Ms. Fiona Marshall  
Secretary to the Aarhus Convention Compliance Committee  
United Nations Economic Commission for Europe  
Environment Division  
Palais des Nations  
CH-1211 Geneva 10  
Switzerland

Vienna, May 20, 2015

Re: Use of domestic remedies concerning Communication to the ACCC regarding the EU in state aid decision for Hinkley Point C, submitted March 9, 2015

Dear Ms. Marshall,

On March 9, 2015, we submitted a communication ("Communication") regarding the EU’s approval of the UK’s state aid measures to support a nuclear power plant at Hinkley Point C ("HPC"). During discussions at the last MoP in Maastricht, the Parties requested that the Committee take a stricter approach regarding the use of domestic remedies. Even though the ACCC is bound by decision 1/7,¹ which does not see domestic remedies as a strict admissibility criteria, the Committee has a certain discretion to change its practice.

In our case we see no possible avenue to effectively challenge the EU’s state aid decision ("Decision") using the remedies provided under the Lisbon Treaty without the direct application of Article 9, paragraph 3 of the Aarhus Convention. However, the latter is not possible according to the latest verdicts of the European Court of Justice ("ECJ"). This is thoroughly discussed in our Communication.

Since we expect the EU and the UK to challenge the admissibility of our case on the grounds that we did not use domestic remedies, we submit this letter to clarify that any remedy under the existing Treaty and case-law would be useless and thus a waste of financial and personal resources. In line with ACCC practice, the application of these remedies is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress.

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¹ Decision 1-7: Review of Compliance, para. 21, adopted at the first meeting of the Parties, 21-23 October 2002. See also the United Nations Economic Commission for Europe’s Guidance Document on the Aarhus Convention Compliance Mechanism, p. 34.
To demonstrate our position, we elaborate as follows:

I. The EU’s Aarhus Regulation Expressly Bars a Request for Review

As explained in detail in the Communication,\(^2\) Communicants GLOBAL 2000 and ÖKOBÜRO cannot use the EU's regulation implementing the Convention ("Aarhus Regulation") to challenge the Decision in the form of a request for review ("RIR"), because that regulation's Article 2(2) expressly excludes state aid determinations. The EU Commission ("Commission") has actively used this exclusion to reject an RIR in the past. The ECJ has, moreover, ruled out the direct or partial direct application of Article 9(3) of the Convention at the EU level, or use of that article in any way as a benchmark for interpreting the Aarhus Regulation or determining its legality.\(^3\) Taken together, this means that this domestic administrative remedy, ostensibly to create access to justice in environmental matter, is unavailable to the Communicants.

II. Annulment under 263, paragraph 4 TFEU

The Treaty of Lisbon modified former Article 230, paragraph 4 of the EC Treaty\(^4\) to remedy the widely-acknowledged lack of access to justice for so-called non-privileged applicants, notably among them NGOs and other members of the public seeking to challenge violations of EU environmental law.

As this Committee is well-familiar, under Article 230, paragraph 4 and its predecessors, an annulment action brought by a natural or legal person was not admissible unless the act in question was addressed to that person or was of direct and individual concern to the former. This restriction on standing to apply for annulment actions, the Plaumann test, has resulted in the fact that no NGO or other individuals acting in the public interest to protect environmental values has been accorded standing under EU jurisprudence to challenge violations of EU law by EU measures or EU actors. Despite this Committee's conclusion that the Plaumann test "is too strict to meet the criteria of the Convention,"\(^5\) this restriction lives on in the Lisbon Treaty for the Functioning of the European Union's ("TFEU") Article 263, paragraph 4 as that article's so-called "second limb."

The TFEU, however, introduced a "third limb," which was anticipated to widen the gates of access to justice. These expectations have proven misplaced, as is evident in the present case.

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\(^2\) See Communicant's Communication to the ACCC regarding the European Union in State Aid Decision concerning Hinkley Point C, submitted March 9, 2015, Sections (V)(B)(1)-(2) and references cited therein.

\(^3\) Joint Cases Council e.a. v. Vereniging Milieudefensie C-401/12 P to C-403/12 P, E.C.R. ___ (delivered January 13, 2015), as well as Joint Cases Council e.a. v. Stichting Natuur en Milieu C-404/12 P and 405/12 P, ECR ___ (delivered January 13, 2015).

\(^4\) This numbering reflects the Treaty of Amsterdam (signed in 1997, in effect in 1999), which amended the Treaty establishing the European Economic Treaty, which itself dates back to 1957. Prior to this amendment, the relevant article was Article 173.

