



Greenpeace European Unit

199 rue Belliard, 1040 Brussels, Belgium
T +32 (0)2 274 1900 | F +32 (0)2 274 1910
european.unit@greenpeace.org
www.greenpeace.eu | @GreenpeaceEU
EU transparency register: 9832909575-41
Non-profit registration (vzw/asbl): BE0457563648

19 April 2021

Brussels

European Commission
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Via electronic mail to Stateaidgreffe@ec.europa.eu

Re: Greenpeace's comments on State Aid SA.59974 (2021/C) - Romania Restructuring of Complexul Energetic Oltenia SA

1. Introduction

Greenpeace welcomes the opportunity to submit comments on the Commission decision of 5 February 2021 (the Opening Decision), which initiates the procedure laid down in Article 108(2) with regard to the public financing in favour of Complexul Energetic Oltenia SA (CEO).

As stated in the Opening Decision, the public financing consists in a restructuring plan, involving State aid, for an energy company active in mining, fossil fuel power generation and local heat supply.¹

As a result of the restructuring plan, CEO is expected to replace 1460 MW (six lignite-fuelled units) of its current generating capacity (3570 MW) with 1325 MW of gas-fired generation, 109 MW of solar and 9.9 MW of hydropower.²

In other words, the State aid in discussion aims at allowing CEO to continue operating 1950 MW of lignite based power generation and heating beyond 2030, while relying for about 94% of its capacity on fossil fuels (when the two planned gas-fired units would become operational).

As such, the restructuring plan fails to open any path towards the decarbonisation of the Romanian energy system and the opening of the country's energy market to renewables and

¹ Opening decision, Para. 4.

² Opening decision, Para. 14 (a).

demand-side measures. On the contrary, if enacted, it would perpetuate Romania's dependency on fossil fuels, forcing society to bear heavy environmental, health and social costs.

In this regard, Greenpeace notes that, according to the Opening Decision, the restructuring plan entails organisational measures that will lead to a "41% staff reduction or reallocation":³ thus, whereas Romania aims at providing significant amounts of economic resources to secure CEO's current generation capacity and market share, without paying regard to its continued reliance on fossil fuels, it fails to guarantee comparable (and in any case adequate) levels of protection for CEO's workers.

Greenpeace submits that, from a general perspective, the approval of the restructuring plan would irremediably contradict Union's policies and objectives set out by the European Green Deal and undermine the Commission's credibility as the institution responsible for driving those policies and objectives and overseeing their implementation.

As the European Green Deal acknowledges: "*further decarbonising 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. Energy efficiency must be prioritised. A power sector must be developed that is based largely on renewable sources, complemented by the rapid phasing out of coal and decarbonising gas.*"⁴

Against this background, the restructuring plan would: (i) lead CEO to increase its CO2 emissions, (ii) allow the company to maintain a substantial part of its coal-generation capacity, (iii) replace part of this capacity with fossil gas generation, with no real environmental benefit, (iv) introduce only a minimal amount of renewable capacity, while (v) disregarding any possible investment in energy efficiency and related services.⁵

Having regard to specific aspects of the restructuring plan, Greenpeace considers that the Commission should find the planned State aid to CEO to be incompatible with the internal market and ensure that Romania does not put it into effect.

³ Opening Decision, Para 14 (b).

⁴ Commission Communication of 11 December 2012, "The European Green Deal", COM (2019) 640 final, para. 2.1.2.

⁵ In this respect, the restructuring plan follows the same deficient approach that Romania took for its NECP. In its assessment of 14 October 2020, the Commission has expressed strong reservations on this plan, particularly with regard to the preservation of coal and gas capacity beyond 2030 and to the lack of concrete and timely support for the deployment of renewables. It is hard to understand how, after having expressed such reservation, the Commission may decide that the restructuring plan at issue is in line with the good functioning of the internal market. See: Commission staff working document, Assessment of the final national energy and climate plan of Romania, SWD (2020) 922 final.

Greenpeace is an independent global campaigning organisation that acts to change attitudes and behaviour, to protect and conserve the environment and to promote peace.

