

Communication ACCC/C/2015/128

Observer comments on the European Union's reply to questions of 26 June 2018

1. ClientEarth wishes to thank the Compliance Committee for providing it with this opportunity to comment on the reply to questions submitted by the European Union (“**EU**”) in the context of this communication (“**the reply**”). The lack of access to the courts to challenge EU State aid decisions is an issue of ongoing concern and, based on ClientEarth’s experience, a challenge in the ongoing work of non-governmental organisations.
2. This submission is separated into three sections, namely (1) preliminary observations on the EU’s introductory remarks concerning the Aarhus Convention and its legal order (addresses paragraphs 9-14 and 33 of the reply), (2) a statement on the absence of available legal remedies to challenge State aid decisions (addresses questions 6-7 & paragraphs 35-54 of the reply) and (3) an explanation as to why State aid decisions have the potential to contravene national law relating to the environment (addresses questions 1-5 and 8 & paragraphs 16-32 and 55-56 of the reply).

1 Preliminary observations concerning the EU’s introductory remarks (paragraphs 9-14 and 33 of the reply)

3. As a preliminary matter, a number of the introductory remarks made by the EU misrepresent the nature of the obligations under the Aarhus Convention, the substance of the EU Declaration and the current status of EU law.
4. As regards paragraphs 9 and 10 of the reply, it is immaterial that the Commission’s decision authorising aid to Hinkley Point C (the “**State Aid Decision**”) formally falls under competition law. The only decisive factor for the applicability of the obligation in Article 9(3) of the Aarhus Convention is whether the act/omission in question has the potential to contravene national law (i.e. EU law) relating to the environment. This term has been previously interpreted by the Compliance Committee in its findings on communication ACCC/C/2011/63, where it held that:

*“the term encompasses any law under any policy, such as chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, **energy**, taxation or maritime affairs, which may relate in general to, or help to protect, or harm or otherwise impact on the environment”* (emphasis added).¹

¹ Compliance Committee’s findings on communication ACCC/C/2011/63 (Austria), ECE/MP.PP/C.1/2014/3, para. 52 (underline added).

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5. Section 3 below further substantiates why the State Aid Decision constitutes an act that has the potential of contravening provisions of national law relating to the environment based on this definition.
6. Concerning paragraph 11 of the reply, the Declaration made upon approval of the Aarhus Convention by the EU does not modify the obligations that the EU has assumed in a way that would make them subordinate to the Treaties. The EU has ratified the Aarhus Convention and is therefore bound by it as a matter of international law and EU law.² Based on Article 27 of the Vienna Convention on the Law of Treaties, the EU cannot invoke provisions of its internal law as a justification for non-compliance with its Treaty obligations. It is accordingly immaterial that the review of State aid decisions is a special feature of EU law.
7. With regard to paragraph 12 of the reply, the EU is again referring to a statement of an institution which forms part of its internal order (the Court of Justice of the EU, “CJEU”) in order to modify its international law obligations, which is clearly impermissible. Moreover, the Compliance Committee has taken into account the EU Declaration in a row of previous decisions and has found that in some areas the EU has no obligations because of its Declaration.³ However, the Compliance Committee has also already established that the Aarhus Regulation is not exempt from review based on the Declaration.⁴ In fact, the Compliance Committee already specifically addressed the exemption under Article 2(2) of the Aarhus Regulation at issue in the present case.⁵ In this context, the Compliance Committee did not make a finding only because it was lacking sufficient evidence to substantiate non-compliance in the context of the specific case, not because this matter was exempt from review.⁶
8. Paragraph 13 of the reply refers to the matter of available remedies and will therefore be addressed in the following section. However, it should already be emphasized that case C-640/16 P *Greenpeace Energy* was not brought by an environmental NGO acting in the public interest but by a competitor on the energy market.⁷ This example is therefore irrelevant from the perspective of seeking to ensure access to justice for members of the public in environmental matters, as envisaged by Article 9(3) of the Convention. In any event, this case also demonstrates the extreme hurdles to obtain access to the EU courts in State aid matters, as further set out below.
9. Concerning paragraph 14 of the reply, it is irrelevant whether the Member State is obliged to actually go ahead with the authorisation of the power plant. The present communication alleges non-compliance with Article 9(3) which is, as opposed to Article 9(2) of the Aarhus Convention, independent from the permitting of a specific activity. The only relevant and in itself sufficient factor is that the State aid decisions have the potential to contravene national law relating to the environment, as further substantiated in Section 3 below.

² Treaty on the Functioning of the European Union, Art. 216(2): “[International] Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”

³ See in particular, the Compliance Committee’s findings on communications ACCC/C/2014/101 (European Union), ECE/MP.PP/C.1/2017/18, para. 49 onwards and ACCC/C/2014/123 (European Union), ECE/MP.PP/C.1/2017/21, para. 50 onwards.

⁴ ACCC/C/2008/32 (European Union) (Part I), ECE/MP.PP/C.1/2011/4/Add.1, ECE/MP.PP/C.1/2011/4/Add.1, para. 58.

⁵ ACCC/C/2008/32 (European Union) (Part II), ECE/MP.PP/C.1/2017/7, para. 105 onwards.

⁶ *Ibid.*, para. 111.

⁷ Greenpeace Energy is a German energy utility, which is legally and financially independent of the environmental protection organisation Greenpeace e.V..

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10. In any case, ClientEarth highlights that being able to challenge Commission's decisions authorising State aid is critical. Indeed, if a Commission decision breaches national law relating to the environment, such violations will necessarily be reverberated in the enforcement of the State aid measure and the aided project at national level. When State aid is approved, the Member State would necessarily, in practice, go ahead with a project. As one criteria of compatibility of an aid measure with the internal market is whether it is necessary to achieve the sought objective – and a positive decision is conditional upon meeting this criteria – a positive decision entails that a project would not go ahead without aid. It follows that a positive State aid decision does not only authorise the grant of State aid, it also allows, practically, a Member State to implement the project at stake – and therefore may have a direct impact on the environment.
11. A final preliminary point concerns paragraph 33 of the reply. While ClientEarth welcomes the EU's submission that its State aid administrative procedure falls under Article 6 of the Convention, this would entail that the EU would also be required to comply with Article 9(2) of the Convention. It should be self-evident that if such a conclusion were to be accepted, most of the present discussion would become irrelevant and State aid decisions should be challengeable as to their substantive and procedural legality, regardless of applicable national law relating to the environment. However, since the Communication instead realistically concerns non-compliance with Article 9(3) of the Convention, we limit ourselves in the present submission to this legal argument. The EU's submission on this point rather demonstrates a lack of understanding of the requirements of the Convention, which is also apparent in some other arguments discussed below.
12. Having clarified these initial points of the reply, we provide in the following section some further evidence as to why no remedies are available to members of the public to challenge State aid decisions.

