Statement by the European Commission, on behalf of the European Union, in the hearing of 14 March 2018 concerning compliance by the European Union with provisions of the Convention in relation to the approval of state aid for Hinkley Point C

(Case ACCC/C/2015/128)

Honourable Members of the Compliance Committee, Communicants, ladies and gentlemen,

1. We would like to thank the Aarhus Convention Compliance Committee for having invited us today to this hearing on **Communication ACCC/C/2015/128**. This case concerns the Commission Decision of 8 October 2014 on an aid measure for the **Hinkley Point C** Nuclear Power Station in the UK, to which I will further on refer as the "**State Aid Decision**".[1]

2. To recall, the Communicants allege that the State Aid Decision would contravene EU state aid and environmental law. The Communicants would, however, be **blocked to challenge** the State Aid Decision, due to the wording of the **"Aarhus Regulation" 1367/2006**[2] which notably **excludes competition rules from its scope** and the **EU Courts' jurisprudence**. These elements would breach **Article 9(3) and (4)** of the Aarhus Convention.

3. The EU already replied to the Communicant's allegations in its written observations of 20 May 2016, to which I would like to refer for a more detailed analysis. I will concentrate today on the main arguments and also reply to the Communicant's **update** to this case which we have received on 26 February 2018.

4. Concerning, firstly, the **admissibility** of this Communication, you already, in your "Preliminary determination of admissibility" of 3 July 2015, as confirmed at your

---

1 Commission Decision C(2014) 7142 final corr. on aid measure SA.34947 (2013/C) (ex 2013/N), which the Communicants have also annexed to their Communication to the ACCC.

2 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, OJ L 264 of 25.9.2006, p. 13.

fifty-fourth meeting from 27 to 30 September 2016, declared the present Communication as admissible, *"subject to review following any comments received from the Party concerned*" (Title II, paragraph 9).

5. The EU would respectfully disagree with this determination. In our opinion, the State Aid Decision is **outside the scope of the Aarhus Convention**. Our arguments on this point of admissibility overlap with arguments on the substance of the Communication, but we deem that they cannot be strictly divided in this case.

6. It already **results from the title and Article 1** of the Aarhus Convention - which is an environmental Convention - that its objective is to ensure the right of every person to live in an environment adequate to his or her health and that access to justice **in environmental matters** is one of the instruments to reach that aim.

7. You held, honourable Members of the Compliance Committee, in your findings of 17 March 2017 in **Case ACCC/C/2008/32** concerning the EU on access to justice, which raises the same questions on remedies in general terms which the present case raises in relation to the State Aid Decision, that Article 9(3) requires Parties to provide a right of challenge where an act ***"contravenes law relating to the environment"*** (point 100) and not only an act ***"under"*** **environmental law**, as stated in Article 10(1) of the Aarhus Regulation.

8. The definition of *"environmental law"* in Article 2(1)(f) of the Aarhus Regulation is very wide, to encompass, and I quote: *"Community legislation which, **irrespective of its legal basis**, contributes to the pursuit of the objectives of community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems"* (emphasis added).

9. Remedies at EU level as outlined in the Aarhus Regulation may therefore go beyond EU legislation based on Article 191 of the Treaty on the Functioning of the European Union (TFEU), insofar as this legislation contributes to the pursuit of environmental objectives, as quoted above. The State Aid Decision is based on Article 108(2) TFEU under Title VII Chapter I of the Treaty concerning competition rules. It **relates to competition matters rather than to environmental matters**. Its goal is to allow, if

the conditions for approval are met and the aid scheme does not distort competition in the internal market, state financial assistance to a development. As the UK rightly mentioned in its submissions on admissibility (point 3), there are **remedies available in relation to the environmental decision-making aspects of the development** at issue, *"and associated opportunities for legal review, potentially including EIA, SEA, habitats, planning and permitting processes"*.

10. Also, the issue whether the State Aid Decision would allegedly contravene EU law, as the Communicants contend, is a matter solely for the EU Courts.[3] Any allegation of a **breach of EU law** is **beyond the scope of the Convention** and not a question to be dealt with by the Committee.

11. Furthermore, under **Article 2(2) of the Aarhus Convention**, bodies or institutions **acting in a judicial or legislative capacity** are **excluded from the scope of the Convention**.

12. As it stems from Article 108(2) TFEU on which the State Aid Decision is based, the European Commission has specific competence to decide on the compatibility of State aid with the internal market. We outlined the exact content of this competence in our written observations to which we would like to refer (points 13 – 17). When the Commission adopts decisions under Article 108(2) TFEU, it acts **as a review body**.

13. The EU considered, when it adopted the Aarhus Regulation, that when institutions **act as a review body**, they should be excluded from the administrative review procedure, as provided by Article 2(2)(a) of the Aarhus Regulation.