A) The Communicants cannot use the third limb of article 263, paragraph 4

The third limb of Article 263, paragraph 4 (Article 263(4)) provides that any natural or legal person may institute proceedings against "a regulatory act which is of direct concern to them and does not entail implementing measures." Thus, to achieve standing to bring an application for annulment under the newly-created third limb of Article 263(4), the applicant must be able to satisfy each of these three elements. Failing to do so means that standing will be considered under that article’s second limb, requiring a showing of "individual and direct concern."

1) The state aid Decision is not a regulatory act according to EU law

The ECJ has interpreted the phrase "regulatory act" within the meaning of the third limb of 263(4) to enable annulment actions of "acts of general application other than legislative acts" only.6

The exclusion of legislative acts is not justifiable given the wording of the Lisbon Treaty, and will exclude a significant number of environmental cases from its ambit. However, this judicially-made exclusion is not likely to pose a problem in the present case, as state aid decisions have been generally acknowledged as non-legislative acts.7

However, the requirement that the decision be an "act of general application" means that the state aid Decision in this case is not a regulatory act for purposes of Article 263(4)'s third limb. Specifically, as defined by the regulation implementing the rules for state aid, the Decision concerns "individual aid,"8 not an "aid scheme"9 which is applicable to objectively determined situations and entails legal effects for categories of persons envisaged in a general and abstract manner,"10 such as a generalized tax scheme. Instead, a court would say that the Decision, which concerns aid directly granted for the support of HPC, is like the aid granted to ten Spanish coal-fired power stations in a case recently decided by the General Court ("GC").11 As in that case, individual aid is at issue, meaning that there is no act of general application. Accordingly, the Decision would not be deemed a regulatory act under Article 263(4)'s third limb, and the Communicants would, as the applicants in the Spanish coal case, have to show that they are "individually and directly concerned" pursuant to that article's second limb.

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7 This was explicitly addressed in AG Kokott’s Opinion in Telefónica v Commission, C-274/12 P, ECR (delivered December 19, 2013), paras. 18-19, implicitly in the CJEU’s decision in that case, and in subsequent case-law. To that effect see e.g. Stichting Woonpunt v Commission, C-132/12 P, ECR ___ (delivered February 27, 2014), para. 72.


9 Id. at sub. d.

10 AG Kokott's Opinion in Telefónica, paras. 25-27. See also Microban, para. 23.

11 Castelnou Energia SL v. Commission, T-57/11, ECR II ___ (delivered December 2014), para. 23. Note: the opinion has not been published in English yet.
The Decision in this case bears a striking resemblance to a case this Committee is already well-familiar with, namely the *Stichting Greenpeace* case.\textsuperscript{12} There, the applicants applied to annul the European Commission’s decision regarding funding for two power stations on the Canary Islands. As the Committee may recall, the applicants in that case were denied standing under what is now the second limb of Article 263(4). The Communicants in the present case would certainly face precisely the same result, as explained in Section (B) below.

2) *Even if the state aid Decision were a regulatory act, the Communicants still could not use the third limb*

It deserves mention that, even if the State Aid Decision were a “regulatory act”, the Communicants would still fail to meet the requirements of Article 263(4)’s newly-created third limb.

First, the Court of Justice of the European Union (CJEU) has interpreted the “direct concern” element in the 263(4) third limb analysis to be the same as that in the second limb of 263(4) and its predecessors.\textsuperscript{13} As explained in Section (B)(1) below, recent judicial interpretation of this element establishes a standard unattainable for those protecting public interests, such as the environment.

Furthermore, there is a serious risk that a court would insist that the Decision entails implementing regulations, thus making the Communicants’ application fail on the third element of Article 263(4)’s third limb. The CJEU has established a strict test for this element, requiring the complete absence of any measure to be taken by the addressee (the Member State, or “MS”) to put the regulatory act into operation, as determined by the standpoint of the applicant and the subject-matter of the action.\textsuperscript{14} This test is so strict, in fact, that it does not seem a state aid decision can meet it.\textsuperscript{15} Only in *Microban*, a non-state aid case, was the court satisfied that this test had been met.\textsuperscript{16}

Thus, even supposing the Communicants suffered some effect that a court would recognize, the court would say that this effect would only materialize or be caused by the UK’s implementing regulations, namely its support for HPC or some action yet further removed from the Decision. In this regard, the present case is similar to the *Azores case*, where the court repeatedly emphasized that the contested regulation had not affected the applicant’s interests, and that further implementing measures would thus be necessary for any effects to materialise.\textsuperscript{17}


\textsuperscript{13} *Microban*, para. 32; see also AG Kokott’s Opinion in *Telefónica*, para. 59.

