

State aid for the closure of lignite plants in Germany

ClientEarth's observations on the Commission's decision to extend the in-depth investigation in case SA.53625 Deutschland Kohleausstieg

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1. Introduction

1. ClientEarth is hereby submitting comments to the extension of the opening of the formal investigation (the “Extension Decision”) in this case that has raised a lot of interest. An unprecedented number of parties have submitted comments at each stage of the procedure (27 upon the decision of 2 March 2021 opening of the formal investigation procedure (the “Opening Decision”), 19 upon the invitation on 17 May 2022 to submit comments on the applicability and application of the Commission’s Guidelines on state aid for climate, environmental protection and energy 2022 (the “CEEAG”).
2. The interest is such that upon the notification by Germany of the amendments to the notification and before any decision was made by the Commission, eight parties had submitted unsolicited comments.
3. Such an interest in the assessment carried out by the Commission can be explained by both the important policy questions involved and the legal issues raised (extending from the choice of the legal instrument used for the assessment to the legal assessment itself).
4. ClientEarth has an interest in the procedure within the meaning of Article 1(h) of Regulation 2015/1589 (the Procedural Regulation) for two main reasons:
 - Firstly, the breach of state aid law and
 - Secondly, a violation of the polluter pays principle as set out in Article 191(2) TFEU.
5. ClientEarth’s active participation in the procedure dates back to October 2019 when it had communicated to the Commission several sets of observations demonstrating why the payments planned for LEAG and RWE under the Closure Law constitute state aid and should not be approved.
6. The comments that are submitted herein must be read in conjunction with the comments that have already been submitted by ClientEarth to the opening of the formal investigation procedure and then regarding the applicability and application of the CEEAG. ClientEarth’s comments are necessarily only based on the publicly available information.
7. ClientEarth would like to stress that the basic concerns raised in June 2021 in the observations to the opening of the formal investigation remain despite the amendments. The key elements that evidence that the compensation notified cannot be considered compatible can be summarised as follows:
 - a. The scheduled closure of lignite plants constitutes a “redefinition of the scope of the lignite’s operators property rights” under Article 14(1) Grundgesetz (Basic Law) and should not be compensated because it does not represent an undue economic burden.
 - b. Though for the sake of legal certainty it is necessary to enshrine the phase-out by 2030 in the law, there is no need for compensation for an earlier closure. The lignite plants and associated mines are likely to close by 2030 under market conditions notably because of rising environmental compliance costs and ETS prices. Despite the short-term increase in electricity prices experienced since 2021, this conclusion remains valid.
 - c. The aid measure has not taken proper account of the polluter pays principle.

- d. It is unknown how the amount of compensation has been determined and it is questionable that despite an amendment of closure schedule it remains unchanged.
- e. No adjustment parameters have been incorporated (or disclosed) and the compensation seems grossly disproportionate.
- f. The lignite sector is structurally non-competitive and non-profitable and thus no compensation for foregone profits may be warranted.

2. Object of the extension

- 8. It is worth recalling that in the Opening Decision the Commission had concluded that it had doubts *“about the way in which the compensation amounts to RWE and LEAG have been justified by Germany”* and that as a consequence it doubted that *“the compensation is kept to the minimum required and that the amounts are proportionate”*.¹
- 9. The justification for the extension of the investigation is that *“some of the facts and circumstances described in the Opening Decision changed after the adoption of that decision”*.²
- 10. It is interesting to note that the justification for extending the investigation is thus not only the adoption on 19 December 2022 of the law amending the Closure Law of 8 August 2020 (the “Amendment Law”) and the corresponding amendment on 16 December 2022 of the public law contract signed with RWE on 10 February 2021 (“the Amendment Contract”) – amending the “Public Law contract on the reduction and termination of lignite-fired electricity generation in Germany” concerning both RWE and LEAG, approved by the German Parliament on 13 January 2021 (“the 2021 Contract”) – but also the fact that the general circumstances (evolution in the energy market, ETS, etc.) had significantly changed since the Opening Decision.