In particular, Greenpeace points out that:

1. The restructuring plan will lead to a cumulative increase of CEO's CO2 emissions;
2. The operating aid for the payment of CO2 allowances would entail a breach of the ETS Directive and of the ETS State aid guidelines;
3. The aid for compliance with environmental standards would breach the requirements for the compatibility of environmental aid;
4. The restructuring plan is based on the assumption that CEO may benefit from the Modernisation Fund.
5. The restructuring plan fails to guarantee CEO's long term viability, at the same time preventing the good functioning and the transition of the Romanian electricity market towards an efficiency and renewables based system.

Finally, Greenpeace calls the Commission's attention on the emergency orders adopted on 31 March and 15 April 2021, which confer CEO a grant of EUR 241,4 million to allow for the payment of CO2 allowances for the year 2020.⁶

As already pointed out in the letter sent by Bankwatch, Europe Beyond Coal and Greenpeace to Executive Vice-President Vestager on 9 April 2021, this rescue grant constitutes an early implementation of the restructuring plan.⁷

To our knowledge, Romania has failed to notify the Commission of this additional measure. In any case, it is clear that the implementation of the rescue grant before the conclusion of the current investigation would constitute illegal aid and infringe Article 108(3) TFEU.⁸

2. The restructuring plan would lead to an increase in CEO cumulative emissions

In accordance with the guidelines on State aid for rescuing and restructuring enterprises in difficulty,⁹ restructuring aid "*cannot be limited to financial aid designed to make good past losses without tackling the reasons for those losses.*"¹⁰

As it clearly stems from the Opening Decision, CEO's losses are intrinsically linked to the activity carried out by the company (lignite-based electricity and heating production) and to the external costs that this activity generates. Indeed, the costs associated with the purchase of CO2

⁶ Annexes I and II.

⁷ Annex III.

⁸ News reports indicate that CEO is currently purchasing emissions allowances in view of the upcoming deadline of 30 April 2021. <https://e-nergia.ro/ce-oltenia-cumpara-certificate-de-emisii-la-exorbitantul-pret-de-44-de-euro-bucata-statul-plateste/>

⁹ Official Journal 2014/C 249/01 (hereinafter, the R&R Guidelines).

¹⁰ R&R Guidelines, Para. 45.

Greenpeace is an independent global campaigning organisation that acts to change attitudes and behaviour, to protect and conserve the environment and to promote peace.

emissions allowances represented, respectively in 2018 and 2019, 31% and 39% of the company's operating costs and 41% and 45% of the company's turnover.¹¹

It would have been logical to expect, taking into account the figures mentioned above, that the restructuring plan would have aimed at drastically reducing CEO's carbon emissions, in view of containing the massive operating costs that these emissions generate.

Instead, according to Greenpeace's analysis of the restructuring plan, carried out on the basis of the information made public by CEO,¹² if the company were authorised to implement the restructuring plan, its total annual emissions would increase from 7 Mt CO₂/year in 2020 to about 9 Mt CO₂/year in 2030, with a peak of 10.7 Mt CO₂/year in 2024.

These increased emissions would have direct negative repercussions of CEO's operating costs (which the expected price increases for CO₂ allowances are also likely to affect). At the same time, they would affect the company's viability and its ability to compete on the Romanian electricity market. As noted in the Opening Decision, such ability has already been compromised since some years.¹³

In other words, the restructuring plan would fail to tackle the structural reasons for CEO's financial losses and therefore to ensure the respect of the "*one time, last time*" principle.¹⁴ The Commission could therefore reject this plan simply in light of its lack of effectiveness.

However, the Commission should not overlook that the restructuring plan, supported with public funds, would cause a worsening of the CEO's impacts on the climate and on the environment.

A decision to authorize the restructuring aid, despite these additional detrimental impacts, would undoubtedly be incompatible with the Union's current climate and energy policies, with the general principles of the Union's legal system (Article 37 of the Charter and Articles 11, 191(2) and 194(1) TFEU) as well as with the Paris Agreement.

It is also worth noting that there would be viable alternatives to the solution proposed in the restructuring plan. In its analysis, Greenpeace has produced an alternative scenario, which considers the projected electricity production of CEO by 2026 and the decrease to zero of lignite-based electricity production (coal phase-out) starting in the same year, at the same time as the launch of the new gas units.¹⁵

¹¹ Opening Decision, Para 9.

¹² See: Greenpeace, "Scenario for a failed transition - Analysis of the decarbonisation plan of the Oltenia Energy Complex", February 2021, page 2. Annex IV. Available at : <https://www.greenpeace.org/static/planet4-romania-stateless/2021/04/7e3378af-co2-emissions-ceo-report.pdf>

¹³ Opening Decision, Para. 8.

