

**Further Reply by the European Commission,
on behalf of the European Union, following the remarks of the complainants
ClientEarth and Ökobüro in Case ACCC/C/2015/128, notified by the
secretariat in July 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)

I. Introduction

1. The Commission has decided to submit a further reply, for the following reasons: First, there is a new important legal element, namely the judgment of the General Court in Case T-356/15 Austria v Commission (“the GC judgment”). The observer quotes (selectively) from that case¹, and the Commission needs to correct those quotes. Furthermore, that judgment confirms the point of Union law made by the Commission, and contested by the Communicant and the Observer, on the (absence of) need to assess national environmental law and environmental impact in the contested Decision.
2. Second, the Communicant and the Observer misrepresent the system of judicial protection in the Union, and those misrepresentations need to be corrected, so as to avoid that the Committee bases its decision on an incorrect understanding of Union law.
3. Third, the Communicant and the Observer try to significantly broaden the scope of the Communication. They no longer challenge the lack of a possibility to challenge the Commission decision approving state aid for Hinkley Point C (as set out in section IV of the Communication), but the “*inability to challenge acts and omissions in the field of State aid more generally*”².

¹ Footnote 36, paragraph 51 and footnote 43 of the comments of 26 June 2018.

² Paragraph 1 of the Communicant’s comments of 19 July 2018; similarly the general statements in paragraph 18, section 2.3, and paragraph 52 of the Observer’s comments.

4. Fourth, the Communicant and the Observer misrepresent the system of State aid control in fundamental aspects. Again, those misrepresentations need to be set straight.
5. The Commission will structure its observations along the different lines of defence, in descending order. The first line of defence, namely that the Aarhus Convention does not apply to State aid control, is cross-cutting and would apply to all State aid decisions. The second line of defence (the concrete decision does not fall in the scope of application of the Aarhus Convention, because the contested decision is not “national legislation relating to the environment”) is specific to the case at hand. The third line of defence (Union law provides in any event for both administrative and judicial review) again applies to all State aid decisions.

II. First line of defence: The Communication is inadmissible, because State aid decisions are outside the scope of application of Article 9(3) Aarhus Convention

6. The complainants maintain their view that the Aarhus Convention would apply to State aid decisions taken by the European Commission under Article 108 of the Treaty on the Functioning of the European Union (TFEU).
7. The Commission reinstates its strongest objections to this view, which entails an interpretation of the provisions of the Aarhus Convention that goes against the specific legal and institutional features of the EU.
8. As regards Article 9(3) of the Convention on access to justice, the specificity of the EU was recalled by the Union itself in the Declarations as to the specific issue of judicial relief against national measures implementing EU law.³ This aspect was

³ “*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).

further detailed by the EU legislator in Recital 11 of the Aarhus Regulation as to, *inter alia*, State aid procedures.⁴

9. The Communicant and the Observer did not explain why these considerations are irrelevant. In this regard, *ClientEarth* argues that it would be “*impermissible*” for the Union to refer to the remarks of the Court of Justice on the effects of these Declarations⁵.
10. This is a clear misconception of the meaning of these Declarations. Indeed, the European Union has made the said Declarations at the moment of signing and concluding the Aarhus Convention. The Declarations cannot then be perceived as a domestic measure, adopted by the European Union, with a purely internal effect for the EU legal order. Conversely, they have a clear interpretative relevance also for all other Contracting Parties and for the ACCC itself, in so far as they clearly limit the commitment of the European Union to the Convention to what is consistent with the specific nature of the Union.
11. Reliance of the complainants on the cases before the ACCC where the Declarations would have been taken into account is also not-conclusive, given that, in the precedents mentioned by the complainants the ACCC considered the issue of the delimitation of powers between the EU and the Member States as regards EU directives.⁶ However, in the case at hand, no compulsory intervention of the Member States can take place after a Commission decision on State aid, the national authority being perfectly free to not implement the Commission decision in the sense of not granting the aid measure⁷.

⁴ 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.*”

⁵ Point 7 of *ClientEarth* submission. To recall, the EU referred to the Judgment in Case C-612/13P, *ClientEarth* and to its point 40, according to which the Court held that the Aarhus 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*”.

