

**Reply by the European Commission,  
on behalf of the European Union, to the questions from the Aarhus  
Convention Compliance Committee in Case ACCC/C/2015/128 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)**

**I. Introduction**

1. This is an important case in which the Aarhus Convention Compliance Committee ("the Committee") is asked to pronounce itself on the scope of the Aarhus Convention and its eventual applicability to State aid decisions taken by the European Commission under Article 108 of the Treaty on the Functioning of the European Union (TFEU).
2. In procedural terms, the present reply is likely the last opportunity for the European Union (EU) to raise its arguments, though we stand ready for further clarifications by way of written exchange or another hearing should this be deemed helpful. Therefore, the EU would like to stress again important legal points, in addition to replying to the specific questions by the Committee.
3. Pursuant to Article 17(1) of the Treaty on European Union (TEU), the European Commission replies on behalf of the EU.

**II. Background of the case**

4. On 9 March 2015, the Communicants, the non-governmental organisations (NGOs) "*GLOBAL 2000*" and "*ÖKOBÜRO – Alliance of the Austrian Environmental Movement*" - introduced their Communication to the Committee. It was supplemented by an Additional Communication of 20 May 2015 relating to the use of domestic remedies.

5. The Communicants allege that the Commission Decision of 8 October 2014 on an aid measure for the Hinkley Point C Nuclear Power Station in the UK<sup>1</sup> (further on referred to as 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<sup>2</sup> which notably excludes competition rules from its scope and due also to the EU Courts' jurisprudence. These elements would breach Article 9(3) and (4) of the Aarhus Convention.
6. To recall, Article 9(3) of the Aarhus Convention foresees that, *"each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, 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"*.
7. Article 9(4) of the Convention adds procedural guarantees for these administrative or judicial review procedures.
8. On 20 May 2016, the EU submitted its written observations to the case, whereby it asked the Committee to dismiss the Communication as inadmissible, or, on a subsidiary basis, to declare it as unfounded. On 23 February 2017, the Communicants submitted an update to this case. On 14 March 2018, a hearing took place which permitted a further exchange on this case. On 26 March 2018, the Committee sent additional questions for the written reply by the EU, under a prolonged deadline, by 26 June 2018.

### **III. The EU arguments**

9. The EU firstly argues, as did the UK in its submissions of 29 June 2015 on admissibility, that this communication in the ambit of competition law is inadmissible. The Aarhus

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<sup>1</sup> 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 Committee.

<sup>2</sup> 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.

Convention is an environmental convention whereas the State Aid Decision refers to competition matters.

10. NGOs promoting environmental protection and meeting any requirements under the national or internal law of the Parties are to be considered to be part of the "*public concerned*" by environmental decision-making and have the right to enforce environmental law. However, this principle does not give them the right to challenge any decision that has some - direct or indirect - impact on the environment, like the promotion of nuclear energy versus wind energy, which is also a distinctly political choice and not a legal decision. The act that is challengeable, in the terms of Article 9(3) of the Convention, needs to "*contravene provisions of its national law relating to the environment*". Else, all kinds of decisions would fall under the Aarhus Convention, for instance in the ambit of social policy, which might equally impact the environment. There are remedies available in relation to the environmental decision-making aspects of the Decision, including environmental impact assessment, strategic environmental assessment, habitats, planning and permitting processes. The Aarhus Convention should not become a vehicle to challenge policy choices by overstretching the interpretation of the environmental acts that fall under its ambit.
11. Secondly, the EU Declarations made upon signature and approval of the Convention which indicate that the EU joined the Convention within its institutional and legal context need to be taken into account. It is primary law, which ranks higher than the Convention, that on the one hand defines State aids as measures "*granted by a Member State or "through State resources"*" (Article 107(1) TFEU) and on the other gives the Commission the exclusive competence to take decisions on the compatibility of these State measures with the Treaty (Article 108 TFEU). It is also primary law that indicates that remedies against State aid decisions of the Commission are those provided for under Articles 263(4) and 267 TFEU. The Committee has a legal duty, by these EU Declarations, to treat the EU differently from other Parties in so far as its specific institutional and legal context is concerned. The role of the Commission to authorise or refuse State aid in the context of the internal market is a unique feature of EU law.
12. Thirdly, in this context, the EU in its earlier submissions quoted Case C-612/13P, *ClientEarth*, where the Court of Justice of the European Union (CJEU) held that the concepts in the Convention have to be given a meaning which takes into account the