2.1. Description

- 11. The extension of the investigation only concerns the measures that were amended since the Opening Decision:³
 - a. The postponement of final decommissioning of two plants from end-2022 to end of March 2024

Two plants with a capacity of approx. 600 MW each and which were supposed to close by 31 December 2022 will close by 31 March 2024 at the earliest. ClientEarth notes that such date for final decommissioning is however not definitive, as the German government may still decide

¹ See Opening Decision, recital 140.

² See Extension Decision, recital 19.

³ See Extension Decision, Section 2.2.1.

by 30 September 2023 to retain such plants on the market until 31 March 2025 or let them enter into the reserve without the need to amend the Amendment Law and the Amendment Contract.⁴

b. The acceleration of final decommissioning of three plants from 2038 to 2030

Germany specifies that this will result in cutting the remaining time of operation of 3 GW of the newest and most efficient power plants operated by RWE by almost 50%.

12. The German authorities do not provide any explanation for the choice of the plants concerned by the acceleration/postponement of the decommissioning.
13. The Commission, apart from repeating the statements made by the German authorities, it does not seem to have examined the impact in terms of volume of the postponement of the closure of some plants in comparison to the early closure of others.
14. The Commission also notes that all the plants concerned could be part of a reserve but does not look into the matter any further.⁵ The question of whether some of the plants will be transferred to the reserve is an important one that is not (sufficiently) analysed by the Commission. There are important economic effects of transferring a plant to the reserve including the possibility to receive additional payments. From the text of the Extension Decision, it cannot be derived whether the German authorities have foreseen a mechanism to monitor the impact of this transfer in the overall public support granted to RWE for the given plant and in the amount of compensation. It cannot be determined either whether there will be any clawback mechanism in place to avoid overcompensation.
15. Despite such significant amendments to the 2021 Contract, the evolution in the global economic context and the changes made to the underlying economic parameters, the compensation agreed is not modified and remains of EUR 2.6 billion for RWE. For that reason, the amount of the compensation is not presented as a change to the 2021 Contract, it is the underlying parameters and calculations that must have changed.
16. If the global compensation amount is unchanged, the number of instalments and their respective amounts are modified. The first four yearly instalments (2020-2023) are of EUR 173 million and the remaining six instalments (2024-2029) are of EUR 318 million.
17. ClientEarth questions the general methodology behind the agreed compensation for coal phase-out whereby a global amount is determined and then paid to RWE in instalments without a substantiated link to the plants concerned by the "earlier" closure. Such an approach necessarily results in part of the compensation being paid without any economic justification.
18. The amount of the global compensation paid, the structuring of the payments over time and the fact that the instalments will be paid to the beneficiaries long after the closure of the plants raises many legal issues.

⁴ See Extension Decision, recital 29.

⁵ See Extension Decision, recitals 29 and 34.

19. In recital 37 of the decision, it is explained that the first instalment to RWE was due on 31.12.2020 which is when RWE closed its first plant. It is however not explained whether the amount to be effectively disbursed under this payment will be adjusted and the case being what will be the adjustment rate.
20. Regarding the existence of foregone profits, as the Commission recalls in recital 30 and further refers to in recital 43.b, the revenues that electricity producers can retain have been subject to a price cap following the adoption of EU Council Regulation 2022/1854. It does not appear apparent from the text of the Extension Decision how this price cap is taken into account in the updated calculations provided by the German authorities. Furthermore, the price cap is a temporary measure but it remains to be seen for how long it will be applied. The impact of this legislation in the determination of the amount of compensation will be addressed in Section 5.2.5 below but it is necessary to point out here that this is one of many issues that are outstanding and should have been subject to monitoring within the compensation mechanism to avoid overcompensation.
21. In recital 30 of the Extension Decision, the Commission refers to the possible postponement of final decommissioning of the two plants Neurath D and Neurath E for another year, i.e. until 31 March 2025. Considering this uncertainty in the running of the two plants, as will be explained below, it is difficult to ensure that RWE is not overcompensated for allegedly foregone profits.
22. Regarding the three plants (Niederaußern K, Neurath F and Neurath G– BoA 3), which following the notified amendment will be closed eight years earlier than originally foreseen, in recital 34, the Commission explains that the German Government can decide to transfer these plants into a reserve until 31 December 2033. Thus, even though the final decommissioning would be accelerated by five years, which would seem to have a positive environmental effect, the impact on the amount of foregone profits that the deferred closure of the concerned plants due to the transfer to the reserve shall not be ignored. There is no indication in the text of the Extension Decision of the impact of this amendment on the amount of compensation foreseen, which does not seem to have been measured. Thus, as we will develop further in Section 5.2.5 below, overcompensation cannot be excluded.
23. As far as the calculations submitted by Germany are concerned, the extension Decision refers in recital 44 to the effect on the German electricity market of the closure of two nuclear power plants and considers it representative. The decision does not provide further information but ClientEarth considers the comparison questionable. In light of Germany's target to reach climate neutrality by 2045 the market for RES should be expected to be fully developed with a significant number of parks being fully deployed by the time the lignite plants will be closed. Thus the impact on the prices of the nuclear power plants and the lignite power plants does not seem to be comparable.

