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EEB contribution to State Aid SA.53625 (2021/C) – Germany - Lignite phase-out

1. Summary

We welcome the opportunity to provide further feedback regarding the above-mentioned case. In the light of the adoption of the EU Guidelines on State aid for Climate, Environmental Protection and Energy 2022 (CEEAG), our view is that the main flaws of the request of the German government to compensate lignite operators for the phasing-out of their operations stand and that the points we raised in our first submission on June 7th, 2021[1] remain valid.
Below we complement our first submission with additional elements directly related to the CEEAG adopted in January 2022.

2. The key point: paragraph 28 of the CEEAG

According to paragraph 28 of the CEEAG "*Proving an incentive effect entails the identification of the factual scenario and the likely counterfactual scenario in the absence of aid*" that according to footnote 39 *"must be credible, genuine and related to decision-making factors prevalent at the time of the decision by the aid beneficiary regarding the project*".
Firstly, the CEEAG state that the scenarios must be based on information available at the time of the request of the aid. Consequently, the assessment of the request by Germany must be conducted as it was 2 December 2020, the date of the notification of the State aid request.
Secondly, concerning the credibility and the genuineness of the counterfactual scenario presented by Germany, our doubts still stand concerning the following points:

- The cost of carbon emissions considered by the German government (20.74 €/ton in 2025 and 35.67 €/ton in 2040) has been greatly underestimated and did not consider the outlook of the energy sector in that moment, when the Commission led by President Von der Leyen had

[1] https://eeb.org/library/eeb-contribution-on-the-case-of-german-state-aid-to-leag-and-rwe/

already clearly stated that climate neutrality and zero pollution would have guided the Commission's action throughout its mandate[2].

- The carbon cost considered by Germany did not consider independent estimates of its true cost. For instance, the DG MOVE "Transport Cost Handbook" (2019) study confirms a central estimate of 105 €/ton, but sets also a higher estimate level set to 199 €/ton[3]. The table below summarises the carbon costs for RWE and LEAG in 2020 considering different scenarios[4]:

	Carbon emissions (Mton, 2020)	Cost of carbon (25€/ton)	Cost of carbon (50€/ton)	Cost of carbon (120 €/ton)
RWE	29	725 M€	1450 M€	3480 M€
LEAG	38.9	972.5 M€	1945 M€	4668

Under a more reasonable and easily predictable scenario of 50 to 100 €/ton, the cost of carbon emissions for LEAG and RWE would prevent any profit and, therefore, any right to get compensations under the CEEAG chapter 4.12.

- The analysis of the calculation method used by the German government has shown large flaws as clearly pointed out by EMBER and Greenpeace[5]; in particular, three key assumptions led to a systematic overvaluation of the compensation payments:
    - An arbitrary choice of carbon and electricity prices,
    - The assumption that no fixed costs would be saved thanks to early closures,
    - The unmotivated choice to compensate RWE and LEAG 4 to 5 years after the closure of their lignite units.

[2] The European Green Deal has been presented on December 11, 2019, the Just Transition Mechanism to support coal regions in transition has been presented on January 14, 2020, the European Climate Law has been presented on March 4, 2020, the 2030 Climate Target Plan to reduce GHG emissions by at least 55% by 2030 has been presented on September 17, 2020.
[3] ETC/ATNI Report 04/2020 "Cost of air pollution from industrial facilities 2017-2020"
[4] The table broken down per single installation is available in our previous submission, paragraph II)
[5] Ember and Greenpeace, *Germany's flawed assumptions behind €4.4bn lignite compensation* available here

We strongly encourage the Commission to consider alternative and more realistic assumptions to assess the counterfactual scenario, namely a more credible carbon price (starting from at least 105 €/ton until 2030, as per DG MOVE's estimate made already in 2019), the internalisation of negative externalities due to pollution emissions (see section III of our first submission) and the assessment of the money that operators would save in terms of avoided retrofit costs to comply with the Best Available Techniques Conclusions under the Industrial Emissions Directive (2010/75/EU).

3. Positive condition

a. Identification of the economic activity facilitated by the measure

The German government fails to identify the economic activities that will be facilitated as a result of the aid and how the development of those activities is supported and the expected benefits in terms of its material contribution to environmental protection, including climate change mitigation, or the efficient functioning of the internal energy market.

Granting such compensations would inevitably distort the internal energy market by giving to energy players already at the top of national and international markets a further selective advantage compared to other businesses that either embraced the energy transition in due time or are in the process of doing so. That would restrict access to the market in a manner contrary to the public interest and to the correct functioning of the internal market.

b. Incentive effect

We dispute the fact that the beneficiaries would not have changed their behaviour without the aid. On the contrary, both companies are in the process of transitioning towards cleaner technologies to produce energy, as clearly demonstrated by their public communications.

We strongly agree that "*the aid must not support the costs of an activity that the aid beneficiary would anyhow carry out and must not compensate for the normal business risk of an economic activity*" (CEEAG paragraph 27). It is hardly debatable that German lignite installations and mines would have run forever, whether it is simply good business-making and correct risk-assessment to read the policy and market scenarios and make sensible business planning to ensure profitability.