\textsuperscript{14} *Telefónica*, paras. 30-31; see also *Stichting Woopunt*, paras. 50-51.

\textsuperscript{15} Notably the state aid decisions in *Telefónica*, *Stichting Woopunt*, and *Dansk Automat Brancheforening v. Commission*, T-601/11, ECR II 991 (delivered September 26, 2014) (on appeal at C-563/14 P) were all deemed to entail implementing regulations.

\textsuperscript{16} *Microban*, para. 33. The court’s conclusion in this regard seem inconsistent with its findings in the state aid context.

\textsuperscript{17} *Região autónoma dos Açores v. Council*, T-37/04, [2008] ECR II-00103, paras. 60, 61, 63, 66.
According to the ECJ in Telefónica, and as endorsed in subsequent case-law, the very objective of Article 263(4)'s third limb is to prevent individuals from having to infringe the law in order to gain access to judicial review. If this is so, it is clear that Article 263(4) offers those wishing to protect the environment and ensure the enforcement of EU environmental laws no increased access to justice. The Communicants, and those serving in the public interest, are not at risk of violating the law by i.e., failing to pay taxes, fines, or selling products that have been banned.

Use of Article 263(4)'s third limb is therefore hopeless, rendering this approach to the domestic remedy of annulment unavailable to the Communicants in this case.

B) Nor can the Communicants use the second limb of article 263, paragraph 4

1) Direct concern has become an impossible hurdle for those defending public interests

The test for "direct" concern according to case-law requires that the contested measure directly affects the applicant's legal status, and leaves no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules.

It is clear that the Communicants cannot fulfill the narrowly interpreted criteria for "direct concern", particularly given its recent application in case-law. Indeed, it is unlikely that any NGOs could, and thus they, or any member of the public seeking to protect the environment, will always be denied standing on this basis.

First, the European courts have generally viewed that a contested measure directly affects the applicant's legal status when the applicant falls within the scope of the contested act. Thus, where the contested act would directly (a) cause the applicant to be liable for paying taxes, a penalty or a fine, or (b) ban the applicant's economic activities, the measure is deemed to

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18 Telefónica, para. 27.
19 Dansk Automat Brancheforening, para. 54
21 Recall from the above that case-law has interpreted "direct concern" to have an identical meaning under the second and third limbs. Therefore, this discussion is critical to understanding the lack of access to justice for NGOs under the third limb as well.
22 See e.g. AG Kokott's Opinion in Telefónica, para. 62.
23 Id. (note the CJEU appears to assume this condition is met, para. 27-29, and rejects the applicant's use of the 263(4)'s third limb on other grounds, namely that the act entailed implementing measures)
24 See e.g. Microban, para. 28, where the contested measure prohibited the marketing of materials and articles intended to
directly affect the applicant's legal status.

This standard is an insurmountable barrier for the Communicants in the present case, as there is no way in which the Communicants' legal status in this sense could be affected by the Decision. Nor is case-law in which European courts have admitted actions for annulment where the effects on the applicants were arguably factual rather than legal availing. Notably, in those cases the applicants challenged decisions which directly affected their capacity as market participants in competition with other market participants. Moreover, in those cases, either the applicants' participation was also substantially affected, or the decision authorised concentrations, neither of which is remotely at issue here. The court's relaxed standards then apply only to agents protecting their private economic interests. The Communicants, by contrast, are protecting public environmental ones.

Far more analogous to the present case is the Inuit case, where the GC viewed that seal hunters and other upstream users were not directly affected by a law that stated that "[t]he placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence." Only those who were active in placing seal products on the EU market were directly affected. Any consequences of the law that seal hunters and other upstream users might suffer were not legal, but merely factual. Although Advocate General Kokott later criticised the factual/legal distinction as being insufficient, she nevertheless endorsed the GC's conclusion that the seal hunters and other upstream users involved in the production of products from seal materials or the connected research were not "directly affected" and merely analysed the question also in terms of direct versus indirect effects instead.

Applying the above, the case-law makes clear that environmental NGOs such as the Communicants will not be found to be "directly concerned," regardless of whether the test involves a factual versus legal distinction, direct versus indirect effects, or a combination of the two.