2.2. The amount of compensation

2.2.1. Preliminary remarks

24. As a preliminary comment, ClientEarth would like to recall recitals 18 to 22 of the Opening Decision. As explained in these recitals, the compensation to RWE and LEAG was foreseen in the Closure Law of 8 August 2020 as amended by Articles 22 and 23 of the "Act amending the Renewable Energy Act

and other Energy Acts". On that basis, Germany and the lignite operators elaborated on the terms and conditions included in the 2021 Contract.

25. In December 2022, the German authorities notified amendments to the RWE measure. No information seems to have been provided to the public by the German authorities on the situation concerning LEAG which raises the question whether and to which extent negotiations with them will result in a further amendment to the notification.
26. In the observations to the formal investigation opened in March 2021, ClientEarth raised the lack of investment effect of the aid foreseen for LEAG given that its units were projected to close earlier under business-as-usual scenarios than as scheduled per the law. Since there has been no amendment to the agreement with LEAG, we refer in that regard to our comments from previous submissions concluding that the aid should be declared incompatible by the Commission.

2.2.2. The determination of the compensation

27. Regarding RWE, as a justification for the fact that despite the change in the closure schedule, the global amount of compensation remains the same, the German authorities have explained that they have based their calculations on different parameters (see recital 43). The fact that the updated calculations are based on different parameters raises questions in a twofold manner.
28. On the one hand, there is a question regarding the accuracy with which the amount of compensation can be calculated to satisfy the state aid requirement and regarding the suitability of such an instrument of support.
29. On the other hand, there is a question regarding the way the compensation for LEAG was calculated. It appears that most of the new parameters used reflect a change in the global energy markets would also concern LEAG.
30. Above all, ClientEarth finds it quite extraordinary that despite the changes in the phase-out schedule (and the different levels of volume of electricity to be produced) and despite the significant changes in the global energy markets, the compensation actually agreed to be paid to RWE remains identical, namely EUR 2.6 billion. The German authorities claim that the compensation paid under the Amended Contract is in fact below what it should be: "*the calculation underestimates the actual forgone profits of RWE as any additional possible revenues from heat generation and from the balancing market were not included in the calculation*".⁶
31. As other third parties have claimed (see recitals 67 and 68), ClientEarth questions whether the payments agreed for RWE were limited to compensate for foregone profits or whether – on the contrary – they are deemed to ensure revenues for the company which could be qualified as windfall profits.
32. ClientEarth questions the methodology used to compensate RWE if such methodology does not actually result in a proper compensation.

⁶ See Extension Decision, recital 70.

33. Though the compensation seems to remain the same at first glance, it cannot be disregarded that the amendment of RWE's phase-out schedule was part of an agreement which includes several benefits for RWE.⁷ By prolonging the operation of two lignite plants RWE profits from the temporarily high energy prices, the government made clear that it would not oppose to the eviction and demolition of the town of Lützerath and will support RWE in building and operating 3 GW of fossil gas plants. Furthermore, RWE's coal plants are currently profiting from the Substitute Powerplant Maintenance Act (Ersatzkraftwerkebereithaltungsgesetz) as well as the Energy Price Cap.