specific features of the Union (e.g. so that infringement proceedings fall under the exemption in Article 4(4)(c) of the Convention for an "*enquiry of a criminal or disciplinary nature*"). This is equally a result from the EU Declarations. The CJEU indeed stated that the 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*" (paragraph 40 of the judgment). Accordingly, provisions of the Aarhus Convention cannot be construed against the specific legal and institutional features of the EU, which, as regards Article 9(3) of the Convention, are recalled in the EU Declarations<sup>3</sup> and further specified in Recital 11 of the Aarhus Regulation.<sup>4</sup>

13. As a fourth point, remedies are in practice available anyway against the State Aid Decision. In case C-640/16 P, *Greenpeace Energy*, the CJEU confirmed, in relation to this same State Aid Decision, 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 which is then up to the courts of the Member States. Examples of other cases will be given below, in the context of the Union's reply to the Committee's additional questions.
14. As a last point, the Commission recalls that the decision to authorize the construction of a nuclear power plant is a decision by the EU Member State. When taking that decision, the Member State needs to ensure compliance with all national, EU and international environmental legislation. That decision is independent from the Commission's State aid decision. Once the State aid is authorized, the Member State is not obliged to actually go ahead with the authorisation of the power plant. The sole

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<sup>3</sup> "In particular, the European Community also declares that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations." (emphasis added).

<sup>4</sup> The text reads: "Given that acts adopted by a Community institution or body acting in a judicial or legislative capacity can be excluded, the same should apply to other inquiry procedures where the Community institution or body acts as an administrative review body under provisions of the Treaty."

object of the Commission decision is the authorisation to the Member State to disburse the aid, if it so wishes.

#### **IV. The Committee's questions**

15. The first set of questions by the Committee relates to the procedure for the adoption of State aid decisions.
16. Question 1) *"Are the environmental impact or climate change impact of State aid measures taken into account in the European Commission's evaluation of a State aid measure proposed by a member State?"*
17. As a matter of principle, State aid is prohibited (Article 107(1) TFEU). Hence, it is up to Member States to invoke a justification for the aid, for instance on the basis of Article 107(3) TFEU. Protection of the environment has been recognized since the 1970's as one possible justification for the authorisation of State aid. The CJEU (C-487/06P, *British Aggregates*; paragraphs 90 and 92) stated that *"it is for the Commission, when assessing, in the light of the Community rules on State aid, a specific measure such as an environmental levy adopted by Member States in a field in which they retain their powers in the absence of harmonisation measures, to take account of the environmental protection requirements referred to in Article 6 EC, which provides that those requirements are to be integrated into the definition and implementation of, inter alia, arrangements which ensure that competition is not distorted within the internal market"*. This confirms that Article 11 TFEU constitutes a justification for a Member State to set up an aid measure pursuing an environmental objective in absence of EU environmental harmonising rules. Such environmental objective has to be taken into account by the Commission within State aid control. Hence, Member States can introduce State aid measures which pursue a policy aim of environmental protection (including the climate). Where the Member State invokes that justification, and only where the Member State invokes that justification, the Commission needs to assess the positive impact of a State aid measure on the environment (including the climate).
18. It is important to stress that such an analysis is only carried out at the request of the Member State, and not *ex officio*, and that it only assesses the positive impact.