14. In Case ACCC/C/2008/32, the exemptions under the Aarhus Regulation for infringement, Ombudsman and OLAF proceedings, including the exemption for competition rules in its Article 2(2)(a), was already at stake. You stated in the findings (point 110) that the wording of the Aarhus Convention provides no support for the EU proposition that acting as an administrative review body can be summarised under acting in a judicial capacity. You, however, indicated in that previous case that

[3] Pursuant to standing case law, the review by the EU judicature of the compatibility assessment made by the Commission is confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers. See e.g. Case C-290/07 P, *Commission v Scott*, paragraph 66 and the case-law cited therein.

"[w]ithout ... having any concrete examples of breaches before it, the Committee does not go so far as to find non-compliance in this respect."

15. This case is now a concrete example of an alleged breach of the Aarhus Convention for exempting competition rules.

16. We do not share your appreciation that the Aarhus Convention does not support our argument. The Aarhus Convention has been **drawn up with State Parties in mind**, and is not adapted in wording to the concrete circumstances of the EU as supranational economic integration organisation.

17. The EU Courts have underlined this fact at various occasions, e.g. in Case C-612/13 P, *ClientEarth*. In this case, the CJEU looked at the question whether the "Access to documents-Regulation" 1049/2001[4] which exempts, under certain circumstances, documents relating to *"investigations"*, is compliant with the Aarhus Convention which does not provide for exemptions for infringement documents, but, in its Article 4(4)(c), for an *"enquiry of a criminal or disciplinary nature"*. The CJEU held in paragraphs 40 to 42 (emphasis added), and allow me to quote the relevant parts as they are very important for the case at hand:

18. "[...] the reference, in Article 4(1) of the Aarhus Convention, to national legislation indicates that that convention was manifestly designed ***with the national legal orders in mind, and not the specific legal features of institutions of regional economic integration, such as the European Union****, even where those institutions can sign and accede to the Aarhus Convention, under Articles 17 and 19 thereof.*

It is for that reason that, as the Commission and the Parliament have stated, the Community, when approving the Aarhus Convention, reiterated, in a declaration lodged in accordance with Article 19 of that convention, the ***declaration which it had made upon signing that convention*** *and which it annexed to Decision 2005/370, namely that* ***'the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention'.***

---

[4] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, p. 43.

That being the case, neither the reference, in Article 4(4)(c) of the Aarhus Convention, to enquiries 'of a criminal or disciplinary nature', nor the obligation, laid down in the second paragraph of Article 4(4) of that convention, to interpret in a restrictive way the grounds for refusal of access mentioned in Article 4(4)(c), can be understood as imposing a precise obligation on the EU legislature. A fortiori, ***a prohibition on giving to the concept of 'enquiry' [enquête] a meaning which takes account of the specific features of the Union,*** *and in particular the task incumbent on the Commission to investigate [enquêter] any failures of Member States to fulfil their obligations which might adversely affect the correct application of the Treaties and the EU rules adopted pursuant to the Treaties,* ***cannot be inferred from those provisions."***

19. This case-law is applicable *mutatis mutandis* to the case at hand. Therefore, the EU would respectfully ask you, honourable Members of the Compliance Committee, to reconsider admissibility in view of the specificity of the mechanism of compatibility of State aid decisions provided under Article 108 TFEU, whereby the Commission acts as a review body, and to declare the present Communication as **inadmissible as being outside the Convention's scope**. Failing this, the Communicants' argument developed at page 15 of the Communication, according to which the exclusion of state aid decisions from the scope of the Aarhus Regulation would be incompatible with the Aarhus Convention, is, for the reasons I just explained, **unfounded** on substance.

20. In any event, even if it were to be admitted, *quod non*, that State aid decisions could be considered within the scope of the Aarhus Convention, the present Communication is, in the Union's view, also inadmissible for **failing exhaustion of internal remedies,** provided by EU law and national law.

21. We would like to recall that, under paragraph 21 of the Annex to Decision I/7 on Review of Compliance, the ACCC *"should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress"*.

22. In the Preliminary determination of admissibility of this Communication, the ACCC underlines that the *"Committee's view is that this provision does not imply any strict requirement that all domestic remedies must be exhausted"* (Title I, paragraph 5).

23. The EU does not share this interpretation. In the Union's view, the terms of paragraph 21 of the Annex to Decision I/7 on Review of Compliance leave no doubt that domestic remedies are to be taken into account, unless they are unsatisfactory.

24. The Communicants did not provide any evidence that they used any of the internal remedies provided under Union law. They limited themselves to argue, on a theoretical basis, that such EU remedies would be *"useless"* and *"a waste of financial and personal resources"*.

25. The Committee should not become a means of redress for issues where remedies internal to the EU are available and have not been used, as in the present case.

26. The EU would therefore respectfully ask the Committee to declare the present Communication as inadmissible, both because it is **outside the scope of the Convention**, and because of **failing exhaustion of internal remedies** by the Communicants.

27. On **substance**, the Communicants further claim that the EU would contravene Article 9(3) and (4) of the Convention insofar as the public **would be blocked from access to effective administrative or judicial remedies against the State Aid Decision.** These arguments overlap with Communication ACCC/C/2008/32, so that I would just like to develop here today some main arguments and refer to recent case-law of the EU Courts.

