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To the Aarhus Convention Compliance Committee
Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10, Switzerland

Subject: Communication to the ACCC regarding the EU in state aid decision for Hinkley point C

I. Information on correspondent submitting

This Communication is submitted jointly by GLOBAL 2000 (FoE Austria) and OEKOBUERO – Alliance of the Austrian Environmental Movement (collectively, Communicants).

GLOBAL 2000 (FoE Austria) has been legally registered (No. 593514598) as a non-governmental organisation (NGO) under Austrian law since 1982. Its aims are to uncover environmental scandals and violations of national and international environmental legislation, to ensure the responsibility Austria has for international environmental issues, and offer ecological approaches for these problems.

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II. Party concerned

The European Union

III. Facts of the communication¹

As early as 2006 the United Kingdom (UK) announced that it wanted to start a new programme of nuclear power plants, thus restarting a programme abandoned nearly 20 years ago. Crucially, the UK promised that no subsidies would be involved. This promise was confirmed in a White Paper on nuclear power as a possible means to achieve decarbonisation in 2008, and in government statements as recent as 2010.

However, pursuant to its Energy Act of 2013, the UK devised a framework for using so-called Contracts for Difference (CfDs) to guarantee revenue streams to producers of nuclear energy and offer a specific rate of return above market conditions, thereby increasing investment security for this fossil- (uranium-) based and mature technology with serious impacts on the environment (nuclear waste, accidents). This is despite the fact that such instruments are intended, per European legislative aims governing the internal market and renewable energy, to promote renewable energy sources, and in particular, those renewable energy sources that are still immature.

Immediately thereafter, the UK signaled its intention to use this framework to support the building of two new nuclear reactors through the use of a CfD in Somerset, England (Hinkley C, or HPC). This move surprised no one, as the UK had already identified this site as particularly desirable for such purposes in April, 2009. Under this CfD, the UK agreed that the French company, Électricité de France S.A. (EDF), would be

¹ For a useful timeline, see the Telegraph Article: Hinkley Point new nuclear power plant: the story so far; attached as Annex 7.

guaranteed a strike price of £92.50 for every megawatt hour of power produced by the Somerset plant for 35 years. To compare, these tariffs are almost twice as high as those for renewables like wind, and they last much longer (35 vs. 13 years). The UK's promotion of nuclear energy went even further, providing EDF with a credit guarantee and compensation to ensure against "political risk" for Hinkley C, should the UK eventually join the growing number of EU member states that are phasing nuclear out from their national energy mix.² In taking these steps the UK, moreover, flouted its obligations under the EU's Electricity Directive to provide an open tender, under which alternative nuclear reactor suppliers could have competed for the contract.

All of this occurred despite massive protests and legal actions against the expansion of nuclear energy in the UK and the promotion of Hinkley C in particular. Indeed, the Aarhus Convention Compliance Committee (Committee) is aware of the serious concerns involving Hinkley C, its capacity for significant transboundary environmental effects, and the procedural irregularities that have marked its promotion.³

The European Commission (Commission) itself expressed grave "doubts" in its 2013 decision (Opening Decision)⁴ to open an investigation as to whether the Measures were legal, and laid out its reasoning in a comprehensive analysis of its laws regarding state aid, energy and the environment.

However, in an unexplained U-turn, the Commission decided on October 8, 2014 to ignore its earlier doubts and the considerable legal underpinnings thereof to find that the Measures did somehow fit into the exceptional category of permissible state aid (Final Decision, or Decision).⁵ The Decision, which was not approved unanimously,⁶ was made by an out-going Commission in its eleventh hour. In addition, the Decision can at best be characterized as having significant legal lapses. For example, in many instances where the Commission had previously argued against the Measures on the basis of a sound legal analysis of key provisions of EU energy and environmental law, the Decision now merely omits reference to those provisions.

There is no question that, but-for the UK's state aid, Hinkley C would never be realized. As a consequence, the Decision has huge environmental consequences.

As a result, the Decision implicates not only EU state aid law, but EU environmental and energy laws as well. EU energy law is embodied in Article 194 of the Treaty on the Functioning of the European Union (TFEU).⁷ This provision aims to ensure the functioning of the energy market and security of supply, and to promote (1) energy efficiency and saving, (2) the development of new and renewable forms of energy, and (3) the interconnection of energy networks. All of these aims are, moreover, to be pursued *with regard for the need to preserve and improve the environment*. Accordingly, environmental policy, especially as embodied in Article 191 TFEU and its precautionary and polluter pays principles, must be considered as well. The essential interrelatedness of energy and environmental policies is reflected throughout an extensive legal framework adopted on the basis of Article 194, which includes, i.e., directives on renewable energy, security of supply, and the internal energy market. Hinkley C, and the UK's planned massive subsidisation thereof, is at odds with these provisions.

The consequences of this Decision are not limited to those that can be caused by Hinkley C alone, however. The Decision clearly sets a precedent for the promotion of nuclear power at the expense of renewable energy sources. According to Reuters, Daniel Beneš, the chief executive of Skupina ČEZ České Energetické Závody (CEZ), already triumphantly claimed that "[i]t is always good when someone clears the way for you." Moreover, the UK joined 7 other countries last month calling for new EU financing mechanisms for nuclear energy and new research and innovation initiatives to deal with the costly and environmentally damaging issues of nuclear waste and decommissioning. Finally, the UK is seeking a revision of the state aid guidelines

² The CfD, credit guarantee and further compensation will henceforth be referred to collectively (Measures) unless individually specified

³ See *United Kingdom ACCC/C/2013/91* Communication of 12.06.2013, available at: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C201391/Communication/Communication_incl_Annexes.pdf

⁴ Investment Contract (early Contract for Difference) for the Hinkley Point C New Nuclear Power Station Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (State aid SA.34947 (2013/C) (ex 2013/N) Commission Decision 2014/C 69/06 [2014] OJ C 69/60; (Opening Decision); attached as Annex 1

⁵ SA. 34947 Support to Hinkley Point C Nuclear Power Station – Commission Decision 8.10.14, Article 7(3); (Decision/Final Decision); attached as Annex 2. Note: as of 06.03.2015 the Decision has not been published in the Official Journal

⁶ 16 were for, 5 were against, and there was 1 abstention

⁷ Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. C 115/47

to essentially codify the Commission's Decision on Hinkley C.⁸

Thus, the Decision takes on vital importance for environmental policy and law throughout Europe. It is not possible to challenge EU state aid decisions on domestic courts since it is only the CFEU that has the mandate to interpret decisions of the European Commission. The treaty provisions and the CFEU case law provide no rights for NGOs to challenge state aid and other decisions of the EC. Therefore, in order to implement Article 9/3 of the Aarhus Convention the EU adopted the so called "Aarhus regulation" as legal instrument.

However, the Communicants and other NGOs are blocked from appealing against state decisions even in the framework of the Aarhus regulation. Crucially, the public has no access to justice via the EU's regulation implementing the Aarhus Convention because that regulation expressly excludes state aid determinations. The jurisprudence of the CFEU, including a January 2015 Grand Chamber decision, rules out the direct or even partial direct application of the Aarhus Convention or any use of it to evaluate the legality of the EU's implementing regulation. This effectively closes any remaining avenues to challenge the Decision. Finally, a recent General Court decision ruling that the Commission need not consider environmental policies in its state aid determinations further renders the EU immune to observing its own environmental obligations. As a result of all of this, environmental organisations such as the Communicants, as well as the public at large, have no means to appeal.

IV. Provisions allegedly not in compliance

The EU Commission's decision to approve the UK's massive subsidization of the nuclear power plant Hinkley C contravenes the EU's state aid law, which relates to the environment, and further violates key EU energy and environmental laws. As such, the Communicants should have a means to challenge the Decision, as is assured under Article 9.3 of the Aarhus Convention. However, the Communicants – and the public at large – are blocked from asserting this right. This is due to the wording of the Aarhus Regulation, which excludes state aid determinations from its scope under its Article 2(2), as well as the Court's jurisprudence on Article 9.3 and recent decisions by the General Court blocking the application of environmental considerations from state aid decisions. As a result, the EU fails to comply with its obligations under the Aarhus Convention.