2 Absence of available remedies to challenge State aid decisions (questions 6-7 & paragraphs 35-54 of the reply)

13. The fact that no available remedies exist to challenge the State Aid Decision has already been addressed at length in the Communicants' additional information provided on 20 May 2015 and the observer statement of Friends of the Earth of 19 July 2016. The points raised in these documents are confirmed by ClientEarth's experience. ClientEarth has also raised similar arguments in the context of its earlier communication ACCC/C/2008/32 and these matters are as relevant today as they were back then. We will therefore limit our observations to (1) the specific cases referred to by the EU in its reply, namely Case C-640/16 P *Greenpeace Energy* and the preliminary rulings included in Annex 1 to the reply, (2) to the role of interventions before the Court, (3) to the absence of effective remedies for NGOs before national courts of the Member States and (4) to briefly updating the Compliance Committee on the restrictive approach undertaken by the EU Ombudsman in relation to State aid complaints.

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2.1 Article 263(4) TFEU and the Greenpeace Energy case

14. Under paragraph 40 of its reply, the EU concedes that NGOs “cannot even theoretically” challenge a negative State aid decision. However, according to the EU, this would not adversely affect NGOs due to the lack of impact of a refusal to approve State aid on the environment.
15. ClientEarth disagrees with the Commission that there is no such adverse effect. Although the Commission has the exclusive competence to assess the compatibility of a State aid measure with the internal market⁸, one aspect of this compatibility assessment in environmental matters consists in balancing the positive impact of the aid measure on the environment against the competition distortion created by the measure.⁹ As a decision not to authorise State aid is not neutral – as it may preclude a project from having a positive impact on the environment, such as the development of renewable energy sources – it is critical that members of the public who have an interest in protecting the environment are able to challenge such a balancing assessment, in particular cases where the Commission finds that “*the competition distortion is so important as to prevent the aid measure from being implemented in spite of its environmental benefits.*”¹⁰
16. However as demonstrated at length by the Communicants, the “Plaumann” doctrine bars NGOs from request the annulment of State aid decisions before the CJEU under Article 263(4) TFEU. Indeed, the Compliance Committee has already recognized in its findings on communication ACCC/C/2008/32 (Part II) that the requirement of having a “direct and individual concern” constitutes an effective bar to claims brought by NGOs promoting environmental protection.¹¹ This is not called into question by the *Greenpeace Energy* case as the applicant was a market operator, and was in any case denied standing due to its lack of “individual concern”.
17. In this respect, we draw the Compliance Committee’s attention to paragraph 72 of the Commission notice on the enforcement of State aid law by national courts¹² according to which:

*“The principle of effectiveness has a direct impact on the standing of possible claimants before national courts under Article 88(3) of the Treaty. In this respect, **Community law requires that national rules on legal standing do not undermine the right to effective judicial protection. National rules cannot therefore limit legal standing only to the competitors of the beneficiary.** Third parties who are not affected by the distortion of competition resulting from the aid measure **can also have a sufficient legal interest of a different character** (as has been recognised in tax cases) in bringing proceedings before a national court”* (emphasis added).

⁸ TFEU, Art. 108

⁹ EU’s reply, para. 17-19

¹⁰ EU’s reply, para. 19

¹¹ ACCC/C/2008/32 (European Union) (Part II), ECE/MP.PP/C.1/2017/7, para. 64

¹² (2009/C 85/1), OJEU of 9 April 2009, C 85/1

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18. In principle, the EU should apply the same principles of effectiveness of the access to justice to its own procedures – though as described above, it does not do so. Nor has this requirement ensured that national courts provide sufficiently wide legal standing, as further described below.
19. Besides, even if NGOs would be admissible to challenge acts of general scope, as argued by the EU (para. 42 of the reply), this is irrelevant in the context of State aid decisions because they are considered acts of individual scope. For individual acts, a request for internal review under the Aarhus Regulation would be the theoretical avenue. However, as explained in the extensive argumentation from the Communicants and the observer Friends of the Earth, such a challenge is prevented by Article 2(2)(a) of the Aarhus Regulation.
20. An action for annulment under Article 263(4) TFEU is therefore not an available remedy for NGOs to challenge State aid decisions.

2.2 Interventions are insufficient to fulfil the requirements of Article 9(3) (paragraph 43 of the reply)

21. As a quick point on paragraph 43 of the reply, the possibilities to intervene cannot be characterized as access to administrative and judicial remedies in the sense of Article 9(3) of the Convention and are therefore of no relevance to the present argument. As a side note, in the context of the case referred to by the Commission in this paragraph (*CastelInou Energia*), the General Court in fact confirmed that Article 2(2) of the Aarhus Regulation excludes State aid decisions from Requests for Internal Review¹³ and also adopted a very narrow interpretation of which NGOs could intervene.¹⁴

2.3 Absence of relevant remedies to challenge State aid decisions before national courts of the Member States (paragraphs 45-47 of the reply)

22. Throughout its observations and reply, the EU creates confusion between the respective roles of the Commission, the CJEU and national courts of the Member States in relation to access to justice in State aid matters. In a nutshell, the EU argues that NGOs are not deprived of remedies to challenge State aid decisions as they can turn to national courts to which they allegedly have “*unlimited access*” (para. 45 of the reply). This assertion is erroneous for three reasons: (1) NGOs are not “systematically admitted to bring cases before national court” (para.

¹³ T-57/11, Order of 6 November 2012, *CastelInou Energia*, ECLI:EU:T:2012:580, para. 24 (available in French and Spanish only). The Court held: “[...] le règlement (CE) n° 1367/2006 du Parlement européen et du Conseil, du 6 septembre 2006, concernant l'application aux institutions et organes de la Communauté européenne des dispositions de la convention d'Aarhus sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement (JO L 264, p. 13), précise que les recours formés par les organisations de défense de l'environnement qu'il prévoit ne peuvent être introduits contre des actes de la Commission relatifs aux aides d'État [article 2, paragraphe 2, sous a)].”

¹⁴ The General Court considered that only NGOs whose geographical scope was Spain and who could demonstrate specific activities against the production of electricity from coal in Spain were admissible to intervene against a State aid decision authorising such production. As a result, only Greenpeace España was admitted to intervene whereas ClientEarth and Stichting Greenpeace Council, who were active against the production of electricity from coal, subsidies to the coal sector and emissions of greenhouse gases, but at a European and worldwide level and not limited to activities at a Spanish level, were denied standing. See: T-57/11, Order of 6 November 2012, *CastelInou Energia*, ECLI:EU:T:2012:580, para. 16-21 (available in French and Spanish only).