¹⁴ R&R Guidelines, Section 3.6.1.

¹⁵ "Scenario for a failed transition", page 4.

Greenpeace is an independent global campaigning organisation that acts to change attitudes and behaviour, to protect and conserve the environment and to promote peace.

Under this scenario:

- Starting in 2026, annual CEO emission levels would be reduced to 4.6 Mt CO₂-eq (5.4 Mt CO₂-eq including Craiova), while the total emission levels in the period between 2021-2030 would amount to 86.9 Mt CO₂-eq (93.3 Mt CO₂-eq including Craiova), allowing for a 52% decrease in annual emissions between 2026-2030, compared to the level of emissions registered in 2020;
- CEO would emit approximately 41 Mt CO₂-eq less than under the restructuring plan;
- Applying an average price basis of €40/t for carbon emissions, costs associated with allowances would be €1.2 billion lower than in the restructuring plan.¹⁶

3. The restructuring plan is incompatible with the ETS Directive, the ETS guidelines and the polluter pays principle

According to the Opening Decision, the EUR 1.33 billion restructuring aid notified by Romania is composed of EUR 0.25 billion rescue aid (already granted), of additional 0.31 billion in the form of a State-guaranteed loan and of EUR 0.77 billion in the form of a State grant. In addition Romania plans to obtain EUR 711 million from the Modernisation Fund.¹⁷

The Opening Decision indicates that the plan shall include four types of measures, among which are “*environmental protection measures, encompassing investments or temporary operating cost support in current and remaining mining and power generation assets, including environmental compliance (CO₂ allowances and compliance costs ash, NO_x, SO₂, etc.)*”.¹⁸

However, the Opening Decision does not provide any clarity on the amount of aid that Romania plans to use for the environmental protection measures mentioned above. Neither does it indicate whether these measures will be financed through a grant or through a loan. This latter option would at least ensure that the costs of CEO’s pollution would not be passed on to society in their entirety.

It is nonetheless evident that a sizeable share of the restructuring plan will take the form of operational aid to allow CEO to pay for CO₂ allowances. It must be noted, in this regard, that:

- The Commission has authorised Romania to put into effect a rescue aid of EUR 250 Million, in the form of a loan, to allow for the payment of CO₂ allowances for the year 2019;¹⁹

¹⁶ This price basis is a conservative estimate. Indeed, as mentioned under footnote 8, specialised press reports that CEO has recently purchased CO₂ allowances for a price nearing €44.

¹⁷ Opening Decision, Para 11.

¹⁸ Opening Decision, Para 14(c).

¹⁹ Commission Decision of 24 February 2020, State aid SA.56250(2020/N), Rescue aid in favour of Complexul Energetic Oltenia SA.

Greenpeace is an independent global campaigning organisation that acts to change attitudes and behaviour, to protect and conserve the environment and to promote peace.

- Romania has recently adopted two emergency orders, respectively on 31 March and 15 April 2021, that confer CEO a grant of EUR 241,4 million to allow for the payment of CO2 allowances for the year 2020.²⁰

The Opening Decision fails to provide any more detailed indication or projection of the total costs of CO2 allowances, respectively for the implementation period of the restructuring plan (2021 to 2030) and for the shorter period during which such plan is intended to be supported with State aid.

However, as pointed out in the previous section, the company's CO2 emissions are set to cumulatively increase during the period 2021-2030, with a peak projected in 2024 (10.7 Mt CO2/year).²¹ Furthermore, as the Opening Decision admits, the price of CO2 allowances is likely to increase during the relevant period, compared to 2019 and 2020.²²

This may well mean that a predominant, or in any case significant, part of the restructuring plan will consist of operating aid, aimed at relieving CEO from the costs of its environmental pollution, while shifting those costs onto Romanian taxpayers.

Greenpeace submits that the use of State aid to support CEO's payment for CO2 allowances would entail a clear breach of Union law's environmental principles and of secondary EU law.

