

COMMUNICANT'S COMMENTS ON THE PARTY CONCERNED'S CHALLENGE OF ADMISSIBILITY IN ACCC/C/2015/128 (EU)

Vienna, 7. September, 2016

I. INTRODUCTION

1. On May 20, 2016 the Party Concerned submitted its **Response** to our **Communication**, (ACCC/C/2015/128 (EU), which concerns the EU's approval of the United Kingdom's state aid for Hinkley Point C. In its **Response**, the Party Concerned challenges the admissibility of the case. At its last meeting in June, 2016 (CC-53) the ACCC decided that it would reconsider the question of admissibility at CC-54.
2. We find many of the Party Concerned's arguments in the admissibility sections of the **Response** pertain to our case on the merits, rather than the question of admissibility. However, in the interest of addressing all points raised and aiding the Committee's deliberations to the best of our ability, we submit the following comments.
3. We will address the Party Concerned's **Response** as to the substance once admissibility is settled.

II. ARGUMENTS

A. The State Aid Decision Clearly Falls within Scope of the Convention

i. The State Aid Decision Relates to the Environment

4. Contrary to the Party Concerned's **Response**,¹ the fact that the decision at issue arises under state aid law is irrelevant to the determination that it falls within the scope of the Convention. There is no legal basis in the Convention for limiting the scope of what may be reviewed on the basis of its label in domestic law, or whether the act in question concerns competition issues.² The test according to Article 9, para. 3 of the Convention is simply whether the act may "contravene laws relating to the environment."

¹ See Party Concern's Response, paras. 10-12

² *Austria ACCC/C/2011/63; ECE/MP.PP/C.1/2012/4; ECE/MP.PP/C.1/2014/3, 13 January 2014*, para. 52 (Article 9, para. 3 "covers any law [...] under any policy [...] which may relate in general to, or help to protect, or harm or otherwise impact on the environment"); see also *Belgium ACCC/C/2005/11; ECE/MP/C.1/2006/4/Add.2, 28 July 2006*, para. 29; see also this Committee's Draft Findings for ACCC/C/2008/32 (Part II) (EU), paras. 91-92

5. As discussed at length in our **Communication**,³ the decision to approve state aid for Hinkley Point C “contravenes laws relating to the environment” within the meaning of Article 9, para. 3. Through this decision key environmental provisions and provisions on renewable energy are undermined, essentially carved out of the Lisbon Treaty.
6. We would also respectfully point out that the United Kingdom, which intervened with written comments against admissibility at CC-49, made the same arguments as the Party Concerned does here.⁴ There is nothing new in the Party Concerned’s submissions to persuade the ACCC to come to a different conclusion as to admissibility now than it did then, over a year ago.

ii. State Aid Decisions Are Not Judicial Acts under Article 2, para. 2 of the Convention

7. The fact that the Commission acted as an administrative review body when approving the UK’s state aid for Hinkley Point C is similarly unavailing. The exclusion of bodies or institutions acting in a judicial capacity under Article 2, para. 2 of the Convention does not include bodies acting as an *administrative review body*.⁵
8. The distinction between an authority acting in a judicial capacity on the one hand, and administrative review on the other, is a meaningful one. If anything, the Party Concerned’s **Response** illustrates this distinction, as it highlights the Commission’s role pursuant to state aid law as an authorizing, or virtual permitting body.⁶ The Commission must be notified of plans to grant aid, and Member States may not grant such aid until “the Commission has authorised it.”⁷ The Commission has, moreover, to conduct investigative procedures,⁸ and where it determines the aid is unlawful, it can issue an order that the aid should not be put into effect.⁹ Where a Member State ignores its order, the Commission’s recourse is to turn to a court – the CJEU.¹⁰ All of the above only proves that the Commission’s actions under state aid law are decisively those of an administrative body – not an authority acting in a judicial capacity. Differing treatment under the Convention is therefore entirely appropriate.
9. Regarding the Party Concerned’s arguments in paragraph 16 of its **Response** and the case law cited therein, we would like to first point out that paragraph 62 of the decision in *Client Earth v. Commission*¹¹ in fact confirms the Commission’s role as an investigator, that is, an administrator,

³ See pp. 5-6 of our Communication

⁴ United Kingdom’s Statement on preliminary admissibility, paras. 2-9

⁵ Draft Findings for C/32 (EU), paras. 98-104

⁶ Party Concerned’s Response, paras. 14-17

⁷ Id. at 14

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ *Client Earth v. Commission*, C-612/P, E.C.R. ___ (delivered July 16 2015). Stated in its entirety the paragraph is: “As the General Court correctly held in paragraph 49 of the judgment under appeal, such studies are among the instruments available to the Commission, in the context of the obligation imposed on it, under Article 17(1) TEU, to oversee, *under control of the Court*, the application of EU law, in order to uncover any failures by Member States to fulfill their obligation to transpose the directives concerned and in order to decide, when necessary, to *initiate infringement proceedings* against those Member States which it considers to be in breach of EU law. The studies fall, consequently, within the scope of the concept of ‘*investigations*’, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.” (Emphasis added.)

not a body acting in a judicial capacity. First, Article 17(1) TEU lays out role of the Commission as an administrative entity. Second, the phrase “*under control of the Court*” makes clear that the Commission is not only *not* a part of the court – it is indeed *separate* and *subject to* this body, which, in contradistinction to the Commission, acts in a judicial capacity. Third, the Commission’s powers to *initiate* infringement proceedings is characteristic of an administrative entity (a prosecutor) and not a court. Finally, this paragraph’s references to “*investigations*” only underscores the Commission’s role as an administrator.

