

## Communication ACCC/C/2015/128

### Observer' further observations, on the Party concerned's further reply of 26 October 2018

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1. ClientEarth wishes to shortly comment on the Party concerned's Further Reply of 26 October 2018 (the "**Further Reply**"), which misrepresents a series of points debated in the present case (sections 1 and 2). In addition, ClientEarth would like to bring the Compliance Committee's attention to a recent ruling of the Grand Chamber of the CJEU of 6 November 2018, that not only confirms that members of the public are barred from challenging State aid decisions under Article 263(4) TFEU, but reinforces this inadmissibility (section 3). The EU legal order thus keeps on breaching Article 9(3) of the Aarhus Convention.
2. These additional comments will not restate any of the submissions and arguments previously made by both the Communicant and the Observers, except where they have been clearly misrepresented by the Party concerned.

## 1 Preliminary observations

### 1.1 Concerning the scope of case ACCC/C/2015/128 (paragraph 3 of the Further Reply)

3. As a preliminary matter, based on paragraph 3 of the Further Reply, the Observer feels the need to recall the scope of the present case. The Communicants brought the present case to the attention of the Compliance Committee on the ground that members of the public are fully barred from challenging Commission State aid decisions that violate national (EU) law relating to the environment, in breach of Article 9(3) of the Aarhus Convention.
4. The State Aid Decision on Hinkley Point C was the trigger for the present case because it has been analysed by the Communicants as violating national (EU) law relating to the environment. However, as a result of Article 2(2)(a) of the Aarhus Regulation and case law of the CJEU, the Communicants were not able to challenge the State Aid Decision before the EU courts, which is a systemic issue.<sup>1</sup> Nor could they challenge it before the UK courts.<sup>2</sup> At no point do the Communicants or the Observers allege that the Compliance Committee should rule on the legality of the State Aid Decision itself, or that the State Aid Decision breaches the Aarhus Convention. Rather, the allegation is that are Article (2)(2)(a) of the Aarhus Regulation and case law of the CJEU violate the Aarhus Convention - and the scope of the present case

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<sup>1</sup> See in particular the Communication, p.5 ("*Indeed, the present case highlights significant general problems regarding access to justice at the EU level concerning the enforcement of energy and environmental law, especially as they relate to nuclear energy.*") and the Communicants Additional information of 20 May 2015

<sup>2</sup> See Friends of the Earth's Statement of 19 July 2016, p. 3, section "Access to justice at UK level".

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was strictly defined by the Communicants as a challenge of these breaches in the Communication of 9 March 2015.

5. Therefore, the Party concerned is ungrounded in alleging, in paragraph 3 of its Further Reply, that "*the Observer try to significantly broaden the scope of the Communication*", while the latter already covered the matter of access to justice in State aid cases generally. There is therefore no doubt that the Communication is admissible and covers the systemic issue of access to justice to challenge State aid decisions in the EU legal framework.

## 1.2 On the notion of "national law relating to the environment"

6. As a short note on paragraphs 28 and 29 of its Further Reply, the Party concerned apparently misunderstands the Aarhus Convention as it states that "*national law relating to the environment*" shall be interpreted as referring to the law of the EU Member States, to the exclusion of EU law. As the Compliance Committee has already confirmed on various occasions, as a contracting party to the Aarhus Convention, the European Union must comply with its obligations and ensure adequate implementation of the Aarhus Convention under its own national law, i.e. EU law.<sup>3</sup> This misconception results in a misunderstanding of ClientEarth's argument: ClientEarth does not allege that the State aid measure would contravene Member State law related to the environment but rather EU law related to the environment. The delimitation of competencies between the EU and the EU Member States is therefore an irrelevant argument.<sup>4</sup> The Party concerned's arguments in these paragraphs does therefore not address the issue raised.