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47 of the reply), (2) national courts of the Member States do not have full jurisdiction on State aid matters and (3) existing case law on State aid decisions confirms lack of access to the CJEU despite Article 267 TFEU.

2.3.1 NGOs are not “systematically admitted to bring cases before national court”

23. For one, the EU errs in fact and law when arguing that NGOs are systematically admitted to challenge State aid decisions before national courts. The challenges encountered in obtaining access to courts in the EU Member States are well documented¹⁵ and by deciding to not adopt a Directive to address the matter, the EU has not taken up the opportunity to address these challenges.¹⁶

2.3.2 National courts of the Member States do not have full jurisdiction on State aid matters

24. National courts are only competent to provide the following remedies: determining whether a measure is a State aid¹⁷ (but not rule on its compatibility with the internal market); preventing payment and ordering recovery of unlawful aid;¹⁸ ordering interim measures;¹⁹ enforcing recovery orders;²⁰ and granting damages.²¹

25. These are only competences in support to a Commission's negative decision (i.e. a decision not to authorise State aid) or annulment of a positive decision by the CJEU (i.e. a decision to authorise State aid), and are not remedies for challenging a decision. Besides, they are not all available to NGOs (e.g. grant of damages).

2.3.3 Existing case law on State aid decisions confirms lack of access to the CJEU

26. In theory, national courts have the obligation to refer a question to the CJEU for a preliminary ruling under Article 267 TFEU to assess the validity of a Commission decision, as this is not within their own competence. The reasons why this route is not readily available are already well explained by the submissions of the Communicants and Friends of the Earth.²² ClientEarth's experience confirms the extreme difficulties in convincing national courts to refer questions for a preliminary ruling, even for interpretation of EU law.²³

¹⁵ See for instance, the 2012/2013 Access to Justice Studies conducted by Professor Darpo (http://ec.europa.eu/environment/aarhus/access_studies.htm) and the 2007 Milieu Study (http://ec.europa.eu/environment/aarhus/study_access.htm).

¹⁶ The Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, (COM/2003/0624 final) was abandoned on 21 May 2014.

¹⁷ Commission notice on the enforcement of State aid law by national courts, para. 10

¹⁸ *Idem*, para. 26(a) and (b), 28-29 (on preventing payments) and 30-31 (on recovery: “the national court can and must limit itself to determining whether the measure constitutes State aid and whether the standstill obligation applies to it.”

¹⁹ *Idem*, para. 21(e), 56

²⁰ *Idem*, para. 21(b). See Case C-232/05, 5 October 2006, *Commission v. France*, ECLI:EU:C:2006:651, para. 60: “the Commission's decision concerning the recovery of sums owed [pursuant to a recovery order] cannot be called in question before a national court. **That question is reserved for the [General Court], which will resolve it in an action for annulment brought before it.**”

²¹ *Idem*, para. 26(d), 43

²² Additional information submitted by the communicant, 20 May 2015, pp. 9-10 and Observer statement from Friends of the Earth, 21 July 2016.

²³ As an example of recent experience, ClientEarth attempted to challenge the inadequacy of air quality programmes in both Poland and Bulgaria and was denied standing to do so, both by the first instance court and the Supreme Administrative Court of each country. Even though clear and

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27. More specifically in the context of State aid measures, the very fact that the EU is unable, in its reply, to substantiate its submission (i.e. that NGOs can obtain preliminary rulings on the validity of State aid decisions) with a single example is self-defeating. Annex 1 to the reply lists some examples of cases referred for preliminary rulings in State aid matters – none of which involve an NGO as plaintiff.
28. The list in the EU's Annex 1 is incomplete and does not explain why and how the EU chose those particular examples, with only one case (Case C-135/16, *Georgsmarienhütte and Others*) relating to energy and the environment – which are at the core of the present debate.
29. In order to provide the Committee with a more relevant and accurate overview, ClientEarth has taken the time to search all available cases of reference of preliminary rulings on State aid matters which are related to energy and environment and then verified whether (a) they concern the validity of a State aid decision and (b) whether they had been filed by an NGO. As presented in an annex to this submission, the result of this research exercise is that only two cases of reference for preliminary rulings on State aid matters in the environment or energy sectors question the validity of Commission's decisions, and none of the cases features an NGO as plaintiff. The only case found where an NGO applied for a procedure under Article 267 TFEU on State aid matters in the environment or energy sectors concerns instead interpretation of EU law, and is the *Vent de Colère* case already quoted by the Commission (para. 48 of the reply).

2.4 Lack of administrative review procedure for challenging a State aid decision

30. As a final note on some recent developments, the Compliance Committee will be well aware that under Article 108 TFEU the Commission has the exclusive power to investigate cases of unlawful State aid measures (i.e. not notified) and assess their compatibility with the internal market. To that end, "interested parties" have the possibility to complain to the Commission and the Commission has the discretion to start investigations. In accordance with the findings of the Compliance Committee, such a right to ask an authority to take action does not amount to a challenge for the purposes of Article 9(3) of the Convention.²⁴ It is nonetheless interesting to note that the Commission has interpreted "interested parties" to only be persons whose market position or the one of their members can be affected (excluding NGOs); on 3 May 2018, the European Ombudsman adopted an even narrower, and *contra legem*, interpretation of Article 1(h) of the State aid Procedural Regulation by limiting "interested parties" to competitors of the aid beneficiary only.²⁵

unequivocal CJEU precedents exist on the very point that NGOs should be granted standing in such situations (see Case C-237/07 *Janeček*, ECLI:EU:C:2008:447 and Case C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382) national courts in these cases refused to make a preliminary reference to the CJEU. Thus, despite the considerable investment of funds and time in both cases, ClientEarth was on final instance left with two judgements that violate EU law, and without access to the CJEU. It should be emphasized that engaging in such lengthy litigation is only rarely affordable for environmental NGOs and can therefore not be tried frequently. The Polish case (file No. II OSK 3218/17) has also been brought to the attention of the Committee in the context of communication ACCC/C/2017.

²⁴ Committee's findings on communication ACCC/C/2013/85&86 (United Kingdom), ECE/MP.PP/C.1/2016/10, paras. 83-84.

²⁵ The Ombudsman held: "[...] it is clear that in order to be considered an interested party, one needs to demonstrate that the alleged State aid affects one's competitive position or that of the persons or firms one represents." See EU Ombudsman decision in case 1226/2017/CEC on the European Commission's rejection of a State aid complaint due to a lack of interest, 3 May 2018; also, read ClientEarth' analysis dated 4 July 2018 at: <https://www.clientearth.org/eu-ombudsmans-decision-reinforces-lack-of-access-to-justice-in-state-aid-matters/>.

