

19 April 2021

# Restructuring aid to Complexul Energetic Oltenia

## Bankwatch România and ClientEarth observations on Commission opening State aid decision of 5 March 2021 in SA.59974

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- A restructuring of Complexul Energetic Oltenia based on maintaining **unviable lignite assets** and on investing into **future stranded assets**, namely fossil gas capacity, would not restore the company's viability in the long term. Besides the little value of those investments, as evidenced by the lack of support from the company's private shareholder, the **constant increase of CO<sub>2</sub> prices** will result in maintaining CEO under State aid perfusion for paying its future ETS allowances. This is incompatible with the Rescue and Restructuring Aid Guidelines.
  - The restructuring plan is also incompatible with the European Green Deal, the Paris Agreement and the Union's **decarbonisation targets** for 2030 and 2050. It is thus also necessarily incompatible with the internal market on the basis of Articles 3(3) and 4(3) TEU, Articles 9 and 11 TFEU and Article 37 of the Union Charter of Fundamental Rights.
  - The Commission must reject the notified restructuring plan. The Romanian authorities must instead present a plan that **shifts the company's activities towards a business model in line with the decarbonisation objectives** of the energy market, as only such one would help restore CEO's viability in a structural manner for the long term.

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- Asociația Bankwatch România (“Bankwatch Romania”)<sup>1</sup> and ClientEarth<sup>2</sup> hereby submit to the Commission their joint comments in respect of the decision of 5 March 2021 to initiate a formal investigation procedure on the restructuring of Complexul Energetic Oltenia SA (“CEO”), (“Opening Decision”).<sup>3</sup>

<sup>1</sup> Bankwatch Romania is a non-profit organisation established in 2012 with the aim to prevent publicly financed projects that have a negative impact on the environment and on human rights. Its main field of activity is energy, supporting the correct implementation of environment legislation and the adoption of ambitious policies for a just transition to clean energy.

<sup>2</sup> ClientEarth is an environmental law organisation, comprising legal, scientific, policy and communications experts working to shape and enforce the law to tackle environmental challenges. Our work notably focuses on shaping energy market rules and a State aid legal framework that supports a flexible, efficient, competitive and sustainable energy market.

<sup>3</sup> Official Journal C 94, 10.3.2021, p. 10-23. Our observations are made on the basis of the Commission's decision of 5 March 2021 as published on the State Aid Register on 9 March 2021.

2. We have been analysing the rescue and restructuring of CEO very closely when it was first examined by the Commission in 2020<sup>4</sup> and sent, on 11 March 2020, a complaint to the Commission concerning what we deemed to be unlawful aid granted to CEO by Romania for purchasing its ETS allowances for 2018 and 2019.<sup>5</sup> Our comments made in that complaint remain valid and shall be read in conjunction with the present observations; as the Commission indicated in its reply letter, we expect that the information we had submitted would be taken into account in the assessment of the restructuring aid.

## Executive summary and recommendations

3. The European Green Deal<sup>6</sup> has recognised that “[f]urther decarbonising of the energy system is critical to reach climate objectives in 2030 and 2050. The production and use of energy across economic sectors account for more than 75% of the EU’s greenhouse gas emissions.”<sup>7</sup> Therefore, a power sector largely based on renewable sources must be developed, “complemented by the rapid phasing out of coal and decarbonisation of gas.”<sup>8</sup>
4. State aid decisions are extremely important to achieve the decarbonisation of the energy system in Europe, as they allow or prohibit the grant of aid to energy production activities. Thus, they need to be consistent with, and contribute to, the Union’s decarbonisation objectives and must support the energy transition in the Member States.
5. As will set out in more detail in Section 2 below, CEO’s Restructuring Plan is not consistent with Romania’s path to decarbonisation. In fact, with the notified aid measure, CEO will continue to use lignite and fossil fuels well beyond 2030 – which is the year by which coal-based electricity production must cease for meeting the Unions’ and the Paris Agreement targets. On the one hand, the **Restructuring Plan did not set any deadline for eliminating lignite from CEO’s energy production**. On the other hand, it **plans to lock the company and Romania into fossil gas, further contributing to harmful greenhouse gas emissions**. The new foreseen photovoltaic and hydropower capacity will have a negligible importance (only 6%) in the energy mix that CEO plans to sell as of 2022.<sup>9</sup>
6. The aid measure under review thus aims at funding a lignite operator’s Restructuring Plan that clearly **impedes the transition to a sustainable and climate-neutral economy**. This also contradicts Article 10d of the ETS Directive.<sup>10</sup>
7. It is worth noting that the Commission itself has raised, in its assessment of Romania’s NECP,<sup>11</sup> serious doubts with regards to Romania’s decarbonisation plan for the period 2021-2030, stating that

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<sup>4</sup> The Commission, with its decision SA.56250 (2020/N) – Romania – *Rescue aid in favour of Complexul Energetic Oltenia SA*, 24.2.2020, C(2020) 1068 final, decided not to raise objections to the plans notified by Romania on 6 February 2020 to grant rescue aid in favour of CEO.

<sup>5</sup> Complaint of 11 March 2020, Registration: 2020/031006 and the Commission’s response letter of 15 April 2020, ref. 2020/046352. See also our other complaint of 11 March 2020 on aid to CEO for covering the costs of expropriation of properties in order to expand its lignite mines, Registration: 2020/031012 and the Commission’s response letter of 15 April 2020, ref. 2020/046353.

<sup>6</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, “The European Green Deal”, 11.12.2019, COM/2019/640 final (“The European Green Deal”).

<sup>7</sup> *Ibid.*, Section 2.1.2.

<sup>8</sup> *Ibid.*

<sup>9</sup> Opening Decision, para. 16.

<sup>10</sup> See paragraphs 50-52 below.

<sup>11</sup> Commission staff working document, Assessment of the final national energy and climate plan of Romania, 14.10.2020, SWD(2020) 922 final, available at

“(t)he final plan does not address the intrinsic tension between the decarbonisation objective and the apparent intent to maintain the use of coal and gas beyond 2030, leaving questions of competitiveness in the context of rising carbon prices, and of air pollution impacts. The interaction between maintaining all energy sources by 2030 and the rollout of low carbon technologies is not sufficiently considered in the research, innovation and competitiveness dimension. Also lacking are clear objectives and the specification of the necessary funds for timely deployment.”<sup>12</sup> The new version of the Romanian NECP is not less flawed. Most importantly, **the Commission must adopt a consistent and coherent approach between its assessment of the NECP and of CEO’s Restructuring Plan**: the latter would only contribute to the “intrinsic tension” denounced by the Commission.