## 2 The Party concerned's second line of defence: the contested decision does not relate to the environment

7. The Observer stands by all the arguments developed in its observations of 20 July 2018 (para. 32-50) according to which a State aid decision is able to violate law relating to the environment even when an aid measure relates to an energy matter.
8. It is however worth responding to paragraph 15 of the Further Reply, which cannot stand. The Party concerned argues that it is "*a simple matter of fact*" that the final State Aid Decision in the Hinkley Point C case is based on the objective of promotion of nuclear energy, contrary to the Opening decision. The Observer disagrees for two reasons.
9. First, it is not a matter of fact but a matter of law, as it pertains to the Member State to define the objective it wants to pursue with a State aid measure and to the Commission to ensure that the measure meets the said objective.

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<sup>3</sup> See for instance, Committee's findings on communication ACCC/C/2008/32, Part I (European Union), ECE/MP.PP/C.1/2011/4/Add.1, para. 76 stating: "when applied to the EU, the reference to "national law" should be interpreted as referring to the domestic law of the EU."

<sup>4</sup> On the contrary, the delimitation of competencies between the European Union and its Member States is relevant when it comes to the (limited) scope of judicial review that the national courts of the Member States can undertake. See in this respect ClientEarth observations of 20 July 2018, para. 24-25.

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10. Second, it cannot be that the Commission determines facts of a case itself, merely by cherry picking among the multiple objectives of common interest alleged by a Member State to justify an aid measure. If that were to be admitted, the Commission could determine which measures fall within the ambit of the Aarhus Convention by simply electing another objective of common interest that the aid measure could meet, whereas the sole competent authority to interpret the scope of the Aarhus Convention and matters of environmental law under its scope is the Compliance Committee. In the case of Hinkley Point C, suffice it to recall that the UK had brought forward several plausible objectives of common interest, including decarbonisation<sup>5</sup> - which is obviously relating to the environment - so one can only assume that the UK considered that all were applicable to its aid measure. The fact that the General Court (T-356/15, para. 113-114) also relied on the objective of promoting nuclear energy is irrelevant. Indeed, it is not within the EU court's powers to review the determination of the objective pursued by an aid measure, but rather only to ensure that the Commission did not manifestly err in its assessment that an aid measure does not distort competition or affect trade in a manner contrary to that objective.
11. As a further observation on this point, the Party concerned admits in paragraph 15 of the Further Reply that the Opening decision in the Hinkley Point C case relied on environmental objectives of common interest, which the Commission doubted were met at the time. These objectives are clearly relating to the environment. However, as with the final State Aid Decision, NGOs and members of the public were barred from challenging the Opening decision - which is a decision challengeable in itself before the EU courts under Article 263(4) TFEU, subject to having standing - by reason of Article 2(2)(a) of the Aarhus Regulation.
12. In addition, in paragraph 18, second point of the Further Reply, the Party concerned defends itself by arguing that it did not conduct an assessment of the aid measure at stake under the ETS Directive. Without alleging here that the State Aid Decision should have taken the ETS Directive into account in that case - which is a matter for the EU courts to decide - it is striking that the Party concerned considers that its decision may not be subject to the Aarhus Convention because it did not expressly assess the aid measure under environmental law. In general and under the EU legal order, a failure of an administrative review body to assess a measure against a legal framework that could be applicable to that measure can constitute a legal violation. However, in the present case, members of the public are barred by Article 2(2)(a) of the Aarhus Regulation to challenge the lack of assessment, by the Commission, of the aid measure at stake against national (EU) law relating to the environment, whatever the relevant piece of legislation is.
13. It is unacceptable that the Party concerned alleges that a State aid decision falls outside the scope of the administrative and judicial review supported by Article 9(3) of the Aarhus Convention, on the ground that assessment of the aid measure against environmental law was not made. On the contrary, one of the purposes of Article 9(3) of the Aarhus Convention is to ensure that members of the public are able to bring a claim that a public authority has failed to conduct such an assessment.