2.3. Change in the decommissioning calendar

34. ClientEarth questions why two plants' decommissioning has been postponed by two years. The German authorities' sole justification for such decision is *"to mitigate further the impact of the current energy crisis, to save gas in the electricity sector and thereby strengthen security of supply"*.⁸

35. Such a decision together with its impact on the calculation of the compensation is not analysed by the Commission.

3. Procedural considerations

3.1. Considerations regarding the comments submitted by ClientEarth

36. ClientEarth wishes to reiterate the active role it has played regarding this procedure:

- Submission of comments in October 2019⁹ and May 2020¹⁰
- Submission of comments to the Opening Decision in June 2021¹¹
- Submission of comments regarding the applicability and application of the CEEAG in June 2022¹²

⁷ <https://www.bmwk.de/Redaktion/DE/Downloads/Energie/221004-Eckpunktepapier-RWE-Kohleausstieg.html>

⁸ See Extension Decision, recital 28.

⁹ See ClientEarth's report of October 2019 "No money for old lignite", available at <https://www.clientearth.org/latest/documents/clientearth-analysis-no-money-for-old-lignite-is-german-coal-compensation-legal/>.

¹⁰ See ClientEarth's report of May 2020 "Coal phase-out compensation for LEAG – legality assessment", available at <https://www.clientearth.org/latest/documents/coal-phase-out-compensation-for-leag-legality-assessment/>.

¹¹ See ClientEarth's observations on the Commission's opening decision in case SA53625 Deutschland Kohleausstieg, available at <https://www.clientearth.org/latest/documents/commission-s-doubts-on-the-state-aid-compensations-for-the-closure-of-leag-and-rwe-lignite-plants-in-germany/>.

¹² See ClientEarth's observations on the Commission's invitation to comment on the applicability and application of the new CEEAG to the aid under assessment in case SA.53625 Deutschland Kohleausstieg, DG COMP Registration: 2022/5795772.

3.2. Considerations regarding the decision

37. ClientEarth questions whether the RWE case should not be handled totally separately from the LEAG one. Indeed the Commission insists in its decision that the reason for extending the formal investigation is not only the fact that the agreement between RWE and the German authorities has been revised but also that the *“circumstances described in the Opening Decision changed after the adoption of that decision”*.¹³
38. Such change in the circumstances should also be taken into consideration by the Commission in its assessment of the LEAG package. Similarly, the fact that the German authorities submitted revised calculations for the compensation to be granted to RWE should have led the Commission to question the calculations underlying the LEAG compensation amount.
39. The fact that an extension of the formal investigation was only adopted for RWE and not for LEAG is questionable.
40. The circumstances have most likely not only changed for RWE but most likely for all lignite operators. The Commission has at its disposal tools to find out the necessary information to assess a measure. In this case, it would seem advisable to ask the German authorities about the impact of the alleged circumstances also for LEAG. In the Extension Decision there is no mention about any request for information having been sent in this respect.
41. If, on the contrary, such changes in the circumstances did not justify adopting an extension of the formal investigation for LEAG, they should, a minima be taken into account in the final decision.
42. Similarly, the Commission should critically assess the underlying calculations provided by the German authorities. In the text of the Extension Decision there is no reference that the submitted calculations have been subject to any review or stress test by the Commission’s services.

4. Policy considerations

43. ClientEarth welcomes the decision by the German authorities to accelerate the final decommissioning of three plants from 2038 to 2030. However, the climate effect remains problematic because due to the prolonging of the operation of two plants planned to phase-out by 2022 little to no emissions are actually reduced with the acceleration.¹⁴
44. This notwithstanding, ClientEarth considers that the foreseen compensation for RWE for the earlier closure of lignite power plants cannot be considered compatible with the rules of the Treaty.

¹³ See Extension Decision, recital 19.

