

**Observations by the European Commission,
on behalf of the European Union, to the Communication
to the Aarhus Convention Compliance Committee concerning compliance
by the European Union with provisions of the Convention in relation to the
approval of state aid for Hinkley Point C**

(ACCC/C/2015/128)

I. Introduction

1. These observations refer to the note by the Aarhus Convention Compliance Committee (ACCC) of 22 December 2015, asking the European Union (EU) to submit to the ACCC any written explanations or statements clarifying the matter referred to in the above-mentioned Communication by 22 May 2016.
2. Pursuant to Article 17(1) of the Treaty on European Union (TEU), the European Commission replies to this note on behalf of the EU.

II. Content of the case

3. On 9 March 2015, the Communicants, the non-governmental organisations "*GLOBAL 2000*" and "*ÖKOBÜRO – Alliance of the Austrian Environmental Movement*" - introduced a Communication to the ACCC. It was supplemented by an Additional Communication of 20 May 2015 relating to the use of domestic remedies.
4. The Communicants are represented by the respective Directors of the two non-governmental organisations (NGOs), Ms Leonore Gewessler for *GLOBAL 2000* and Mr Thomas Alge for *ÖKOBÜRO*, for the purpose of this Communication.
5. Under the terms of paragraph 18 of the Annex to Decision I/7 by the Meeting of the Parties on Review of Compliance, a Communication is the means for the public to address a "*Party's compliance with the Convention*".
6. The Communicants allege that the Commission Decision of 8 October 2014 on the aid measure SA.34947 (2013/C) (ex 2013/N) which the United Kingdom (UK) is planning

to implement for support to the Hinkley Point C Nuclear Power Station¹ (further on referred to as the "State Aid Decision") would contravene the EU's State aid law. The Communicants would, however, be blocked to challenge the State Aid Decision, which would breach Article 9(3) and (4) of the Aarhus Convention.

7. To recall, Article 9(3) of the Aarhus Convention foresees that, *"each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment"*.
8. Article 9(4) of the Convention adds procedural guarantees for these administrative or judicial review procedures.

III. Legal observations

1. Admissibility of the Communication

9. In its "Preliminary determination of admissibility" of 3 July 2015, the ACCC declared the present Communication as admissible, *"subject to review following any comments received from the Party concerned"* (Title II, paragraph 9).
10. The EU disagrees with this determination, given that the State Aid Decision which forms the subject-matter of the present Communication and the question whether the Communicants have access to remedies against this Decision is clearly outside the scope of the Aarhus Convention. The EU has no obligation under the Convention to grant review possibilities to environmental NGOs in respect of the State Aid Decision.
11. It results already from the title and Article 1 of the Aarhus Convention (*"Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters"*) that its objective is to ensure the right of every person to live in an environment adequate to his or her health and that access to justice in environmental matters is one of the instruments to reach that aim.

¹ Commission Decision C(2014) 7142 final corr., which the Communicants have already annexed to their Communication to the ACCC.

12. The decision at stake is based on Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) which is inserted in Title VII of the Treaty concerning inter alia competition rules.
13. Under Article 2(2) of the Aarhus Convention, bodies or institutions acting in a judicial or legislative capacity are excluded from its scope. The EU considered, when it adopted the proposal which became the "Aarhus Regulation" 1367/2006², that when bodies or institutions act as review body, they should be excluded from the administrative review procedure, as provided by Article 2(2) of the Aarhus Regulation.
14. As it stems from Article 108 TFEU, the European Commission has specific competence to decide on the compatibility of State aid with the internal market when reviewing existing aid, when taking decisions on new or altered aid and when taking action regarding non-compliance with its decisions or with the requirement as to notification. In accordance with Article 108(3) TFEU, Member States have a duty to notify any plans to grant new aid to the Commission and must refrain from putting the aid into effect before the Commission has authorised it. If the Commission finds that, after a preliminary investigation, there are no doubts as to the compatibility of the notified measure, or that, after having initiated the formal investigation procedure, any doubts as to the compatibility of the notified measure with the internal market have been removed, it will decide that the aid is compatible with the internal market. On the contrary, if the Commission finds that the notified aid is not compatible with the internal market, it will decide, after having initiated a formal investigation procedure and given the Member State and the interested parties the opportunity to comment on the opening decision, that the notified aid shall not be put into effect. Where the State aid is found to be not compatible, the Commission orders the Member State concerned to abolish or alter such aid within a given period of time, on the basis of Article 108(2), first subparagraph, TFEU.³ If the Member State does not comply with that Commission

² Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264 of 25.9.2006, p. 13.

³ This includes the obligation to recover the aid in case the incompatible aid was already granted.

decision, in derogation to the provisions of Articles 258 and 259 TFEU (infringement proceedings), the Commission may refer the matter directly to the European Court of Justice (EUCJ) pursuant to Article 108(2), second subparagraph, TFEU.