The EU is therefore in violation of **Article 9, paragraph 3** (Article 9.3) of the Convention⁹, which provides that:

"[E]ach Party shall ensure that, where they meet the criteria, if any, laid down in its national law, 10 members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

In the present case the public's complete lack of *any* remedy subsumes having an adequate remedy; thus a violation of Article 9, paragraph 4 is also entailed.¹¹

V. Nature of alleged non-compliance

The present Communication arises out of the specific decision of the EU Commission to approve the UK's state aid in support of Hinkley C, which constitutes an act that contravenes provisions of EU law relating to the environment. The Decision was a clear error of law relating to the environment with profound environmental consequences, not limited merely to the specifics of Hinkley C, but to the future of nuclear energy within the EU and the EU's entire energy policy and the environmental values that policy is

⁸ See Annex 8 for more details

⁹ Especially in conjunction with Article 3.1, which provides that "[e]ach Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention."

¹⁰ In this case "national law" is to be understood as EU law. See e.g. *Denmark ACCC/C/2006/18*; ECE/MP.PP/2008/5/Add.4, para 27

¹¹ See e.g. *Austria ACCC/C/2011/63*; ECE/MP.PP/C.1/2012/4 para. 48

designed to serve.

Not only do the Communicants have no access to justice to challenge this decision, but the entire public lacks such access. This defies the clear mandates of Aarhus. This is of great concern in the present case, where the decision was made in the context of considerable procedural irregularities and represents a complete reversal of the Commission's earlier assessment, as discussed in section III above.

Indeed, the present case highlights significant general problems regarding access to justice at the EU level concerning the enforcement of energy and environmental law, especially as they relate to nuclear energy.

A. The Communicants qualify as members of the public

As a preliminary matter, it should be noted that the Communicants, as registered NGOs devoted to the protection of the environment for decades, qualify as "members of the public" under Article 9.3. They fulfil the criteria the EU laid down in Article 10 and 11 in its regulation transposing the Aarhus Convention for EU level issues

(Regulation (EC) No 1367/2006): They are NGOs registered under Austrian law and have worked with the primary stated objective of protecting the environment for more than 2 years and the Decision's subject matter falls squarely within their objectives and activities

B. The state aid Decision is an act that contravenes provisions relating to the environment

1. The state aid laws relate to the environment

Based on the clear language of Article 9.3, the Committee has established in its case law that the "**decisive issue is if the provision in question somehow relates to the environment.**"¹² Thus, Article 9.3:

"covers any law that relates to the environment, i.e. a law under any policy, including and not limited to, chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, **energy**, taxation or maritime affairs, **which may relate in general to, or help to protect, or harm or otherwise impact on the environment.**"¹³

Moreover "*to the extent the laws of the Parties relating to the environment apply to acts and omissions of a transboundary or extraterritorial character or effect, these acts and omissions are also subject to Article 9.3.*"¹⁴

In applying the above to the present case it seems clear that the Decision falls well within Article 9.3's scope. First, it is established that nuclear energy has significant negative environmental impacts in terms of the mining and importation of uranium, the production of radioactive waste, and the storage of spent fuel in a safe repository, a problem which no country in the world has solved. Additionally, there are the risks associated with catastrophic accidents. All of these impacts are of particular concern in the Aarhus context. As the Committee has itself noted in one of its many cases dealing with nuclear energy, the production of nuclear power is "an activity of such a nature and magnitude," that it is the subject of "serious public concern."¹⁵ This is reflected in the fact that Euratom¹⁶ has implemented the Convention¹⁷ and that nuclear

¹² *Belgium* ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2.; see also *Bulgaria* ACC/C/2011/58; ECE/MP.PP/C.1/2012/14, para. 83

¹³ *Austria* ACC/C/2011/63; ECE/MP.PP/C.1/2012/4, para. 52, emphasis added (demonstrating that Article 9.3 even applies to proceedings under criminal law, and in animal protection matters, which is to include how animals (both individually and at the species-level are treated)

¹⁴ *Id.* at para. 55

¹⁵ *Slovakia* ACC/C/2009/41; ECE/MP.PP/2011/11/Add.3, para. 57

¹⁶ The Treaty establishing the European Atomic Energy Community, March 25, 1957, 298 U.N.T.S. 167

¹⁷ Commission Decision 2008/401/EC.

activities are subject to further environmental laws.¹⁸

Nuclear energy, moreover, entails potential transboundary and extraterritorial effects as well, as the Committee has recognized even in another Communication regarding Hinkley C, discussed above.¹⁹

Given the above, the right of access to justice to challenge the Decision in the present case seems even more obviously relevant to Article 9.3's aims than, i.e. challenging provisions on taxes or criminal laws regarding the ill-treatment of individual animals. As such, **the provision at issue here clearly "relates to the environment."**

The relevant provision here that "relates to the environment" is found under state aid law, specifically Article 107(3)(c) TFEU. The Decision was compelled to limit its basis for approving Hinkley C to Article 107(3)(c) because the Measures clearly constitutes state aid pursuant to Article 107(1) TFEU,²⁰ and because no other exception to a finding of unlawfulness could even remotely be found under the TFEU or the Commissions guidelines for state aid for environment and energy²¹ (Guidelines).²²

Aarhus case law has noted the "exceptional" status of lawful state aid and the special importance of the Guidelines in "grant[ing state aid] on the basis of the consideration that environmental protection (especially in terms of sustainable development and the "polluter pays" principle) needs to be integrated into the definition and implementation of competition policy. The Guidelines limit the number of exceptions in order to avoid distortion of competition within the Union."²³

The Decision here, in fact, creates an unlawful exception to the general prohibition against state aid, thereby creating precisely the sort of distortion the laws on competition and the Guidelines seek to avoid. In doing so the Decision further violates key energy and environmental laws and policies thereto. This not only poses huge environmental impacts in term of Hinkley C, but also sets a dangerous precedent for future state aid and energy determinations in the EU. Accordingly, it is vitally important to understand the core of this Communication, which is why, precisely, the Decision violates the state aid provision Article 107(3)(c) and entails further violations of environmental and energy law. These arguments are laid out below:

2. The Decision contravenes state aid laws, and further violates Articles 191 and 194 TFEU

Article 107(3)(c) employs a balancing test, which evaluates whether (1) the measure is aimed at a well-defined objective of common interest (growth, employment, cohesion and environment); (2) the aid is well designed to deliver the objective of common interest; and (3) distortions of competition and effect on trade are limited, so that the overall balance is positive.²⁴

The Commission's decisions under Article 107(3)(c) are erroneous and, furthermore, in violation of Articles 191 and 194. First and foremost, as demonstrated by the analysis of a growing body of environmental and energy law, as well as recent Euratom documents, neither Euratom specifically nor nuclear energy in general is a common interest. While security of supply is indeed a common interest, the Measures cannot ensure this in the required manner, which is to preserve and improve the environment. Furthermore, neither the considerable environmental risks associated with nuclear power nor the possibility that future governments would choose to eliminate nuclear from their energy mix qualifies as a market failure. To claim the contrary defies the purposes of state aid law and violates core environmental and energy laws and policies. There is moreover no need to subsidise nuclear energy, which is a mature technology.