8. Finally as explained in Section 1 below, part of the aid (€241.4 million) would be used to pay for the CO<sub>2</sub> allowances CEO has to purchase for 2020 and, thus, for paying the costs of CEO’s compliance with environmental law. **This support, which consists of a new rescue operating aid, should be treated as a separate aid** because it is not covered by the Commission’s Rescue & Restructuring (“R&R”) Guidelines.<sup>13</sup> **Romania is already granting this aid** in flagrant violation of its standstill obligation under Article 108(3) TFEU.
9. In general, **no operating aid should be granted for environmental compliance costs**, because – besides the clear prohibition of aid to meet EU legal obligations – it sets the wrong incentives by not exposing companies themselves to the costs of such compliance and it does not facilitate the ‘development of an economic activity’ as required under Article 107(3)(c) TFEU. This amounts on the one hand to a violation of environmental law itself, preventing the Commission from approving the aid in line with the CJEU’s *Hinkley Point C* judgment.<sup>14</sup> On the other hand, it also conflicts with the very idea underlying the ETS itself. Allowing operating aid to CEO for environmental compliance costs would finally set a dangerous precedent for other instances of State aid to pay for CO<sub>2</sub> allowances.<sup>15</sup>

## 1 On the operating aid for paying the costs of CEO’s CO<sub>2</sub> allowances for 2020, in violation of Romania’s standstill obligation under Article 108(3) TFEU

10. Aid for CEO to be able to pay the CO<sub>2</sub> allowances it has to purchase for 2020 shall not be treated as restructuring aid, it **not being a structural measure** covered by the R&R Guidelines.<sup>16</sup> Such aid falls

[https://ec.europa.eu/energy/sites/ener/files/documents/staff\\_working\\_document\\_assessment\\_necp\\_romania.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/staff_working_document_assessment_necp_romania.pdf) (last visited on 13 April 2021).

<sup>12</sup> See fn. 11 above, pp. 12 f.

<sup>13</sup> Communication from the Commission. Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249 of 31.7.2014, p. 1 ff.

<sup>14</sup> C-594/18 P *Republic of Austria v European Commission* EU:C:2020:742, paragraphs 20, 44-45 and 100, as well as, regarding the aspect of operating aid, paragraph 119.

<sup>15</sup> On 12 April 2021, for instance, it has been reported that **the State-owned, gas-fired, Electrocentrale Constanța applied for State aid to pay its ETS allowances for 2020**. See: <https://www.profit.ro/povesti-cu-profit/energie/exclusiv-document-certificate-co2-ucigase-inca-un-producator-de-energie-a-cerut-ajutor-de-stat-de-salvare-20104262>.

Another example has been discussed in our complaint submitted on 11 March 2020 regarding a number of aid measures of the Bulgarian Government in favour of the operator of the lignite-fired thermal power plant Maritsa East 2/Maritsa Iztok 2, to finance the purchase of CO<sub>2</sub> allowances needed for the operation of the said lignite-fired power plant for the years 2017, 2018 and 2019. Registration: 2020/030984.

<sup>16</sup> Point 27 of the R&R Guidelines clarifies that restructuring aid should involve an assistance which is more permanent than the one offered with rescue aid, because it “*must restore the long-term viability of the beneficiary on the basis of a feasible, coherent and far-reaching restructuring plan.*” As further explained by point 45 of the R&R Guidelines, restructuring aid “*cannot be limited to financial aid designed to make good past losses without tackling the reasons for those losses*” and, thus, may

under the harmful category of **operating aid for environmental compliance**, which is likely to unduly distort competition on the electricity production market.<sup>17</sup>

11. Operating aid is in principle not compatible with the internal market. Indeed, the Court has long held that operating aid in principle distorts competition because it lacks the required incentive effect.<sup>18</sup> As stated under point 53 of the EEAG,<sup>19</sup> “(t)he Commission considers that aid granted to adapt to future Union standards has in principle an incentive effect, including when the standard has already been adopted but is not yet in force. However, in the latter case, aid has an incentive effect if it incentivises the realisation of the investment long before the standard enters into force”. A contrario, aid that is given to cover the cost of environmental compliance lacks an incentive effect, because the aid would subsidise the costs of an activity that the undertaking would anyhow incur, as opposed to incentivizing them to increase environmental protection beyond standards (Point 49 EEAG); and such aid contravenes environmental law itself.
12. Moreover, together with lacking incentive effect, operating aid “cannot be regarded as being intended to facilitate the development of an economic activity” as recalled by the CJEU recently.<sup>20</sup>
13. At the same time, despite Romania’s commitment mentioned in recital 36 of the Opening Decision not to put the aid into effect prior to an approval by the Commission, **the standstill obligation under Article 108(3) TFEU appears to already have been infringed**: the Romanian Government took the decision on 30 March 2021 to grant CEO 1,180,446 thousand lei, representing the equivalent of € 241.4 million for purchasing the CO<sub>2</sub> allowances it must surrender for 2020.<sup>21</sup>
14. CEO’s exposure to fines of €100 per allowance (should it not surrender its allowances for 2020 by the end of April 2021) shall not excuse Romania’s breach of the standstill obligation. We hereby refer to the letter sent to Vice-President Vestager by Bankwatch România, Greenpeace and Europe Beyond Coal on 9 April 2021 denouncing this breach; the form of aid as a direct non-repayable grant as opposed to a loan; and the fact that it would be operating aid for environmental compliance costs.
15. A subsequent emergency ordinance of 15 April 2021 amends the source of funding: part of the aid would now come from the Budget Reserve Fund and part from the Privatisation Fund, that is a general fund. Nevertheless, the whole amount still stems from State resources and is under the State’s

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involve only: (i) “the reorganisation and rationalisation of the beneficiary’s activities on to a more efficient basis, typically involving withdrawal from loss-making activities”; (ii) “restructuring of those existing activities that can be made competitive again”; (iii) “possibly, diversification towards new and viable activities”; and (iv) “financial restructuring in the form of capital injections by new or existing shareholders and debt reduction by existing creditors”.

<sup>17</sup> Commission Decision in case SA.35818 (2016/C) (ex 2015/NN) (ex 2012/CP) implemented by Spain for Iberpotash, 31.8.2017, C(2017) 5877 final, recital 102. The Commission found that the aid granted by Spain to Iberpotash to comply with its obligations of restoration of its sites (environmental obligation), in the form of reduced costs for the financial guarantee required by the law to comply with such obligation, was liable to distort competition on the markets where Iberpotash was active (recital 102). The Commission’s decision in this case has been upheld by the General Court in Case T-257/18 *Iberpotash SA v Commission* EU:T:2020.1.

<sup>18</sup> C-86/89 *Italy v Commission* EU:C:1990:373, paragraph 18; C-156/98 *Germany v Commission* EU:C:2000:467, paragraph 30.

<sup>19</sup> Communication from the Commission, *Guidelines on State aid for environmental protection and energy 2014-2020*, OJ C 200, 28.6.2014, pp. 1 ff.