19. If a positive impact on the environment is established, that positive impact has to be balanced against the competition distortion created by the measure. That balancing exercise seeks to establish whether the competition distortion is so important as to prevent the aid measure from being implemented in spite of its environmental benefits.
20. Member States can also invoke more than one justification. In the Hinkley Point case, the United Kingdom invoked in particular the development of nuclear energy (a recognized justification in the Euratom treaty), security of supply and decarbonisation. The authorisation is only based on the development of nuclear energy.
21. Question 2) *"Are EU environmental Regulations and Directives taken into account in the European Commission's evaluation of a State aid measure proposed by a member State? Does the Party concerned consider that a State aid measure needs to comply with all EU environmental Regulations and Directives and if so, how is this assessed in the evaluation of a State aid authorization decision? If not, what is the legal reasoning for allowing a State aid measure to not be in compliance with secondary EU legislation?"*
22. In general, EU environmental regulations and directives are not taken into account in the European Commission's evaluation of a State aid measure proposed by a Member State. The Member State is responsible to ensure that the measures comply with the entire EU *acquis*, including EU environmental regulations and directives. If a private party contests that compliance, it can challenge the measure before the competent national judge as *juge de droit commun du droit de l'Union*. Furthermore, the Commission may, where it is informed of the alleged breach of compliance, launch the procedure foreseen in Articles 258 to 260 TFEU.
23. If the Commission could use its powers under Article 108 TFEU to ensure compliance with other provisions of the EU *acquis*, the institutional balance between the procedure foreseen in Articles 258 to 260 and Article 108 would be upset (but see also the reply to Question 4 below for situations of an inextricable link between the violation of the provision of the Treaties and the State aid measure).

24. In the State aid Guidelines on State aid for environmental protection and energy 2014-2020 (EEAG)<sup>5</sup> (in particular, points 117 and 118 EEAG), the Commission, in exercising its broad discretion, has put particular emphasis on the obligation of Member States when granting the aid to observe certain EU environmental directives' provisions (here: the Water Framework Directive or waste hierarchy principle in Directive 2008/98/EC). Similar rules for other provisions in the *acquis communautaire* can be found in the Framework for compensation for services of general economic interest (there, the public procurement directives). This auto-limitation of discretion only applies where a State aid measure falls within the scope of the relevant guidelines or frameworks.
25. This is not the case for the Hinkley Point State aid case, which has been approved on the basis of Article 107(3) TFEU directly. This is also the reason why the Hinkley Point decision in question did not contain any assessment of the project's compliance with EU environmental rules.
26. Question 3) *"With respect to Treaty provisions, do State aid measures have to comply with articles 11 and 191 to 193 of the TFEU? If so, how is this assessed in the evaluation of a State aid authorization decision?"*
27. Articles 191 to 193 TFEU do not have direct effect, but set out general interpretative principles and legal bases for secondary EU legislation. Hence, a state aid measure cannot violate those provisions. Concerning Article 11 TFEU, see answer to Question 1). As explained above, the Hinkley C state aid measure does not pursue an environmental objective.
28. Question 4) *"Do State aid measures need to comply with other articles of the TEU or the TFEU besides article 107 TFEU? If so, how is such compliance assessed in the evaluation of a State aid authorisation decision?"*
29. For the reasons set out above under reply to Question 2), compliance with other articles of the TEU or the TFEU can be verified by national Courts and in the infringement procedure foreseen under Article 258 TFEU. The CJEU held that those aspects of aid which contravene specific provisions of the Treaty other than Articles 107 and 108 may be so indissolubly linked to the object of the aid that it is impossible to evaluate them

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<sup>5</sup> OJ C 200, 28.6.2014, p. 1–55.

separately (judgment in Case 74/76, *Iannelli v Meroni*, [1977] ECR 557; judgment in Case C-225/91, *Matra*, paragraph 41). It is only in that particular situation that compliance with other articles of the TEU or the TFEU is assessed in a State aid decision.

30. Question 5) *"Do State aid measures have to comply with international obligations of the European Union related to the environment?"*
31. According to Article 216(2) TFEU, agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. That includes also international obligations related to the environment. Therefore, the Member State, when deciding on the design of a State aid measure, has to respect those agreements. Any violation of those agreements follows the same rules as set out above under the reply to Question 4).
32. For the reasons set out above (see section III), State aid decisions do not fall within the scope of the Aarhus Convention. However, this does not mean that EU environmental legislation is irrelevant in State aid procedures. In particular, for certain State aid decisions, the authorisation is based on the positive impact on the environment when the national measure at stake falls within the scope of the EEAG, for the reasons set out above under the reply to Question 2). This does not apply to the present case.
33. In any event, the State aid administrative procedure complies with the requirements of Article 6 of the Aarhus Convention. As is demonstrated by the present case, the Commission publishes an invitation to interested parties to comment on the proposed State aid measure in the Official Journal of the European Union. The final decision of the Commission has to take into consideration all information available to the Commission at the date of its final decision. That includes any information received by environmental NGOs or citizens.
34. The following set of questions refers to access to justice regarding the State aid decision.
35. Question 6) *"The Party concerned submits that the preliminary reference procedure under Article 267 of the TFEU allows national courts to refer a question on the validity*