Secondly, the Measures are not well-designed because they constitute a massive subsidy, taking place over decades, which uses an economic instrument tailored specifically for immature alternative energies, such as renewables, to achieve decarbonisation. Nuclear neither achieves decarbonisation as well as alternatives

¹⁸ Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (EIA Directive), the Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Finland, 25 February 1991 (Espoo Convention), for example

¹⁹ See fn. 2 above

²⁰ See e.g. Opening Decision para. 429

²¹ Communication from the Commission "Guidelines on State aid for environmental protection and energy 2014-2020", 2014 O.J. C 200/01; available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014XC0628%2801%29&from=EN>

²² See e.g. Opening Decision at para. 430

²³ *European Union ACC/C/2010/54*; ECE/MP.PP/C.1/2012/12, para 19-20

²⁴ See e.g. Opening Decision at para. 235-236

such as energy efficiency, nor does so in a manner that achieves an overall positive environmental balance, which is necessary according to EU goals. The Measures, both in their execution and ultimate effect, impermissibly crowd out alternatives and thwart the goals of the internal electricity market as well.

Finally, the Measures would lead to significant distortions in the market and the overall balance of the assessment is overwhelmingly negative.

a. Common Interest

The Commission's discussion of common interest, the first prong of its 107(3)(c) analysis, is conclusory, covering only nine brief paragraphs. Entirely absent from the analysis is one of the UK's three proffered arguments for a common interest, namely decarbonisation. This is no surprise, considering that in its Opening Decision the Commission, noting the Measures' potential to "crowd out alternative instruments... including renewable energy sources," concluded that it was not clear whether the Measures "can be argued to be aimed at a common EU objective in terms of environmental protection in general, and decarbonisation in particular."²⁵ **Thus, the Commission's silence on the subject in the Final Decision can only lead to the conclusion that the Commission answered this question for itself – in the negative.**

Instead the Decision briefly describes the general aims of Euratom, references, with little elaboration, Euratom Articles 2(c) and 40, and repeats that it had previously found that "the measure was in line with [Euratom]" to conclude generally that "*aid measures aimed at promoting nuclear energy pursue an objective of common interest.*"²⁶ Not only is the Commission's common interest analysis of Euratom and nuclear energy in the present case erroneous, we are concerned that the Commission's broad and sweeping language here could set a dangerous precedent in favour of an outdated technology with negative impacts on the environment.

Furthermore, while security of supply is indeed a legitimate common interest, the Measures neither ensure it, nor do so in the required manner. Therefore, the Commission's conclusion that the Measures contribute to security of supply²⁷ is likewise erroneous. In the Energy Union Communication by the European Commission on 25 February 2015, the sum of € 40 billion is quoted by Energy Commissioner Canete as being lost annually due to lacking interconnectors between member states, including explicitly the interconnection of the UK. Likewise, the Measures do not guarantee security of supply as nuclear power plants are prone to irregular outages due to cooling problems such as jellyfish infestations of cooling water or seaweed blockage of filters.²⁸ Therefore, a large generating capacity of 3200 MW would be impeded with very short notice, thus endangering security of supply.

Neither Euratom specifically nor the promotion of nuclear generally can establish a common interest

As a preliminary matter, it should be emphasized that Euratom does not establish the Decision's legal basis. It is widely recognized that the Treaty establishing the European Atomic Energy Community ("Euratom")²⁹ is not an isolated treaty that covers the entire scope of nuclear activities³⁰. Rather, it governs some of the specific conditions (relating to safety, accounting, free movement of specialists, etc.) for the use of nuclear energy, *should nuclear be used at all*. In this respect Euratom is not unique; other laws, notably environmental laws, impose further requirements for nuclear activities.³¹ Moreover, in terms of EU energy policy in general, of which nuclear energy is merely a part, the legal basis is Article 194 TFEU, as the Court of Justice of the European Union (Court) has clarified.³² The EU Parliament and the EU Commission take the

²⁵ Id. at para. 245-246

²⁶ Final Decision para. 373

²⁷ Id. at para.374

²⁸ Torness, UK, 2011 and 2013, respectively

²⁹ Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167

³⁰ See e.g. *Pechstein*, *Elektrizitätsbinnenmarkt und Beihilfenkontrolle im Anwendungsbereich des Euratom-Vertrags*, EuZW 2001, S. 301 (309)

³¹ Among them: Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment ("EIA Directive"), the Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Finland, 25 February 1991 ("Espoo Convention"), and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("Aarhus Convention")

³² See *Parliament v. Council*, Case C-490/10 [2012] ECR-2012-00000, para. 65-67. (The Court evaluated the "aim and content" of a regulation concerning the notification of investments in energy, of which nuclear

same view.³³ In this regard, there is no controversy.

Thus, Euratom does not establish the Decision's legal basis. Nor could it. The Commission merely tries to rely on Euratom to establish a common interest for purposes of its Article 107(3)(c) analysis. However, this, too, falls apart upon closer inspection.

Euratom's role as described in Article 2(c) to "facilitate investment and ensure...the construction of the basic facilities required for the development of nuclear energy" is to be pursued in accordance with the Treaty's other provisions. Article 40, which relates to "investments," tasks the Commission with publishing programs ("Nuclear Illustrative Programmes" or "PINCs")³⁴ The Commission's Decision therefore correctly identifies this provision as key to clarifying and fulfilling the aims stated in Article 2(c) – PINCs are indeed relevant to determining whether Euratom can establish a common interest for investment in nuclear projects. The Commission, however, does nothing more than cite these provisions. What is needed is an analysis of what those provisions actually accomplish. The below does precisely that.

First it must be noted that the Commission stopped using the PINCs to establish nuclear energy production targets after 1985.³⁵ Instead, the EU has since then developed a consistent, expanding and increasingly specific policy for the support of renewable energy, as evidenced in a series of action plans.³⁶

Moreover, in its 1997 PINC, the Commission acknowledged that "[t]he right to decide to develop *or not* the peaceful use of nuclear energy belongs to *each member state*."³⁷ This entails two things: First, a recognition that the decision to invest in nuclear power is a *national* matter. It follows that investment in nuclear energy cannot possibly be considered a *common EU objective*. Second, it means that the Commission cannot derogate the rules on the internal market and competition in support of nuclear energy. To do so would violate its commitment to respect the decisions of the member states who have chosen *not* to pursue nuclear energy, the number of which is significant and growing.³⁸

The most recent PINC, adopted in 2007 and updated in 2008, underscores these two points perfectly, stating that the choice to pursue nuclear energy as part of a member state's own energy mix are "*individual national decisions* [...]" that can have an impact on *other States* in terms of [...] *competitiveness and the environment*".³⁹ Section 3.3 of the 2008 Update is unequivocal in its position regarding state aid specifically:

energy was a part, to determine that such a regulation was "needed to achieve the objectives specifically assigned to [the EU policy under] Article 194(1) TFEU." Given this, the regulation, which improperly had Article 337 TFEU and Article 187 of Euratom as its legal basis, was nullified.)

³³ See e.g. the EU Parliament's own website at:

http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_5.7.1.html; see also EU Commission documents relating to the EU/Euratom – Serbia explanatory session, April 14 Brussels, which explains on page 10 that "Euratom energy or EU energy 'is a false question...Art. 194 is the legal basis for EU energy policy...[it] includes general provisions on energy policy and it applies also to the electricity produced from nuclear energy" available at:

http://www.seio.gov.rs/upload/documents/skrining/eksplanatorni/prezentacije/pg15_21/15_21_21_13.pdf

³⁴ Article 40 Euratom

³⁵ Communication from the Commission on the nuclear industries in the European Union (an illustrative nuclear programme according to Article 40 of the Euratom Treaty), COM (1985) 41 final

³⁶ See, e.g. **the Europe 2020 Strategy** (Communication from the Commission "EUROPE 2020 A strategy for smart, sustainable and inclusive growth" COM(2010) 2020 final of 3.3.2010); **the climate and energy package** (Decision No 406/2009/EC of 23 April 2009 (OJ L 140, 5.6.2009, p. 136) and Directive 2009/28/EC of 23 April 2009 (OJ L 140, 5.6.2009, p. 16)); and **the 2030 Framework** (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A policy framework for climate and energy in the period from 2020 to 2030" (COM(2014) 15 final) of 22.1.2014)

³⁷ Communication from the Commission on the nuclear industries in the European Union (an illustrative nuclear programme according to Article 40 of the Euratom Treaty), COM (1997) 401 final, at pg. 34, emphasis added

³⁸ Austria, Belgium, Cyprus, Denmark, Estonia, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland and Portugal

³⁹ Communication from the Commission to the Council and the European Parliament Nuclear Illustrative Programme Presented under Article 40 of the Euratom Treaty for the opinion of the European Economic and Social Committee, COM(2006) 844 final at para. 2.3, emphasis added; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52006DC0844&from=EN>

*"It is important to ensure in the EU that nuclear energy projects do not benefit from any State subsidy."*⁴⁰

Given this, it is doubtful whether the Measures can even be fairly described as "being in line with Euratom."

