval of the reserve under State aid law expired in June 2020 and this approval has not been renewed to ClientEarth's knowledge.

2 The next procedural steps

Once the decision is published in the Official Journal of the EU, stakeholders will have **1 month to submit their comments** on the aid measure.⁷ The Commission will communicate the comments to Germany (unless they are marked as confidential). However, neither stakeholders' comments nor Germany's reply to them will be published. The final Commission's decision will, in principle, only summarise arguments that are deemed relevant for the assessment.

The Commission will then have **at maximum 18 months** to adopt a final decision. It can be **a positive decision** (allowing the aid) **or a negative one** (prohibiting it). Since no aid has been paid to the operators yet, there should not be any recovery (reimbursement) order, unless some aid is paid before the Commission adopts its final decision.⁸ The Commission's final decision can be subject to an action for annulment before the General Court of the EU under Article 263 TFEU.

⁴ The operation of lignite mines is intrinsically linked to the operation of the plants they supply, so the closure of the latter ultimately implies the closure of the mines as well.

⁵ See Opening Decision, Table 2

⁶ LEAG's Jänschwalde A and Jänschwalde B would enter the deferred closure mechanism respectively on 31 December 2025 and 31 December 2027 and would definitely close by 2028. RWE's eligible installation, that will either be Niederaußem G or Niederaußem H, is eligible for the deferred closure compensation as of 31 December 2029 and is scheduled to close down permanently by the end of 2033.

⁷ The comments must be sent to the State aid greffe (stateaidgreffe@ec.europa.eu) with the reference of the case. Instructions will be mentioned in the version of the decision that will be published in the OJEU.

⁸ Given the importance of this case and its level of publicity, it is very unlikely that Germany would breach its standstill obligation (Article 108(2) TFEU). In any case the contract provides that the compensations are subject to the Commission's approval. In theory a first instalment could have been paid to RWE on 31 December 2020, as per section 45 of the Coal Exit Law but to the best of our knowledge, it has not been paid yet.

3 The compensations are State aid

In its decision authorising the tendered compensations for hard coal plants, the Commission did not conclude whether the compensations constituted State aid or not. Since the Commission found that they would be compatible with the internal market anyway, it considered that a full assessment of the nature of the measure was not necessary to authorise it. The Commission adopted a very comparable approach in its previous decisions on the German lignite reserve in 2016 and on the aid for closing Vatenfall's Hemweg 8 coal plant in the Netherlands in May 2020, in particular.⁹

Conversely this time, the Commission (preliminarily) concludes that the compensations for RWE and LEAG **are State aid**.¹⁰ Based on its analysis of Article 14 of the constitutional German Basic Law the phase-out obligation does not constitute an expropriation and therefore must only be compensated for if there are exceptional circumstances. In light of the classic *Asteris* EU case law¹¹, the Commission finds that the **planned compensations would “very likely” go beyond what could be justified** under German law and thus give an advantage to RWE and LEAG¹², mainly because:

- (a) “in the case of older plants that have already been written off, decommissioning without a compensation can be possible” under German law, whereas here several installations that would receive compensations are already written-off. We estimate it is about 90% of them;
- (b) “considering also the transition periods certain installations have, it seems that installations which are **the least likely** to be granted a compensation by a German court receive a compensation under the current measure”¹³; and
- (c) the planned compensations amounts seem “to go beyond a compensation of unamortised investment costs” and include turnover and profitability prospects, that in principle cannot give rise to damages under Article 14 of the Basic Law.

ClientEarth fully shares the Commission's analysis.¹⁴

Legally, qualifying the measure as State aid under Article 107(1) TFEU is a prerequisite to establish the Commission's competence on the one hand, and to allow the Commission to issue a negative decision, on the other hand. However, it does not mean that the Commission will necessarily take a negative decision: a very large majority of aid measures is approved by the Commission, even after the opening of formal investigations raising numerous doubts on a measure.¹⁵

⁹ Even if the decision allowed the aid, the Netherlands are challenging the Commission's decision before the General Court of the EU on the ground that the measure does not constitute State aid, so that the Commission would not have been competent to assess it under Article 107 TFEU. The Netherlands had notified the aid only for legal certainty (certainly hoping the Commission would conclude the measure did not constitute State aid), which is standard practice for novel cases. See pending case [T-469/20](#).

¹⁰ Opening Decision para. 91-114

¹¹ The Court of Justice found in its judgment in joined cases C-106 to C-120/87 (*Astéris*) that compensation for damages incurred as a result of State action does not confer an advantage on the recipients of the compensation. The question is then to determine whether the beneficiary would have had a right for damage compensation under national law. If the planned aid exceeds the foreseeable damages amount, the excess is an advantage on the recipient and thus a State aid (if the other criteria of the definition of State aid are met).

