



COMMUNICANTS' OPENING STATEMENT IN ACCC/C/2014/128

Dear Chair, Members of the Compliance Committee, and distinguished colleagues,

I would like in my statement to do two things: (1) discuss what we see as the key issues, and in the course of this try to highlight points where we and the Party Concerned agree or disagree; and (2) explain why we decided to bring this communication in the first place. Of course I am happy to elaborate on any of these or other points and welcome your questions.

I. Key Issues

A. State Aid Decisions are within the scope of Article 9(3)

1. The Party Concerned has denied a duty to provide access to justice for state aid decisions like Hinkley Point C, suggesting that they are outside the scope of the Convention¹ for two reasons. First, because such decisions are based in state aid law, and second because, in making such decisions the Commission is acting in a quasi-judicial capacity and is not acting as a “public authority” within the meaning of article 2, para. 2.

2. We cannot agree.

- i. State aid decisions in principle fall under Article 9(3)

3. The fact that the decision permitting state aid for Hinkley Point C arose under state aid law is irrelevant to the determination of whether it falls under the scope of article 9(3).² This Committee has consistently found that the clause “national law related to the environment” is to be understood broadly, and in light of the broad definition for “environment information” provided under article 2(3). Notably in cases C-11 (Belgium), C-18 (Denmark), C-63 (Austria), and more recently, C-32 (Part II) and the joined cases in

¹ See in particular paras. 10-18

² Communication at p. 16, Comments on the Party Concerned’s Challenge of Admissibility, from 7 September, 2016 at paras 4-11. We respectfully remind the Committee that these issues were already raised twice and considered by the Committee, namely in relation to the UK’s intervention against preliminary admissibility from 29 June, 2015, and again in relation to the Party Concerned’s challenge of admissibility in its Response from 20 May, 2016

C-85-86 (UK). Not only is the label in domestic law not determinative, but the fact the law at issue might primarily relate to or have the purpose of achieving protection of one thing “does not exclude that it at the same time regularly concerns various components of the environment and aims to protect them.” The test is rather, whether “the provision in question somehow relates to the environment”³ and covers any law under any policy which may relate in general to, or help to protect, or harm or otherwise impact on the environment.⁴

4. This test is not only met in the present case; it is clearly exceeded.
5. State aid decisions for projects such Hinkley Point C entail the potential for enormous negative effects on the environment and state aid decisions in general are one of the most powerful ways in which the EU can affect environmental and energy policies in the Member States. This particular case, which has fulfilled all expectations in terms of serving as a precedent, as we demonstrated in our most recent Update, illustrates this.
6. Moreover, such decisions involve consideration of environmental aspects. As outlined in detail in our Communication, the Commission had to consider the possibility of whether the aid fell under a narrow exception of the rules banning state aid, and this evaluation required considering environmental issues in Articles 191 and 194 TFEU, and the laws and policies implementing these provisions. And exactly this consideration was undertaken.
7. To conclude, there is no question that state aid decisions as such can fall within the scope of article 9(3); the decision for Hinkley Point C being a clear example.
 - ii. State aid decisions are not removed from the ambit of the Convention via the “public authorities” exclusion
8. Nor can state aid decisions be excluded from the ambit of the Convention on the basis of the definition of “public authorities” under article 2, para. 2. As this Committee observed in C-32 (Part II), “the wording of the Convention provides no support” for the proposition that “an administrative review body is somehow acting in a judicial capacity...indeed the wording of the Convention leads to the opposite conclusion.”⁵ We absolutely agree and we respect the Committee’s decision to refrain from making a finding on this aspect in that case, in that no such concrete example of a breach was before it at that time.
9. We submit this case is such a concrete example, and moreover, proves this breach.
10. Finally, we observe that, article 9(3), like article 3(1) requires assessing the legal situation in the Party Concerned as a whole. On this point it seems that we and the Party Concerned

³ C-85-86 at 71, citing the Implementation Guide at p. 197

⁴ C-63 at para. 52

⁵ C-32 Part II, para 109

agree. I refer here to the Response⁶. It follows then, that the assessment of compliance, looking at the big picture, must include all institutions and it is thus unsurprising that these articles address the Parties themselves, rather than public authorities.

11. In conclusion, these decisions fall within the scope of article 9(3) and there is no relevant exclusion for them. This means we should have some access to challenge them.

B. The public is blocked from any means to challenge state aid decisions

12. Where we and the Party Concerned disagree is on the question of whether the EU has a complete system of legal redress. The Party Concerned lists potential bases for access to justice but never evaluates whether we or members of the public might have access to justice in these specific kinds of cases. We have and our results in short: We have none.

13. First, there is no way to challenge state aid decisions via the Aarhus Regulation, as they are expressly excluded under Article 2(2)(a). This is unsurmountable. Nor are there ways to challenge through direct access to the EU courts, either.