However, even should the Measures be construed as not at odds with Euratom, it would be of little consequence. As the above analysis of Euratom's provisions and documents demonstrates, Euratom cannot serve as the basis for a common interest for purposes of the Decision's TFEU analysis. That the Commission is compelled to make further conclusions regarding security of supply on this prong of its analysis underscores this point.

Nor is the promotion of nuclear in general a common interest. Rather, the role of nuclear energy must be scrutinized in the context of energy policy as a whole. In particular, a new legal basis for energy policy in the EU was inserted under the Lisbon Treaty.⁴¹ Article 194(1) states that:

"In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

- (a) ensure the functioning of the energy market;**
- (b) ensure security of energy supply in the Union;**
- (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and**
- (d) promote the interconnection of energy networks."**

Note that by its very language, Article 194 goes further than requiring merely consideration of the environment in the way that, i.e., Article 11 TFEU imposes a duty to integrate environmental protection requirements in the policies and activities of the EU. Indeed, it requires that energy policy actively preserve and improve the environment.

Thus environmental policy is not only implicated in energy policy under the TFEU; it is a major driving force. This then requires consideration of Article 191,⁴² which in turn defines the EU's environmental policy goals as:

- preserving, protecting and improving the quality of the environment,**
- protecting human health,**
- using natural resources prudently and rationally,**
- and promoting measures at an international level to deal with regional or worldwide environmental problems, and in particular combating climate change.⁴³**

EU environmental policy must additionally **"aim at a high level of protection [...] be based on the precautionary principle that preventative action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."**⁴⁴

From the outset it is clear that nuclear energy is fundamentally incompatible with Article 191. Specifically, energy from nuclear sources violates the precautionary principle.

Again, such energy necessarily produces dangerous waste, entails costly and risky decommission efforts and the storage of spent fuel in a safe repository, should such a thing exist. Additionally, there are the risks associated with accidents, the scope of which can to this day only be partially assessed, although in the wake of the Fukushima accident it is clear the costs – both economic and to the environment – are enormous. It is the avoidance of precisely these sorts of risks that the precautionary principle mandates.

⁴⁰ Communication from the Commission to the European Parliament, the Council and the Economic and Social Committee - Update of the nuclear illustrative programme in the context of the second strategic energy review, COM (2008) 0776 final; /* COM/2008/0776 final; available at: [m=EN](#)

⁴¹ See above

⁴² See <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-3-union-policies-and-internal-actions/title-xx-environment-climate-change/479-article-191.html>

⁴³ Article 191(1)

⁴⁴ Article 191(2)

It should thus be unsurprising that Article 194 does not include energy from nuclear sources as a means to ensure its goal to “preserve and improve the environment.” Rather, efficiency, saving and, in particular, the development of renewable energy sources are central to achieving its aims. Article 194(1)(c).

Article 194’s efforts are driven by a comprehensive framework, the Europe 2020 Strategy. It aims at creating the conditions for smart, sustainable and inclusive growth and includes a headline target to raise the use of energy from renewable sources. Renewable energy is one of the three pillars of the 2030 Framework for climate and energy and plays a key role in the Commission’s Energy Roadmap 2050.⁴⁵ Indeed, in the 2050 Energy Roadmap, renewables are expected to cover 55-97% of the EU electricity consumption, depending on the considered scenario.⁴⁶

Both the 2020 Strategy and the 2030 Framework are expressly mentioned in the preamble to one of the Commission’s newest measures in the field of state aid, specifically the Guidelines. The Guidelines are designed to alleviate restrictions on state aid where measures serving to protect the environment are involved. Investment in renewable sources is expressly provided for.⁴⁷ Conspicuously absent again are sources of nuclear power, however. This was no oversight; investments in nuclear energy were in the Draft Guidelines and were expressly rejected.

All of the above demonstrates that Euratom does not in fact establish a common interest in nuclear and that, indeed, there can be no common interest in nuclear sources of energy. To claim otherwise, as in the Decision, is to violate Articles 191 and 194 TFEU and thwart the comprehensive provisions and policies adopted thereto. It is furthermore a violation of Article 107(3)(c) and, arguably, an attempt to stretch Euratom beyond its legal limits.

Euratom cannot be used to defeat environmental and energy policy. This is bolstered by Euratom’s implementation of the Aarhus Convention, and the fact that nuclear activities are subject to further environmental laws, such as those governing environmental impact assessment generally (EIA Directive) as well as in the trans-boundary context (Espoo), both discussed above.

Euratom documents acknowledge that Euratom is subject to environmental and energy policy, as is clear from the 2007 PINC which states the “[t]he future of nuclear energy in the EU *depends* primarily on its [...] capacity to deliver cost-efficient and reliable electricity *to help meet the Lisbon goals*, its contribution to the *shared energy policy objectives, its safety, its environmental impact and its social acceptability*.”⁴⁸

The Measures do not meet the standards to ensure security of supply

As a threshold matter, it is unclear the Hinkley C can ensure *any* security of supply.

As the Decision notes, there is a “mismatch between the predicted shortfall in demand and the moment when HPC would be available,” and it is unclear “whether alternative technologies might address the need of new energy capacity.”⁴⁹ As made clear in its Opening Decision, “the generation adequacy problem is forecast to take place by Ofgem *before 2020*...[i]t is therefore unclear how a measure which is expected to support generation becoming operational only *after 2020* can remedy, or address, a generation capacity problem taking place before.”⁵⁰ Indeed, according to original estimates, HPC was only expected to come online in 2023.

That this original estimate was, moreover, unrealistically optimistic, is underscored by recent experiences in Finland and France where reactors of the same type as Hinkley are being built. In Finland, for example, the construction of a new plant on Olkiluoto Island has encountered enormous problems. The plant is now expected to open nine years later than planned and more than 5 billion Euros over budget. Similarly, a new nuclear plant in Flamanville, France is due to be completed five years later than originally planned, and costs have more than doubled, going from 3.3 billions Euros to at least 8.5 billion Euros. In the specific case of HPC, even greater time delays must be reckoned with on the basis of increased investor insecurity⁵¹ and pending litigation.⁵²

⁴⁵ Communication from the Commission “Energy Roadmap 2050”, COM(2011) 885 final

⁴⁶ *Id.* at p. 7

⁴⁷ Guidelines at 1.2(e)

⁴⁸ 2007 PINC, para. 8, emphasis added

⁴⁹ Final Decision, para. 367

⁵⁰ Opening Decision, para. 262

⁵¹ <http://www.theguardian.com/business/2015/feb/12/edf-energy-delays-hinkley-point-nuclear-decision>

⁵² <http://www.theguardian.com/environment/2015/jan/21/austria-to-launch-lawsuit-hinkley-point-c-nuclear->

Accordingly, the Commission's conclusory assessment that "the measure contributes to long-term security of supply, in particular based on capacity forecasts and the role which HPC's supply of electricity will play *when it is expected to start operating*,"⁵³ seems grossly misguided, both in terms of its factual and legal assessment.