Again, the Stichting Greenpeace case is highly relevant here. There, while not making clear whether it was speaking to "direct" or "individual" concern, the court mentioned that the contested decision, which concerned the European Community's financing of Spanish power stations, could only affect the applicant's rights indirectly. The court in the Azores case similarly failed to clearly distinguish between "direct" and "individual" concern. Yet its discussion, too, suggests it would find

come into contact with foodstuffs. The applicants, who bought triclosan and used it to manufacture a product which was then sold on for use in the manufacture of products intended to come into contact with foodstuffs, were directly concerned.

28 Id. at para. 75.
29 AG Kokott's Opinion in Inuit, para. 74. (Note that the ECJ in this case decided the applicants lacked standing merely on the issue of "individual concern.") See also Emma Bonino and others v Parliament and Council, T-60/04, [2005] ECR II-02685, para. 56 (noting both the factual/legal and direct/indirect distinctions in analysing the effects of funding conditions for political parties on Members of Parliament).
30 Stichting Greenpeace, para. 31.
a lack of direct concern, given that the court was of the view that, in the absence of implementing regulations, the contested regulation could only have indirect effects on the applicants.\footnote{Azores, paras. 60-67.}

The further "direct concern" requirement that the \textbf{addressee (MS) has no discretion} is essentially another way the courts block applicants who they deem to only have indirect effects. The idea is that, where the MS has discretion, it could change its action and avoid creating an effect. In the present case it is fairly likely that the Decision will involve further MS implementation and it is clear that the UK intends to do so. The CJEU has exceptionally found this second part of the "direct effect" test satisfied where there was little doubt as to the MS's intended implementation.\footnote{Telefónica, para. 46, Stichting Woonpunt, para. 57, Dansk Automat Brancheforening, para. 31.} However, here it is clear that the court would find there is no direct effect for the Communicants in the present case, based on the case-law discussed above.

2) \textbf{The Individual Concern Test under \textit{Plaumann/Cofaz} is an absolute bar}

As the CJEU has made abundantly clear, the direct and individual concern test established over 50 years ago in \textit{Plaumann} is alive and well.\footnote{Plaumann v Commission, 25/62, [1962] ECR 95; see also Commission v. Aktiengemeinschaft Recht und Eigentum, C-78/03 P, [2005] ECR I-10737, paras. 32-33.} Although, as explained above, the direct concern prong as currently interpreted excludes NGOs aiming to protect the environment, and would thus bar the Communicants' application for annulment, the individual concern prong is also of great concern. Under the \textit{Plaumann} test, a person can only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually.\footnote{European Union ACCC/C/2008/32 (Part 1), para. 86.}

However, as this Committee has found: "\textit{The consequences of applying the Plaumann test to environmental and health issues is that in effect no member of the public is ever able to challenge a decision or a regulation in such case before the ECJ.}"\footnote{See id. at para. 34, repeating the arguments of communicant NGO ClientEarth.} This is because public interests, such as protecting the environment, are \textit{necessarily diffuse and collective}\footnote{Marie-Thérèse Danielsson and Others v Commission, T-219/95 R, [1995] ECR II-03051.} - completely at odds with the \textit{Plaumann}'s requirement that the interests be peculiar, individualized and differentiated. Accordingly, applicants have consistently been denied standing, even where they would suffer harm,\footnote{WWF-UK Ltd v. Council, T-91/07, [2008] ECR-00081. *Summary publication.} and even where they could show that their statutory aim was to protect the environment and that this special status had permitted it to participate in the decision-making process of the contested measure.\footnote{Lesoachranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky, C-240/09, [2011] ECR I-01255.} Any possible relaxation of the CJEU's strict test for standing\footnote{Azores, paras. 60-67.} has been limited to cases concerning contested member state
acts. Where an EU actor, instrument or measure has been challenged, the CJEU has insisted upon its most rigid standards.\textsuperscript{40}

In the context of state aid decisions specifically, applicants challenging the merits of a decision appraising aid taken at the end of the formal examination procedure – such as is the case here – are further subject to the Cofaz rule, under which they are only considered to be individually concerned by that decision if their market position is substantially affected by the aid to which the contested decision relates.\textsuperscript{41} Originally under Cofaz applicants had to further show that they were substantially involved in the procedure before the Commission. Under subsequent case-law,\textsuperscript{42} it is not clear whether this is a second necessary condition; it remains, however, highly relevant to the individual concern inquiry. Noteworthy is the fact that procedural involvement as an indicator weighing in favor of a finding of individual concern is precisely the argument the court rejected in the WWF case. The CJEU’s inconsistency in this respect is striking.