For instance, any sensible business plan must foresee not only costs and profits related to the opening and the exploitation of a mine, but also its closure and rehabilitation. The consequences of flawed business plans should not be paid by the public purse, but by the businesses that missed to understand and anticipate clear (and easy to read) market trends.

c. No breach of any relevant provision of Union law

Industrial Emissions Directive (IED, 2010/75/EU)
As correctly stated by the Commission in paragraph 126 and 127 of the Commission decision (C(2021) 1342 final), there is a discrepancy between the expected lifespan of some lignite installations declared by Germany and their actual compliance with the IED. In this sense, we strongly recommend the Commission to make Germany and the operators provide actual compliance evidence, particularly investment decisions or other documents showing that the operators have made the necessary steps to ensure compliance with the Best Available Techniques Conclusions for Large Combustion Plans by 21 August 2021. More on this aspect in chapter III.b of our first submission.

Data opacity
The German authorities failed to comply with the Commission's implementing rules 2018/1135 on IED reporting; data for the reporting years 2017 and 2018 should have been submitted by 30 September 2019 at the latest, instead Germany was still failing to comply at the time of the submission of the State aid request and still failed to provide the required data to date[6].

Water Framework Directive (WFD, 2000/60/EC)
Germany failed to comply with the cost recovery principle enshrined in art. 9 of the WFD. Compliance with this Directive is relevant to this case because:

- lignite mines abstract high quantities of groundwater to keep the pits dry, with effects on the groundwater table kilometres around, as well as causing pollution of ground and surface waters,
- coal and lignite combustion plants also abstract large amounts of water for cooling purposes and the intake and discharge of water has negative impacts on the ecological status of the source/recipient water bodies,

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[6] See https://www.eea.europa.eu/data-and-maps/data/industrial-reporting-under-the-industrial-6

- lignite and coal combustion have negative effects on the chemical status of water bodies, as they are the top source of anthropogenic mercury released to the environment, a very toxic and persistent pollutant subject to phase out under the international Minamata Convention Treaty and the WFD.

According to our findings[7], most of the German federal states where lignite is extracted and burnt exempts lignite operators from the fees foreseen by the WFD. In Saxony-Anhalt, water abstraction for all mining purposes is exempted from fees, while in Saxony lignite mines are exempted from the fee of 0.015 €/m^3 which is applied to drainage of other types of mines. In Brandenburg mine drainage is exempted from fees, unless the drained water is used for public water supply, production, or cooling water. Only the federal state of North-Rhine Westphalia applies a fee of 0.05 €/m^3, but only for mine drainage, which was introduced in 2011 and does not consider other kinds of abstractions, such as for cooling power plants.
For estimates concerning the amount of this hidden subsidy to the German lignite industry, please check chapter III.c and V of our first submission.

4. Negative conditions

a. Necessity and appropriateness of the aid

Paragraph 35 of the CEEAG states that "*the mere existence of market failures in a certain context is, however, not sufficient to prove the necessity of State aid. Other policies and measures may already be in place to address some of the identified market failures".*
Our concerns and proposals to find other policy instruments to address market failures and promote an increased level of environmental protection are included in our first submission, chapter VI, whether we addressed the problem of *asymmetric information* in chapter VII.

b. Proportionality

As already stated above and in our first submission, the aid requested by Germany is far from being proportional; the profitability of lignite operations has been clearly overestimated since it lies on flawed and unrealistic assumptions.

[7] Mind the Gap: Mapping Hidden Subsidies for the coal and lignite industry in the Czech Republic, Germany and Poland

Moreover, granting such a high and unmotivated amount of public funds to only two players would greatly distort the internal market and affect competition and trade at national and, given the dimension of RWE and LEAG, EU level. As a matter of fact, RWE and LEAG will be helped to maintain their power on the market despite their poor business decisions and push out of the market competitors that made savvier strategic decisions in due time towards cleaner energy production.

5. Conclusions

To conclude, we call the Commission to:

- Assess the case at the date of the notification of the State aid request (2 December 2020).
- Consider a more realistic carbon price to assess the expected profitability of lignite operations, as it was easily readable by the policy actions already taken by the Commission in 2019 and early 2020. It was already clear since 2019 that the expected carbon debt price range up to 2030 period was in the range of 105€/tCO2eq, expected to double after that period.
- Assess and disclose either the actual compliance or plans to ensure compliance of RWE's and LEAG's power plants to the emission ranges set under the Best Available Techniques Conclusions for Large Combustion Plants by 17 August 2021.
- Condition state aid with compliance of Germany with art. 9 of the Water Framework Directive (cost recovery principle).
- Condition state aid with compliance of Germany with the Commission's implementing rule 2018/1135 on IED reporting.
- Fully enforce the polluter pays principle by including in the counter scenario the full cost of remediation of lignite mines; measures ensuring the full liability being placed on the operators are still unclear.
- Make the beneficiaries disclose the economic activities that would be facilitated by the aid and how they would not distort the internal market by keeping the beneficiaries in a position of power, despite their poor decision making.

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