Additionally, nuclear in general raises unique security of supply problems, as it crucially hinges on an external energy resource, namely the importation of uranium. The 2008 PINC Update acknowledges this, stating: "security of supply of nuclear fuels cannot be taken for granted, especially should there be a rapid increase in global demand due to an expansion of nuclear power programmes."⁵⁴

This is an area of particular concern to the EU; in fact, one of the agreed priorities of the May 2013 European Council was (1) to make the best use of the EU's indigenous energy resources, including renewables such as wind, ocean, sun, and (2) to reduce external energy dependency. Aimed at addressing such concerns is Directive 2009/28/EC of April 2009, which introduces a 20% renewable energy target by 2020. The EU's import of 40% of its uranium and nuclear supplies,⁵⁵ a large portion of which comes from Russia, runs contrary to this directive and EU policy in general.

Thus, it is entirely unclear that the Measures could fulfill even a cursory security of supply assessment.

Even presuming it could, security of supply is an Article 194 inquiry. The Commission acknowledges this point in its Opening Decision.⁵⁶ That the Commission in the Decision now omits reference to the Treaty does nothing to change the fundamental nature of this question. Articles 107-109 TFEU establish the framework for deciding the legality of state aid and, where security of supply is the basis for a state aid decision, Article 194 must guide the analysis. This follows not merely from Article 194's establishment as the basis for energy policy in the EU, but also from Article 194(1)(b), which addresses security of supply specifically.

Applying Article 194, it must be acknowledged that the Measures fail utterly to meet Article 194's requirement that it ensures energy in a manner that "preserves and improves the environment." To the contrary, as noted above, nuclear power is, among certain other energy sources, in natural conflict with the fundamental environmental precautionary principle as embodied in Article 191(2), in that it involves the creation of radioactive waste and raises problems with decommissioning, the storage of waste, and the risk of accidents.

Moreover, there is a serious risk that subsidies in nuclear energy, especially the Measures at issue, could squeeze out crucial alternative measures, including renewable energies. The Commission itself identified this risk when it originally questioned whether the Measures "can be argued to be aimed at a common EU objective in terms of environmental protection."⁵⁷ This concern for crowding out "alternative energies" is reiterated in the Decision.⁵⁸

Such concern is not misplaced.

The Measures endanger the future of renewables, whose essential role in EU energy policy is ensured under Article 194(1)(c) and systematically affirmed via diverse legislative frameworks and policies, including Directive 2005/89/EC (Security of Supply Directive),⁵⁹ Directive 2009/28/EC (Renewables Directive),⁶⁰ the Guidelines discussed above, the 2020 Strategy, 2030 Framework and 2050 Energy Roadmap. In fact, the 2050 Energy Roadmap highlights the concern that the growth of renewable energy will slacken after 2020

subsidies

⁵³ Final Decision, para. 373

⁵⁴ 2008 Update at Section 5

⁵⁵ <https://ec.europa.eu/energy/en/topics/imports-and-secure-supplies>

⁵⁶ Opening Decision, para. 248

⁵⁷ Opening Decision, para. 245-246

⁵⁸ Final Decision, para. 367

⁵⁹ Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, 2006 OJ L 33

⁶⁰ Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, 2009 OJ L 140

unless there is further intervention.”⁶¹ It was in light of this concern that the Guidelines discussed above were adopted, under which renewables were given special status due to their capacity to provide an environmentally sound source of energy.

By committing to a substantial amount of money - € 31 billion for the construction of the project, € 43 billion for the entire project including decommissioning - into one single energy project, the Measures risk the availability of funding necessary to achieve the above mentioned programs and policies in the UK.⁶²

Finally, it must be noted that, in addition to energy from renewable sources, Article 194 names energy efficiency and saving (Article 194(1)(c)) as its goals. HPC would be at odds with these provisions as well. As the Commission noted in its Opening Decision, the Measures have “the potential to decrease the incentives to invest in demand-side response measures, including storage, energy efficiency and energy saving measures.”⁶³ This runs absolutely contrary to Article 194(1)(c).

Various studies have shown that massive energy efficiency potentials exist in the EU and also in the UK. For example, the Friends of the Earth Europe 40 % Study has presented scenarios of reducing EU primary energy needs from 2010 71 000 PJ down to 55 000 PJ in 2020 and 21 000 PJ in 2050, in combination with a progressive exit from nuclear electricity as well as from burning fossil fuels (71 % renewables in 2050). While this scenario still envisages a substitution of fossil fuels, in particular in the transport sector, this is leveled out by increased energy efficiency of electrical products, leading to a reduction also in the electricity sector from 2020 onwards.⁶⁴

Another more recent example for the huge energy efficiency potentials in the EU demonstrates that the correct implementation of the EU Ecodesign Directive would yield yearly savings of up to 600 TWh of electricity and 600 TWh of heat in 2020, equivalent to 17% and 10% of the EU total electricity and heat consumption, respectively.⁶⁵ As nuclear reactors generate 863,8 TWh (2012) in the EU and the two reactors in Hinkley C are expected to generate 20 TWh annually (no EPR is operational anywhere in the world, so this is projected data), the proposed implementation of the Ecodesign Directive would be much more cost efficient at achieving the common objective of decarbonisation.

Moreover, the massive investment in the Measures “is also likely to displace the exchange of large quantities of electricity between the UK and its neighbours, i.e. through the interconnectors which are in place” and negatively impact the incentive framework which might otherwise lead to more investment in interconnection in the future.⁶⁶ The Measures would then be at odds with the Security of Supply Directive, which establishes measures to ensure *inter alia*, an adequate level of interconnection. The Measures would further block effective implementation of Article 194(1)(d) which also names interconnectivity as one of the key goals of EU energy policy. Interconnections as a cost-effective way of creating better European-level integration of electricity markets are also mentioned explicitly in the Commission's Communication on the Energy Union on 25 February 2015.

The Measures would thus defeat Article 194's ability to preserve and improve the environment through ensuring security of supply.

There is no market failure/need for State intervention

The Commission's initial assessment⁶⁷ was correct: nuclear technology is mature. It has been in use commercially for 60 years. The EPR reactor technology planned for Hinkley C in no way changes this assessment. It is merely a development in old and established pressurized water reactors.

This means that there is no need for state aid. Indeed, this is underscored in the 2030 Framework, which calls for an end to subsidies for mature energy technologies. Moreover, the Commission's market failure

⁶¹ See e.g. Commission's own Renewable Energy Factsheet, Section D, available at:

http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_5.7.4.html

⁶² See <http://ec.europa.eu/transparency/regdoc/rep/10061/2014/EN/10061-2014-2100-EN-F1-1.Pdf>

⁶³ Opening Decision, para. 398

⁶⁴ Die 40% Studie, Eine Zusammenfassung der Ergebnisse der SEI-Studie „Europe's share of the Climate Challenge“, Global 2000 2009

⁶⁵ ECOFYS study “Economic benefits of the EU Ecodesign Directive - Improving European economies” of 2012

⁶⁶ Opening Decision at para. 395

⁶⁷ Id. at para. 317

analysis, which identifies significant investment and political risks unique to nuclear energy is flawed.

First, the Commission points out that investors face risks due to the long and complex life cycle of nuclear energy production, which includes a 60-year operational life, a decommissioning period of up to 40 years, and high-level nuclear waste storage and treatment before the ultimate transfer to a repository, where the waste is expected to be stored for hundreds of thousands of years.⁶⁸ This much is correct, though it must be recalled that worldwide, there is no final storage place and no technology exists to isolate the long-living dangerous waste, making the scope of this risk difficult to assess. It must also be added that there are catastrophic risks in the event of accidents; the Commission's omission of this risk is striking.

Nuclear energy entails therefore massive environmental risks. These are precisely the risks that Article 191's precautionary principle mandates we avoid, as discussed above.

Furthermore, to translate these environmental risks into pure cost risks associated with a market failure and thereby justify state aid measures which shield investors from all consequences of their activities violates the TFEU. Article 191(2) is unequivocal: the polluter must pay. Additionally, as the Commission itself has noted, "[t]he polluter pays principle is...clearly envisaged for the decommissioning of nuclear power plants."⁶⁹ The polluter pays principle is also reflected in Council Directive 2011/70 Euratom, which clarifies that "the costs for the management of spent fuel and radioactive waste shall be borne by those who generated those materials."⁷⁰ Despite this legal framework, the Commission has rightly expressed concern that there is still "a disconnect between the costs which need to be borne by the operator, and the actual costs of the activity"⁷¹ in the field of nuclear energy generally.