28. As a preliminary argument and as outlined, the Union has in our opinion no obligation under the Aarhus Convention - which excludes bodies acting in a judicial capacity - to provide for review possibilities in view of the State Aid Decision.

29. However, in any event, we would contend that the system of access of justice in the EU **complies** with Article 9(3) and (4) of the Aarhus Convention. As the CJEU held in Joined Cases C-401/12 P to C-403/12 P, *Vereniging Milieudefensie*, (paragraph 60), mentioned also by the Communicants (p. 16 of the Communication), the right to internal review under the Aarhus Regulation is *"only one of the remedies available to individuals for ensuring compliance with EU environmental law."*

30. On page 16 of the Communication, the Communicants contest the CJEU case-law in this Case *Vereniging Milieudefensie*, which declared that **Article 9(3) of the Aarhus Convention is not directly applicable**.

31. In the Commission's view, it cannot be disputed that **Article 9(3) requires the further adoption of measures by Contracting Parties**. The EU Courts have since underlined this element in several cases, see e.g. the Order of the General Court of 28 September 2016 in Case T-600/15, *PAN Europe e.a.* In its Order, the General Court noted that the Aarhus Convention does not have primacy over EU primary law (paragraph 56), confirmed the failing direct effect of Article 9(3) of the Aarhus Convention (paragraph 59) and added that, *"in any event, [..] the applicants have failed to demonstrate that the fourth paragraph of Article 263 TFEU, as interpreted by the Courts of the European Union, was incompatible with Article 9(3) of the Aarhus Convention. It is, in fact, the Aarhus Convention itself, when it refers to members of the public who 'meet the criteria, if any, laid down [in] national law', which makes the rights that Article 9(3) is supposed to give to members of the public conditional upon meeting the eligibility criteria arising under the fourth paragraph of Article 263 TFEU."* (paragraph 60).

32. To just recall briefly, acts by the institutions can be challenged **before the EU Courts** in **direct actions** under the terms of Article 263(4) TFEU. Within the framework of a direct action, an applicant can challenge also measures of general scope by raising a **plea of illegality** under Article 277 TFEU. Where implementation is a matter for the Member States, individuals and NGOs may plead the invalidity of the basic EU act at issue before the national courts and tribunals and ask the latter to seek a **preliminary ruling** from the CJEU, pursuant to Article 267 TFEU[5].

33. Judicial review of compliance with the EU legal order is thus ensured not only by the CJEU but also by the courts and tribunals of the Member States.

34. That obligation on the Member States is reaffirmed by the second subparagraph of **Article 19(1) of the Treaty on European Union (TEU)**, which states that Member States *"shall provide remedies sufficient to ensure effective judicial protection in the*

---

5 Judgments in *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, paragraph 93, and *Telefónica v Commission*, C-274/12 P, paragraph 29.

fields covered by EU law".[6] That obligation also follows from **Article 47 of the Charter** of fundamental rights of the European Union as regards measures taken by the Member States to implement Union law within the meaning of Article 51(1) of the Charter (paragraph 50 of the judgment).

35. In its Order of 10 October 2017 in Case C-640/16 P, *Greenpeace Energy*, the CJEU rejected the application for annulment of this same State Aid Decision. It confirmed that natural or legal persons who do not fulfil the conditions for a direct action before the EU courts under Article 263(4) TFEU **are not deprived of judicial protection** – Indeed, it is **for the national courts** to decide and in case to ask the CJEU for a preliminary ruling (paragraph 61). The Member States are obliged to provide a system of remedies that guarantees effective judicial protection (point 63). The Communicants' mention this case in their update, but fail to point out their **unfettered right of action before the national courts**.

36. In conclusion, the TFUE has established a **complete system of remedies** and procedures intended to ensure the control of the lawfulness of acts of the institutions by entrusting this control to the EU judicature, acting in cooperation with national courts, where appropriate. The different possibilities of access to justice are therefore **in line with the Aarhus Convention** and in particular its Article 9(3) which expressly refers to *"administrative or judicial procedures"*, implying that the Parties may decide to implement this provision by means of either type of procedure or by a combination of both. Therefore, the EU fulfils its obligations under Article 9(3) and (4) of the Aarhus Convention in case the Compliance Committee considers, *quod non*, that State aid decisions are subject to the Aarhus Convention.

37. In any event, the Communicants had also **other opportunities for access to justice in relation to the environmental decision-making aspects** of the construction of Hinkley Point C in relation to the various stages: environmental impact assessment, strategic environmental assessment, habitats, planning and permitting processes

6 See judgment in *Inuit*, paragraph 101.

provided by EU legislation such the SEA Directive[7], the EIA Directive[8] or the Habitats Directive[9].

38. For the reasons set out above, and this brings me to the end of this statement, the EU considers the Communicants' arguments on the alleged violation of Article 9(3) and (4) of the Aarhus Convention as **inadmissible**, and, in the alternative**,** as **unfounded**.

Thank you all for your attention and I am looking forward to our subsequent debate on this case.

---

7 Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197 of 21.7.2001, p. 30.

8 Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, OJ L 124 of 25.4.2014, p. 1.

9 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206 of 22.7.1992, p. 7.