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31. This demonstrates how doors close one after the other to NGOs seeking to be involved in State aid decisions.

3 EU procedures and decisional practice recognise that State aid decisions may contravene national law related to the environment (questions 1-5 and 8 & paragraphs 16-32 and 55-56 of the reply)

32. Contrary to the EU's arguments, the Commission is not exonerated from duly taking into account national law relating to the environment, whether it stems from the Treaties or EU secondary legislation.²⁶

33. Firstly, the EU recognises in paragraph 24 of its reply that the Commission shall assess compliance of State aid measures falling within the scope of the 2014 Guidelines on State aid for environmental protection and energy with national law relating to the environment, in particular the Water Framework Directive and the Waste Management Directive. Recital 29 of the Guidelines clearly states that "*if a State aid measure or the conditions attached to it (...) entail a non-severable violation of Union law [which includes primary and secondary legislation, and necessarily includes environmental legislation], the aid cannot be declared compatible with the internal market*" (emphasis added).

34. It follows that NGOs promoting environmental protection should be able to request the Court to exercise its supervision over the Commission's assessment in a State aid decision in this respect. Since Article 2(2)(a) of the Aarhus Regulation instead excludes all State aid decisions from its scope (whether or not they fall under the Guidelines), the EU has thereby effectively acknowledged that the procedures governing State aid decisions may not comply with Aarhus Convention requirements, including Article 9(3).

35. Secondly, there is a general obligation on the Commission to ensure that EU law is applied, as per Article 17(1) TEU,²⁷ and this is independent of whether any guidelines are applicable. Logically, the Commission may not avoid its own obligation to comply with EU law (including other provisions than Articles 106-108 TFEU) when it acts as an administrative review body, such as in State aid matters.

²⁶ M. STOCZKIEWICZ, "Environmental Aspects of State Aid for Energy Investment Projects" in B. Vanheusden & L. Squintani, eds, *EU Environmental and Planning Law Aspects of Large-Scale Projects* (Intersentia Ltd, Cambridge, 2016), pp. 11-26, available online at: https://uhdSPACE.uhasselt.be/dSPACE/bitstream/1942/21154/1/EU%20Environmental%20and%20Planning%20Law%20Aspects_2ndproof.pdf

²⁷ TEU, Art. 17(1): "*The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union [...]*".

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36. As the Court held in the *Castelnou Energía* case:

“According to settled case-law, when the Commission applies the State aid procedure, it is required, in accordance with the general scheme of the Treaty, to ensure that provisions governing State aid are applied consistently with specific provisions other than those relating to State aid and, therefore, to assess the compatibility of the aid in question with those specific provisions.”²⁸

37. As mentioned above, those provisions may stem from the Treaties, general principles or EU secondary legislation relating to the environment.

38. As for **principles found in the Treaties (questions 3-4)**, Article 3(3) TEU sets a “*high level of protection and improvement of the quality of the environment*” as one of the essential objectives of the EU.²⁹ Integrating this fundamental principle in all EU policies and decision-making processes³⁰, Article 11 TFEU provides that “*Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.*”

39. As confirmed in the *British Aggregates* case³¹, compliance with Article 11 TFEU is a prerequisite for the authorisation of State aid in environmental matters.

40. One example is that only aid measures to incentivise undertakings to improve their environmental performance beyond regulatory standards may be authorised, compared to merely meeting existing standards. Although this principle is now enshrined in the EEAG³², it falls within the general assessment criteria of the incentive effect of aid measures under Article 107(3) TFEU as well.

41. It is immaterial in this regard that a State aid measure pursues environmental objectives as per Article 191(1) TFEU or energy objectives as per Article 194(1) TFEU, as in the State Aid Decision³³ (see paras. 20 and 56 of the reply). Indeed Article 194(1) provides that the Union energy policy – which is designed and implemented by the Commission through State aid decisions in the energy sector – shall have “*regard for the need to preserve and improve the environment*”. Moreover as the Compliance Committee held in its findings on communication ACCC/C/2011/63 (Austria):

²⁸ *Castelnou*, para. 181 referring to *Matra v Commission*, EU:C:1993:239, paragraphs 41 to 43, T-197/97 and T-198/97, *Weyl Beef Products and Others v Commission*, ECR, EU:T:2001:28, paragraphs 75 and 77.

²⁹ C-240/83, 7 February 1985, *ADBHU*, ECLI:EU:C:1985:59; C-86/03, 15 December 2005, *Greece v. Commission*, ECLI:EU:C:2005:769, para. 96 ; C-487/06 P, 22 December 2008, *British Aggregates Association v. Commission*, ECLI:EU:C:2008:757, para. 91-92 : “*protection of the environment constitutes one of the essential objectives of the Community. In that regard, Article 2 EC states that the Community has, as one of its tasks, to promote ‘a high level of protection and improvement of the quality of the environment’ and, to that end, Article 3(1)(l) EC provides for the establishment of a ‘policy in the sphere of the environment’ [...] account may in any event usefully be taken of the environmental objectives when the compatibility of the State aid measure with the common market is being assessed pursuant to Article 87(3) EC [...]*. See also T-375/03, 20 September 2007, *Fachvereinigung Mineralfaserindustrie*, ECLI:EU:T:2007:293, para. 142-143

³⁰ DE SADELEER N., *Environnement et Marché intérieur*, Commentaire J. Mégret (3^{ème} ed. 2010), ed. Université de Bruxelles, p. 24

³¹ T-210/02, 13 September 2006, *British Aggregates*, ECLI:EU:T:2006:253, para. 117 – reference to para. 90-92 of the CJEU case in para. 17 of the reply is erroneous. See also C-240/83, 7 February 1985, *ADBHU*, ECLI:EU:C:1985:59, para. 12-13: “*it should be observed that the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community provided that the rights in question are not substantively impaired. (...) The directive must be seen in the perspective of environmental protection, which is one of the Community’s essential objectives.*”

³² EEAG, para. 53

³³ Commission’s final decision of 8 October 2014, para. 373-374

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*“the term [“national law relating to the environment”] encompasses any law under any policy, such as chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, **energy**, taxation or maritime affairs, which may relate in general to, or help to protect, or harm or otherwise impact on the environment” (emphasis added).³⁴*