¹⁴ Zehrfeld, Sina: Braunkohle-Ausstieg NRW: Wissenschaftler sehen CO₂-Ersparnis „von nahezu Null“. RP ONLINE. Oktober 2022. https://rp-online.de/nrw/landespolitik/braunkohle-ausstieg-nrw-wissenschaftler-sehen-co2-ersparnis-von-nahezu-null_aid-78276877

45. In August 2020, ClientEarth sent a response to the Commission on the possible compatibility of aid for coal closure. The main position points raised in this paper are valid today and applicable to the lignite compensation proposed by Germany:

- **The extraction and the use of hard coal and lignite are not compatible with the Green Deal objectives.** Phasing out fossil fuels from Europe's energy mix is crucial for meeting the Paris Agreement commitments as well as EU's 2030 climate and energy targets and the objective of making Europe carbon-neutral by 2050.
- **When granting State aid aimed at incentivising earlier plant closure** it appears useful to ensure:
 - **legal certainty** for Member States, operators, affected workers and taxpayers as well as market participants
 - **social acceptance** for the phase-out of coal, which calls for support for regions and workers to ensure a just transition in different Member States
 - **compatibility** of the phase-out schedule **with climate obligations** as well as ensuring no legal and financial hurdles for more ambitious climate policies are created
 - **transparency** regarding any negotiations with or payments to operators
- ClientEarth advocated that when granted, aid for the closure of coal and lignite plants shall be:
 - subject to the plants **definitively closing by 31 December 2029** at the latest
 - **targeted** to costs directly relating to the closure and comply with the **polluter pays principle**
 - **degressive** in order to incentivise early closure, whilst **workers' rights** shall be protected
 - **transparent.** Adverse climate and health impacts of coal and lignite combustion are well established. Transparency regarding the **reduction of greenhouse gas emissions** pursued by the closure of plants, the **modalities of the closure**, the amount of aid supporting the closure and eligible costs are of the utmost importance for the adequate enforcement of the payment of aid and for the public to **know how much State money is supporting the transition** to decarbonised energy systems

46. The proposed compensation for the closure of lignite power plants proposed by Germany is not transparent, not degressive, not targeted to costs directly relating to the closure but compensates foregone profits of a highly polluting activity, it disregards the polluter pays principle in as far as it does not link the compensation to the duties to comply with this type of obligations.

5. The state aid analysis of the compensation foreseen for RWE

5.1. The legal basis for the assessment of compatibility

5.1.1. Article 107(3)(c)TFEU

47. ClientEarth would like to reiterate the doubts submitted in the observations sent in June 2021 that aid for the closure of an economic activity can be found compatible with the internal market based on Article 107(3)(c)TFEU.
48. The wording of this provision allows the Commission to consider compatible aid to “facilitate the development of certain economic activities or of certain economic areas”. Aid to close an activity does not facilitate its development except if it is granted in order for another activity to be developed that replaces the closed one. If this is the case, and with the compensation under assessment RWE finances the deployment of wind parks or other renewable energy sources, then the compatibility of the aid should be assessed on the basis of the provisions regulating this type of support and the Commission has not provided any indications in the opening or the extension decision to this end.

5.1.2. The CEEAG

49. The Commission has based an entire compatibility assessment on Section 4.12 CEEAG.
50. ClientEarth has submitted that the CEEAG were not applicable to the measure under review.¹⁵ Indeed, in order to determine when the aid is awarded one must refer to the legal basis for such aid measure. The legal basis for the measure is the Closure Law of 8 August 2020.
51. In ClientEarth’s view, the reference to the *Freistaat Sachsen* judgment to justify the applicability of the CEEAG implies a misreading of this case law and disregards the *Magdeburg* case law¹⁶ that establishes that an aid is granted when the legal right to obtain it is awarded.
52. In recital 92, the Commission recalls that in line with point 466 CEEAG, it will apply these guidelines to assess the compatibility of all notifiable aid for climate, environmental protection and energy “awarded or intended to be awarded from 27 January 2022”. In recital 93, the Commission explains that due to the standstill clause foreseen in the Closure Law, the 2021 Contract and the Amendment Law, no payments have taken place. In recital 94, reference is made to the *Freistaat Sachsen* judgment according to which the Commission is required to apply the rules in force at the time of its decision even if the notification of the measure took place under a different legal framework.