It is thus all the more troubling that the Commission now characterizes these risks as constituting a market failure and permits the UK to use state aid measures to shield investors from the costs of carrying out their activities.

Similarly disturbing is the Commission's second stated cause for a market failure, namely that investors face the political risk that future governments will decide to cease the use of nuclear energy and shut HPC down.⁷² The Measures would insure the investors against precisely this risk and thus have profound democratic consequences for decades to come, effectively thwarting the UK's freedom to set future energy policy, in violation of the rules governing internal market electricity adopted pursuant to Article 194.

For the above reasons, there is neither a common interest nor a market failure and attending need for state intervention. Thus the Decision violates Article 107(3)(c) at its first prong, as well as Articles 191 and 194 TFEU and the provisions and policies adopted thereto.

b. Well-designed

Although the lack of a common interest or market failure means that the Measures are not permissible state aid under 107(3)(c), it is worthwhile noting that it is, moreover, not well-designed, and entails further violations of environmental and energy laws.

First, it must be emphasized that the construction costs for HPC alone are already expected to be almost 31 billion Euros. Generating electricity from a variety of renewable sources is more economical than using nuclear power, as a model-based assessment of future developments up to 2050 has clearly shown.⁷³ Across the EU, end consumers can save up to 37% on their electricity costs – in some Member States even up to 74% – when plans to build nuclear power plants are shelved in favour of renewables.⁷⁴

Second, it must be noted that any measure that protects investors from all risks related to the environmental

⁶⁸ Final Decision, para. 383

⁶⁹ Opening Decision, para. 286

⁷⁰ Id. at para. 288

⁷¹ Id. at para. 287

⁷² Final Decision, para. 384

⁷³ Gabriele Mraz et al, "Renewable Energy versus Nuclear Power, Comparing Financial Support", Vienna (2014)

⁷⁴ Id.

effects cannot possibly be considered appropriate or proportional.

Furthermore, as the Commission itself explained, the Measures also contain significant insurance against market risks. This comes in the form of a Contract for Difference (CfD) that guarantees a revenue stream. This “*de facto* eliminates any price risk that the beneficiary might face, at least during its duration.”⁷⁵ The duration in HPC's case is 35 years.

In terms of the appropriateness of a CfD instrument in general, as the Commission itself states: “CfDs can be an appropriate instrument to support *low-carbon technologies, and in particular renewable technologies.*”⁷⁶ However, nuclear power is not a low-carbon technology in this sense, meaning that a CfD cannot be considered an appropriate instrument for HPC.

First, nuclear power is not low in terms of CO₂ emissions when one considers the complete production cycle of uranium from mining to decommissioning. The full production cycle emissions of nuclear power are only between 5–40 g CO₂/kWh when the uranium content of uranium ore is high. With declining uranium content in the world uranium ore, CO₂-Emissions of 82–210 g CO₂/kWh are to be expected, not even taking into account the permanent storage of nuclear waste.⁷⁷ These findings are in marked contrast to the comparative emissions from renewable technologies such as onshore wind ranging from 2,8–7,4 g CO₂/kWh, hydro from 17–22 g CO₂/kWh and PV from 19–59 g CO₂/kWh. Accordingly, nuclear power is not a GHG-free technology and would do far less to achieve the goals of Directive 2003/87,⁷⁸ than other truly low-carbon alternatives.

Second, as the Commission itself noted in its Opening Decision, in evaluating technologies which have the potential to contribute to decarbonisation, one must still consider the overall environmental balance under Article 191 TFEU:

“The Commission notes that while Art 191 TFEU establishes that the preservation, improvement and protection of the environment must be regarded as objectives of EU policy, it is unclear whether such objective can be immediately applicable to low-carbon generation as defined by the UK. In particular, while certain generation technologies emit less carbon emissions, their impact on the environment might nonetheless be considered substantial. This seems to be particularly true of nuclear generation, due to the need to manage and store radioactive waste for very long periods of time, and the potential for accidents.”⁷⁹

From this perspective, the UK's failure to consider other technologies such as wind and solar is troubling in two respects: First, those technologies can make a greater contribution towards decarbonisation, and second, those technologies do not entail substantial negative environmental impacts, making their overall environmental balance extremely positive.

Moreover, arguments that alternative technologies, including renewables such as wind and solar, would not meet the UK's required timeframe are unavailing. As discussed in the consultation process on the Measures, the importance the UK places on baseload electricity generation, given the changes that are happening in the energy sector, make it questionable whether, by the mid-2020s, baseload will still be as relevant as it is today. With smart metering being implemented through the third EU internal energy market package, the role of smart grids and decentralized energy storage is expected to grow within the next decade, making up for any intermittency of renewable sources.

The Commission's approval of the UK's utter failure to conduct “an open tender where more electricity generating technologies would participate” is thus baffling. Far more, the failure appears in direct violation of Article 8 of the Electricity Directive 2009/72/EC, which imposes strict tendering rules to provide transparency and non-discrimination when measures are undertaken to ensure security of supply. The tendering rules therefore are specifically targeted to avoid undue distortions of competition and free movement principles,

⁷⁵ Opening Decision, para. 325

⁷⁶ Final Decision, para. 397, emphasis added

⁷⁷ Andrea Wallner, Antonia Wenisch, Martin Baumann, Stephan Renner, Energy Balance of Nuclear Power Generation, Life Cycle Analysis of Nuclear Power: Energy Balance and CO₂ Emissions, Wien 2011

⁷⁸ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, 2003 OJ L 275

⁷⁹ Opening Decision, para. 240

thereby guaranteeing the functioning of the internal market in electricity pursuant to this directive and, by extension, Article 194(1)(a).

Accordingly, the Measures are neither appropriate nor proportional, and cannot therefore be considered well-designed. Moreover, the Measures and the means to their adoption violate Articles 191 and 194 and the provisions and policies adopted thereto.

c. Distortions/Overall balance

The Measures are a massive state subsidy of a mature technology known to have enormous environmental impacts and the potential for catastrophic damage. As discussed above, it effectively shields investors from these grave environmental risks. It further insures against all market and political risks.

Furthermore, as explained in the Commission's Opening Decision at length, the Measures displace investment in renewables, storage, energy efficiency and saving, as well as interconnectivity.⁸⁰

Given all of this, the Measures critically distort competition and are on balance overwhelmingly negative. Thus, they fail the final prong of the 101(3)(c), in addition to thwarting the EU's environmental and energy goals, in violation of Articles 191 and 194.

B. The public is blocked from access to administrative or judicial procedures to challenge this act

As the Committee has established, “[w]hen evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, namely to what extent national law effectively has such blocking consequences for environmental organizations, or if there are remedies available for them to actually challenge the act or omission in question.”⁸¹ The “general picture” thus includes not merely the question of whether administrative appeals or remedies for third parties exists, but also access to courts, as evaluated on the basis of legislative wordings and jurisprudence.⁸²

Looking at the general picture in this case it is clear that the public is entirely blocked from access to administrative or judicial procedures to challenge the Decision. This follows both from the wording of the Convention's implementing regulation itself and the enforcement thereof, as well as court decisions blocking any application of the Convention, whether direct, partial, or merely to assess the legality of EU law, and a further judicial decision excluding the application of environmental considerations in state aid decisions.