⁶ See the ACCC cases recalled in the footnote 7 of the Communicant’s comments and in footnote 3 of the Observer’s comments.

⁷ See for instance ECJ judgement of 30 mai 2018, *Yanchev*, C-481/17, points 22-24.

12. The Commission then takes the view that the complaints at hand have to be rejected as inadmissible. In the alternative, the Commission makes the following points on the substance.

III. Second line of defence: The Communication is inadmissible, because the contested Decision does not relate to the environment

13. The complainants did not provide evidence that the contested decision falls within the scope of Article 9(3) of the Aarhus Convention, because it relates to the environment.
14. Paragraphs 19 and 20 of the Communicant’s comments of 19 July 2018 and paragraphs 33 and 44 to 47 of the Observers comments are completely irrelevant for the case at hand⁸, where the sole objective of common interest justifying the granting of the aid is the promotion of nuclear energy, but not environmental protection.
15. In particular, it is not misleading, but a simple matter of fact, confirmed by the GC judgment, that the contested Decision (as opposed to the Opening Decision) is not based on the objectives of common interest of decarbonisation, but on the sole objective of common interest of the promotion of nuclear energy⁹.
16. Furthermore, as also confirmed by the GC judgment, and contrary to what is claimed by the Communicant and the Observer, environmental protection, the precautionary

⁸ The same holds true for the Commission decision quoted in footnote 42 of the Observers’ comments, where the objective of common interest pursued was environmental protection (more precisely the sub-sets electric mobility).

⁹ GC judgment, paragraph 224. The claim in Communicant’s comments, paragraphs 9 to 13; 21; 23 to 26, and in the observer’s comments paragraphs 35 to 42 and 44 to 51, is hence without foundation in Union law. The paragraphs of the GC judgment quoted by the observer in footnote 36 refer to provisions of the Euratom treaty (paragraph 101 and 237 of the GC judgment) and the provisions in the TFEU guaranteeing Member States’ freedom to choose their energy mix (paragraph 537 of the GC judgment). None of those provisions qualifies as “*environmental legislation*” even under the broad conception of that term quoted in paragraph 41 of the Observer’s comments, because they do not “*relate in general to, or help to protect, or harm or otherwise impact the environment*”. The judgment of the General Court in *British Aggregates v Commission*, T-210/02, quoted in footnote 31 of the Observer’s comments has been annulled by the Court of Justice in the case quoted in paragraph 17 of its reply to the questions of the Compliance Committee, where the Court of Justice stressed precisely that environmental protection may, where the Member State invokes it, be used as objective of common interest under Article 107(3) TFEU, but not at the level of the notion of State aid. The Commission fails to see why its quote is “*erroneous*”, as claimed by the Observer in the same footnote. The judgment in *ADBHU*, also quoted in that footnote, concerns free movement of goods, and not State aid, and the justification of a restriction, not the absence of a restriction.

principle, the polluter pays principle and sustainability principle do not form part of the balancing test under Article 107(3) TFEU.

17. The truncated quote in paragraph 51 of the Observer comments misrepresents the GC judgment, and the Commission refers the Compliance Committee to the full text of paragraphs 512 to 518 of the GC judgment, which are clear: in line with earlier case-law, there is no scope for the Commission to assess compliance with environmental legislation in the contested Decision. The Communicant and the Observer may disagree with the GC as a matter of policy,¹⁰ but for the purpose of this proceeding, the decisive question is whether the Commission, under the balancing text under Article 107(3) TFEU and as a matter of law, needs to take into consideration Articles 11, 191 to 193 TFEU, the principles set out therein, and relevant secondary environmental legislation, and the clear answer of the Union Court is “no”.
18. In this context, it is important to set the record straight with regard to further claims which are wrong as a matter of Union law.
 - First, the case-law on the indissoluble link quoted in footnote 23 does not support the claim in paragraph 18 of the Communicant’s comments that environmental provisions are included in that case law.¹¹ Rather, the GC judgment and the earlier judgment of the General Court in *Castelnuov v Commission* come to the opposite finding, i.e. that that case law does not apply to environmental provisions¹².
 - Second, contrary to the claim in paragraph 22 of the Communicant’s comments, there is no requirement to establish a market failure (or rather: regulatory failure) of the Emission Trading System, as confirmed at paragraph 240 of the GC judgment. Contrary to what the Communicant claims in paragraph 43 of its comments, no such assessment has been carried out by the Commission in the contested Decision.