¹⁵ See submissions of June 2022

¹⁶ Judgment of the Court of 21 March 2013, *Magdeburger Mühlenwerke GmbH v Finanzamt Magdeburg*, Case C-129/12, ECLI:EU:C:2013:200.

53. A closer look to the wording of this relevant part of the *Freistaat Sachsen* judgment is called for.
54. According to paragraph 44 of the judgment, the substantive rules of Community law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such effect must be given to them (see, inter alia, Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 49).
55. In the case at hand, the German authorities decided to compensate RWE for the closure of lignite power plants in full awareness of the absence of guidelines by the Commission regarding the compatibility of this type of aid with the rules of the Treaty. Thus, at the time the compensation was awarded to RWE, Germany was conscious that the assessment of this intervention would be carried out directly under the Treaty.
56. The Court of Justice recalls in paragraph 46 that „according to the last sentence of Article 108(3) EC, a Member State planning to grant aid is not to put its proposed measures into effect until that procedure has resulted in a final decision by the Commission.“ A distinction must be made between the notions of “putting into effect“ and “granting an aid“.
57. As part of that control, the Court considers in paragraph 49 that Article 4(1) of the Procedural Regulation, which provides that the Commission must examine a notification ‘as soon as it is received’, imposes merely an obligation of particular diligence on the Commission, and therefore is not a rule of application *ratione temporis* of the criteria for assessment of the compatibility of notified proposed aid with the common market.
58. In the comments submitted in June 2022 to the applicability of the CEEAG to the compensation for lignite closure, ClientEarth explained the reasons why it considered that the aid that had been foreseen under the Closure Law of August 2020 had been granted with the 2021 Contract. The legal validity of this contract is not subject to the state aid clearance and thus it grants RWE the right to obtain the compensation. The Amended Contract does not change or alter this right. It does not even modify the amount of compensation.
59. In this context it is relevant to mention the judgment in case C-129/12 *Magdeburger Mühlenwerke* and in particular paragraph 41. On the basis of applicable national law, an aid must be considered to be granted when the right to that aid is acquired.
60. As the CEEAG are not applicable for the reasons set out above, the only possible legal basis for compatibility is Article 107(3)(c) TFEU.
61. It is however not coherent to consider the compensation paid to RWE compatible on such a ground as Article 107(3)(c) TFEU only allows aid measures targeted at the development of an economic activity to be found compatible.
62. The compensation in the case at hand is directed at and meant to compensate for the closure of the plants and cannot thus be considered as support of an economic activity. If any, as mentioned above, the economic activity that is supported with this measure is the shift from coal electricity production to renewables and in this case, there are specific rules to assess compatibility of public support, which are not fulfilled in this case.

5.2. The compatibility assessment cannot be concluded in a positive manner

5.2.1. Preliminary remark

63. ClientEarth would like to stress its regrets that the Commission has not addressed in the Extension Decision the failure in the Opening Decision to assess any criteria regarding compatibility other than proportionality.
64. ClientEarth not only submitted arguments regarding the assessment of compatibility in previous observations but in the observations to the Opening Decision sent in June 2021 explicitly point out that the Commission had only expressed doubts regarding proportionality. In addition, ClientEarth considered that *“the need, appropriateness and incentive effect of the closure compensation are also not met”* and argued that *“the negative effects of the closure compensations on the market cannot be outweighed by positive effects”*.

5.2.2. Lack of incentive effect

65. According to recital 70 of the Extension Decision, *“RWE’s foregone profits in the past and nearby future already exceed and therefore justify the compensation to be granted to RWE”*. Should this be the case, the logical consideration is that RWE is compensated for already incurred losses in the form of foregone profits and that therefore the compensation does not have the effect of advancing closure of power plants but only the objective to lighten the costs of closure of certain plants for the company.
66. Thus, without incentive effect, the aid cannot be approved.