<sup>20</sup> C-584/18 P (see fn. 14 above), paragraph 119. This has also been pointed out by Nicolaides, *Shedding Light into the ‘Black Box’ of State aid: The Impact of Hinkley Point C on the Assessment of the Compatibility of State Aid*, ESTAL 2021, p. 4 (9).

<sup>21</sup> Romanian Minister for Energy, “Proiectul de Ordonanță de urgență a Guvernului pentru aprobarea acordării unui ajutor de stat de restructurare Societății “Complexul Energetic Oltenia”-S.A.”, 30.03.2021, available at: <http://energie.gov.ro/transparenta-si-integritate/transparenta-decizionala-2/> (last visited on 7 April 2021). See in particular, Articles 1, 2 and 4 of the Decision.

Already on 17 March 2021, there were news reports that CEO’s management had approved obtaining a loan of up to € 241 million from the Government to fulfil its obligation to purchase CO<sub>2</sub> allowances for 2020; see: <https://www.profit.ro/povesti-cu-profit/energie/inca-un-imprumut-de-stat-masiv-pentru-certIFICATELE-co2-ale-complexului-energetic-oltenia-20067412> (last visited on 10 April 2021).

control.<sup>22</sup> The aid still takes the form of a grant and only any unused amounts must be reimbursed by the company (Articles 3(3) and (4)). The emergency to grant this aid is justified in the ordinance by a) negative implications on the stability of the national energy system; b) negative influence on both Romania's domestic and international connectivity; c) risk of a negative social impact. This confirms, if need be, that the State funding for CEO's CO<sub>2</sub> allowances is not a restructuring measure but **another operating, rescue aid** that cannot be found compatible with the R&R Guidelines.

16. The financing of the ETS allowances also amounts to providing undertakings with allowances for free, whereas there is no ground for covering the costs of *past* allowances (for 2020 in this case) under Article 10(c) ETS Directive or the ETS State aid Guidelines post-2012 and post-2021.
17. As we already pointed out in last year's complaint, "[w]ithout the aid, CEO probably would be unable to finance the purchase of its EUA for (...) [2021] (and probably in future years (...)) entirely from its own budget. So, it would be unable to continue its electricity production activity to the same extent. (...) [S]ince the 'normal' way to refinance EUA costs would be the electricity producer increasing its electricity price to cover its costs, thereby re-financing itself on the market, the need for any State intervention in this area remains entirely in the dark. (...) If this would not have been sufficient, it reveals (...) the unviability and absence of prospects of CEO's activity – which shall therefore not be artificially kept afloat via State aid given alternative electricity production possibilities and potential in Romania."<sup>23</sup>
18. Indeed, any need for aid measures aiming at financing CEO's "*higher (and only CO<sub>2</sub> emissions-related) costs can also be questioned on the basis of pure EU policy considerations, because [such aid measures] directly counteract [...] the rationale underlying the ETS. As the Commission is well aware, the ETS has been introduced to provide incentives for economic actors to move away from high-carbon activities in the favour of less carbon-intensive or zero-carbon ones.*"<sup>24</sup> The restructuring of CEO foreseen in the Plan would precisely eliminate this incentive: were CEO forced to increase its electricity prices to finance its CO<sub>2</sub> allowances, electricity consumers would turn to electricity produced from less-carbon intensive sources, which is cheaper. Instead of partially replacing its lignite-fired production with gas-fired production, i.e. again requiring the purchase of CO<sub>2</sub> allowances, **CEO would actually have higher incentives to turn to energy production involving less CO<sub>2</sub> emissions**, including a full (instead of only a half) lignite phase-out by 2026. It is hard to see a need for approving a State aid measure that directly counteracts EU policy objectives in such an obvious and flagrant way.
19. This aid to purchase CO<sub>2</sub> allowances (after CEO was, as we set out in our complaint of last year,<sup>25</sup> already for several years not in a position to finance the purchase of such allowances without bank loans or grants from the State) is testimony to CEO's business model being unsustainable in the long run, as it obliges it to rely on fossil fuels for which ever-increasing CO<sub>2</sub> allowances cost will have to be paid.

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<sup>22</sup> Ordonanță de urgență nr. 27 din 15 aprilie 2021 privind modificarea Ordonanței de urgență a Guvernului nr. 21/2021 pentru aprobarea acordării unui ajutor de stat de restructurare Societății "Complexul Energetic Oltenia" - S.A., publicat în MONITORUL OFICIAL nr. 397 din 15 aprilie 2021 (**Annex 1**)

<sup>23</sup> Complaint of 11 March 2020, Registration: 2020/031006, p. 21 f.

<sup>24</sup> *Ibid.*, p. 22.

<sup>25</sup> See Complaint of 11 March 2020, Registration: 2020/031006, p. 7-9.

## 2 On the restructuring aid

### 2.1 CEO's financial situation

20. While we do not have any comments regarding the description of CEO in Section 2.1. of the Opening Decision, we do have some comments to make with regards to Section 2.2. regarding the financial situation of CEO.
21. CEO's current financial situation does not at all appear to be different from its financial situation in 2019 and 2020. Already in our complaint of 11 March 2020,<sup>26</sup> we pointed out that without the rescue aid, CEO would be unable to finance entirely from its own budget the purchase of its CO<sub>2</sub> allowances for 2018 and 2019, and probably in future years – as confirmed by the Restructuring Plan under review.
22. CEO's projections that the long-term survival of its business would depend on the notified restructuring aid are wrong. Indeed, as we had already pointed out in our 2020 complaint,<sup>27</sup> any restructuring plan of CEO would have to live up to high expectations, because it would have to explain how a business based on lignite-fired electricity production could become viable (since it is not currently) against the prospect of ever-increasing costs of CO<sub>2</sub> allowances. Already at that time, we had noted that it would have been hard to see how a restructuring plan, including with a partial replacement of lignite-fired generation with gas-fired generation, would have shown an easy way to mid- and long-term recovery, because such a plan includes significant upfront investments and still requires the purchase of CO<sub>2</sub> allowances.
23. CEO's financial situation cannot be restored with the Restructuring Plan. The projections on which the Restructuring Plan is based are indeed wrong, because they rely on the unrealistic assumption that the prices of the CO<sub>2</sub> allowances remain relatively the same during the restructuring period, ranging from €25.3 in 2020 to €31.2 in 2030. However, whereas the Opening Decision mentions, in footnote 17, that the price of CO<sub>2</sub> allowances amounted already, as of 24 January 2021, to €33, at present, **the price level of CO<sub>2</sub> allowances has already reached €44.39.**<sup>28</sup>
24. Moreover, this price is expected to further increase in the future, not least to take into account the most recent adaptation of the EU's CO<sub>2</sub>-emissions reduction target for 2030 from 40% against 1990 levels to at least 55%.<sup>29</sup> Thus, an increased EU ETS carbon market price will lead to an increase in the amount of aid that will be needed in 2022 to pay for CO<sub>2</sub> allowances due for 2021. This would ultimately lead to a situation where, with an equal amount of restructuring aid, less and less aid could be used for the actual restructuring measures.