¹² The Commission cannot go as far as concluding with certainty that no damages would be granted under national law because the determination of damages, if any, is within the competence of the German courts as per Article 14 of the Basic Law.

¹³ We underline.

¹⁴ See ClientEarth's report of October 2019 “[No money for old lignite](#)”, para. 25 ff for a similar demonstration.

¹⁵ See for example the case of the State aid for the construction of Hinkley Point C nuclear power plant in the UK (2014, case [SA.34947](#)) in which the Commission issued numerous doubts in the opening decision and finally approved the aid.

4 The Commission's doubts and our preliminary analysis

Whereas there are several criteria to assess for the compatibility of a State aid with the internal market¹⁶, the Opening Decision only contains the Commission's doubts **on the proportionality criterion**.¹⁷ The Commission had announced in the Green Deal Investment Plan that it would pay particular attention to the proportionality of aid for the closure of coal plants¹⁸ and it is indeed, in our opinion, particularly problematic here.

It therefore makes sense that the Commission welcomes comments from third parties on this point more specifically. However, stakeholders can submit comments on any other assessment criteria, since they all need to be verified by the Commission.

4.1 Doubts on the proportionality of the compensations

As indicated in the Opening Decision (para. 120), to be deemed proportionate the "*aid amount must be limited to the minimum needed to incentivise the desired outcome. In the present case, it therefore needs to be assessed whether there is a risk of overcompensating the beneficiaries LEAG and RWE.*" The Commission doubts that the compensations are effectively proportionate, based on the information provided by Germany, on the calculation of the foregone profits of the plants and the rehabilitation costs of the opencast mines.

4.1.1 Foregone profits of the plants

Germany assumes that without the Coal Exit Law, some units would have operated until 2061; it also says that RWE's installations would need to run until 2051, and LEAG's installations until 2040, for their respective expected foregone profits to exceed the compensations amount. The Commission doubts such long lifespans are realistic **from a technical and economical perspective** given that (a) the usual lifespan of a plant is between 40 and 55 years; (b) Germany's projections do not include the investments to upgrade the lifespan of the plants, notably for their compliance with mandatory environmental standards (such as under the Industrial Emissions Directive); and crucially, **given the (c) "recent climate ambitions agreed at EU-level and recent developments in the power sector"**, notably in relation with the increase of fuel and CO₂ prices that greatly influence the merit-order and profits of the lignite plants.

It is also interesting to note that the Commission "has not obtained **specific data and calculations for each of the lignite plants** scheduled for closure" and thus feels unable to reach a final conclusion on the validity of Germany's calculations. Conversely, and wrongly in our opinion¹⁹, the Commission did not request individual data for the hard coal plants and even acknowledged that some of them may be overcompensated because they were already written-off and/or unprofitable. ClientEarth agrees with the approach in the Opening Decision that the best manner to assess the proportionality of the aid **is to obtain and assess individual data for each plant**. Indeed based on this information, it could be estimated that the compensations are justified for some installations and not for others, or for an amount that differs from

¹⁶ The aid must support the development of an economic activity, be necessary, appropriate, proportionate and have an incentive effect. It must also not distort competition and trade between Member States to an extent contrary to the common interest.

¹⁷ The Commission confirmed to us that the Opening Decision was published as they intended it to be, so the omission of the analysis of the other criteria is voluntary. This is not unusual even though we believe it is detrimental for the full analysis of the Opening Decision.

¹⁸ Green Deal Investment Plan of 14 January 2020, COM(2020) 21 final, section 4.3.4

¹⁹ ClientEarth, "Grounds of incompatibility of the compensations for hard coal plants with State aid law", September 2020, see para. 22-24 and 71 in particular

what Germany presented and, in principle, the compensations amount would have to be reduced accordingly. Given that no other third party can obtain these financial data, we can only encourage the Commission to use its power to request them from the operators directly.²⁰ Other stakeholders can submit their own projections to the Commission for supporting the investigations.

4.1.2 Rehabilitation costs of the mines

Germany and the operators claim that the 'early' closures of the lignite plants imply *additional* rehabilitation costs for the opencast mines associated with the plants that will also need to close. Those additional costs would be due for adapting the rehabilitation of the sites (including of Hambacher Forst for RWE) and the increase of the provisions paid by the mines to cover rehabilitation costs. One issue is that the study commissioned by Germany to assess those additional costs **is not conclusive**.²¹ Due to *information asymmetry* with the operators, the consultants could not assess the individual costs for each mining site of the removal of waste material, recultivation and landscaping, geotechnical securing, and renaturation, whereas they vary depending on the configuration.

