

**Aarhus Convention Secretariat**

United Nations Economic Commission for Europe  
Environment Division  
Palais des Nations  
CH-1211 Geneva 10  
Switzerland

Vienna, 12 March 2020

**Re: Communication ACCC/C/2015/128 (*European Union*); comments on the suspension**

During the open session of the ACCC meeting of 9 March 2020, we have become aware that the Committee has deferred its consideration of communication ACCC/C/2015/128 (*EU*).

We were taken by this information by surprise because we had not received an email informing us of this step, nor is there any record of such an email on the Committee's webpage relating to case C128. We would have hoped that such a decision would have been notified to the Party, communicant and all interested observers

Moreover, we would have wished to have the opportunity to comment on this decision. We note that the Committee has previously sought the views of the communicant where it decided to defer consideration of a communication until a judgement had been rendered.<sup>1</sup> It is not clear to us why the Committee would deviate from this practice.

It would have been of particular importance in the present case to be able to comment because we consider the upcoming CJEU judgement on Case C-594/18 P *Austria v Commission* as not decisive to the Committee's findings. As essentially set out, for instance, in the communicants' comments of 21 July 2018 and in the observer's comments of 20 July 2018, there are indeed state aid decisions that can violate EU environmental law. The Party concerned does even appear to acknowledge this very point for certain state aid decisions (see for instance para. 33 of the observer comments of 20 July 2018). The only question that will be answered by the CJEU in Case C-594/18 is whether the claimant (Austria) has advanced arguments in relation to EU environmental law that the Commission failed to

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<sup>1</sup> See letter to the communicant of 19 August 2009 in relation to communication ACCC/C/2008/32 (*European Union*).

adequately take into account. This does not answer the question whether this or any other state aid decision could ever violate EU environmental law, which is the standard for the applicable Art. 9 (3) Aarhus Convention. Nor are the argumentation of Austria and the communicant identical, meaning that it is not decisive whether the CJEU finds that any of the EU environmental law relied on by Austria is applicable to this case. The question is rather whether it is conceivable that the state aid decision could contravene EU environmental law – *Austria v Commission* will not conclusively answer that question.

It is of course in principle understandable that the Committee wants to have a full picture when issuing its draft findings. However, as of 9 March 2020 the present communication has been pending for 5 years, which makes any delay rather significant. Even more importantly, and as the Committee is well aware, the European Commission is currently preparing a legislative amendment to Regulation 1367/2006 which is to be finalized and published by the 3<sup>rd</sup> quarter of 2020. There is therefore a real risk that the findings of the Committee will be delayed until after the Commission finished its preparation of this amendment. This would mean missing a central opportunity to immediately address a possible finding of non-compliance. Politically speaking, a quick second revision of the same Regulation is extremely unlikely, moving a resolution of this communication into a far and unforeseeable future.

As the Chair clarified during the open session of 9 March, this decision is indeed recorded in the Committee’s report of its 64<sup>th</sup> meeting. However, we consider that this is not an effective way to inform communicants and observers of such a decisive procedural decision. The Compliance Committee meeting reports are only published a number of months after each meeting. Their publication is also not at that stage notified to communicants and observers. For example, the Committee’s report for the 65<sup>th</sup> meeting is not yet published as of today.

In light of the foregoing, we urge the Committee to reconsider its decision to defer the finalization of its draft findings on case C128. We would instead call on the Committee to issue its findings as soon as possible, so that it can be taken into consideration by the Party concerned in the upcoming revision of Regulation (EC) 1367/2006.

Thank you in advance for considering this request.

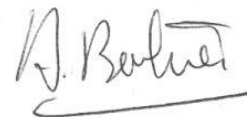
Best regards,



**Thomas Alge**  
**ÖKOBÜERO**



**Reinhard Uhrig**  
**GLOBAL 2000**



**Anaïs Berthier**  
**Client Earth**