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<sup>26</sup> *Ibid.*, p. 21.

<sup>27</sup> *Ibid.*, pp. 20 f.

<sup>28</sup> On 12 April 2021, the EU ETS carbon market price amounted to 44.39 EUR:  
<https://ember-climate.org/data/carbon-price-viewer/>.

<sup>29</sup> A study by EWI, the *Energiewirtschaftliches Institut an der Universität zu Köln*, models expected price developments for CO<sub>2</sub>-allowances both for the 40% and for the 55% reduction scenario, from 2019 to 2038. Even only in the 40% reduction scenario, prices would be expected at levels of € 35 in 2023, of € 38 in 2025, of € 45 in 2028 and of € 49 in 2030. In the now relevant scenario of at least 55% reduction by 2030, however, prices for CO<sub>2</sub>-allowances are modelled to reach € 42 in 2023, € 48 in 2025, € 56 in 2028 and € 61 in 2030. 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 – own convenience translation), 17 March 2021 (available at <https://www.ewi.uni-koeln.de/en/news/eu-climate-target-tightening/> (last visited on 10 April 2021)), p. 4. “Die EU ETS Preise von ca. 37 €/t CO<sub>2</sub>-Äq im März 2021 deuten bereits auf eine Anpassung auf den Preispfad des MK55 Szenarios hin. Emittenten beschaffen in Erwartung steigender Preise bereits jetzt Zertifikate.” (“The EU ETS prices of approx. 37 €/t CO<sub>2</sub>-equivalent in March 2021 do already indicate an adaptation to the pricing path of the 55% reduction scenario. Emitters are already now acquiring certificates, in expectation of rising prices” – own convenience translation”).

25. Alternatively, or perhaps even in addition, the Romanian authorities would regularly need to give additional aid to CEO for it to pay its ETS allowances. This would be breaching the “one time last time” principle.<sup>30</sup> We also do not see how those potential aid could be approved as amendments of the Restructuring Plan<sup>31</sup> in particular because (a) continuously granting aid for CO<sub>2</sub> allowances would demonstrate the lack of viability of the company’s business and (b) it is doubtful that CEO could increase its own contribution given that it is already insufficient under the current plan, as held by the Commission, and it presumably would not have any assets of value left to divest as compensatory measures without impeding its recovery.<sup>32</sup>
26. All this already confirms that the Restructuring Plan is not capable of restoring CEO’s long-term viability without the need for any further aid, against the spirit of the R&R Guidelines.<sup>33</sup>

## 2.2 The restructuring aid measures

### 2.2.1 The Restructuring Plan

27. The description of the notified Restructuring Plan in Section 3.1. of the Opening Decision partly differs from the Romanian Minister for Energy’s Fundamentation Note published on 30 March 2021<sup>34</sup> and from CEO’s own presentation of the Restructuring Plan in August 2020.<sup>35</sup>

<u>Information offered in Opening Decision</u>	<u>Information offered by...</u>
“The plan includes replacing 1460 MW of (six) lignite-fuelled units with i) 1325 MW (two) gas-fired units, ii) 109 MW solar and iii) 9.9 MW hydro-power. The plan includes the closure of five mines halving current production by 2025.”	... <b>Fundamentation Note</b> (p. 5): - the installed capacity of lignite will decrease from 3570 MW (early 2020) to 660 MW at the beginning of 2027, which means a reduction by 3,920 MW (instead of the 1460 MW mentioned in the Opening Decision), corresponding to 82% in 6 years); - the annual reduction of CO <sub>2</sub> emissions from lignite will be of 1 <sup>36</sup> million tons (from 8.6 million tons in 2021 to 2.6 million tons in 2027 (or by 70% over six years);
	... <b>CEO’s presentation</b> on the Restructuring Plan (p. 14): foresees construction of eight photovoltaic parks with a total capacity of 725 MW;
	... <b>Draft Territorial Just Transition Plan (TJTP) for Gorj county</b> , circulated on <b>15 March 2021 (Annex 2)</b> , p. 12: offered, indeed, two scenarios regarding CEO’s restructuring: - In <b>Scenario 1</b> , CEO would maintain part of its lignite-based production capacity until 2030, simultaneously with the commissioning of new capacities, based on gas and photovoltaic energy; - In <b>Scenario 2</b> , <b>CEO would decrease its lignite production to zero from 2026 to 2030</b> (i.e. a full lignite phase-out), simultaneously with the commissioning of new capacities on gas and photovoltaic energy.

<sup>30</sup> Rescue and Restructuring Aid Guidelines, para. 8 and 71. None of the exceptions in para. 72 would apply since the increase of CO<sub>2</sub> prices are clearly neither exceptional nor unforeseeable.

<sup>31</sup> Rescue and Restructuring Aid Guidelines, para. 124.

<sup>32</sup> Opening Decision, para. 53-54.

<sup>33</sup> See for instance Point 45 of the R&R Guidelines (quoted in paragraph 36 below).

<sup>34</sup> Romanian Minister for Energy, “Proiectul de Ordonanță de urgență a Guvernului pentru aprobarea acordării unui ajutor de stat de restructurare Societății “Complexul Energetic Oltenia”-S.A.”, 30.03.2021, available at: <http://energie.gov.ro/transparenta-si-integritate/transparenta-decisionala-2/> (Decision and Fundamentation Note available – last visited on 7 April 2021).

<sup>35</sup> CEO, “Planul de Restructurare al Complexului Energetic Oltenia 2021- 2025 cu perspectiva 2030”, 18.11.2020, available at: <https://www.ceoltenia.ro/documente/Transparenta/Plan%20restructurare%20CEO.pdf> (last visited on 7 April).

<sup>36</sup> The calculation in the Fundamentation Note (see fn. 34 above), on p. 5 (“The annual reduction of lignite CO<sub>2</sub> emissions is 4 million tons (from 8.6 million tons in 2021 to 2.6 million tons in 2027)” (own convenience translation), must be mistaken, because the annual reduction of lignite-based CO<sub>2</sub> emissions should be of 1 million tons (i.e. the annual reduction resulting from a decrease from 8.6 million tons in 2021 to 2.6 million tons in 2027).

28. All discrepancies listed above reveal that CEO had apparently initially planned deploying much higher capacities of renewable energy production, which suggests that it deemed these scenarios to be realistic. In this regard, it is also very telling that the full lignite phase-out scenario by 2030 contained in Gorj county's TJTP circulated on 15 March 2021 has been removed from a new draft TJTP later circulated by Gorj county, on 29 March 2021 (**Annex 3**).<sup>37</sup>
29. The Commission must base its assessment on the Restructuring Plan that was notified to it, in light of information on alternative scenarios that CEO and the Romanian authorities may have contemplated. In fact, all the inconsistencies we listed above show opposing business strategies that are not part of a single restructuring continuum, as required.<sup>38</sup> The mentioned documents also suggest the viability of alternative scenarios, including one where CEO would phase out lignite entirely by 2030, and others that foresee higher renewable energy production capacities. This, in turn, casts doubt about the appropriateness of any restructuring aid measures that foresee maintaining such a high share of fossil fuel-based production (lignite and fossil gas), such as the ones currently assessed by the Commission.