The Opening Decision states that additional mines rehabilitation costs "*could in principle constitute a justification for compensation payments, but notes that these are subject to considerable uncertainties due to the long time horizon and information asymmetries.*"²² However, the Opening Decision remains vague: the Commission limits itself to requesting more evidence on the additional costs and does not suggest that there could be no additional costs, nor if covering them with taxpayers' money could go against the '**polluter pays principle**' or not. This remains for us **one of the core issues** of this assessment.

On the contrary, based on a study by the Öko-Institut²³, ClientEarth believes there is no real additional recultivation cost for LEAG's Jänschwalde and Welzow-Süd mines since those costs would have to be borne anyway. In any event, all costs should be borne by the mines operators as per their legal obligations – this is actually recalled in Section 44(1) of the Coal Exit Law itself. In principle, the 'polluter pays principle' implies that State aid can be granted for the remediation of polluted sites only when the polluter cannot be held liable for it under Union or national law. As per the State aid guidelines for environmental protection and energy, "*In particular, the Commission will consider that aid for contaminated sites can be granted only when the polluter — i.e. the person liable under the law applicable in each Member State without prejudice to the Environmental Liability Directive (Directive 2004/35/EC) and other relevant Union rules in this matter — is not identified or cannot be held legally liable for financing the remediation in accordance with the 'polluter pays' principle.*" Conversely here, the mine operators are well identified and legally liable.

This being said, in reality it appears that the relevant permits have not required sufficient provisions for recultivation of the opencast mines²⁴; but this is a matter of **enforcing environmental law** on the operators at national level, namely §55 and 56 of the German Mining Law in this case. Moreover the Commission

²⁰ 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, Article 7

²¹ https://www.bet-energie.de/fileadmin/redaktion/PDF/Studien_und_Gutachten/Gutachten_Folgekosten/Gutachten_Folgekosten_Braunkohleausstieg_Abschlussbericht.pdf

²² Opening Decision, para. 136

²³ Öko Institute, Einordnung der geplanten Entschädigungszahlungen fuer deutsche Braunkohlekraftwerke, 29 June 2020, at: <https://www.oeko.de/fileadmin/oekodoc/Einordnung-der-geplanten-Entschädigungszahlungen-fuer-deutsche-Braunkohlekraftwerke.pdf>

²⁴ ClientEarth and organisation BUND Landesverband Brandenburg e.V. challenge the mining permit for LEAG's mine Welzow-Süd for this reason and filed a legal action against the permit in the beginning of 2021.

cannot authorise a State aid if the beneficiary's activities breaches the polluter pays principle and the operators' obligations derived thereof.²⁵

4.1.3 List of information Germany still needs to provide

In summary, it appears that Germany still needs to provide the Commission with:

- The justification of the long lifespan of the installations assumed by Germany
- How investments for upgrades of the installations to meet mandatory environmental standards were taken into account in evaluating their lifespan
- Individual data and calculations for each of the lignite plants, for evaluating their foregone profits including the CO₂ price increase
- The sensitivities of the model for calculating the foregone profits
- How the EU climate ambitions and recent developments of the power sector were included in the model
- Accurate and consistent justification of the additional mines rehabilitations costs assumed by Germany

The exchanges of these information between the operators, Germany and the Commission are covered by confidentiality of the investigations. It means that third parties, who generally do not have access to these information, will not be able to comment on the data in the course of the investigation and provide a critical analysis thereof.

4.2 Doubts on the other assessment criteria

ClientEarth believes the compatibility of the compensations with State aid law is also questionable on other grounds than their proportionality.

Firstly, the fact that a Member State can no longer justify the grant of aid by the pursuit of an objective of common interest such as the reduction of greenhouse gas emissions²⁶ means it needs to demonstrate that the aid helps developing an economic activity or an economic sector. It is exactly the opposite of what the closure aid aim at. It is thus questionable whether closure aid can be allowed at all under the TFEU.

Secondly, the Opening Decision does not assess whether the closure aid are needed and have an incentive effect, even though we understand from the Decision's reasoning that these criteria are problematic too. The necessity for the aid must be assessed against the possibility for the market or regulation to achieve the same result than the aid measure (thus, without spending public funds for the same objective). The incentive effect means that the beneficiary of an aid would not have made an investment or conducted an activity with its own funds, absent the aid – here, RWE and LEAG would not have closed their lignite installations (or not at the same dates) without the compensations.

