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TO: Margrethe Vestager, Executive Vice-President, Commissioner for Competition
Cc: Frans Timmermans, Executive Vice-President, European Green Deal
Virginijus Sinkevičius, Commissioner for Environment, Oceans, and Fisheries

RE: German State aid for coal phase out notification – request to open an investigation

Brussels, 11/09/2020

Dear Vice President Vestager,

Dear Vice President Timmermans,

Dear Commissioner Sinkevičius,

The European Commission is due to take an important decision on German state aid related to its coal phase out law – herewith ‘DE coal operators aid’¹. That decision will have far-reaching implications for state aid decisions relating to energy and the environment, the Commission’s role as guardian of the treaties, and forward-looking appreciation of the ‘common interest’. Other countries may be inspired to grant similar compensations if the German scheme is considered admissible.

We hope that Commission services will rigorously enforce the common assessment principles set out under the EU Guidelines on State aid for environmental protection and energy², in full alignment with the EU Green Deal objectives and relevant frameworks. Any state aid for coal phase out shall be aligned with the EU’s Paris Agreement commitments, which are incompatible with the use of coal for power generation after 2030.

We would like to highlight the following five fundamental flaws of the DE coal operators aid, namely:

- a) It will promote business as usual for lignite operators, and in some cases even prolong operation. This scheme also deteriorates the market value of renewable energy sources in various ways.

¹ ‘Kohleausstiegsgesetz’ BGBL 1818 of 2020 Teil I Nr 37, 13 August 2020

² 2014/C 200/01; OJEU of 28.6.2014 C200/1 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014XC0628%2801%29>



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- b) Aid is not conditioned to full implementation of Union standards such as Best Available Techniques for Large Combustion Plants, including energy efficiency performance (as in the Dutch case³)
- c) It entails “compensation” to polluters without clarity on the calculations, whilst the negative externalities of their activities (e.g. air pollution and water impact from mining) are not even addressed; covering re-cultivation costs is also in clear breach of the ‘polluter pays’ principle.
- d) A special conversion bonus to support gas combustion is provided.
- e) It does not prohibit expropriations due to continuation of lignite mining.

In the annex **we outline five conditionalities linked to the DE coal operators state aid approval. If any of those are not adequately addressed, the Commission should reject the state aid demand. A formal investigation procedure should be opened.**

Yours sincerely,

A handwritten signature in black ink, appearing to read 'J. Wates', is positioned above the typed name.

Jeremy Wates
Secretary General.
European Environmental Bureau

Acting on behalf of:

Wendel Trio
Director
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³ State aid SA.54537 (2020/NN) Netherlands
https://ec.europa.eu/competition/state_aid/cases1/202025/284556_2165085_151_2.pdf



Annex: Minimal list of conditionalities for possible approval (cumulative 5 conditions)

Condition A: the aid shall not reward business as usual for polluters or negatively affect producers of renewable energy sources

The aid shall not provide incentives to either keep business as usual operation, or provide state aid funding for polluters to operate beyond their anticipated date of closure. Operators of plants that are older than 25 years (i.e. that went into operation before 2005), with a closure date of 2030, should not be eligible for any compensations because return on investments have already been made. In addition, the current scheme negatively affects renewable energy sources (RES) actors in various ways.

Rationale: We cannot see how the DE coal operators aid could demonstrate an ‘incentive effect’ for an earlier and adequate coal phase out, and whether this state intervention is anyway needed under the current and future market conditions. The main points are as follows:

- Operators of lignite plants are already loss-making.
See: <https://ember-climate.org/wp-content/uploads/2019/07/2019-Cash-Cow-report-1.3.pdf>
- All lignite plants eligible for “compensations” are older than 34 years (average life time is 48 years) and are all owned by RWE, LEAG, EnBW (one unit). The oldest plants are all owned by RWE (14 entries are above 50 years, the remaining 2 above 47 years). Of EPH’s units, 6 units are older than 40 years, while the other 3 “younger” units (all above 34 years) are anyway already on standby or de-activated.
- Some direct payments made for the closure of LEAG’s 12 lignite units foresee a €1.75 billion in state aid “compensation”, although there are no “incentive effects” for earlier closures compared to Best Available Techniques (BAT). Moreover, there are 6 units that will benefit from the state aid to delay their anticipated closure, in business-as-usual, for 1 year.
See: <https://www.documents.clientearth.org/wp-content/uploads/library/2020-06-16-legality-of-compensation-for-leag-under-german-coal-phase-out-ce-en.pdf>

- The DE coal operators aid has market-distorting effects for producers of renewable energy sources (RES): the tender scheme will prolong hardcoal overcapacities, and thus lower electricity prices. RES actors generally opt for power purchase agreements. As the subsidiaries of coal asset utilities (e.g. RWE Renewables) will gain additional purchasing power, those companies will have more advantages in future bidding on RES tendering schemes. The current state-aid scheme provides selective support to gas power plants (see condition D), and a disproportionate advantage for operators of lignite power plants, thus distorting the market dynamics for RES operators.