*of a state aid decision to the Court of Justice of the European Union (CJEU).<sup>6</sup> Please provide the Committee with examples of cases in which the CJEU has examined the validity of a State aid decision adopted by the Commission on the basis of a preliminary reference from a national court under article 267 of the TFEU. Please specifically highlight those cases, in which the plaintiff/applicant in the national proceeding was an NGO."*

36. The list in the annex contains examples of preliminary reference cases where the CJEU has examined the validity of a State aid decision adopted by the Commission; none of the plaintiffs was an NGO.
37. Question 7: *"How can NGOs challenge a decision by the Commission not to authorize State aid?"*
38. Article 263 TFEU provides for direct actions before the EU Courts to review the legality of acts adopted by, inter alia, the Commission. Its paragraph 4 reads: *"Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them and against a regulatory act which is of direct concern to them and does not entail implementing measures."*
39. Parties concerned (e.g. competitors of the aids' beneficiaries) can challenge the Commission decisions not to open the formal procedure under Article 108(2) TFEU, when the Commission finds that aid is compatible with the common market (cf. Case C-198/91, *Cook v Commission*, [1993] ECR I-2487, paragraph 23; Case C-225/91, *Matra v Commission*, [1993] ECR I-3203, paragraph 17; Case T-188/95, *Waterleiding Maatschappij*, [1998] ECR II-3713, paragraph 53; Case T-86/96, *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd v Commission*, [1999] ECR II-179, paragraph 49), under the terms of Article 263(4) TFEU.
40. Natural and legal persons may equally challenge a Commission decision not to authorize a State aid, under the same terms of Article 263(4) TFEU. However, this cannot even theoretically be an act adversely affecting environmental NGOs, not even in their wide

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<sup>6</sup> Party's response to the communication, 20 May 2016, paragraphs 39, 40 and 42.

reading of the rights granted under the Aarhus Convention. If State aid allowing for a project is not authorised, there is no impact at all on the environment.

41. Where, by an action for annulment of a Commission decision, an applicant seeks to secure compliance with the procedural guarantees provided for by Article 108(2) TFEU, the mere fact that it has the status of a "party concerned" within the meaning of that provision is sufficient for it to be regarded as directly and individually concerned for the purposes of Article 263(4) TFEU (see *Cook*, cited above, paragraphs 23 to 26); *Matra*, cited above, paragraphs 17 to 20; and *BP Chemicals*, Case T-11/95, ECLI:EU:T:1998:199, paragraphs 89 and 90).
42. So far, there are no cases of NGOs bringing cases under Article 263(4) TFEU. However, it is theoretically possible, based on a case by case analysis, that NGOs can introduce direct actions against acts of general scope under Article 263(4) TFEU, if they fulfil the relevant criteria.
43. Furthermore, NGOs can be admitted as interveners in support of one of the parties to a procedure triggered by an annulment action (see for example Case T-57/11, *Castelnou Energía*, paragraph 14, ECLI:EU:T:2013:669).
44. Natural or legal persons, including NGOs, 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 which is then up to the courts of the Member States. This has been confirmed by the CJEU in Case C-640/16 P, *Greenpeace Energy*, in relation to this very same State aid decision that is at issue in the present case. The Court could not have been clearer – it specifically stated, in relation to the State Aid decision, that a private person can challenge it before the national jurisdictions, and, in that context, contest the validity of this decision (see notably paragraphs 61 and 63; ECLI:EU:C:2017:752).
45. Indeed, NGOs have unlimited access to the national courts and can ask a national court to refer a case to the CJEU under the terms of Article 267 TFEU ("*The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning [...] (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.*")