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<sup>5</sup> Commission, SA.34947, Opening decision of 18 December 2013, para. 238-246

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### 3 The Party concerned's third line of defence: Union law provides a complete set of judicial remedies against State aid decisions and violations of national environmental law by projects that receive State aid

14. On the matter of judicial remedies available to members of the public to challenge State aid decisions that violate environmental (EU) law relating to the environment, either before the EU courts or domestic courts of a Member State, the Observer stands by Section 2 of its observations of 20 July 2018. The conclusion is that there is no proper available remedy for members of the public, including NGOs, to challenge a Commission's decision such as the State Aid Decision.
15. The Observer nonetheless wishes to draw the Committee's attention to a recent ruling of the CJEU (Grand Chamber) of 6 November 2018, *Scuola Elementare Maria Montessori Srl & Pietro Ferracci /Commission*<sup>6</sup>. This ruling influences the admissibility conditions of claims against State aid decisions, generally. Read in light of Articles 2(1)(g) and 2(2)(a) of the Aarhus Regulation, it is particularly relevant for the possibility for members of the public to challenge State aid decisions that violate national law relating to the environment.

#### 3.1 Absence of remedy under Article 263(4) TFEU

16. In the above-mentioned judgment of 6 November 2018, the CJEU ruled that a Commission's State aid decision (or parts thereof) relating to an aid *scheme* is a regulatory act falling within the ambit of the third limb of Article 263(4) TFEU, when that decision (or those parts) "*are of general application*" (para. 28). To date, as expounded by the Communicants and the Observer<sup>7</sup>, State aid decisions were only considered acts of individual scope, even when their object was an aid scheme of general application in a Member State. This is an important evolution for the admissibility of claims brought by competitors of State aid beneficiaries against this category of State aid decisions, who are now in such instances only required to demonstrate a *direct concern* and no longer an individual concern for being admissible in a petition for annulment.
17. Examples of Commission's decisions on State aid which could violate national law relating to the environment and which could be considered as regulatory acts as per this new case law include (1) decisions authorizing aid schemes for waste management<sup>8</sup> or aid schemes for the production of hydropower<sup>9</sup>.
18. However, this new case law is of no help to members of the public who are not competitors of the beneficiaries. Quite the opposite: it appears to confirm the lack of standing and clarifies that additional barriers to access to justice persist. Specifically:

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<sup>6</sup> Joined cases C-622/16 P to C-624/16 P, ECLI:EU:C:2018:873

<sup>7</sup> Communicant's additional information of 20 May 2015, p.3; ClientEarth' observations of 20 July 2018, para. 19

<sup>8</sup> See EEAG, para. 118 and 156

<sup>9</sup> See EEAG, para. 117

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- The CJEU strongly reiterated that only those claimants whose competitive position can be affected by the aid measure at stake can meet the criteria of being directly affected by the measure (para. 47). This appears to confirm that NGOs and members of the public who are not market operators are barred from bringing a challenge;
  - The Court held that Commission decisions on State aid schemes are acts of general scope. Therefore, State aid schemes are now *de jure* "doubly excluded" from the scope of the Aarhus Regulation: potentially for not being "measures of individual scope" subject to review under the definition of Article 2(1)(g) of the Aarhus Regulation, on the one hand and for being State aid decisions excluded from review under Article 2(2)(a) of the Aarhus Regulation, on the other. The ACCC has already found that the exclusion of acts of general scope from the definition of acts subject to administrative and judicial review under the Aarhus Regulation is breaching the Aarhus Convention in its findings on communication ACCC/C/2008/32 (Part II).<sup>10</sup> However, the Party concerned has not yet addressed this failure to comply.
19. The aforementioned classification is limited to Commission's decisions relating to State aid schemes and does not encompass decisions relating to individual aid measures. This means that the "Plaumann test" still fully applies to aid measures such as the one in Hinkley Point C and other measures aiding, for example, to the construction or operation of biomass plants, coal plants, conversion of units to a different source of energy and so on.<sup>11</sup> In such cases, claimants still need to demonstrate that they are directly and individually affected by the aid measures, which is an impossible test to meet for NGOs and members of the public who are not operating on the market;<sup>12</sup>
20. As a conclusion on this point, the Observer emphasizes that the Compliance Committee should be aware that there is no positive evolution of the EU courts case law on admissibility of members of the public in State aid matters, in particular against State aid decisions that violate national (EU) law relating to the environment - rather the contrary.