14. Decisions such as the state aid decision for Hinkley Point C are not acts of general application and thus are not “regulatory acts” according to the CJEU’s interpretation of the new limb of Article 263(4) TFEU.⁷ This means we would have to show we are “individually and directly concerned”, which this Committee has already found to be noncompliant with the Convention.⁸ But in these types of cases, the showing would require even more, and this is one of the reasons why this case is new and different from other cases this Committee have reviewed, and why it is so important: To show being individually concerned in this context, we would have to show per the *Cofaz* line of CJEU case-law that our market position is substantially affected by this state aid. As we notified the Committee in our most recent Update, even Greenpeace Energy, a competitor producer of renewable energy was unable to make this showing. And we note the court in that decision spoke in general terms, regarding the general showing that applicants need to meet in order to be substantially affected.⁹

15. Claimants in state aid cases might have to show that were also substantially involved in the procedure before the Commission about such aid. What seems clear, however, from the orders cited to at para. 16 and fn. 5 of the Party Response and the case-law we cited to in our Additional Information¹⁰ is that any such involvement is not deemed enough of an interest to be granted standing, even to intervene in litigation.¹¹ In those cases the

⁶See particularly para 33 in which the Party Concerned submitted that the CJEU’s interpretation of the application of the Aarhus Regulation could not be understood as exhaustive in terms of laying out the EU legal system; see the further discussion in the following paras. 34-42

⁷ *Castelnuovo Energia*, Case C-640/16 P at pt. 26

⁸ C-32 (Part II)

⁹ See our Update of 23 February and references cited therein

¹⁰ See p. 8 of our Additional Information, citing *Sniace v. Commission*, C-260/05 P

¹¹ See e.g. Pt. 25 of order of 6 November 2012 in Case T-57/77 *Castelnuovo Energia v. Commission*

General Court also justified its refusal to permit the NGO intervention on the basis of the exclusion of state aid decisions in the Aarhus Regulation. We must add that the ability to initiate and actively participate in these procedures in the very first place is limited. The Commission's rejection of the complaint of IIDMA and ClientEarth concerning state aid for capacity mechanisms in Spain, which exclusively benefit polluting technologies, exemplifies this. It was done on the basis that these NGOs were not so-called "interested parties" under the State Aid Regulation,¹² which are defined as economic operators, such as the beneficiary of the aid or competing undertakings and trade associations."¹³¹⁴

16. And finally, there is no way we could bring an action to challenge these decisions via the national courts of the Member States, nor could such actions provide an appropriate means of legal redress.¹⁵
17. All of this demonstrates that there is not a single means available to members of the public to challenge state aid decisions which are acts in contravention of laws related to the environment. We are entirely blocked. This despite the requirement that at least one procedure be available which meets all the requirements of article 9(3) and 9(4) under the Convention.¹⁶

II. Why we brought this Communication

18. To be clear: No, we are neither asking the Committee to weigh in on our doubts as to the conformity of this state aid decision with provisions of EU law.¹⁷ Nor do we see this as the proper place to make policy determinations concerning nuclear power as such.
19. However, these decisions have massive consequences, and we should have a means to challenge them. This is why we are here. And here we must emphasize that it is no answer to our complaint that we might have been able to challenge the specific Hinkley Point C project at some other stage or in some other aspect, as both the Party Concerned and the UK have submitted.¹⁸ This is irrelevant. This has no bearing on the question of whether our complaints about state aid decisions should be challengeable under article 9(3). Consider plans and programs by way of illustration. They do not fall under article 6 of the and cannot therefore be challenged per article 9(2). Does this mean that these plans and programs are outside of the ambit of the Convention entirely and cannot be subject to judicial review, given that they might linked or be part of a tiered decision-making process, to the same concrete project in question. Clearly not. They should be

¹² Council Regulation (EU) 2015/1589, Article 1(h). This regulation lays down the detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union

¹³ See p. 8 of our Additional Information

¹⁴ See p. 2 of our Update from 23 February, 2018

¹⁵ The Party Concerned cites in this context Articles 277 (plea of illegality) and article 267 (the preliminary reference procedure

¹⁶ C-85-86 at 79

¹⁷ Rather our discussions on this point are intended to show that we have reason to believe that the decision is an „act or omission in contravention of national laws related to the environment.”

¹⁸ Response at para. 43; see also the Comments of the UK relating to the Issue of Preliminary Admissibility in this case

challengeable under article 9(3). In a parallel fashion, it cannot be said that state aid decisions are outside of the Convention and cannot be challenged under 9(3). If anything, the critical role such state aid decisions play with respect to such projects only underscores the grave need for members of the public to be able to play their recognized role as a watchdog, and ensure that laws relating to the environment are not contravened, that such decisions cannot result in the gutting of laws on energy and the environment.

CONCLUSION:

Considering all of the above, we submit Party Concerned is in noncompliance with article 9(3) and (4) and we respectfully ask this Committee to issue findings to that effect and appropriate recommendations.

Finally, we would like to express our particular gratitude for having been given this opportunity to discuss this case in an open hearing, for your attention, and your consideration. I look forward to answering any questions you might have. Thank you.