42. In the assessment of the objectives put forward by the Member States, the Commission refers frequently to these provisions. This is in fact also reflected in the final State Aid Decision at dispute in the present communication³⁵ and the General Court's judgement on the same Decision on the application of Austria.³⁶
43. As regards the Compliance Committee's fifth question, it should be noted that a State aid decision can also contravene **international agreements** entered into by the EU. Based on Article 216(2) TFEU: *“[International] Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”* International agreements therefore form part of primary EU law and the Commission is obliged to comply with these agreements; the same as being obliged to comply with the Treaties.
44. As for **general principles** of national law relating to the environment such as the “polluter pays” principle, it is clear from the Commission's decisional practice that such principles are enshrined in the assessment of State aid measures under Article 107 TFEU itself. As clearly summarised by Advocate General Jacobs:

“In its State aid practice the Commission uses the polluter-pays principle for two distinct purposes, namely (a) to determine whether a measure constitutes State aid within the meaning of Article 87(1) EC and (b) to decide whether a given aid may be declared compatible with the Treaty under Article 87(3) EC. (...).”³⁷

45. In short, one of the criteria for qualifying a measure as a State aid is whether it grants an advantage to an undertaking. A measure that relieves an undertaking from the costs it would have incurred in the normal course of its business and under normal market conditions e.g. costs of decontaminating a site, or of relocating populations affected by extractive activities³⁸, in proportions that would undermine or breach the “polluter pays” principle, are such advantages and a measure may therefore be qualified as State aid (assuming the other usual criteria are also met).

³⁴ Compliance Committee's findings on communication ACCC/C/2011/63 (Austria), ECE/MP.PP/C.1/2014/3, para. 52 (underline added).

³⁵ Final State Aid Decision on Hinkley Point C (Annex 2 to the communication), paras. 237, 505 and 526. While the Commission emphasizes mostly the freedom of the UK to determine its own energy mix, this goes to the substance of whether or not their was non-compliance with the Treaties, not whether the provisions of the Treaty needed to be complied with.

³⁶ Court's judgement of 12 July 2018 on Case T-365/15 Austria v Commission, ECLI:EU:T:2018:439, paras. 101, 237 and 507. Note that ClientEarth does not endorse the findings of the Court on various legal points in this judgement and that the General Court's decision may still be appealed by Austria.

³⁷ Conclusions of Advocate General Jacobs delivered on 30 April 2002 under Case C-126/01, *GEMO*, ECLI:EU:C:2002:273, para. 68-71

³⁸ See for a recent example of a positive decision of the Commission, approving Dutch support to compensate damage linked to gas extraction in the province of Groningen, where a Dutch gas company involved in extraction in the affected area took on its own charge three quarters of the costs of relocating populations affected by earthquakes caused by gas extraction, in compliance with the polluter pays principle: SA.47866 (not yet available). Press release available at: http://europa.eu/rapid/press-release_MEX-18-4524_en.htm

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46. When a measure is qualified as State aid under Article 107(1) TFEU, the Commission proceeds to assess its compatibility with the internal market under either Article 107(2) – where the Commission has no discretion – or Article 107(3) – where the Commission has some discretion to assess the measure.
47. Assessment of the polluter pays principle also intervenes when assessing the compatibility of a State aid measure with national law relating to the environment, in particular when assessing the proportionality of the aid measure. The question becomes whether the undertaking is relieved from costs it would normally have to incur according to that principle, in an amount that is limited to the minimum needed to achieve the environmental protection or energy objective aimed for.³⁹
48. Lastly, as for assessing compliance of State aid measures with **EU directives and regulations** (question 2), it is settled case-law that the Commission may take into account EU secondary legislation when relevant and **shall** do so when particular rules “*are so inextricably linked to the object of the aid that it is impossible to evaluate them separately*”.⁴⁰
49. Paragraph 25 of the reply is misleading in stating that, outside the scope of guidelines, the Commission is not required to review a State aid measure against EU directives and regulations. In the State Aid Decision (para. 348-365), the Commission assessed in details whether public procurement rules applied to the aid measure. Should they have applied (the Commission concluded negatively), the aid measure could not have been authorised without conditions.⁴¹ The fact that the aid measure granted to Hinkley Point C fell outside the scope of guidelines is therefore not a justification claiming that the Commission was not obliged to assess compliance of the project with EU law, including environmental law.
50. On the contrary, the Commission does assess State aid measures with the objective of meeting EU targets for the reduction of greenhouse gas emissions and EU secondary legislation, i.e. national law relating to the environment, even when the objective of the measure is not to protect the environment. In a decision concerning support for the use of environmentally friendly electric vehicles in the Netherlands by developing a nationwide infrastructure of publicly accessible electric charging posts, the Commission found that (1) the aid measure is outside the scope of the EEAG and shall therefore be assessed under Article 107(3)(c) TFEU, (2) it contributes to the development of electric mobility which is in itself a priority of the EU, (3) it “*will also help the Netherlands meet their 2020 10% target for energy from renewable sources in transport set by the Renewables Directive*”, i.e. national law relating to the environment, (4) that “*this initiative is fully in line with Directive 2014/94/EU on the deployment of alternative fuels infrastructure*”, i.e. national law relating to the environment and (5) would also help improving air quality, i.e. improvement of health which is an objective of Article 9 TFEU.⁴²

³⁹ See 2014 EEAG, para. 69

⁴⁰ *Castelnuovo*, para. 182. See also case law cited therein.

⁴¹ The Commission may ask a Member State to redesign a measure, or organise a public tender in that case to ensure it complies with public procurement rules. The Commission refers in this context for instance to the Electricity Directive.

⁴² Commission decision of 11 August 2015, SA. State Aid SA.38769 (2015/N) – The Netherlands, *The Green Deal for Publicly Accessible Charging Infrastructure Scheme*, para. 40-44

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51. Such compliance assessment is obviously subject to supervision of the Court; as confirmed (*a contrario*) by the General Court on 12 July 2018 in its ruling upholding the State Aid Decision, the Court would verify the Commission's assessment of EU environmental legislation would it be raised by the plaintiffs:

"[...] in so far as, by their arguments, the Republic of Austria and the Grand Duchy of Luxembourg seek to establish that measures that are contrary to EU law may not be authorised by the Commission, it should be noted that, apart from the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability [which were addressed by the Court in the previous paragraph], those Member States do not invoke any EU environmental legislation that may not have been complied with." (emphasis added)⁴³

52. Consequently, access to justice by members of the public under Article 9(3) of the Aarhus Convention is critical, as they should be able to challenge a State aid decision when, for instance:

- **The objectives pursued by a State aid measure contradict the objective of protection of the environment set by Article 11 TFEU that shall be integrated in all EU policies and decisional practices.** This is arguably the case of promoting nuclear energy to the detriment of development of renewable energy sources. The liberty of Member States to choose their energy mix remains legally subject to taking environmental considerations into account, as is clear from the first sentence of Article 194(1) TFEU⁴⁴.
- **The Commission failed to take due account, or erred in its application of EU regulations and directives related to the environment,** whereas it was relevant to take such legislation into account or whereas the Commission was bound to do so due to its inextricable link with the object of the aid measure. In the case of Hinkley Point C, as stated in paragraph 20 of the reply, the UK did not invoke environmental protection as a specific justification but it did invoke the objectives of decarbonisation, security of supply and diversity of generation.⁴⁵ All three justifications are related to energy development and have a clear connection to environmental protection – they therefore fall under the concept of "law relating to the environment". The intrinsic link between energy, environment and climate is reflected for example on the Renewable Energy⁴⁶ and Energy Efficiency Directives⁴⁷, but also in the European Energy Security Strategy.⁴⁸ Those are examples of

⁴³ T-365/15, 12 July 2018, *Austria v Commission*, ECLI:EU:T:2018:439, para. 517.

⁴⁴ See EU's reply para. 10 where the EU inaccurately considers that it is merely a political choice.

⁴⁵ Commission's opening decision of 18 December 2013, para. 238

⁴⁶ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140 of 5 June 2009, p. 16, recital (44): "that *"The coherence between the objectives of this Directive and the Community's other environmental legislation should be ensured. In particular, during the assessment, planning or licensing procedures for renewable energy installations, Member States should take account of all Community environmental legislation and the contribution made by renewable energy sources towards meeting environmental and climate change objectives, in particular when compared to non-renewable energy installations"*.

⁴⁷ Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU, OJ L 315 of 14 November 2012, p. 1, recital (1): "*Energy efficiency is a valuable means to address these challenges. It improves the Union's security of supply by reducing primary energy consumption and decreasing energy imports. It helps to reduce greenhouse gas emissions in a cost-effective way and thereby to mitigate climate change."*

⁴⁸ Communication from the Commission to the European Parliament and the Council, European Energy Security Strategy, COM/2014/0330 final, Sect. 4.2: "*Both during permitting and project implementation [of interconnectors, i.e. energy transport infrastructure], due account should be taken of existing EU environmental legislation and guidance to ensure the environmental sustainability and secure public support and acceptance for the project.*"; see also sect. 5.1: "*The exploitation of conventional oil and gas resources in Europe, both in traditional production areas (e.g. the North Sea)*

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EU regulations that the Commission shall thus take into account when assessing energy measures.

- **An aid measure has positive effects on the environment, whilst it is arguably not the case.** We can take the example of a measure aiding the construction of a biomass plant – that arguably contributes to environmental protection and sustainable development in the sense of Article 11 TFEU as a sustainable energy source and will have a net positive climate impact. However, (in our scenario) the proposed biomass plant would obtain its wood from unsustainable logging practices and in fact have a net negative climate impact. An NGO should be able to challenge a Commission's assessment that the positive environmental effects outweigh the market distortion and thereby authorises the State aid measure.
 - **Positive effects on the environment of an aid measure are outweighed by competition distortion, where this is arguably erroneous.** Another example could be when a Member State proposes to grant State aid for a number of offshore wind farm developments. The Commission decides, in our example, that the State aid is not sufficiently justified under Article 11 TFEU and thus finds that environmental protection does not outweigh the market distortion. In such a situation, the failure to authorise the aid leads to the wind farm not being built and the Member State instead prolongs the operation of coal-fired power plants. Again, the Commission has arguably failed to comply with Article 11 TFEU and an NGO should be able to challenge this contravention of national law relating to the environment.
53. Since plaintiffs who currently meet the "Plaumann" admissibility criteria, i.e. aid beneficiaries, competitors or trade unions, are less likely than members of the public active in protecting the environment to raise such pleas of illegality of State aid decision, it is absolutely necessary that access to justice is granted in these matters pursuant to Article 9(3) of the Aarhus Convention.

4 Proposed findings and recommendations

54. In view of the above, ClientEarth submits that the Compliance Committee should find that the Party concerned fails to comply with Article 9, paragraphs 3 and 4, of the Convention by failing to ensure that members of the public have access to administrative or judicial procedures to challenge EU Commission's State aid decisions.
55. The Compliance Committee should, moreover, emphasize that procedures must be available to challenge not only State aid measures which serve an environmental objective but any State aid decision which may contravene national law relating to the environment, specifically

and in newly discovered areas (e.g. Eastern Mediterranean, Black Sea), should be developed in full compliance with energy and environmental legislation".

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including (but not limited to) State aid decisions on proposed measures relating to nuclear energy and other forms of energy production.

56. As a consequence, ClientEarth submits that the Compliance Committee should recommend that:

- All relevant European Union institutions within their competences take the steps necessary to ensure that members of the public have access to administrative or judicial procedures to challenge State aid decisions, in accordance with Article 9, paragraphs 3 and 4, of the Convention.
- If and to the extent that the Party concerned intends to rely on the Aarhus Regulation or other European Union legislation to implement Article 9, paragraphs 3 and 4, of the Convention: the Aarhus Regulation be amended, in particular its Article 2(2)(a), or any new European Union legislation be drafted, so that it is clear to the CJEU that members of the public shall have access to administrative or judicial procedures to challenge State aid decisions;
- If and to the extent that the Party concerned is going to rely on the jurisprudence of the CJEU to ensure that the obligations arising under Article 9, paragraphs 3 and 4, of the Convention are implemented, the CJEU interpret European Union law in a way which ensures that members of the public have access to administrative or judicial procedures to challenge State aid decisions.

Yours sincerely,



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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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Annex to ClientEarth observations in case ACCC/C-2015/128

This annex supplements paragraph 29 of ClientEarth' submission on the application of Article 267 TFEU. The following cases referred for preliminary ruling to the CJEU have been selected based on their relation with State aid, on the one hand and environment or energy matters, on the other hand.

ClientEarth has searched all available cases of reference for preliminary rulings in State aid matters which are related to energy and environment and then verified whether (a) they concern the validity of a State aid decision and (b) whether they had been filed by an NGO.

Only two cases referred the validity of Commission's State aid decisions (cases C-135/16, *Georgsmarienhütte GmbH* and case C-262/11, *Kremikovtsi AD*) while all the other referred questions of interpretation of EU State aid law.

Only one case was brought by an NGO promoting protection of the environment, along with natural persons (case Case C-262/12, *Vent de Colère*). However that case does not refer the validity of a Commission's State aid decision.

This demonstrate that reference for preliminary rulings on the validity of State aid decisions relating to the environment is not generally accessible to the public concerned, as opposed to what Article 9(3) of the Aarhus Convention requires.