ClientEarth's analysis, which seems shared at least in part by the Commission in the Opening Decision, is that some of LEAG's installations **would have closed earlier under market conditions** than scheduled under the Coal Exit Law. This is because – and it is linked with the assessment of the proportionality of the compensations – the declining market conditions for lignite (due to climate policies and the decreasing

²⁵ *Hinkley Point C* case C-594/18, para. 100

²⁶ The CJEU ruled in the *Hinkley Point C* judgement (C-594/18) that Article 107(3)(c) TFEU does not require the demonstration that the aid pursues an objective of common interest.

prices of other energy sources such as renewables), combined with the constant rise of CO₂ prices and of the ETS allowances, are driving this business model down. In 2017 LEAG's business plan was actually that two of its units would close under market conditions a year *sooner* than planned in the law.²⁷

On 12 April 2021, the EU ETS carbon market price amounted to EUR 44.39²⁸ and could reach EUR 61 by 2030 given the EU's commitment to reduce at least 55% of its greenhouse gas emissions by that year.²⁹ The Opening Decision does not reveal the formula used by the German authorities to calculate the compensation amounts. We can reasonably assume that CO₂ prices constitute one of the parameters. But without knowing the figures, ClientEarth cannot confirm whether the parameter is based on realistic assumptions; it is crucial that this is verified by the Commission and explained in the final decision.

In relation with the need for installations to upgrade for prolonging their lifespan, the Opening Decision mentions that Niederaußem D – that already closed in 2020 – could not have operated beyond August 2021 anyway since it had not planned investments to comply with the Industrial Emissions Directive. **The need to take retrofitting into account in the installation's lifespan projections apply to all in any case.**

Thirdly, the Opening Decision does not assess whether the closure aid **would create distortive effects on the market to an extent contrary to the common interest**. It is rare that the Commission issues negative decision for this reason. However, it is one of the critical criteria of compatibility of the aid and it must be assessed seriously. ClientEarth's preliminary analysis is that the compensations, associated with the late closure dates, actually support the prolongation of the operations of several of the installations. We also raise the issue whether the payment of large sums in compensation to operators of lignite plants (not only closing them down by law) – could itself lead to a distortion of competition. This could be the case if, for example, they would ordinarily suffer losses if they were to continue operating lignite plants – and where compensation for early closure is incorrectly premised on the future profitability of such plants – which we believe is the case.

The distortive effects of the lignite compensations can also be differentiated from previous cases:

- On the compensations for the closure of German hard coal plants, the Commission held that the competitive design of the auctions, via a tendering systems, limits their negative effect on the electricity market; whereas here, the compensations are lump sums which proportionality is seriously doubtful. If the compensations are not strictly proportionate to the foregone profits, they could be reinvested by the operators to cover other costs or invest, which would distort competition with other energy producers who do not get the same aid;
- On the aid for closure of Hemweg 8 in the Netherlands, the Commission concluded that "*the contribution to EU environmental and climate goals of the measure outweighs any potential distortion of competition and trade brought about by the support*". But there are very clear differences between the Dutch and German cases: LEAG's units don't actually close earlier than under a business-as-usual scenario and a similar amount of lignite will still be mined and burned,. Also, given the rapidly declining profitability of lignite plants in Germany, it is much harder to argue that LEAG, in particular, would be compensating for profits lost due to the coal phase-out.

²⁷ ClientEarth "[Coal phase-out compensation for LEAG - legality assessment](#)", May 2020

²⁸ <https://ember-climate.org/data/carbon-price-viewer/>

²⁹ See EWI, [Auswirkungen einer Verschärfung der europäischen Klimaziele auf den deutschen Strommarkt](#) (Impact of an increase of the European climate targets on the German electricity market – our translation), 17 March 2021

Juliette Delarue

Lawyer/Juriste State aid

jdelarue@clientearth.org

www.clientearth.org

Nothing in this document constitutes legal advice and nothing stated in this document should be treated as an authoritative statement of the law on any particular aspect or in any specific case. The contents of this document are for general information purposes only. Action should not be taken on the basis of this document alone. ClientEarth endeavours to ensure that the information it provides is correct, but no warranty, express or implied, is given as to its accuracy and ClientEarth does not accept any responsibility for any decisions made in reliance on this document.

Beijing

Berlin

Brussels

London

Los Angeles

Luxembourg

Madrid

Warsaw

ClientEarth is an environmental law charity, a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 10 Queen Street Place, London EC4R 1BE, a registered international non-profit organisation in Belgium, ClientEarth AISBL, enterprise number 0714.925.038, a registered company in Germany, ClientEarth gGmbH, HRB 202487 B, a registered non-profit organisation in Luxembourg, ClientEarth ASBL, registered number F11366, a registered foundation in Poland, Fundacja ClientEarth Poland, KRS 0000364218, NIP 701025 4208, a registered 501(c)(3) organisation in the US, ClientEarth US, EIN 81-0722756, a registered subsidiary in China, ClientEarth Beijing Representative Office, Registration No. G1110000MA0095H836. ClientEarth is registered on the EU Transparency register number: 96645517357-19. Our goal is to use the power of the law to develop legal strategies and tools to address environmental issues.