

Aarhus Convention Secretariat  
c/o Fiona Marshall  
Palais des Nations 8 – 14 avenue de la Paix  
1211 Geneva 10, Switzerland,

**UPDATE PROVIDING INFORMATION  
IN CASE ACCC/C/2015/128 (EU)**

Vienna, 23 February, 2017

Dear Ms. Marshall,

We would like to bring the following information<sup>1</sup> to the Committee’s attention, as we feel such information is relevant to understanding the big picture concerning our case, ACCC/C/2015/128 (EU).

First, the CJEU in *Greenpeace Energy v. Commission* in a judgment from 10 October 2017 rejected Greenpeace Energy’s application for the annulment of the Commission’s decision approving state aid for Hinkley Point C. The Court confirmed exactly what we already suggested on p. 3 of our “Additional Information”<sup>2</sup> submitted on May 20, 2015, that the aid in question was not an act of general application, and accordingly could not be considered a “regulatory act” according to the CJEU’s interpretation of the new third limb of Article 263(4) TFEU.<sup>3</sup> This meant that any claimant seeking an annulment of the decision would have to show “individual concern” under its traditional Plaumann doctrine.<sup>4</sup>

Moreover, as the Court went on to explain, to show “individual concern” in state aid cases requires a yet more restrictive test, namely the showing that the measure in question “substantially affects” the market position of the claimant.<sup>5</sup> This point we had also earlier raised in our Additional Information at p. 8. Even Greenpeace Energy, a competitor producer of renewable energy, was not able to satisfy this requirement in this case. What is more, there is likely yet another requirement in this context that the claimant demonstrate that they were “substantially involved” in the procedure before the Commission. Note this issue and the case law cited in this decision<sup>6</sup> is again exactly what we raised at p. 8 and fn. 42 of our Additional Information.

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<sup>1</sup> See Report of the Compliance Committee on procedural matters; ECE/MP.PP/2017/31 at para. 24

<sup>2</sup> This information was submitted to specifically address the question of domestic remedies but is of course relevant to understanding the general circumstances surrounding this case. The information is available at: [https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2015-128\\_European\\_Union/frComm\\_EU\\_Okoburo\\_additional\\_information\\_20.05.2015.pdf](https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2015-128_European_Union/frComm_EU_Okoburo_additional_information_20.05.2015.pdf)

<sup>3</sup> Case C-640/16 P from 10. October, 2017, at pt. 26

<sup>4</sup> Ibid. pt. 37

<sup>5</sup> Ibid. at pt. 38

<sup>6</sup> Ibid. The source cited to is namely *Sniace v. Commission*, C-260/05 P

The Commission rejected on October 10, 2017 the formal complaint of the environmental NGO IIDMA, which could have led to such a procedure before the Commission. This complaint alleged unlawful state aid in Spain in the form of an investment incentive on the grounds that payments are addressed to operators of certain technologies of electric generation while excluding electricity generators from renewable sources. The Commission stated that formal complaints within the meaning of Article 24(2) of Council Regulation (EU) 2015/1589 can only be submitted by interested parties, which are to be understood as those being “affected by the measure; they are for example competitors or trade associations.”<sup>7</sup>

At the same time, we can also forward other information relevant to our expressed concern that the state aid decision in Hinkley Point C was a precedence case which reveals general issues not limited to this decision alone.<sup>8</sup> Since we submitted our Communication in March 2015, the Commission:

- Approved state aid for lifetime extensions of three nuclear reactors in Belgium (Tihange 1, Doel 1 and Doel 2);<sup>9</sup>
- Approved state aid for the construction of two new nuclear reactors in Hungary (Paks 2);<sup>10</sup> and
- Modified the “Nuclear Illustrative Programme” or “PINC” which had until 2016 unequivocally stated that it “is important to ensure in the EU that nuclear energy projects do not benefit from any State subsidy.”<sup>11</sup> This statement was deleted in the new PINC from 2016 and now the Contract for Difference used for Hinkley Point C was specifically named as one of the possible financing models for new NPPs.<sup>12</sup>

We hope the above information will assist the Committee in its consideration of this case and look forward to answering any questions and providing any needed clarifications.

Kind regards,



Mag. Thomas Alge, Director  
ÖKOBÜRO – Alliance of the Environmental Movement

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<sup>7</sup> See Letter from the Commission to IIDMA in case SA 48561, dated 06.10.2017 (B.2 BAL/mkl D\*2017/094358)

<sup>8</sup> See in particular our Communication at pp. 4-5, including fn. 9 in Section V. “Nature of alleged non-compliance”; these concerns appear throughout the Communication (see e.g. 3, 4, 15, 16 (including fn. 85), 18, and 19; these concerns also appear throughout the Additional Information submitted 20.5.2015; see also our Comments on the Party Concerned’s Challenge of Admissibility, dated 07.09.2016

<sup>9</sup> SA.39487. Published in the OJ on May 5, 2017. Available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:C:2017:142:TOC>

<sup>10</sup> SA.38454. Published in the OJ on December 1, 2017. Available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:L:2017:317:TOC>

<sup>11</sup> We cite to this provision on pp. 8-9 and fn. 9 of our Communication

<sup>12</sup> Brussels, 4.4.2016 COM (2016) 177 final, at p. 6: available under: <http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-177-EN-F1-1.PDF>