Cases references	Question of validity of a Commission's decision or interpretation of EU law	Questions referred to the CJEU in relation with State aid and the environment or energy	Was the claimant an NGO?
<p>C-135/16</p> <p>Applicants: Georgsmarienhütte GmbH, Stahlwerk Bous GmbH, Schmiedag GmbH, Harz Guss Zorge GmbH</p> <p>Lodged on 7 March 2016</p>	<p>Validity of a Commission's decision</p>	<p>"Does the European Commission Decision of 25 November 2014 (Commission Decision of 25.11.2014 on the aid scheme SA.33995 (2013/C) (ex 2013/NN) implemented by Germany for the support of renewable electricity and of energy-intensive users, C(2014)8786</p>	<p>No</p>

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<p>Case in progress</p>		<p>final) breach the Treaty on the Functioning of the European Union in so far as the Commission qualifies the limitation of the EEG-surcharge as aid within the meaning of Article 107 TFEU?"</p>	
<p>C-262/11</p> <p>Applicant: Kremikovtsi AD</p> <p>Lodged on 26 May 2011</p> <p>Judgement of 22 November 2012 (ECLI:EU:C:2012:760)</p>	<p>Validity / interpretation of a Commission's decision</p>	<p>"If the answer given to the previous question is in the affirmative: Is the Commission Decision of 15 December 2009 produced to the Varhoven administrativen sad (Higher Administrative Court) to be considered a negative decision on unlawful aid within the meaning of Article 14 of Regulation No 659/1999?"</p>	<p>No</p>
<p>C-262/12</p> <p>Applicants : Association Vent De Colère! Fédération nationale, Alain Bruguier, Jean-Pierre Le Gorgeu, Marie-Christine Piot, Eric Errec, Didier Wirth, Daniel Steinbach, Sabine Servan-Schreiber, Philippe Rusch, Pierre Recher, Jean-Louis Moret, Didier Jocteur Monrozier</p> <p>Lodged on 29 May 2012</p>	<p>Interpretation of EU law</p>	<p>"In the light of the change in the mechanism for financing in full the additional costs imposed on Électricité de France and the non-nationalised distributors referred to in Article 23 of Law No 46-628 of 8 April 1946 on the nationalisation of electricity and gas by the obligation to purchase at a price higher than the market price the electricity generated by wind-power installations, as</p>	<p>Yes: NGO and natural persons</p>

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<p>Judgement of 19 December 2013 (ECLI:EU:C:2013:851)</p>		<p>a result of Law No 2003-8 of 3 January 2003, must that mechanism now be regarded as an intervention by the State or through State resources within the meaning, and for the application, of [Article 107(1) TFEU]?"</p>	
<p>C-105/18, C-106/18, C-107/18, C-109/18, C-110/18, C-111/18, C-112/18, C-113/18</p> <p>Multiple applicants</p> <p>Lodged on 13 February 2018</p> <p>Case in progress</p>	<p>Interpretation of EU law</p>	<p>"Must Article 107(1) TFEU be interpreted as meaning that the levying of a hydraulic tax such as that at issue to the detriment of hydroelectricity producers operating within river basins encompassing more than one autonomous community constitutes prohibited State aid, in that it introduces an asymmetrical system of taxation within the same area of technology, depending on the plant's location, and the tax is not levied on producers of energy from other sources?"</p>	<p>No</p>
<p>C-706/17</p> <p>Applicants: Achema AB, Orlen Lietuva AB, Lifosa AB</p> <p>Valstybinė kainų ir energetikos kontrolės komisija (VKEKK)</p>	<p>Interpretation of EU law</p>	<p>Several questions relating to the legislative framework for the provision of public interest services in the electricity sector and their financing (compensation) established in the Lithuanian Law on electricity, in the Lithuanian Law on</p>	<p>No</p>

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<p>Lodged on 18 December 2017</p> <p>Case in progress</p>		<p>energy from renewable sources, in the Lithuanian Law on integration of the electricity system into European electricity systems, in the Lithuanian Law implementing the Law amending and supplementing Articles 2, 11, 13, 14, 16, 20 and 21 of the Law on energy from renewable sources and in the legal measures implementing those laws.</p>	
<p>C-585/17</p> <p>Applicants: Finanzamt Linz, Finanzamt Kirchdorf Perg Steyr</p> <p>Intervener: Dilly's Wellnesshotel GmbH</p> <p>Lodged on 5 October 2017</p> <p>Case in progress</p>	<p>Interpretation of EU law</p>	<p>"Does an energy tax rebate scheme such as that at issue here, under which the amount of the energy tax rebate is clearly determined by law on the basis of a calculation formula, fulfil the conditions laid down in Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty?"</p>	<p>No</p>
<p>Joined C-583/16 and C-584/16</p> <p>Applicant: Green Yellow Canet en Roussillon SNC</p>	<p>Interpretation of EU law</p>	<p>"Must Article 107(1) TFEU be interpreted as meaning that the obligation to purchase the electricity generated by plants which use solar</p>	<p>No</p>