¹⁰ Communicant’s communication paragraphs 9 to 13; 21; 23 to 26; observer’s comments paragraphs 35 to 42; 44 to 51, in particular footnote 36.

¹¹ The same applies to the similar claims made in paragraphs 48 and 49 of the Observers’ comments.

¹² Again, the Observer quotes selectively and in an unfaithful manner, at paragraph 36 of its comments.

- Third, contrary to the claim in paragraph 12 of the Communicant's comments, there is no role whatsoever for environmental legislation for establishing whether or not a measure constitutes State aid.¹³ As the Court of Justice held several times, environmental considerations only come into play where the Member States invokes environmental protection as an objective of common interest.¹⁴ Contrary to what the Communicant claims in paragraph 15 of its Communication, it is the obligation of the Member States to invoke grounds of justification of the aid.¹⁵

- Fourth, the role of an international environmental agreement is not different from Union rules of environmental law.¹⁶ A possible violation of those rules cannot be assessed in a State aid decision, for the reasons set out above in paragraphs 16 and 17. If they have been violated by the project in question, the Commission may use the infringement procedure (Article 258 and following TFEU), and private parties can invoke them before national Courts, provided that they have direct effect on the basis of the *Rusal* case law of the Court of Justice.¹⁷

¹³ The sole exception, which is not relevant here, concerns the polluter pays principle, as pointed out by the Observer in paragraphs 44 and 45 of its comments, where that principle has been translated into legal obligations to pay certain costs, and the aid relieves the beneficiary from paying those costs. In the present case, there is no such relief, because the beneficiary needs to comply with all regulatory costs imposed upon him.

¹⁴ See case law quoted in paragraph 17 of the Commission's reply to the questions of the Compliance Committee.

¹⁵ C-364/90 Italy v Commission [1993] ECR I-2097, para 20; Case C-372/97 Italy v Commission [2004] ECR I-3679, para 81; joined Cases T-132/96 and T-143/96 Freistaat Sachsen and Others v Commission [1999] ECR II-3663, para 140.

¹⁶ As a side note, it is wrong to claim, as the Observer claims in paragraph 43, that international environmental rules have the same legal value as EU primary law. Rather, they stand in the hierarchy of norms of Union law under EU primary law.

¹⁷ Case C-21/14 P, Commission v Rusal, EU:C:2015:494, paragraph 37 to 42, and case-law quoted there, which includes case-law on international environmental law.

IV. Third line of defence: Union law provides a complete set of judicial protection against State aid decisions and violations of national environmental law by projects that receive State aid

19. Even if the Compliance Committee were to come to the conclusion that the Communication is admissible, *quod non*, Union law provides judicial protection against the contested Decision and for possible violations of national environmental law by Hinkley Point C. Thus the Communication should be dismissed as being unfounded.
20. **Union law provides a complete set of judicial protection against State aid decisions.** As a preliminary observation, the Commission considers it useful to recall the seminal findings of the Court of Justice in *Rosneft*, which describes that Union law provides for a complete set of legal remedies against acts of Union law. That system has two complementary judicial procedures, namely direct actions under Article 263(4) TFEU and actions before national Courts, which can make references for validity under Article 267 TFEU:¹⁸