1. The Aarhus Regulation expressly excludes state aid determinations

Regulation (EC) No 1367/2006 (Aarhus Regulation)⁸³ is intended to implement the mandates of the Aarhus Convention within the EU. Its Article 10(1) provides that NGOs meeting certain criteria are “*entitled to request an internal review to the EU institution or body that has adopted certain administrative act under environmental law or, in the case of an alleged administrative omission, that should have adopted such an act.*” This provision is meant to implement the specific obligations under the Convention's Article 9.3

However, the Aarhus Regulation's Article 2(2) expressly excludes state aid determinations from its definition of challengeable acts: “*Administrative acts and administrative omissions shall not include measures taken or omissions by a Community institution or body in its capacity as an administrative review body, such as under: (a) Articles 81, 82, 86 and 87 of the Treaty⁸⁴ (competition rules)...*”

That this limitation is not purely hypothetical is demonstrated by the Commission's rejection of ClientEarth's Request for Internal Review (RIR) of the Commission's statement regarding GHG trading directive

⁸⁰ Opening Decision, para. 395-398

⁸¹ *Belgium* ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, para. 37

⁸² *Id.*

⁸³ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, 2006 OJ L 264

⁸⁴ Now Articles 101, 102, 106 and 107 TFEU

(2008/0013(COD)) on the basis that, *inter alia*, "any measures taken by the Commission under Article 86 and 87 of the EC Treaty, such measures in any event [...] would not be a reviewable administrative act as it is excluded from the definition of Article 2 of the Aarhus Regulation."⁸⁵

The exclusion of state aid decisions is unlawful under the Aarhus Convention. First, as clearly demonstrated in section B above, the Decision, while made in the framework of state aid law, necessarily entails analysis of the EU's energy and environmental laws in this case. Moreover, it cannot be emphasized enough that permitting state aid to Hinkley C will have profound environmental effects, not limited to the specifics of Hinkley C. Rather, the Decision will set a precedent for a general regime in the EU in which nuclear energy is massively subsidized at the cost of better, legislatively mandated, alternatives. This is clear from the Minutes of the Commission's Decision, where the then president of the Commission José Manuel Barroso stated that "The Commission decision on this case would, admittedly, create a precedent since this was the first time that it was giving its opinion on state aid in the nuclear sector."⁸⁶ Accordingly, the EU cannot shield itself from Aarhus's application by using the mere label of state aid law. Nor can it do so by merely labeling its determinations as being made in its capacity as an administrative review body, therefore claiming its determination is excluded under the Convention's Article 2(2). This is clear from this Committee's case law.

As this Committee has repeatedly clarified, "[w]hen determining how to categorize a decision under the Convention, its label in the domestic law of a Party is not decisive. Rather, whether the decision should be challengeable under article 9, paragraph 2 or 3, is determined by the legal functions and effects of a decision."⁸⁷ As discussed above, provisions under such diverse labels as taxes and criminal proceedings regarding the ill-treatment of individual animals are within the scope of Article 9.3, and the Committee has emphasized that its broad list is not exhaustive. Accordingly, there is no reason why the label state aid should invoke some talismanic protection against the application of Aarhus, justifying its exclusion in the EU's implementing regulation.

Moreover, the Committee has on multiple occasions said that **the Aarhus Convention, and in particular Articles 3 and 9, can include acts arguably carried out in a judicial capacity within its scope.**⁸⁸ This makes sense, given that these two articles place the Convention's obligations "not on public authorities, but upon the Party itself."⁸⁹ The presumed independence of the judiciary (or administrative bodies acting in a judicial capacity), therefore, "cannot be taken an excuse by a Party for not taking the necessary measures to implement the Convention." To do so would ignore the judiciary's status "as part of the state" under international law, its obligation "to operate within the boundaries of law"⁹⁰ and its "important role in the administration of justice under article 9...and to enforce national law related to the Convention more generally."⁹¹

Finally, should any rationale exist for excluding so-called judicial acts from the scope of Aarhus generally on the basis that tribunals are expected to apply the law impartially and professionally without regard to public opinion, that rationale is utterly misplaced here, where the public and the Committee have every reason to doubt the Commission's impartiality and professionalism. To the contrary, the events leading up to the Decision were plagued by procedural irregularities and the Decision itself, which is a full reversal of the Commission's previous assessment, contains significant gaps and omissions.

Accordingly, the Commission should not be considered as having acted in a "judicial capacity" within the meaning of Article 2(2), or otherwise escape the scope of Article 9.3

2. The Court has ruled that the Convention is not precise and unconditional enough to permit direct application; nor can the Convention even be used as a benchmark

⁸⁵ http://ec.europa.eu/environment/aarhus/pdf/client_earth_reply.pdf

⁸⁶ Minutes of the 2100th meeting of the Commission held in Brussels (Berlaymont) on Wednesday 8 October 2014 (morning), <http://ec.europa.eu/transparency/regdoc/rep/10061/2014/EN/10061-2014-2100-EN-F1-1.Pdf>

⁸⁷ *Belgium* ACCC/C/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, para 29. See also *European Union* ACCC/C/2008/32 (Part I); ECE/MP.PP/C.1/2011/4Add.1, May 2011, para. 61

⁸⁸ See, e.g. The Aarhus Convention, An Implementation Guide (Aarhus Guide) 2d. Edition, pg. 49 and discussion of Aarhus case law therein

⁸⁹ *Id.*

⁹⁰ *Kazakhstan* ACC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 24

⁹¹ Aarhus Guide at p. 49, citing *United Kingdom* ACCC/C/2008/33; ECE/MP.PP/C.1/2010/6/Add.3

Sitting as a Grand Chamber, the European Court of Justice (Court) made clear on January 13, 2015 that, in its view, the Aarhus Convention is not sufficiently precise and unconditional to be applied with direct effect, and blocked any other means to review the legality of the Aarhus Regulation against the benchmark of Article 9.3.⁹² Thus, the Court overruled the General Court's decision, which had found Aarhus Regulation's Article 10 incompatible with Article 9.3 on the basis that it impermissibly limited the scope of acts subject to review.

In so doing, the Court confirmed an earlier ruling⁹³ that Article 9.3 does not contain a clear and precise obligation capable of directly regulating the legal position of individuals because it refers to "criteria" to be laid down in national law. The Court went yet further, however, in finding that exceptions in jurisprudence where individuals can rely on provisions found in international agreements to challenge provisions of EU law are inapplicable. Among them was the exception used by the General Court (Nakajima exception). According to the Court, the General Court erred as a matter of law when it used this exception to examine the Aarhus Regulation in light of the Convention. The Court explained:

*"[I]n the present case, there is no question of implementation, by Article 10(1) of Regulation No 1367/2006, of specific obligations within the meaning of [the exception], in so far as, as is apparent from Article 9(3) of the Aarhus Convention, the Contracting Parties thereto have a broad margin of discretion when defining the rules for the implementation of the 'administrative or judicial procedures. In that regard, it cannot be considered that, by adopting the regulation referred to, which concerns only EU institutions and moreover concerns only one of the remedies available to individuals for ensuring compliance with EU environmental law, the European Union intended to implement the obligations [...] which derive from Article 9(3) of the Aarhus Convention with respect to national administrative or judicial procedures, which, as EU law now stands, fall primarily within the scope of Member State law."*⁹⁴

The Court also chose to ignore the Advocate General's opinion that Article 9.3 was a "mixed provision" which contained sufficiently clear obligations to preclude a rule with the effect of excluding certain decisions from the possible scope of review, and therefore could serve as a benchmark for the review of legality.⁹⁵ Such a view would have distinguished the Court's earlier ruling and allowed Article 9.3 to have at least a partial direct effect. The Court thus confirmed a narrow interpretation of Aarhus Regulation's Articles 2 and 10 and ruled out the direct or partial application of Article 9.3 or use of that provision as any benchmark. The Court reached this conclusion not merely as Article 9.3 relates to the Aarhus Regulation's restriction of challengeable acts to "measures of individual scope" – which is not the subject of this Communication – but Article 9.3 as a whole.