5.2.3. Absence of necessity of the state intervention

67. ClientEarth submits that the Commission should have assessed the condition regarding necessity of the compensation.
68. In that regard, reference may be made to Decision SA.54537 Netherlands Prohibition of coal for the production of electricity in the Netherland where the Dutch authorities granted compensation to the only plant – Hemweg – who did not benefit from a transition period as the other plants covered by the closure law did.¹⁷
69. Furthermore, the effects of climate policies, the newly introduced price cap on revenues applicable to all electricity producers, the increasing price and upcoming scarcity of ETS licences, the rapid and efficient development of cleaner energy sources would have driven the lignite plants out of the market in the short-term.

¹⁷ See Judgment of the General Court of 16 November 2022, Kingdom of the Netherlands v European Commission. Case [T-469/20](#). ECLI:EU:T:2022:713. The judgment has been appealed at the Court of Justice. Case C-40/23P.

70. Thus, the need for a state intervention cannot be justified under these circumstances.

5.2.4. Appropriateness

71. ClientEarth also submits that the Commission should have examined whether alternatives such as regulatory measures, carbon prices, emission performance standards were possible.

72. As mentioned in the observations to the Opening Decision, the German government seems not to have investigated whether there could have been other suitable options to ensure the proportionality of phase-out compensations.

73. The fact that lignite mines are closely linked to the power plants does not per se justify that they are included in the calculation of the compensation. This does not seem the appropriate approach if other state aid decisions adopted by the Commission in the sector are taken into account.

74. Indeed and for example, on 5 May 2023, the Commission adopted a decision approving amendments to a Polish state aid scheme to support closure of coal mines (SA.100533). The amendments to this scheme that were approved include: (i) its prolongation until the end of 2027; (ii) a budget increase to cover exceptional costs; and (iii) the inclusion of two additional mines that ceased coal production in 2020 (Ruch Jastrzębie III) and 2021 (Ruch Pokój II).

75. The Commission assessed the amended scheme under EU State aid rules, and in particular [Council Decision 2010/787/EU](#) on State aid to facilitate the closure of uncompetitive coal mines. The Commission found that the amended scheme continues to be necessary and appropriate to support the closure process of mines that ceased operations, by (i) providing financial support to workers who have lost, or will lose, their jobs due to the closure of the mines, and (ii) helping to secure mine shafts and decommission mine infrastructure, repair damage to the environment caused by mining and recultivate land after the mine closures. Furthermore, the Commission found that the aid amounts do not exceed the exceptional social and environmental costs incurred.

76. It is not clear from the information provided under the Opening or the Extension Decision whether the costs taken into account in the context of the RWE compensation correspond to exceptional social and environmental costs, as it is the case of the Polish scheme.

77. Furthermore, considering that lignite-fired power plants are one of the most polluting forms of power generation compensating the operators for closure of an activity extremely damaging from the environment does not seem appropriate in the context of the current climate crisis.

5.2.5. Proportionality and assessment of the foregone profits

78. As mentioned above in Section 2.1, ClientEarth questions the principles applied to the calculation of the compensation.

79. As a general fundamental concern, ClientEarth questions how the amount of the compensation to be paid to RWE may remain the same whereas the schedule for the closure of the plants has been modified and the general circumstances surrounding such closure have also changed.

80. The changes made to the parameters used to determine the compensation¹⁸ to be granted evidence that the methodology is at best extremely uncertain and even lead to a questioning of the new calculations submitted.
81. As explained in recital 43.e of the Extension Decision, the German authorities have considered that the market revenue cap affects the foregone profits of only one plant since the others were closed before the cap was introduced or will be closed after the end of the period of application of the cap. However, in the opinion of ClientEarth, for the closed plants foregone profits beyond the price cap should not be compensated for without incurring in overcompensation. This is even more the case as the payments for the concerned period have not yet been effectuated.
82. Reference may be made here to Decision SA.54537 and the general approach followed by the Commission regarding proportionality.
83. ClientEarth also questions the Commission's approach whereby there is no need to consider an update mechanism. If, as the Commission considers, the CEEAG were applicable, the latter provide that the aid should be granted through a competitive bidding process. In this case, the Commission accepted that no bidding process would take place. In such a case, a detailed case by case analysis should be carried out. Such analysis should be thorough and should not merely rely on what "seems reasonable"¹⁹.
84. ClientEarth also notes that the Commission has not examined any possible issue of cumulation with other aid measures such as capacity mechanisms etc.
85. Finally, in view of the fact that the calculations have already been revised once and in light of the global changes on the electricity market, ClientEarth questions the Commission's preliminary finding that "*an update mechanism is not necessary*".²⁰