*“The review of the legality of acts of the Union that the Court is to ensure under the Treaties relies, in accordance with settled case-law, on two complementary judicial procedures. The FEU Treaty has established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the Courts of the European Union (judgments of 23 April 1986, *Les Verts v Parliament*, 294/83, EU:C:1986:166, paragraph 23; of 25 July 2002, *Unión de Pequeños Agricultores v Council*, C-50/00 P, EU:C:2002:462, paragraph 40, and of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 92). It is inherent in that complete system of legal remedies and procedures that persons bringing proceedings must, when an action is brought before a national court or tribunal, have the right to challenge the legality of provisions contained in European Union acts on which a decision or national measure adopted in respect of them is based, pleading the invalidity of that decision or measure, in order that the national court or tribunal, having itself no jurisdiction to declare such invalidity, consults the Court on that matter by means of a reference for a preliminary ruling, unless those persons unquestionably had the right to bring an action against those provisions on the basis of Article 263 TFEU and failed to exercise that right within the period prescribed (see, to that effect, judgments of 15 February 2001, *Nachi Europe*, C-239/99, EU:C:2001:101, paragraphs 35 and 36, and of 29 June 2010, *E and F*, C-550/09, EU:C:2010:382, paragraphs 45 and 46). Accordingly, requests for preliminary rulings which seek to ascertain the validity of a measure constitute, like actions for annulment, a means for reviewing the legality of European Union acts (see judgments of 22 October 1987, *Foto-Frost*, 314/85, EU:C:1987:452, paragraph 16; of 21 February 1991, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, C-143/88 and C-92/89, EU:C:1991:65, paragraph 18; of 6 December 2005, *ABNA and Others*, C-453/03, C-11/04, C-12/04 and C-194/04, EU:C:2005:741, paragraph 103, and of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 95).”*

¹⁸

Case C-72/15, *Rosneft*, EU:C:2017:236, paragraphs 66 to 68.

21. It is common ground between the parties that environmental NGOs do not have standing to bring an action for annulment on the basis of Article 263(4) TFEU against the contested Decision, which is a State aid decision adopted after a formal investigation procedure, which offered all interested parties whose interests might be affected by the granting of aid¹⁹, the opportunity to present their observations.
22. Contrary to what the Observer implies at paragraph 14 of its comments, the Commission never said that the lack of standing under Article 263(4) TFEU would mean that “NGOs cannot even theoretically challenge a negative State aid decision”. They cannot do so under Article 263(4) TFEU.
23. But, as the Court of Justice recalled in *Rosneft*, there are two complementary judicial procedures, Article 263(4) TFEU and Article 267 TFEU. And the second of those avenues is perfectly available to environmental NGOs.
24. The Compliance Committee has before it a list of more than ten examples where national Courts have referred questions on the validity of State aid decisions to the Court of Justice (Annex 1 to the EU reply of 26 June 2018). The claim in paragraphs

¹⁹ The notion of interested party is defined in Article 1(h) of as “any Member State and any person, undertaking or association of undertakings, whose interests might be affected by the granting of aid”. Contrary to the view taken by the Observer in paragraph 30 of its comments, this does not in all circumstances require that the market position of the company is affected. Rather, the Court held that, for example, trade unions can be interested parties (Case C-319/07 P, 3F, EU:C:2009:435, paragraphs 44 to 60, where the Court rejects the Commission’s view that a trade union can, a priori, not be an interested party, and insists in that context on the treaty provisions on social policy; those considerations apply *mutatis mutandis* to the treaty provisions on environmental policy). Similarly, the Commission has acted in the past on the basis of complaints filed by an association of tenants (State aid No SA.25076 (2011/NN) – Czech Republic, Privatisation of OKD a.s. to Karbon Invest a.s. (http://ec.europa.eu/competition/state_aid/cases/240829/240829_1235019_32_2.pdf)), by a local environmental NGO (Commission Decision (EU) 2017/2336 of 7 February 2017 SA.21877 (C 24/2007), SA.27585 (2012/C) and SA.31149 (2012/C) — Germany Alleged State aid to Flughafen Lübeck GmbH, Infratil Limited, Ryanair and other airlines using the airport (notified under document C(2017) 602), OJ L 339, 19.12.2017, p. 1, recital 1), and by an association of electricity consumers (State aid — Germany — State aid SA.33995 (2013/C) (ex 2013/NN) — Support for renewable electricity and reduced EEG-surcharge for energy-intensive users — Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union Text with EEA relevance, OJ C 37, 7.2.2014, p. 73–111, paragraph 1). Furthermore, in its order on the admissibility of the intervention of Greenpeace Spain in the *Castelnou* case, the General Court has recognized that that NGO did have such an interest (Order in Case T-57/11, *Greenpeace Spain and others*, EU:T:2012:580, paragraph 10 to 15). Therefore, the Commission maintains that the system of State aid control complies with Article 9(3) and (4) Aarhus Convention already because it allows for an administrative review procedure.