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<p>Lodged on 17 November 2016</p> <p>Order of the President of the Court of 18 May 2017 (no EUCLI reference): removal</p>		<p>radiation energy at a price higher than the market price, that is financed by all final consumers of electricity, as it results from the Ministerial Orders of 10 July 2006 (JORF No 171 of 26 July 2006, p. 11133) and 12 January 2010 (JORF No 0011 of 14 January 2010, p. 727) fixing the conditions for purchasing that electricity, read in conjunction with Law No 2000-108 of 10 February 2000 on the modernisation and development of the public electricity service, Decree No 2000-1196 of 6 December 2000 and Decree No 2001-410 of 10 May 2001, constitutes State aid?"</p>	
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<p>C-515/16</p> <p>Appellant: Enedis SA, formerly Électricité Réseau Distribution de France (ERDF)</p> <p>Lodged on 3 October 2016</p> <p>Order of 15 March 2017 (ECLI:EU:C:2017:217): the measure involves State resources</p>	<p>Interpretation of EU law</p>	<p>“Must Article 107(1) TFEU be interpreted as meaning that the obligation to purchase the electricity generated by plants which use solar radiation energy at a price higher than the market price, that is financed by all final consumers of electricity, as it results from the Ministerial Orders of 10 July 2006 (JORF No 171 of 26 July 2006, p. 11133) and 12 January 2010 (JORF No 0011 of 14 January 2010, p. 727) fixing the conditions for purchasing that electricity, read in conjunction with Law No 2000-108 of 10 February 2000 on the modernisation and development of the public electricity service, Decree No 2000-1196 of 6 December 2000 and Decree No 2001-410 of 10 May 2001, constitutes State aid?”</p>	<p>No</p>
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<p>C-556/15</p> <p>Applicant and appellant: Fondul Proprietatea SA</p> <p>Lodged on 28 October 2015</p> <p>Order of 22 June 2017 (ECLI:EU:C:2017:494) (inadmissibility of the reference for preliminary ruling)</p>	<p>Interpretation of EU law</p>	<p>“Must Article 107 TFEU be interpreted as meaning that the participation of the Complexul Energetic Oltenia SA in the capital of the project company Hidro Tarnița SA, whose object is to construct and operate the Tarnița-Lăpușești hydroelectric power station, constitutes State aid to the producers of wind and photovoltaic energy in that the declared aim of the project is to guarantee optimal conditions for the installation of greater capacity in the power stations which produce those types of energy, that is to say: (i) is it a measure financed by the State or through State resources, (ii) is it selective in nature, and (iii) can it affect trade between the Member States?”</p>	<p>No</p>
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<p>C-574/14</p> <p>Applicant: PGE Górnictwo i Energetyka Konwencjonalna S.A.</p> <p>Lodged on 11 December 2014</p>	<p>Interpretation of EU law</p>	<p>This request for a preliminary ruling concerns the interpretation of Article 107 TFEU and Article 4(3) TEU, read together with the provisions of Commission Decision 2009/287/EC of 25 September 2007 on State aid awarded by Poland as part of Power Purchase Agreements and the State aid which Poland is planning to award concerning compensation for the voluntary</p>	<p>No</p>
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<p>Judgement of 15 September 2016 (ECLI:EU:C:2016:686)</p>		<p>termination of Power Purchase Agreements.</p>	
<p>C-493/14 Appellant: Dilly's Wellnesshotel GmbH Lodged on 6 November 2014 Judgement of 21 July 2016 (ECLI:EU:C:2016:577)</p>	<p>Interpretation of EU law</p>	<p>Second question is: "Is EU law infringed if an aid scheme is based on the special procedure of the GBER which is applicable to environmental aid in accordance with Article 25 but the requirements laid down in Chapter II — namely the promotion of environmental protection measures and energy-saving measures under Article 17(1) GBER — are not satisfied?"</p>	<p>No</p>
<p>C-5/14 Applicant: Kernkraftwerke Lippe-Ems GmbH Lodged on 7 January 2014 Judgement of 4 June 2015 (ECLI:EU:C:2015:354)</p>	<p>Interpretation of EU law</p>	<p>"Do Directives 2008/118/EC and 2003/96/EC, which were adopted for the harmonization of excise duty and for energy products and electricity in the Union, preclude the introduction of a national duty which is levied on nuclear fuels used for the commercial production of electricity? Does this depend on whether the national duty can be expected to be passed on to consumers by means of the electricity price and, if appropriate, what is meant by 'passed on'?"</p>	<p>No</p>

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		<p>“Can an undertaking resist a duty which a Member State imposes in order to raise revenue on the use of nuclear fuels for the commercial production of electricity, by objecting that the levying of the duty constitutes aid contrary to EU law under article 107 TFEU?”</p>	
<p>C-275/13</p> <p>Applicant: Elcogás, S.A.</p> <p>Lodged on 21 May 2013</p> <p>Order of 22 October 2014 (ECLI:EU:C:2014:2314)</p>	<p>Interpretation of EU law</p>	<p>“Does the interpretation of Article 107(1) of the Treaty on the Functioning of the European Union, and of the case-law of the Court of Justice of the European Union concerning that article (in particular, the judgments in Cases C-379/98 and C-206/06), mean that the annual sums allocated to Elcogás in its capacity as the owner of a particular electricity generating facility, as provided for in the extraordinary viability plans approved for Elcogás by the Council of Ministers, are to be regarded as ‘aid granted by a Member State or through State resources’, where those sums are collected under the general category of ‘permanent costs of the electricity system’, which are paid by all users and are transferred to undertakings in the electricity sector by means of subsequent settlements made by the Comisión Nacional de Energía (National Energy Commission) in accordance with predetermined statutory criteria, for which purpose that Commission has no margin of discretion?”</p>	<p>No</p>

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<p>Case C-169/08</p> <p>Applicant: Presidente del Consiglio dei Ministri</p> <p>Lodged on 21 April 2008</p> <p>Judgement of 17 November 2009 (ECLI:EU:C:2009:709)</p>	<p>Interpretation of EU law</p>	<p>“ By its first and third questions, which should be examined together, the referring court asks, essentially, whether Article 49 EC must be interpreted as precluding tax legislation, adopted by a regional authority, such as Article 4 of Regional Law No 4/2006, which provides for the imposition of a regional tax in the event of stopovers for tourist purposes by aircraft used for the private transport of persons, or by recreational craft, where that tax is imposed only on undertakings which have their tax domicile outside the territory of the region.”</p> <p>§45 of the judgement: “Accordingly, the restriction on the freedom to provide services which is brought about by the tax legislation at issue in the main proceedings cannot be justified on grounds relating to environmental protection since the basis for applying the regional tax on stopovers introduced by that legislation is a distinction between persons which is unrelated to that environmental objective.”</p>	<p>No</p>
<p>Case C-143/99</p> <p>Applicant: Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH</p>	<p>Interpretation of EU law</p>	<p>“By its first question, the national court asks in substance whether national measures which provide for a rebate of energy taxes on natural gas and electricity only in the case of undertakings whose activity is shown to consist primarily in the manufacture of goods are to be regarded as State aid within</p>	<p>No</p>

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<p>Lodged on 21 April 1999</p> <p>Judgement of 8 November 2001 (ECLI:EU:C:2001:598)</p>		<p>the meaning of Article 92 of the Treaty.”</p>	
<p>C-379/98</p> <p>Applicant: PreussenElektra AG</p> <p>Lodged on 23 October 1998</p> <p>Judgement of 13 March 2001 (ECLI:EU:C:2001:160)</p>	<p>Interpretation of EU law</p>	<p>First question is: “Do the rules on payment and compensation for supplies of electricity, laid down in Paragraph 2 or 3 or 4 or in Paragraphs 2 to 4 of the Gesetz über die Einspeisung von Strom aus erneuerbaren Energien in das öffentliche Netz of 7 December 1990 (BGBl. 1990 I, p. 2633), as amended by Article 3(2) of the Gesetz zur Neuregelung des Energiewirtschaftsrechts of 24 April 1998 (BGBl. 1998 I, p. 730 (734-736)) constitute State aid for the purposes of Article 92 of the EC Treaty?”</p>	<p>No</p>