See further information on the overall shortcomings for RES actors in the complaint: https://www.greenpeace-energy.de/fileadmin/docs/pressematerial/200901_Background-Paper_Complaint.pdf



Condition B: the national draft law implementing Union standards (e.g. EU LCP BREF) shall be strengthened

Any operator of lignite plants with capacity bigger than 300MWth, benefitting from the aid scheme shall be required to:

- Operation until 2030: comply with the strict Union standards (2017 LCP BREF), namely for air emissions: Emission Limit Values (ELV) set to 85mg/Nm³ for NO_x, 10mg/Nm³ for SO₂ and 1µg/Nm³ for mercury (yearly average)
- Operation capped by 2025: possible compromise levels of up to 150mg/Nm³ NO_x to at least align with standards applicable for biomass and hardcoal and 3µg/Nm³ for mercury
- Operation up to 2025/2030: removal of derogations such as desulphurization rate (§28(3) 13. BImSchV draft)
- Operation beyond 2025-2030: achievement of an electrical efficiency of 44% net at the latest by 2025.

This shall be requested by DG COMP either through amending the German LCP BREF transposition law currently under review (13. BImSchV), or as a condition to the granting of the state aid.

Rationale: The German government is already providing an indirect state aid by not addressing the “negative externalities” linked to air pollution. This can be mitigated by rigorous implementation of the Union standards, notably by the ongoing implementation of the EU LCP BREF. The German government voted against the implementation of these standards to protect its lignite industry from costly air pollution control retrofits that are due by August 2021 at the latest. The main reason, cited for a lax implementation of these standards, is a “disproportionate costs [for polluters] compared to the benefits [for the public]”. Special derogations are also provided for LEAG and EnBW, who use high mercury and sulphur containing lignite from a specific mine area, constituting a selective advantage also for the mine operator. Even though the disproportionality claims are not substantiated with any factual cost-benefit assessment, now a state aid scheme is demanded to further “compensate” the polluters. Moreover, both Germany and the EU are signatories to the Minamata Convention, in which the BAT/BEP guidance confirm that the level of 1µg/Nm³ is to be considered BAT. Lignite combustion is the main EU source of mercury emissions, which could be cut by at least 80% if BAT =1µg/Nm³ is enforced. The current draft law is however allowing BAU (7µg/Nm³). The Commission’s approval of the current state aid scheme would therefore implicitly reward business as usual (7 times more mercury pollution per year of operation than what is required by the Minamata Convention), countering all potential incentive effects to other lignite combusting member states, and harming the EU’s reputation as a frontrunner in environmental protection. Not requiring further action would de facto incentivise a further breaching of the Water Framework Directive’s requirement of good chemical status for water, due to the mercury biota standard exceedance.

The 2017 LCP BREF sets BAT associated energy efficiency levels, which are as “optional” for permit writers due to the EU ETS Directive (Art 26, consolidated in Article 9.2 of Directive 2010/75/EU). DG COMP will have to enforce the “need for state intervention”, as per section 3.2.2 (and para 36) of the precited EU Guidance on State aid for energy and the environment. Para. 39 refers to the ‘Union Standards,’ in the scope of which the EU Guidance reference is made mandatory Union standards (19 para 3 point a),



as well as the BAT based standards in general (19 para 3 point b). Requiring compliance with the BAT-Associated Energy Efficiency Levels on energy efficiency would support early adaptations to future Union standards, and we propose to use the levels set by the Dutch coal phase out scheme¹ i.e. 44% to be complied with by latest 2025 as an analogous minimal level.

The German Government has failed to take the required measures, and even to set counteracting requirements to deal with those market failures (e.g. continuation of derogations and lax pollution controls).

See: <https://mk0eeborgicuyptuf7e.kinstacdn.com/wp-content/uploads/2020/08/EEB-submission-to-German-draft-law-implementing-the-2017-LCP-BREF.pdf>

Condition C: “negative externalities” should be addressed first / subtracted from any aid

DG COMP shall require a subtraction of ‘negative externalities’ and air pollution damage costs by applying the Value of Statistical Life (VSL) damage costs method of the EEA, adapted to 2020 prices, as a minimum. This shall be applicable to eligible operators until the closure date of the concerned pollution source. A minimal price level of €100/ton of GHG emitted shall be accounted for GHG emissions. The GHG allowances (EUA) of retired plants, that are no longer needed, shall be automatically withdrawn from GHG budgets in accordance to Article 12(4) of the EU ETS Directive. Water cost services shall also be subtracted, e.g. sulfate pollution from lignite mining, and water abstraction for industrial use. Re-cultivation costs of opencast mines shall be removed.