46. To recall, besides ensuring uniform interpretation, the preliminary reference procedure also gives private parties access to the CJEU where they do not fulfil the criteria under Article 263 TFEU to directly ask the Court to control the validity of Community acts. Requests for a preliminary ruling must emanate from a national court.
47. NGOs are systematically admitted to bring cases before national courts and, in that context, to ask the national court to submit a question about the validity of the underlying EU act to the CJEU, even though, at least so far, there is not yet a case where the CJEU examined the validity of a State aid decision adopted by the Commission upon request by an NGO (see above point 36).
48. An example of a state aid case brought by an NGO before a national court is, for instance, case no. 324852, *Vent de colère*, of 28 May 2014, where the NGO was successful and the national court annulled the contested national measures.<sup>7</sup> To resume briefly the facts of the case, the association *Vent de colère* brought an action for annulment before the French Council of State. The NGO claimed that two national orders on the purchase of electricity generated by wind-power installations at a price higher than its market value constituted state aid within the meaning of Article 107(1) TFEU. The French Council of State decided to stay the national proceedings and to refer this question to the CJEU. The CJEU found in its preliminary ruling in Case C-262/12 of 19 December 2013 that the French orders at issue indeed allowed a measure that constituted state aid, which should have been submitted for prior notification to the Commission. The Council of State therefore annulled the contested orders.
49. In case no 393721, *Vent de colère*, of 15 April 2016<sup>8</sup>, the Council of State pronounced a penalty ("astreinte") of 10 000 € per day should France not execute its earlier decision no 324852 of 28 May 2014.

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<sup>7</sup> <http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2014-05-28/324852>

<sup>8</sup> <https://juricaf.org/arret/FRANCE-CONSEILDETAT-20171011-393721>

50. On 11 October under the same case no 393721, *Vent de colère*,<sup>9</sup> the Council of State decided that France had implemented its previous decision no 324852 of 28 May 2014 and that therefore the penalty need not be executed.
51. In another case brought by *Vent de colère*, case no. 384092 of 9 March 2016<sup>10</sup>, the NGO asked a different national measure to be annulled and the Commission State aid decision at issue to be referred to the CJEU. The French court assessed the validity of the State aid decision and confirmed that it was legal. The national court upheld the national measure, without that it was necessary in that specific case to refer a preliminary question to the CJEU, which would however have been perfectly possible.
52. In yet another case, no 347037 of 13 July 2012,<sup>11</sup> the NGO *Les Verts* challenged a national measure which then the Council of State found not to constitute state aid in the sense of Article 107 TFEU.
53. These cases clearly show that there is access to justice against State aid decisions, which constitute an act of general scope, and that the national court acts as "*juge communautaire de droit commun*", i.e. as ordinary court of EU law.
54. The last question by the Committee refers to the "*Procedure for the challenged State aid decisions*".
55. Question 8: "*How was the decarbonisation impact of the Commission's authorization decision of 8 October 2014*<sup>12</sup> assessed? Did the Commission examine the impact of the decision on the Emission Trading Scheme?"
56. The Commission decision assessed the impact of the measure mainly from the angle of the development of nuclear energy and of the impact on competition: the Commission

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<sup>9</sup><https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032409025&fastReqId=1473373724&fastPos=1>

<sup>10</sup> <http://www.revuegeneraledudroit.eu/blog/decisions/conseil-detat-ssr-9-mars-2016-vent-de-colere-requete-numero-384092-inedit-au-recueil/>

<sup>11</sup> <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000026198983>

<sup>12</sup> Commission Decision of 08.10.2014 on the aid measure SA.34947 (2013/c)(ex 2013/N) which the United Kingdom is planning to implement for Support to the Hinkley Point C Nuclear Power Station, C(2014) 7142.

verified that the aid would not crowd out competitors, including electricity producers from renewable energy sources. However, the decarbonisation impact as such is not assessed in the decision. This is because the Commission has recognised that the objective of general interest pursued by the measure is to foster the development of nuclear installations as foreseen under Article 2 of the EURATOM Treaty. The impact of the decision on the Emission Trading System (ETS) has not been examined, as this question was immaterial for the achievement of the common interest objective as foreseen in the decision. Nevertheless, the Commission verified whether the ETS system and the carbon floor price would be sufficient to trigger new investments in nuclear and whether there was really a need for the UK to provide support in order to reach its nuclear development objective.

## **V. Conclusion**

57. For the reasons set out above, and as detailed further in the earlier submissions by the EU, the EU would respectfully reiterate its request to the Committee to declare Communication ACCC/C/2015/128 as inadmissible, and, in the alternative, unfounded.