## 2.2.2 Own contribution and burden sharing

30. As regards Section 3.1 of the Opening Decision, the closure in February 2021 of two units by CEO (8 Isalnita and 3 Turceni)<sup>39</sup> cannot be seen as own contribution through the sale of assets. Indeed, the closure of these units must be considered **as compensatory measure**. The same measure cannot, indeed, be considered for the fulfilment of more than one condition of the R&R Guidelines<sup>40</sup> (i.e. the measure cannot be considered own contribution and compensatory measure at the same time).
31. In addition, we note that the Opening Decision discusses how the funding from the Modernisation Fund is planned to be used for the restructuring of CEO in recitals 17 and 18. Our comments on the use of the Modernisation Fund concern the assessment of the Restructuring Plan and are described under Section 3.3.1.4 below.

## 2.2.3 Compensatory measures

32. With regards to Section 3.2. of the Opening Decision, the Commission should take into account that **CEO has closed two units in February 2021** (8 Isalnita and 3 Turceni).<sup>41</sup>
33. Moreover, the adequacy report by the Romanian TSO, Transelectrica, that the Commission mentions,<sup>42</sup> suffers – somewhat typical for such TSO adequacy reports – from extremely conservative assumptions, and it **does not consider system adequacy**. As highlighted in another report,<sup>43</sup> the Transelectrica adequacy report is based on two extreme assumptions: very severe weather conditions and peak demand in the coming years that would exceed available supply. With particular regard to the assumption of shortages in gas network supply, the scenario foreseen by Transelectrica results in two thirds of installed capacities becoming unavailable, and the Romanian system missing 1799 MW

<sup>37</sup> **Annex 3**, p. 9.

<sup>38</sup> The Commission has already clarified the difference between the existence of a restructuring continuum based on a single restructuring strategy and the existence of opposing strategies in Case SA.36868 (2014/C) (ex 2013/N) — Restructuring aid to Estonian Air, 6.11.2015, C(2015) 7470 final, recitals 149-154.

<sup>39</sup> As decided at the meeting of the Regulatory Committee of 24.02.2021, see: <https://www.anre.ro/ro/presa/comunicate/comunicat-24-02-2021-anre-elimina-1-010-mw-nefunctional-din-licentele-producatorilor> (last visited on 10 April 2021).

<sup>40</sup> See fn. 13 above.

<sup>41</sup> See fn. 39 above.

<sup>42</sup> Opening Decision, recital 23.

<sup>43</sup> REKK, TU Wien, CSD, EPG, FACETS, "Accelerated lignite exit in Bulgaria, Romania and Greece", May 2020, available at: [https://www.enpg.ro/wp-content/uploads/2020/05/SIP-report-Final\\_SE3T.Net\\_May-2020.pdf](https://www.enpg.ro/wp-content/uploads/2020/05/SIP-report-Final_SE3T.Net_May-2020.pdf) (last visited on 10 April 2021), p. 68 f.

of capacity in 2022 and 2512 MW in 2027. However, given the net transfer capacity of 2000 MW, even such severe power plant failure should not cause system adequacy issues in 2022, while by 2027 investment in additional generation capacities is foreseen, as well as newly built net transfer capacity additions being in the order of additional 1000 MW from Hungary and Serbia. Hence, system adequacy (which considers not only domestic capacity, but also net transfer capacity) is sufficient even in the absence of lignite plants and other restrictive conditions.<sup>44</sup> Finally, the assurance of security of supply without any of the CEO's lignite units is confirmed in all the scenarios of the REKK, TU Wien and others' study.

## 2.3 Existence of State aid within the meaning of Article 107(1) TFEU

34. We agree with the Commission's assessment of the existence of State aid under Article 107(1) TFEU, as set out in recitals 26 to 35 of the Opening Decision: Romania's plans to grant approx. EUR 1.328 billion to CEO amounts to State aid.

## 2.4 The aid is not compatible with the internal market under the R&R Guidelines

### 2.4.1 Purpose of the restructuring plan

35. While we share the doubts expressed by the Commission in its initial assessment under Article 107(3)(c) TFEU and the R&R Guidelines, its preliminary assessment on the need for State intervention<sup>45</sup> and the transparency of the aid is not part of the Opening Decision.<sup>46</sup>
36. Point 45 of the R&R Guidelines provides that: "*Restructuring aid within the scope of these guidelines cannot be limited to financial aid designed to make good past losses **without tackling the reasons for those losses**. In the case of restructuring aid, therefore, the Commission will require that the Member State concerned submit a **feasible, coherent and far-reaching restructuring plan** to restore the beneficiary's long-term viability. Restructuring may involve one or more of the following elements: the reorganisation and rationalisation of the beneficiary's activities on to a more efficient basis, **typically involving withdrawal from loss-making activities**, restructuring of those existing activities **that can be made competitive again** and, possibly, **diversification towards new and viable activities**. It typically also involves financial restructuring in the form of capital injections by new or existing shareholders and debt reduction by existing creditors.*" (we underline)

None of these criteria is met in the present case:

- The reasons for CEO's losses are the increasing costs of environmental compliance it faces, notably the increasing price of CO<sub>2</sub> allowances due by reason of its lignite production activities. As it maintains a large share of lignite, and plans to diversify the company to fossil gas to a large extent whereas CO<sub>2</sub> allowances will also be due for that activity, the Restructuring Plan **does not sufficiently tackle the reasons for the losses**. Closing some units including non-profitable ones is insufficient for a structural restoration of viability. As stated in point 49 of the R&R Guidelines, "*Where the beneficiary's difficulties stem from flaws in its business model or corporate governance system, appropriate changes will be required*";

<sup>44</sup> *Ibid.*, p. 69.

<sup>45</sup> As required by point 38 b) of the R&R Guidelines.

<sup>46</sup> As required by point 38 g) of the R&R Guidelines.

- The Restructuring Plan is **not coherent and far-reaching** given its reliance on unviable economic activities and the inevitable risk of creating stranded assets in a medium future<sup>47</sup>;
- CEO **would not withdraw from loss-making activities** since it does not plan to phase out lignite.
- Gas is not a competitive activity in the medium term and diversification towards renewable energy sources is negligible in the notified plan.
- Energy efficiency measures do not appear to have been considered to reduce the company's operational costs.