This has the direct effect of blocking the Communicants and the entire public from challenging the Decision. As discussed above, the Aarhus Regulation explicitly excludes state aid determinations. Were it not for the Court's jurisprudence on Article 9.3, including its Grand Chamber ruling in January, one could have challenged the Decision by arguing that Article 9.3 has a direct or partial direct effect and that state aid determinations are within its scope, as discussed in section B(1) above. Failing that, one could have employed an exception, such as the Nakajima Exception, to attack the legality of the Aarhus Regulation's exclusion of state aid determinations, using Article 9.3 as a benchmark.

Notably, when the General Court evaluated the lawfulness of the Aarhus Regulation pursuant to the Nakajima Exception it rejected the Commission's claim that, in adopting a regulation, it was acting in a legislative capacity and was therefore outside of Article 9.3's scope. In doing so the General Court relied on the Aarhus Convention generally, and the Aarhus Convention Implementation Guide specifically.⁹⁶ A challenge to the Decision in question could follow parallel lines, as discussed in section B(1) above.

This Court's jurisprudence is, moreover, inconsistent with this Committee's Aarhus case law. Again, Article 9.3 demands an evaluation of the general picture and, in particular, the blocking consequences for members

⁹² Joint Cases *Council e.a. v. Vereniging Milieudefensie* C-401/12 P to C-403/12 P, E.C.R. ___ (delivered January 13, 2015), as well as Joint Cases *Council e.a. v. Stichting Natuur en Milieu* C-404/12 P and 405/12 P, E.C.R. ___ (delivered January 13, 2015)

⁹³ *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, C-240/09, [2011] E.C.R. I-01255

⁹⁴ *Vereniging Milieudefensie*, E.C.R. ___ (delivered January 13, 2015) para 59-60

⁹⁵ Opinion of the Advocate General Jääskinen, *Vereniging Milieudefensie*, E.C.R. ___ (delivered January 13, 2015)

⁹⁶ *Stichting Natuur en Milieu v. Commission*, Case T-338/08, ECLI:EU:T:2012:301, para 68-70. Indeed, the General Court cites the 1st Edition's page 34, which corresponds to page 49 of the 2d. Edition, discussed above

of the public in general, including environmental organizations.⁹⁷ That **Article 9.3 is to be construed broadly is clear from the fact that this provision "should be read in conjunction with articles 1 to 3 of the Convention, and in the light of the purpose reflected in the preamble, that 'effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced.'**"⁹⁸ Accordingly, the Parties may not take Article 9.3's reference to "the criteria, if any, laid down in national law," as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging act[sic] or omissions that contravene national law relating to the environment."⁹⁹

The criteria are merely intended to allow some margin of flexibility as to the required qualities of the party challenging the act or omission so as to avoid an *actio popularis*. Such criteria could thus conceivably require that the challenging party demonstrate a direct legal interest of some sort, that the organization have a specific statutory goal or concern itself with a certain geographical area, for example, as long as "such criteria do not bar effective remedies for members of the public."¹⁰⁰ This can be understood as affording some limited flexibility as to **who** may make a challenge. Here it must be briefly recalled that the Communicants fulfill the criteria laid down in the Aarhus Regulation¹⁰¹ since they are NGOs registered under Austrian law and have worked with the primary stated objective of protecting the environment for more than 2 years and the Decision's subject matter falls squarely within their objectives and activities.

The Convention may also afford the Parties some flexibility as to the choice of forum, i.e. administrative or judicial, available to the public, though the Committee has found that Article 9.3 requires more than a mere right to address an administrative authority about a criminal activity.¹⁰² Thus, within proscribed limits, the Parties may also have some discretion in deciding **where** the challenge can be brought.

Criteria limiting the definition of **what** can be challenged; that is, the object of an appeal, is entirely different. **The broad sweep of the Aarhus Regulation, without regard to environmental effects and, in particular, its limitation of challenges to state aid determinations is inconsistent with the Aarhus Convention.** The absurdity of a conclusion to the contrary is well illustrated in the present case.

3. The General Court has ruled that environmental law is inapplicable to state aid decisions

In a further attempt to shield EU actions from its environmental obligations in general and in the specific context of state aid, the General Court ruled that the Commission only needs to concern itself with assessing a state aid measure's compliance with environmental policies if the state aid measure has an environmental aim.¹⁰³ The General Court came to the conclusion, moreover, that environmental protection is not part of the internal market. As such, it does not need to be taken into consideration.

Not only is it clear that the claimed aim of a state aid measure can be grossly misrepresented, as the present case demonstrates, but also a state aid measure can entail consideration of, and have a profound effect on legislatively mandated environmental policies, regardless of its purported aim. This is particularly true when the aim of the measure is in the field of energy, and security of supply. As discussed above, the Decision in this case, despite being made in the general framework of state aid law, essentially is a decision based in energy law and such law, in turn, requires consideration of environmental protection. This dependency and the ultimate environmental goals of the EU are fully reflected in the rules governing the internal market.

Given the above, the EU fails to comply with Article 9.3, as it has blocked the public from challenging an act that contravenes its laws relating to the environment.

⁹⁷ *European Union* ACCC/C/2008/32 (Part I); ECE/MP.PP/C.1/2011/4Add.1, May 2011 para. 79, citing *Belgium* ACCC/C/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, para. 34 and *Denmark* ACCC/C/2006/18; ECE/MP.PP/2008/5/Add.4, para 30

⁹⁸ *Id.*

⁹⁹ *Belgium* ACCC/C/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, para. 35

¹⁰⁰ *Id.* at 36

¹⁰¹ The criteria are laid out in Articles 10 and 11 of the Aarhus Regulation.

¹⁰² *Denmark* ACCC/C/2006/18; ECE/MP.PP/2008/5/Add.4, para 28

¹⁰³ *Castelnou Energia SL v. Commission*, Case T-57/11, E.C.R. II ____ (delivered December 2014); note: the opinion has not been published in English yet.

VI. Use of domestic remedies or other international procedures

The Communicants have not pursued other remedies because, as is clear from the discussion in Section V, all means to challenge the Decision at the European level have been effectively blocked by the Aarhus Regulation, and the Court's Jurisprudence on Article 9.3. The General Court's ruling that environmental law is inapplicable to state aid decisions only underscores the pointlessness of any appeal. It is also clear that the Communicants could not possibly have a national remedy for this EU violation.

VII. Confidentiality

The Communicants do not request confidentiality.

VIII. Supporting documentation

In addition to the information provided in footnotes, the Communicants attach the following supporting documentation:

- 1) Opening Decision
- 2) Final Decision. Note, as explained in fn. 5, the Decision has not been published yet in the Official Journal. It is, however, published on its website¹⁰⁴
- 3) EU's Aarhus Regulation
- 4) Court's Decision in Joint Cases *Council e.a. v. Vereniging Milieudefensie* C-401/12 P to C-403/12 P
- 5) Court's Decision in Joint Cases *Council e.a. v. Stichting Natuur en Milieu* C-404/12 P and 405/12 P
- 6) European Environmental Law Observatory Discussion of General Court's Decision in *Castelnou Energia SL v. Commission* Case T-57/11
- 7) Telegraph Article: Hinkley Point new nuclear power plant: the story so far
- 8) The Guardian Article: UK joins Romanian push for new EU nuclear aid package

IX. Summary

The EU Commission's decision to approve the UK's massive subsidisation of the nuclear power plant Hinkley C contravenes the EU's state aid law, which relates to the environment, and further violates key EU energy and environmental laws. As such, the Communicants should have a means to challenge the Decision, as is assured under Article 9.3 of the Aarhus Convention. However, the Communicants – and the public at large – are blocked from asserting this right. This is due to the wording of the Aarhus Regulation, which excludes state aid determinations from its scope under its Article 2(2), as well as the Court's jurisprudence on Article 9.3 and recent decisions by the General Court blocking the application of environmental considerations from state aid decisions. As a result, the EU fails to comply with its obligations under the Aarhus Convention.

¹⁰⁴ http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_34947

X. Signature



Leonore Gewessler



Thomas Alge

Vienna, 9th of March 2015