In the recent *Hinkley Point C* judgment, the European Court of Justice ruled that "*State aid which contravenes provisions or general principles of EU law cannot be declared compatible with the internal market*".²³

The general principles and primary law provisions identified in aforementioned judgement are "*Article 37 of the Charter, which states that 'a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development', Article 11 TFEU, according to which environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development, and Article 194(1) TFEU, according to which Union policy on energy must have regard for the need to preserve and improve the environment.*"

These principles and provisions are equally relevant in the case at issue, which deals with a planned public intervention in support of a form of energy production whose nefarious impacts on climate, the environment and human health are well known.

²⁰ See, above, footnote 6.

²¹ Greenpeace, "Scenario for a failed transition", page 3.

²² See Opening Decision, page 14, footnote 17.

²³ Judgement of the Court of 22 September 2020, Case C-594/18 P, Austria v. Commission, para 45.

Greenpeace is an independent global campaigning organisation that acts to change attitudes and behaviour, to protect and conserve the environment and to promote peace.

Greenpeace deems the use of State aid to support the continued operation of a fossil fuels company like CEO to be at odds with the objective of improving the quality of the environment, with the need to integrate the “polluter pays” and the “prevention” principles in Union’s policies and with the need to integrate environmental preservation and improvement in the energy policy.

All the more so given that such aid would simply release CEO from its obligations under EU environmental law, allowing it to continue polluting while passing the costs onto society.

As for the specific EU law provisions, Greenpeace points out that the restructuring plan would amount to a breach of the provisions of the ETS Directive²⁴ and would be therefore incompatible with ETS State aid guidelines.²⁵

The ETS Directive has the purpose of establishing a trading system for greenhouse gasses emission allowances, to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner (Article 1). It does so by requiring operators, whose installations emit greenhouse gasses, to purchase and surrender allowances to cover for their installations’ emissions.

By essentially requiring operators to pay a price for the CO₂ emissions generated by their activities, the ETS Directive implements the polluter pays principle enshrined in Article 191(2) TFEU.

The relation between the ETS Directive and Article 191(2) is further compounded by the fact that, under the Directive, the possibility for Member States to allocate free allowances to operators is subject to the strict rules set out in Articles 10a, 10b and 10c and limited to specific conditions.

Article 10a (3) of the Directive excludes, as a general rule, that electricity generators may benefit from the allocation of free allowances. The exceptions to this rule concern district heating (subject to the conditions of Article 10a (4)) and the support, for instance, to “*innovation in low-carbon technologies and processes*” and to “*innovative renewable energy and energy storage technologies*”.

Article 10c of the Directive foresees a derogation to the exclusion of electricity generators. However, this derogation is subject to strict substantive and procedural conditions and bound to a Member State’s efforts for the modernisation of the energy sector.

In no case does the ETS Directive allow Member States to directly and unconditionally allocate CO₂ allowances to electricity generation companies, as this would jeopardise its objectives.

²⁴ Directive 2003/87/EC of the European Parliament and of the Council, of 13 October 2003.

²⁵ Guidelines on certain State aid measure in the context of the system for greenhouse gas emission allowances trading post 2021.

Greenpeace is an independent global campaigning organisation that acts to change attitudes and behaviour, to protect and conserve the environment and to promote peace.

Likewise, and following the same logic, the Commission should see that Member States are prevented from providing public resources (whether in the form of a grant or as a subsidised loan) directly to generation companies, with a view to allowing them to buy CO2 allowances.

Besides circumventing (and therefore substantially breaching) the rules of the ETS Directive and the compatibility conditions set out in Paragraph 3.2. of the ETS State aid guidelines, an aid of this kind would remove any incentive, for electricity generators, to reduce emissions or to engage in decarbonisation, while providing an unjustified reward for pollution.

In light of the foregoing, the Commission should conclude that the aid for the purchase of CO2 allowances embedded in the restructuring plan is incompatible with the internal market.

4. The restructuring plan violates EU principles and rules on environmental aid.

Among the environmental measures that are foreseen and supported in the restructuring plan are those that are necessary to bring CEO's installations in compliance with EU standards applicable to the emissions of ash, NOx and SO2.

Greenpeace points out, in this regard, that applicable State aid guidelines already lay down the rules and conditions on the admissibility of aid to meet EU standards.²⁶

In particular, for individually notified aid like the one at issue, the environmental aid guidelines require Member States to demonstrate "*the contribution of an individually notifiable aid towards an **increased** level of environmental protection*",

The guidelines clarify that "*Member State may use, as much as possible in quantifiable terms, a variety of indicators*".