## 2.4.2 Need for State intervention

37. CEO's general need for a restructuring aid given its financial difficulties, should it wish to restructure indeed, is doubtless. CEO has demonstrated since 2014 that none of its current lignite production activities are "essentially viable".<sup>48</sup> The issues with the aid relate more to the fitness of the notified Restructuring Plan to actually restore the company's viability in the long-term, and whether CEO's own contribution and burden sharing are sufficient to meet the requirements in the R&R Guidelines, notably. It is also questionable **why no aid seems to be planned for workers** who are necessarily going to be laid off, as permitted under points 33-35 of the R&R Guidelines.
38. However, there are doubts as to the need for any operating aid for CEO's environmental compliance costs. Under the need criterion, the Commission has to verify whether the State aid measure is "*targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing an equity or cohesion concern.*"<sup>49</sup> The Opening Decision is silent on the "*credible alternative scenario not involving State aid*" that Romania should have provided as Member State intending to grant restructuring aid, which would have to demonstrate how the objective pursued with the aid "*would not be attained, or would be attained to a lesser degree, in the case of that alternative scenario. Such scenarios may, for example, include debt reorganisation, asset disposal, private capital raising, sale to a competitor or break-up, in each case either through entry into an insolvency or reorganisation procedure or otherwise.*"<sup>50</sup>
39. Other than the (non-restructuring) aid for paying the costs of CEO's CO<sub>2</sub> allowances (which have already been discussed in Section 1 above), also the aid to reportedly finance CEO's deSOx and deNOx investments falls under the category of operating aid for environmental compliance. In this last regard, **CEO has already made investments for the implementation of deNOx and deSOx installations.**<sup>51</sup> Therefore, the aid granted through the Restructuring Plan will most likely be used by CEO to pay back the loans obtained to make such investments (as well as to finance past CO<sub>2</sub> allowances costs) and, thus, **would be misused.**
40. "*Further doubts regarding the need criterion can be based on considering that reducing coal-based electricity production would at the same time lead to a positive environmental outcome. Also, in many cases, security of supply ('SoS') can be improved by developing new interconnection infrastructure between Member States, increasing the capacity of existing interconnections, improving the design of*

<sup>47</sup> See also point 51 of the R&R Guidelines : "*The beneficiary's return to viability should derive mainly from internal measures, entailing in particular withdrawal from activities which would remain structurally loss-making in the medium term*".

<sup>48</sup> Point 7 of the R&R Guidelines

<sup>49</sup> Point 38 b) of the R&R Guidelines.

<sup>50</sup> Point 53 of the R&R Guidelines.

<sup>51</sup> As results from CEO's website: <https://www.ceoltenia.ro/responsabilitate/mediu/investitii-si-proiecte-de-mediu/> (last visited on 12 April 2021).

*the market, e.g. by improving price signals or better enabling demand response.<sup>52</sup> Considering the fallen cost of RES production, there is scope for replacing at least part of electricity production from coal in Romania with electricity production from RES (e.g. solar, due to the huge potential in Romania or also wind [and, well-understood - this ‘part’ can easily play a much bigger role than foreseen in the plan,]<sup>53</sup>)” as also evidenced by the alternative plans and scenarios mentioned in paragraphs 27 to 29 above.*

41. As regards instead the planned massive investments in fossil gas-fired production, we note that fossil gas-fired production is at least currently (still) competitive and thus not in need of any State aid. It is also doubtful whether the continued reliance on lignite-fired production, combined with replacing half of the lignite capacities with an even higher amount of gas-fired capacity and only a very minor reliance on RES-based production is indispensable to ensure SoS in Romania. In addition, in accordance with Article 3 TEU and Article 11 TFEU, as well as the Green Deal objectives and its imperative of “*Do no harm*”, there should be no more fossil fuel subsidies **at all**.

### 2.4.3 Appropriateness

42. We agree with the statements made by the Commission in recitals 44 and 45 of the Opening Decision.
43. In addition, we note that the provision of restructuring aid in the form of a sizeable (non-remunerated) grant of €0.768 billion does not constitute an appropriate financial instrument, because it does not remunerate the State nor allow the State alone appropriating the related upsides of the grant funding the restructuring plan. Moreover, the Restructuring Plan would result in additional costs of more than €4 billion for CO<sub>2</sub> allowances needed from 2021 to 2030, as it will be explained in more detail in the following paragraphs. These massive funds could (and indeed should rather) be redirected to the urgently needed buildout of RES-based electricity production in Romania.
44. Indeed, as explained by a Report published by Greenpeace,<sup>54</sup> the total annual emissions of CEO indicated in the Restructuring Plan will increase from 7 Mt CO<sub>2</sub>/year in 2020 to approx. 9 Mt CO<sub>2</sub>/year in 2030, with a peak of 10.7 Mt CO<sub>2</sub>/year in 2024. Throughout 2021–2030, CEO will be responsible for total emissions of approximately 92 Mt CO<sub>2</sub> (95,5 Mt CO<sub>2</sub> with Craiova emissions).
45. Taking into account the ETS allowances due for both the remaining lignite units and the new fossil gas units, and calculated at an annual average certificate price of €44/ton of CO<sub>2</sub> emissions,<sup>55</sup> the costs to be paid by CEO for its CO<sub>2</sub> emissions between 2021 and 2030 would amount to at least €4.048 billion (and to at least €4.202 billion if emissions from cogeneration units in Craiova are also taken into consideration). Calculating instead with a more realistic average price assumption, taking for instance into account the expected CO<sub>2</sub>-allowance prices under EWI’s modelling for 2025, 2028

<sup>52</sup> Commission Decision in case SA.52687 (2018/N) – Slovakia. Electricity production from indigenous coal in Slovakia, recital 69.

<sup>53</sup> Agora Energiewende (2019): “Climate (Un)ambition in South East Europe – A Critical Assessment of the Draft National Energy and Climate Plans”, available at <https://www.agora-energiewende.de/en/publications/climate-unambition-in-south-east-europe/> (last visited on 10 December 2019), p. 6; International Renewable Energy Agency (IRENA), “*Cost-Competitive Renewable Power Generation: Potential across South East Europe*”, available at <https://www.irena.org/publications/2017/Jan/Cost-competitive-renewable-power-generation-Potential-across-South-East-Europe> (last visited on 11 April 2021); P Enevoldsen a.o., “*How much wind power potential does Europe have? Examining European wind power potential with an enhanced socio-technical atlas*”, 28 June 2019, Energy Policy 132 (2019) 1092-1100 (available at [www.elsevier.com/locate/enpol](http://www.elsevier.com/locate/enpol)), p. 1097 (Note that the “x 1000” in “Capita (x1000) per MW” in this figure must be a typo, because on p. 1096, the Study says that if on-shore wind potential “were fully realized it would equate to a shift in turbine density in Europe increasing from 1 MW per 4564 inhabitants to 1 MW per 15 inhabitants (approximately).”)

<sup>54</sup> Greenpeace, “*Scenario for a failed transition – Analysis of the decarbonization plan of the Oltenia Energy Complex*”, February 2021, p. 3.