10. Furthermore, we have never disputed that the Aarhus Regulation excludes state aid decisions. To the contrary this is one of the main points of our **Communication**;¹² we find that this, taken together with the Party Concerned’s failure to provide any other review mechanisms, fails to comply with the Convention.
11. Finally, we note again¹³ that Article 9 differs from many provisions in the Convention in placing the duty to fulfill the obligations of the Convention *on the party itself*, rather than on public authorities. Accordingly, all institutions of the state – including the judiciary, which is not implicated here – are to be evaluated for compliance with the Convention.¹⁴

B. No Domestic Remedies Exist for this Case

12. We consider the Party Concerned’s discussion at para. 16 makes our own point for us: No domestic remedies were available to us pursuant to the Aarhus Regulation.
13. As to other possible avenues for domestic review, we note that the Party Concerned fails to address our comprehensive arguments¹⁵ as to why there were no other possible domestic remedies available to us.¹⁶ In fact, the Party Concerned expressly denies the obligation to provide any remedies at all.¹⁷
14. As discussed at length in our **Additional Information**,¹⁸ there was no possible remedy under either the second or the newly-created third limb of Article 263, para. 4 TFEU. Also discussed in our **Additional Information** are the shortcomings of the preliminary ruling procedure pursuant to Article 267 TFEU, and the fact that this Committee has not only found this procedure irrelevant for purposes of determining a communication’s admissibility;¹⁹ it has further found the procedure fails to compensate for the lack of redress available at the EU level.²⁰

¹² See the discussion in pp. 15-16

¹³ See Communication at p. 16 and references cited therein

¹⁴ Ibid; see also Draft Findings for C/32 (EU), paras. 35-36

¹⁵ See our Communication pp 16-18 and our additional information: *Use of domestic remedies concerning Communication to the ACCC regarding the EU in state aid decision for Hinkley Point C, submitted March 9, 1015* (“Additional Information”)

¹⁶ Party’s Response, para. 23

¹⁷ Part’s Response, para. 34

¹⁸ Additional Information, Section II

¹⁹ *European Union ACCC/C/2008/32 (Part I); ECE/MP.PP/C.1/2011/4/Add.1, May 2011*, para. 68

²⁰ Id. at para. 90; reaffirmed by the Draft Findings in C-32 (Part II) (EU), paras. 52-53

15. The General Court’s ruling in *Castelnou Energía*²¹ underscores that domestic remedies would have been futile in our case, as explained in our **Communication**.²² Not only does the court make clear that state aid decisions such as the one at issue would be deemed a measure of individual scope and thus not a regulatory act under Article 263(4) TFEU,²³ it also ruled that environmental law is inapplicable to state aid decisions unless the aid has an express environmental purpose.²⁴
16. That we lacked any remedies at either the EU level or before a court in the UK is confirmed by Friends of the Earth England, Wales and Northern Ireland, which submitted a **Statement** in support of our Communication. The **Statement** details the insurmountable legal, financial and practical hurdles they themselves faced for a state aid case and those which we would have similarly confronted. It also points out that they see no basis under which a UK court would accept jurisdiction to decide on the validity of an act of an EU institution and falling within the competence of that institution.²⁵ **The Statement** further serves as a reminder of the real-world effects that ensue when NGOs are prevented from bringing public interest cases.
17. To conclude: any conceivable remedies would be unreasonably prolonged or obviously not provide an effective and sufficient means of redress.²⁶ Accordingly, there is no basis for determining the present communication is inadmissible.

III. CONCLUSION

18. This **Communication** is clearly within the scope of the Convention as it concerns an act that contravenes laws relating to the environment which, moreover, is not excluded per the definition of a “public authority” under the Convention. There were no domestic remedies available, as neither administrative avenues per the Aarhus Regulation, nor any judicial means of redress were remotely possible. We therefore respectfully request that this Committee determine again that our **Communication** is preliminarily admissible.



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²¹ *Castelnou Energía, SL v. Commission*, T-57/11, ECCR II __ (delivered December 2014); an English translation of this case was unavailable at the time we submitted our communication. This can now be accessed at:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d5e5df0f3a4b0643d3871ef2357e300331.e34KaxiLc3qMb40Rch0SaxuTch50?text=&docid=160262&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=291515>

²² See our Communication at p. 18

²³ Id. at para. 23; see also our Additional Information at p. 3

²⁴ *Castelnou Energía*, paras. 187-189

²⁵ See Statement of Friends of the Earth England, Wales and Northern Ireland, p. 3

²⁶ Decision I/7, para. 21