In particular, when existing standards are used as a reference, Member States should be able to show "*the absolute amount and relative size of the increase in the level of environmental protection **over and above the standard**, that is to say a reduction of pollution that would not be achieved by the standard in the absence of any State aid*".²⁷

However, the Opening Decision does not provide any element or indication that the environmental measures covered by the restructuring plan would allow Oltenia to achieve anything more than the compliance with existing and applicable environmental requirements.

Unless Romania and CEO can demonstrate that the environmental measures at issue are aimed at reaching protection goals "over and above" these standards, the Commission should conclude that the support foreseen for those measures in the restructuring plan does not meet

²⁶ Guidelines on State aid for environmental protection and energy 2014-2020.

²⁷ Guidelines on State aid for environmental protection and energy 2014-2020, para. 33.

Greenpeace is an independent global campaigning organisation that acts to change attitudes and behaviour, to protect and conserve the environment and to promote peace.

EU law requirements for the compatibility of environmental aid and declare it to be incompatible with the internal market.

5. The restructuring plan is based on the unsubstantiated assumption that CEO may be eligible to receive funds from the Modernisation Fund

According to the Opening Decision, Romania is planning to obtain additional EUR 711 Million in State aid from the Modernisation Fund.²⁸

The Opening Decision states that *“The funding from the Modernisation Fund is planned to be used for the financing of the technical and technological measures under the restructuring plan, which aim at diversifying the energy mix by replacing lignite with (mostly) gas and renewables (see table 2 above). In addition, Romania states that exceptionally, under certain conditions, the Modernisation Fund may finance, in Romania and Bulgaria, investments in efficient and sustainable district heating systems involving fossil fuels. Moreover, Romania submits that financing from the Modernisation Fund can be granted to CE Oltenia.”*

Yet, it is entirely unclear how CEO may effectively have access to the above mentioned resources, seen that, in accordance with Article 10d (1) of the ETS Directive, *“No support from the Modernisation Fund shall be provided to energy generation facilities that use solid fossil fuels, other than efficient and sustainable district heating”*.

It is on the one hand necessary that Romania and CEO provide clarity on the concrete investments and measures for which they intend to use the Modernisation Fund (whose resources should be directed towards the activities listed in Article 10 (2), rather than in support of lignite-based generation). Without such clarity, the possibility of accessing the Modernisation Fund remains a mere assumption.

On the other hand, the Commission should ensure that, where it finds that some of the measures proposed by the restructuring plan are in fact eligible under the Modernisation Fund, these are complemented with appropriate accountancy separation mechanisms and subject to full transparency. Any possibility of undue cross-subsidisation between the activities supported by the Fund and fossil fuels generation should be prevented and excluded.

5. Conclusive remarks

The Opening Decision highlights several problematic aspects of the restructuring plans that, according to the Commission, would fail to restore the viability of CEO and its ability to efficiently compete on the Romanian electricity market.

²⁸ Opening decision, para.11.

Greenpeace is an independent global campaigning organisation that acts to change attitudes and behaviour, to protect and conserve the environment and to promote peace.

At the core of CEO's difficulties, however, is the company's reliance on lignite based generation and heating, which determines extremely high operating (including environmental) costs and undermines the company's competitiveness on the electricity market.

Besides making it impossible for CEO to survive on the market without operating State support, reliance on lignite is likely to make such State support ineffective, as most of it would be absorbed by the operating costs of CO2 allowances.

The restructuring plan risks therefore to translate into a costly missed opportunity for Romania (the opportunity to break away from coal and to modernise its electricity sector) and in a waste of public resources that could be used to support the livelihoods of (and a healthy environment for) the people of the South-West Oltenia region, who rely on the company's activities.

Finally, as Greenpeace has pointed out, CEO's continued reliance on lignite-based generation and heating has the effect of making State support to the company inconsistent with the European Green Deal, with the EU policies on climate, the environment and energy. The current restructuring plan would also breach several provisions of the ETS Directive and of the related State aid guidelines. The Commission should find this restructuring plan incompatible with the internal market and reject it.

Annexes:

- I. Emergency Order of 31 March 2021
- II. Emergency Order of 15 April 2021
- III. Letter to Executive Vice President Vestager of 9 April 2021
- IV. Greenpeace, "*Scenario for a failed transition - Analysis of the decarbonisation plan of the Oltenia Energy Complex*", February 2021