<sup>55</sup> See fn. 28 above.

and 2030,<sup>56</sup> thus calculating with an average price of €51.75/ton of CO<sub>2</sub> emissions),<sup>57</sup> the costs to be paid by CEO for its CO<sub>2</sub> emissions between 2021 and 2030 would amount to €4.76 billion, according to in-house emission projections (and to €4.94 billion if emissions from cogeneration units in Craiova are also taken into consideration).

#### 2.4.4 Own contribution and burden sharing

46. We agree with the Commission's view that the Restructuring Plan does not live up to the basic requirements of the R&R Guidelines with regards to an own contribution and an appropriate burden sharing.
47. With regards to the potential conclusion of long-term bilateral power purchase agreements ("PPAs"), so far, it still does not seem that CEO has been successful in concluding any. The available evidence appears to be limited to statements, by CEO, about discussions allegedly being happening.<sup>58</sup> Thus, there is no evidence as of yet that the actual financing of the Restructuring Plan through such contracts will ever take place.
48. We agree with the Commission that CEO's own contribution "*must be real, that is to say actual, excluding future expected profits such as cash flow, and must be as high as possible*".<sup>59</sup> An own contribution is normally adequate if it amounts to at least 50% of the restructuring costs. We thus agree with the Opening Decision that CEO's own contribution is inadequate because it would at most be only 42% of the restructuring costs. The figure of 53% featuring in Table 2 of the Opening Decision (and also mentioned in its recital 17) is irrelevant in this regard, as it only shows CEO's own contribution before the intervention of the Modernisation Fund. The latter, however, amounts to State aid, as the Commission points correctly out in recital 53 of the Opening Decision. In addition, as likewise mentioned in said recital 53, even the 42% refer only to an alleged own contribution, because this mostly consists of sources, in particular electricity sales revenues (assumed to amount to € 1.3 billion in the period 2020-2025) and revenues from PPAs (assumed to amount to € 150 million), i.e. resources that do not qualify as "*real*" contributions pursuant to Point 63 of the R&R Guidelines, as such would have to exclude "*future expected profits such as cash flow*". Those two items summed up represent not less than € 1.45 billion, i.e. nearly CEO's whole alleged own contribution amounts of € 1.499 billion (Opening Decision, Table 2), or 96.7% of the alleged 42% of own contribution.
49. In other words, the actual own contribution appears to be limited to a meagre sale of assets that is projected to raise just €49 million (and the sale procedure of these assets apparently has not even started<sup>60</sup>).
50. With regards to the use of the Modernisation Fund to finance the Restructuring Plan, Article 10d of the ETS Directive<sup>61</sup> establishing the Modernisation Fund, provides that "*(t)he investments supported shall be consistent with the aims of this Directive, as well as the objectives of the Union's 2030 climate and energy policy framework and the long-term objectives as expressed in the Paris Agreement. No support from the Modernisation Fund shall be provided to energy generation facilities that use solid fossil fuels, other than efficient and sustainable heating plants in member states registering their GDP per capita at market prices below 30% of the EU average in 2013...*" – meaning Romania and Bulgaria.

<sup>56</sup> See fn. 29 above.

<sup>57</sup> Obtained by averaging the four modelled observations for the 55% reduction scenario – which do appear to be, considering the most recent current price levels achieved, conservative. See fn. 28 above.

<sup>58</sup> See: [https://www.ceoltenia.ro/precizari-ce-oltenia-pe-marginea-comunicarii-deciziei-comisiei-europene-privind-deschiderea-investigatiei-referitoare-la-ajutorul-de-stat/?parent\\_page=142](https://www.ceoltenia.ro/precizari-ce-oltenia-pe-marginea-comunicarii-deciziei-comisiei-europene-privind-deschiderea-investigatiei-referitoare-la-ajutorul-de-stat/?parent_page=142) (last visited on 12 April 2021).

<sup>59</sup> R&R Guidelines, point 63.

<sup>60</sup> Recital 19 c) of the Opening Decision.

<sup>61</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13.10.2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, p. 32 ff.

51. First, the Restructuring Plan already clearly contradicts the “*objectives of the Union’s 2030 climate and energy policy framework and the long-term objectives as expressed in the Paris Agreement*”. Second, as set out in the Report published by Greenpeace, “*by simple economic reasoning, (...) [the restriction of not providing support from the Modernisation Fund to energy generation facilities that use solid fossil fuels] must also include calling into operation [by operators of lignite mines and lignite-fired power plants] of low-energy greenhouse gas production capacities (such as natural gas or renewable energy capacities) as well as the continuing operation of coal-fired power stations, as profits thus obtained would establish domestic subsidies for the extended functioning of coal-fired power stations, [i.e. of power stations using solid fossil fuels, contrary to Article 10d of the ETS Directive] in direct contradiction with the objectives of Directive EU ETS and the goal of the Modernisation Fund*”.<sup>62</sup>
52. Thus, CEO’s Restructuring Plan, which foresees to reduce greenhouse gas emissions by means of increasing renewable and gas-based energy production while maintaining lignite-based production to a considerable extent is not compatible with Article 10d of the ETS Directive. Operating new gas units would only be possible simultaneously with the shutdown of lignite-based capacities.

#### 2.4.5 Restoration of long-term viability

53. Up-front, we would like to point out that CEO has already for a number of years been a company without any long-term viability, as clearly shown by the fact that it isn’t even able to fund the expenses entailed by its own operations (e.g. the required CO<sub>2</sub> allowances) without bank loans or, once no banks were any more willing to grant such loans, without Government grants.<sup>63</sup> Further, as noted in the Opening Decision, it does not appear to be apparent from the Restructuring Plan that CEO will provide a sufficient return and will be capable of remaining on the market without further aid.
54. Moreover, as correctly pointed out by the Commission and shown above based on more recent CO<sub>2</sub> prices projections, CEO’s projected results are premised on the optimistic assumption that the prices of the CO<sub>2</sub> allowances remain relatively the same during the restructuring period, which is grossly illusory.

#### 2.4.6 Compensatory measures

55. The Commission’s doubts that the Restructuring Plan does not envisage any real structural compensatory measures are well-founded.
56. Pursuant to Point 76 of the R&R Guidelines, any restructuring aid measures must be accompanied by appropriate measures “*to limit distortions of competition, so that adverse effects on trading conditions are minimised as much as possible and positive effects outweigh any adverse ones.*” Such measures might include structural measures, including divestments and the reduction of business activities. This implies, as clarified by point 78 of the R&R Guidelines, that restructuring measures may require the undertaking to divest assets or that the undertaking’s capacity or market presence decreases. Furthermore, point 79 of the R&R Guidelines makes clear that “*(i)n order for such measures to strengthen competition and contribute to the internal market, they should favour the entry of new competitors, the expansion of existing small competitors or cross-border activity.*” This is further confirmed by Point 80 of the R&R Guidelines, which provides that “[m]easures to limit distortions of competition should not lead to a deterioration in the structure of the market. Structural measures should therefore normally take the form of divestments on a going concern basis of viable stand-alone businesses that, if operated by a suitable purchaser, can compete effectively in the long term. In the event that such an entity is not available, the beneficiary could carve out and subsequently divest an

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<sup>62</sup> See fn. 54 above, p. 6.