24 and 25 of the Observer's comments, according to which national Courts would not be competent to hear arguments about the invalidity of a State aid decision, is hence utterly wrong and shows profound lack of understanding of the Union's system of legal protection, as set out in *Rosneft*. The case quoted in footnote 20 is taken from an action brought by the Commission against a Member State for failure to comply with a State aid decision based on Article 108(2) TFEU. It has no bearing for the competences of the national judge under Article 267 TFEU. The arguments of the Communicant at paragraph 35 of its comments that those measures do not relate to the legality of Commission decisions is proven wrong by the clear content of the questions referred, which refer in their majority to the validity, and not the interpretation, of the decisions.

25. The order of the Court of Justice in *Greenpeace Energy v Commission* is relevant and ultimate proof that the procedure before the national Court and Article 267 TFEU provide full legal protection. The fact that the applicant has been a producer of renewable energy, and not an environmental NGO, is irrelevant for the general point the Commission makes, namely that judicial review of the contested Decision exists before the English Courts, where environmental NGOs can invoke the invalidity of the contested Decision in an action brought against the measure(s) by which the aid to Hinkley Point C is granted.
26. As a matter of fact, the Communicants have not even tried that avenue (nor has Greenpeace Energy). An argument based on alleged difficulties in access to national Courts *in general*, such as presented in paragraphs 23 and 26, are irrelevant for State aid decision in general and the contested Decision in particular, because they do not relate to the English courts, which are the only courts that matter in this case.
27. The alleged difficulties for State aid cases on energy in paragraphs 28 and 29 are even less convincing. First, it is common ground that there are references to energy in the field of State aid. Second, and even more importantly, the French environmental NGO did have standing in the French Courts to challenge the legality of a Commission State aid decision (see paragraph 51 of the Commission's reply). This illustrates that, contrary to the claim of the Communicant and the Observer, the Union's complete system of legal protection functions. In that context, it also has to be stressed that the Court of Justice has repeatedly held that national judges, when interpreting national

provisions on standing, need to interpret their national law in conformity with the international obligations of the Union.²⁰

28. **Violations of national environmental law by projects that receive State aid can be challenged in national Courts.** In particular, at point 9 of its submission, *ClientEarth* argues that State aid decisions “*have the potential to contravene national law relating to the environment*”. This assumption is not correct, first, because in the light of the delimitation of competencies between the Union and its Member States, a breach of national law has to be put forward before a national court, and not before the EU judicature. Failing to challenge a breach of national environmental law cannot then be considered as a breach of the Convention attributable to the Union.
29. Second, Article 9(3) of the Aarhus Convention does not require access to justice against measures that have “*the potential to contravene*” but against measures “*which contravene*” environmental law. Again, the complainants wrongly assume that State aid decisions of the Commission have a direct effect, whilst they have to be further implemented by the Member States, which have to decide whether granting the aid at the conditions set out by the Commission or not granting the aid at all. In both cases, the concrete effect of the Commission’s state aid decision as regards compliance with environmental law will always be contingent upon a further measure, taken by national authorities and not by the Union.
30. As to the submission of *Ökobüro*, at points 35-36 thereof, the complainant argues to invoke “*an ability to challenge certain state aid decisions*”. However, this is in no way required by Article 9(3) of the Aarhus Convention, which rather requires “*access to [...] judicial procedures to challenge acts*” that can be contrary to environmental law. It goes without saying that judicial review of national measures which are adopted following State aid decisions can take place only before national courts.
31. It is also clear that the complainant does not explain why having access to national courts, which they do not question they can do, can weaken their judicial protection against State aid decisions if the national court can refer any doubts as to the validity of these decisions to the Court of Justice under Article 267 TFUE. Similarly, the

²⁰ Case C-240/09 *LZI*, EU:C:2011:125, paragraph 51.

complainants do not consider that the national court can indeed assess an issue of validity of an EU measure, such as a State aid decision, without asking the Court to decide on it under Article 267 TFUE, if they consider, following this assessment, that this measure is valid.²¹

V. Conclusion

32. 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.

²¹ Case 314/85, *Foto-Frost*, point 14.