Applying the above to the present case, it is clear that the Communicants could not possibly fulfill the definition of individual concern. Like the applicants in all the previous environmental cases discussed above, the Communicants are protecting diffuse and collective interests. Moreover, the state aid regulation\textsuperscript{43} conceives of “interested parties,” whose interests can give rise to procedural rights, as economic operators, such as the beneficiary of the aid or competing undertakings and trade associations, not NGOs such as the Communicants. It is further obvious that the Communicants are in no way individuals whose market position could be substantially affected. Accordingly, the Communicants would not be deemed to have individual concern. Indeed, from the Cofaz rule, it seems only economic operators could possibly make the requisite showing.

It should be further noted that a court would indeed apply the Cofaz rule in the present case, given the language used in case-law, which repeatedly emphasizes this rule’s application to “applicants” for annulment, rather than the more narrowly defined category “competitors.”\textsuperscript{44} Again, the court’s preferential treatment for those protecting private economic interests in this context is deeply troubling.

However, even were a court to refrain from applying Cofaz to the Communicants, even the basic Plaumann test for individual concern poses an impossible hurdle.

3) NGOs like the Communicants face yet further hurdles

A further hurdle for the Communicants stems from the fact that they are NGOs. Under CJEU case-law, this means that they are promoting the collective interests in two respects: First, the

\textsuperscript{40} As in Joint Cases Vereniging Milieudefensie and Stichting Natuur en Milieu, for example.

\textsuperscript{41} Dansk Automat Brancheforening, para. 32, citing Cofaz.


\textsuperscript{43} Regulation 659/1999, Article 1, sub. h.

\textsuperscript{44} See e.g. Dansk Automat Brancheforening, para. 32.
Communicants necessarily promote collective interests by virtue of protecting the environment, as discussed above. Second, the Communicants would be viewed as promoting the interests of their individual members in a manner parallel to a trade association serving its individual members. Thus, similar to the court in *Stichting Greenpeace*, a court would require the Communicants to prove that their individual members have standing.\(^{45}\) In practice, this is extremely difficult. The NGO or association must show that its individual members belong to something like "closed circle of operators, a fact which individually distinguishes them in relation to" the decision.\(^{46}\) This is yet another onerous, perhaps impossible hurdle for any NGO as long as courts continue refuse to consider things like an NGO's statutory purpose, as the court did in *WWF*.

In conclusion, the Communicants did not attempt to use the domestic remedy of annulment for the simple reason that this remedy is unavailable to them. First, the Communicants could not use Article 263(4)'s third limb because the Decision is not a regulatory act. Even if it were, the third limb would be unavailing because a court would find the Communicants are not directly concerned, and because the Decision entails implementing regulations. Neither could the Communicants use Article 263(4)'s second limb. Again, under recent case-law the Communicants would not be deemed directly concerned; nor would they be individually concerned, especially given the narrow definition thereof in the state aid context, which excludes non-economic actors. The Communicants would face an additional hurdle by virtue of being NGOs.

### III. Preliminary Ruling pursuant to Article 267 TFEU

In cases where the CJEU has rejected an applicant's annulment claim based on a lack of standing, the CJEU has repeatedly emphasized that its jurisprudence provides for another remedy, namely to bring an action in a national court, which could in turn make a request to the ECI for a preliminary ruling pursuant to Article 267 TFEU.\(^{47}\) Not only has this Committee itself found this recourse to be irrelevant for purposes of a communication's admissibility;\(^{48}\) it has specifically found the preliminary ruling procedure to be lacking in several respects and therefore fails in itself to meet the requirement of access to justice in Article 9 of the Convention, and fails to compensate for the CJEU's strict jurisprudence regarding standing in annulment procedures.\(^{49}\)

This Committee's criticisms are as valid today as the day they were adopted in 2011. Crucially, it is not possible to challenge EU-level measures themselves in a national court, as only the CJEU is competent to adjudicate such claims.\(^{50}\) This would include EU Commission decisions such as the state aid Decision here.

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45 *Stichting Greenpeace*, para. 29.