Rationale: Implementing Condition B (points a and c) would mean that an air pollution damage cost of €2,5Billion/year of operation could be prevented thanks to NOx and mercury measures alone. A recent study² assesses potential damage cost saving due to strict BAT implementation for all German coal/lignite plants, and shows that €58billion of costs/20,200 premature deaths can be prevented between 2022-2038. Health benefits would not only materialize in Germany (avoiding 7930 premature deaths), but also outside of Germany (mainly in Poland, the Czech Republic, France and the Benelux, as well as in Ukraine) due to the dispersion of pollutants. This is therefore an EU issue. We expect the European Commission to take air quality seriously, and to rigorously enforce the “need for state intervention” test as per section 3.2.2 (and para 36) of the precited EU Guidance on State aid for energy and the environment, notably assessing whether negative externalities and market failures have been dealt with. That seems not to be the case.

The European Environmental Agency (EEA) uses the accepted Value of Statistical Life (VSL) Method to quantify air pollution damage costs, but other type of methods exists such as the Value of Life Year Lost (VOLY) method. The latter has been declared as biased against the elderly by the US supreme court and therefore may not be used in any cost-benefit assessment methods. Damage costs are further outdated because based on 2005 prices, it would be advisable to follow up on the OECD recommendations to

¹ Approved by DG COMP State aid SA.54537 (2020/NN) Netherlands

https://ec.europa.eu/competition/state_aid/cases1/202025/284556_2165085_151_2.pdf

² <https://www.documents.clientearth.org/library/download-info/emissionsgrenzwerte-fur-kohlekraftwerke-gesundheitliche-folgen-der-vorgeschlagenen-grenzwerte-in-deutschland>



adapt the price level to €6Million. According to recent climate science, the damage cost of GHG is at least €100/tonne of CO₂eq.

Finally, the EU-ETS Allowances (EUA) of the closing plants, that are no longer needed, shall be permanently removed from the GHG budgets in accordance to Article 12(4) of the ETS Directive 2003/87 as amended) in order not to annihilate the desired common interest behind the DE coal operators aid, which is GHG reduction. Otherwise, the unused allowances could be sold or displaced to other emitting sources, which will counter the intended effect of the aid.

Treatment costs to address sulphate pollution in drinking water is estimated to be between €0.55-0.7575 /m³ in relation to one LEAG lignite mine in Frankfurt (Oder). However, LEAG, which is eligible for state aid, has not been held liable by the German state to compensate for this pollution so far.

Furthermore, the aid does not explicitly prohibit the exclusion of recultivation costs of opencast lignite mines. The German mining law requires mine operators to fund such recultivation regardless of anticipated coal phase outs.

See section 2 of <https://www.documents.clientearth.org/wp-content/uploads/library/2020-08-25-letter-to-dg-competition-legality-of-state-aid-to-german-lignite-operators-ce-en.pdf>

Condition D: extra conversion bonus for gas fired CHP shall be removed

The extra coal substitution (CHP bonus) shall be based on qualitative environmental criteria (exclude other fossil fuels).

Rationale: §7c “Kohleersatzbonus” provides for extra state aid rates (“bonus”) for the replacement of coal and lignite combustion. However, it does not contain any qualitative criteria that would exclude a substitution by other fossil fuels, e.g. natural gas, which is heavily subsidised (up to €450/kW³) – in fact meaning a price distortion. The fossil fuel exclusion should be added to be fully coherent with the intentions for the Taxonomy, the Just Transition Fund criteria, and wider EU climate targets.

Condition E: further expropriation due to lignite mining extension should be prevented

§48(1) of the German coal exit law shall be removed, and the continuation of Lignite mine Garzweiler II shall not be labelled as “overriding national interest due to security of supply”.

Rationale: The German state aid law contains a provision declaring the continuation of exploration of the Garzweiler II lignite mine as necessary for “overriding interest of security of energy supply”. This is unacceptable considering the EU climate ambition, water relevant impacts and human rights implications of the expropriation. This sets a bad example for less wealthy member states that are currently planning their coal phase out. The European Commission shall not tacitly promote new lignite mining operations, and shall require this condition to be implemented as for the pending State aid decision.

³ See more information on this CHP conversion bonus in section E of this briefing <https://www.bundestag.de/resource/blob/697412/ff1b408f05f7070851d73affc6797f60/sv-matthes-data.pdf>