5.2.6. Competition concerns

86. ClientEarth is also concerned that the compensation granted through the agreement may de facto imply the company is overcompensated and will reinforce RWE's market power and will be used in a distortive manner on the green electricity markets.

a. The risk of overcompensation

87. In the observations on the opening decision sent in June 2021, ClientEarth proposed that the compensation includes variable parameters to eliminate the risk of overcompensation. The current extension of the investigation exactly two years after its opening following the notification of updated figures regarding the calculation of the compensation show the little reliability of the exercise.

¹⁸ See for example Extension Decision, recital 110.

¹⁹ See for example Extension Decision, recital 102.

²⁰ See Extension Decision, recital 104.

88. The facts have thus proven that ClientEarth's proposal to include a mechanism that allows compensations to be adjusted on the basis of actual foregone profits and closure costs would allow to avoid the risk of overcompensation.
89. The compensation is envisaged on yearly instalments and thus a review and claw-back mechanism that adjusts the compensation in a proportionate manner on a yearly basis should be easy to implement.

b. The spill-over distortive effects on the renewable energy market

90. The Extension Decision confirms such a concern as RWE itself indicated that it would invest massively in the energy transition, more than EUR 50 billion gross globally in the expansion of its green core business, EUR 15 billion of which being earmarked for Germany.²¹
91. If the compensation is actually used for the deployment of renewable energy production, be it to build wind parks or in the context of hydrogen generation, the Commission has issued specific rules to consider the grant of aid for these activities and an assessment would have to be carried out in line with them. Such an assessment is not part of the Extension Decision.

5.3. Contravention of other EU rules

92. In the observations submitted in June 2022, ClientEarth recalled the principle whereby in order for an aid measure to be found to be compatible, it must not in any way breach a provision of EU Law.
93. This principle was reaffirmed in very clear terms in the context of EU environmental law in Case C-594/18 P, *Austria v Commission* (paras 44-45 and 100) but has been part of the case law of the Court much longer and regarding any provision of the EU law.
94. In a judgment rendered in 1980,²² the Court considered that *"whilst the procedure provided for in Articles [107] and [108] leaves a wide discretion to the Commission, and in certain conditions to the Council, to come to a decision regarding the compatibility of a system of aids granted by States with the requirements of the common market it is clear from the general plan of the Treaty that that procedure must never produce a result which is contrary to specific provisions of the Treaty."*
95. This principle prevents any public support for foregone profits of a polluting activity from being considered compatible aid.
96. There is no detailed information regarding the compensation foreseen for RWE to identify whether it may (directly or indirectly) cover any obligations imposed on RWE in line with the polluter pays

²¹ See Extension Decision, recital 22.

²² Judgment of the Court of 21 May 1980. - *Commission of the European Communities v Italian Republic*. - *Internal taxation: "sovrapprezzo"*. - Case 73/79, ECLI:EU:C:1980:129, Para 11.

principle. Thus, it cannot be established whether it violates this principle by absorbing costs normally due by RWE.

6. Conclusion

97. ClientEarth considers that the extension of the investigation evidences that the closure compensation should be found incompatible with the internal market. This was the conclusion brought to the attention of the Commission in June 2021. The information (and the lack of data and transparent information) in the Extension Decision reinforces the strong concerns raised regarding the risk of overcompensating RWE, also considering the prolongation of the operation of two plants with the corresponding prolongation of the coal mining and the devastating environmental effects of this practice.

98. For these reasons, the Commission should not authorise the aid measure.

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