47 See e.g. *Telefónica*, para. 29; *Inuit*, para. 93.


49 Id. at para. 90.

50 Article 263 TFEU. See also *Foto-Frost v Hauptzollamt Lübeck-Ost*, 314-85, EU:C:1987:452.
Moreover, in some cases,\textsuperscript{51} there is no MS implementation involved, in which case there is no basis upon which a national court could competently adjudicate. Even assuming there is an implementing measure at the MS level, it is far from clear that NGOs, individuals and members of the public will be granted standing in the relevant national courts to challenge it and that their complaint would be pursued adequately. Article 19(1) TFEU, which exhorts MSs "to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law," has in no way removed the real-world dangers of challenges before a national court that the applicants in Stichting Greenpeace faced. In the present case the Communicants, being NGOs based in Austria, would likely face very considerable challenges before a UK court indeed.

Further assuming the existence of a national court able and willing to pursue a claim itself, such a court can refuse to refer a question to the ECJ. Even though courts of last instance are compelled under Article 267, paragraph 3 to refer questions, appeals within the national judicial system are prone to significant costs and delays.

That the decision of a MS's national court following a preliminary ruling from the ECJ is only applicable within that specific MS is also of great concern to the Communicants. As explained in the Communication, the Decision is assured to set a dangerous precedent, one which several other EU MSs have already indicated they intend to apply as well.\textsuperscript{52}

The fact is, the preliminary ruling procedure is an incomplete and imperfect means of accomplishing what should be accomplished in a direct action to the CJEU: namely, the adjudication of claims involving breaches of EU laws by EU actors with EU-level consequences before an EU tribunal.

Accordingly, the preliminary ruling procedure pursuant to Article 267 TFEU is a prolonged, ineffective and insufficient means of addressing the Communicants' claims in this case. Thus, the Communicants' failure to seek redress in this domestic remedy is entirely appropriate.

**CONCLUSION:**

The Communicants in the Communication to the ACCC regarding the EU in the state aid Decision for Hinkley Point C have no effective and sufficient domestic remedies available to them. Just as so many other citizens and organizations before them, and so many others today, the Communicants have no access to justice for this environmental matter. The CJEU's bold claim that it "has a comprehensive system of legal remedies"\textsuperscript{53} is belied in the present case.

\textsuperscript{51} Unión de Pequeños Agricultores (UPA) v. Council, C-50/00 P [2002] ECR I-6677, e.g.

\textsuperscript{52} Eight EU nations (the UK, Czech Republic, France, Lithuania, Poland, Romania, Slovakia and Slovenia) have recently lobbied the Commission in support of nuclear power as this body drafts its Energy Union Strategy. See our Communication, pp. 3-4 and Annex 8 thereto for more detail.

\textsuperscript{53} Telefónica, para. 57, citing Inuit, paras. 90-92.
The Communicants cannot use the administrative review mechanism established by the EU's Aarhus Regulation, because that regulation expressly excludes state aid decisions from its scope. Second, the ECJ has clarified that Article 9(3) of the Aarhus Convention may not apply directly or even partially directly, or be used in any way as a benchmark for interpreting the Aarhus Regulation or determining its legality.

Neither can the Communicants apply for annulment under Article 263(4)'s third limb because the State Aid Decision is not an act of general application, and therefore not a regulatory act. Even if it were, the Communicants would be denied standing under the CJEU's recent jurisprudence regarding "direct concern," and because the Decision would be deemed to entail implementing regulations. An annulment action under Article 263(4)'s second limb would again fail according to the CJEU's "direct concern" jurisprudence, and the CJEU's Plaumann test regarding "individual concern" would be an absolute bar to standing. The CJEU's specific "individual concern" test in the context of challenges on the merits made to state aid decisions after an opening decision, as set forth in Cofaz, makes the hopelessness of an annulment claim in this case even more evident. Finally, the Communicants' status as NGOs entails further hurdles.

The preliminary ruling procedure under Article 267 similarly offers no real legal remedy for the Communicants. The Communicants wish to address the violation of EU environmental laws by EU actors at the most appropriate level – directly before an EU tribunal. This is denied them under the preliminary ruling procedure. Even if the UK implements measures pursuant to the Decision in this case, it is unlikely that the Communicants will be able to successfully challenge these measures in a UK court. Still more unclear is whether a properly formed question would be referred to the ECJ without rounds of appeals and significant delays. Indeed, it is unclear whether such questions would be referred at all. What is clear is that, should any question be referred, and presuming the ECJ issued a favorable interpretation, resulting in a ruling from the national court, this would be in no way binding throughout the EU legal order. This is a huge problem for the present case.

In the face of these obvious and certain obstacles, the Communicants have not pursued domestic remedies.

Best wishes,

[Signatures]

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