### 3.2 Absence of remedy under Article 267 TFEU

21. Further in the same ruling of 6 November 2018, the Grand Chamber of the CJEU ruled that claimants unable to meet the admissibility criteria of Article 263(4) TFEU may challenge the implementing measures that a State aid decision entails, before EU or national courts, in particular on the ground of 267 TFEU (para. 59-60). However, the Court further stated that not all State aid decisions entail implementing measures (para. 58) and the existence of implementing measures "*must be assessed by reference to the position of the person pleading the right to bring proceedings under the third limb of the fourth paragraph of Article 263*

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<sup>10</sup> ECE/MP.PP/C.1/2017/7, para. 94.

<sup>11</sup> The authorisation of aid measures to the construction or operation of energy utility installations can violate national law relating to the environment. As already indicated by the Observer in its submissions of 20 July 2018, Member States nearly systematically proceed forward with a project that has been authorised by the Commission pursuant to a State aid law assessment - as the legality of the State financing of the project is then secured.

Construction and operation of such installations are subject to strict environmental laws, relating notably to public consultation, environmental permits, gas emissions, compliance with best available techniques and so on.

<sup>12</sup> See para. 16 of ClientEarth's observer submission of 20 July 2018.



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*TFEU. It is therefore irrelevant whether the act in question entails implementing measures with regard to other persons."* (para. 61).

22. NGOs and members of the public who need to rely on Article 9(3) of the Aarhus Convention to obtain access to justice against State aid decisions are, by their nature, not beneficiaries of the aid measure at stake.<sup>13</sup> Consequently, as per paragraphs 61-62 of the Grand Chamber ruling of 6 November 2018, they cannot be recipients or addressees of implementing measures in that sense. It constitutes a formidable hurdle to access the national courts and subsequently the EU courts by way of Article 267 TFEU. This fact was explicitly confirmed by the Court: *"In those circumstances, as the Advocate General observes in point 71 of his Opinion, it would be artificial to require that competitor to request the national authorities to grant him that benefit and to contest the refusal of that request before a national court, in order to cause the national court to make a reference to the Court on the validity of the Commission's decision concerning that measure"* (para. 66). The same would apply to an individual or NGO as they would as well be forced to *"apply for aid which they know perfectly well cannot be granted to them"* (see for this phrasing the Advocate General Opinion, para. 71<sup>14</sup>).
23. The direct consequence of that case law is the confirmation that the avenue of Article 267 TFEU for indirectly challenging a State aid decision of general scope is not only vain for NGOs to pursue, but also considered "artificial" and an unnecessary burden by the CJEU itself. A similar conclusion can be drawn for State aid decisions of individual scope, i.e. on individual aid such as the one authorizing aid to Hinkley Point C, as the implementing measures that the Member State would adopt would concern the beneficiary or beneficiaries of the aid only.
24. This new case law confirms that, under the current status of EU law, neither Article 263(4) TFEU, nor Article 267 TFEU are available judicial remedies for the members of the public to challenge State aid decisions, in general and those that (have the potential to) violate environmental law. This further confirms the breach of Article 9(3) of the Aarhus Convention by the EU legal order.

## 4 Proposed findings and recommendations

25. In view of the above and its previous observations of 20 July 2018, ClientEarth maintains its submission 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.

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<sup>13</sup> If they were beneficiaries of State aid under a particular regime, they could seek annulment of the relevant State aid decision directly under Article 263(4) TFEU, and this whole present debate would lack a purpose.

<sup>14</sup> Opinion of AG Wathelet, Joined Cases C-622/16 P to C-624/16 P, ECLI:EU:C:2018:229.

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Yours sincerely,

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