<sup>63</sup> See first Complaint mentioned in fn. 5 above, p. 7.

*existing and appropriately funded activity, creating a new and viable entity that should be able to compete in the market. Structural measures that take the form of divestment of assets alone and do not involve the creation of a viable entity able to compete in the market are less effective in preserving competition and will therefore only be accepted in exceptional cases where the Member State concerned demonstrates that no other form of structural measures would be feasible or that other structural measures would seriously jeopardise the economic viability of the undertaking* (emphasis added).

57. The Restructuring Plan, however, does not foresee any such measure – to the contrary, the economic significance of CEO, in particular its production capacity, is even foreseen to increase (notably because new gas units are expected to function more than the old lignite units).
58. We therefore fully agree with the Commission’s concerns expressed in recital 63 of the Opening Decision as regards the absence of any prospects that the “outsourcing” of cogeneration units as a capital contribution by CEO to the joint-venture between CEO and the company owned by the local council of the city of Craiova, were they to materialise at all, CEO and the State would keep controlling the joint-venture. Thus, there would be no compensation in that regard because, contrary to point 79 of the R&R Guidelines, such measure would neither strengthen competition, nor favour the entry of new competitors, nor the expansion of existing small competitors, nor the cross-border activity.
59. Further, as shown in the Greenpeace Report,<sup>64</sup> CEO estimates a drop in specific CO<sub>2</sub> emissions of 0.82 t CO<sub>2</sub>/MWh in 2020 to 0.74 tCO<sub>2</sub>/MWh in 2025 and 0.51 tCO<sub>2</sub>/MWh starting with 2026. However, cumulatively, CEO would emit higher annual greenhouse gas emissions in 2030 than in 2020, which questions the very “decarbonisation plan” notion itself. Indeed, CEO’s total annual emissions indicated in the Restructuring Plan will increase from 7 Mt CO<sub>2</sub>/year in 2020 to approximately 9 Mt CO<sub>2</sub>/year in 2030, reaching a peak of 10.7 Mt CO<sub>2</sub>/year in 2024. Thus, the Restructuring Plan could lead to a 28% increase in emissions over the next 10 years.
60. While lignite-based electricity will still represent a significant share of electricity sold by CEO after 2026 – approximately 41% of the total amount, renewable energy produced by solar panels will represent only 6% of this total by around 2030.
61. As further explained in the Greenpeace Report<sup>65</sup> an alternative scenario to that of the Restructuring Plan, consisting of decrease to zero of lignite-based electricity production (lignite phase-out) starting from 2026, would, on the contrary, allow for a 52% decrease in annual emissions for 2026-2030, compared to emissions registered in 2020. As already noted, such scenario was also originally included in the draft Territorial Just Transition Plan (TJTP) for the county of Gorj that was circulated on 15 March 2021.<sup>66</sup>
62. In any event, the compensatory measures envisaged in the Restructuring Plan, by allowing COE to still rely on lignite and gas beyond 2030, are contrary to the Green Deal’s objective of phasing out fossil fuels subsidies. Although the R&R Guidelines are currently under review to ensure that they are fit for the delivery of the European Green Deal, the Commission has already recognised (with reference to another State aid instrument under review)<sup>67</sup> that State aid measures must not contradict

<sup>64</sup> See fn. 54 above, p. 3.

<sup>65</sup> See fn. 54 above, p. 4.

<sup>66</sup> **Annex 2**, p. 12.

<sup>67</sup> Namely the consultation document pertaining to the review of the Communication on important projects of common European interest (IPCEI) (available at: [https://ec.europa.eu/competition/consultations/2021\\_ipcei/draft\\_communication\\_en.pdf](https://ec.europa.eu/competition/consultations/2021_ipcei/draft_communication_en.pdf)); it expressly states, at paragraph 21, that “(t)he project must respect the ‘do no significant harm’ principle and ensure the phasing out of environmentally harmful subsidies, as recalled by the European Green Deal”.

the 'do no harm' imperative of the European Green Deal<sup>68</sup> and the need to ensure the phasing out of environmentally harmful subsidies.<sup>69</sup>

63. Finally, the Restructuring Plan, in maintaining the said levels of emission, does not comply with the EU Climate Law, and in particular with its climate-neutrality objective and the 2030-2050 trajectory.<sup>70</sup> The European Court of Justice has already clarified that aid to an economic activity that violates EU environmental law is necessarily incompatible with the internal market.<sup>71</sup>

## 2.4.7 Transparency

64. With regards to transparency, we would recommend making the Restructuring Plan publicly available. Indeed, the Plan is of particular importance in the context of Romania's decarbonisation of its energy mix, for which the Commission has already expressed serious doubts in its assessment of Romania's NECP.<sup>72</sup> Romania has, however, so far refused to make the Restructuring Plan public, and has even refused to show it to members of parliament.<sup>73</sup>

## 2.4.8 Conclusion on the incompatibility under the R&R Guidelines

65. In light of our comments above, we agree with the doubts raised by the Commission in the Opening Decision about the compatibility of the Restructuring Plan with regards to: (i) the presence of real and actual own contribution free of aid from the beneficiary, (ii) the presence and effectiveness of burden sharing, (iii) the restoration of long-term viability and restructuring within a reasonable timescale, and (iv) the presence and effectiveness of meaningful compensatory measures. Moreover, we have above also pointed to serious doubts about a need for State intervention under the R&R Guidelines at all, as well as to Romania thus far, not having made this Plan publicly available, as required under point 96 of the R&R Guidelines.

**The Commission should, therefore, find both the operating, rescue aid for the CO<sub>2</sub> allowances for 2020, and the restructuring aid, incompatible with the internal market pursuant to Article 107(3)(c) TFEU.**

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<sup>68</sup> See The European Green Deal (fn. 6 above), p. 19.

<sup>69</sup> *Ibid.*, p. 17.

<sup>70</sup> Commission amended Proposal for a Regulation of the European Parliament and of the Council on establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), 17.9.2020, COM(2020) 563 final, 2020/0036(COD). The legal basis for the EU Climate Law is Article 192(1) TFEU.

<sup>71</sup> See fn. 14 above.

<sup>72</sup> See fn. 11 above.

<sup>73</sup> See the letter by MEP Mihai Weber, dated 6 October 2020, available at <http://www.cdep.ro/interpel/2020/i11256A.pdf> (last visited on 13 April 2021). An own convenience translation of the letter, as well as of the Government's answer to it is provided as **Annex 4**.