15. The possibility for the Commission to seize the EUCJ directly, in derogation of Articles 258 and 259 TFEU, in the area of State aids pursuant to Article 108(2), second subparagraph, TFEU does not modify the nature of the Commission's review powers. According to Articles 258 and 259 TFEU, the Commission may open proceedings against a Member State which has failed to fulfil its obligations under the Treaty. These provisions are inserted in Section 5 of the Treaty which concerns the Court of Justice. The Commission's task, under Article 17(1) TEU, is to oversee, under the control of the Court, the application of EU law, in order to uncover any failures by Member States to fulfil their obligation to transpose the directives concerned and in order to decide, when necessary, to initiate infringement proceedings against those Member States which it considers to be in breach of EU law.
16. Therefore, when the Commission adopts decisions under Article 108(2) TFEU, it acts as review body and thus it cannot be considered falling within the scope of the Aarhus Convention. In this respect, Article 2(2) of the Aarhus Regulation excludes administrative decisions and omissions inter alia adopted pursuant to Article 108 (ex-Article 87) of the Treaty.⁴ This interpretation was also acknowledged by the General Court of the EU.⁵ Therefore, the argument developed at page 15 of the Communication, according to which the exclusion from the scope of the Aarhus Regulation which followed such an interpretation would be incompatible with the Aarhus Convention, is to be dismissed.
17. The EU would thus respectfully ask the ACCC to reconsider its determination of admissibility in view of the specificity of the mechanism of compatibility of State aid decisions provided under Article 108 TFEU, whereby the Commission acts as a review body, and to declare the present Communication as inadmissible.

⁴ Cf. Case C-612/13 P, *Client Earth v Commission*, paragraph 62.

⁵ See orders of 6 November 2012 in Cases T-57/11 *Castelnuovo Energia v Commission*, and T-520/10, *Galicia v Commission*, paragraphs 25 and ff.

18. Indeed, under the terms of paragraph 20(d) of the Annex to Decision I/7 on Review of Compliance, the ACCC shall consider communications unless it determines that the relevant Communication is incompatible with the Convention. The present Communication is, as the EU would respectfully submit, clearly "incompatible" with the Convention, being outside its scope. The ACCC does not have any discretion to accept Communications which are incompatible with the Convention.
19. In any event, even if it were to be admitted, *quod non*, that State aid decisions could be considered within the scope of the Aarhus Convention, the present Communication is, in the Union's view, also inadmissible for failing exhaustion of internal remedies (those provided by EU law and national law as explained thereafter under the observations on substance).
20. The EU would like to recall that, under paragraph 21 of the Annex to Decision I/7 on Review of Compliance, the ACCC "*should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress*".
21. In the Preliminary determination of admissibility of this Communication, the ACCC underlines that the "*Committee's view is that this provision does not imply any strict requirement that all domestic remedies must be exhausted*" (Title I, paragraph 5).
22. The EU does not share this interpretation. In the Union's view, the terms of paragraph 21 of the Annex to Decision I/7 on Review of Compliance leave no doubt that domestic remedies are to be taken into account, unless they are unsatisfactory.
23. The Communicants did not provide any evidence that they used any of the internal remedies provided under Union law. They limited themselves in the Additional Communication to argue, on a purely theoretical basis, that such EU remedies would be "*useless*" and "*a waste of financial and personal resources*".
24. The ACCC should not become a means of redress for issues where remedies internal to the EU are available and have not been used, as in the present case. The Communicants should not be given the opportunity to circumvent the available domestic remedies. In the interest of legal clarity and procedural economy, the Communicants should not be able to choose which way to go – either by exhausting

domestically available remedies or by bringing their case directly to the ACCC (no "*forum shopping*").

25. The EU is therefore of the view that these remedies available at the level of the Union should be "*taken into account*". This can be done by either declaring the compliance case as inadmissible, if the Communicant directly addresses the ACCC without having made use of available domestic remedies, or by suspending the compliance case if a domestic remedy has been taken and is still ongoing.
26. The EU would therefore respectfully ask the ACCC to declare the present Communication as inadmissible, both because it is outside the scope of the Convention, and because of failing exhaustion of internal remedies by the Communicants.
27. The following limited observations on substance are thus solely made on a subsidiary basis, to demonstrate that the Communication, beyond being inadmissible, is equally unfounded.

2. Observations on substance

a) On the alleged violation of EU Law

28. The Communicants (page 6 to 13) allege that the State Aid Decision would contravene the EU's State aid law. Notably, the State Aid Decision would contain "*legal lapses*" and procedural irregularities which are detailed in the Communication. It would also set a precedent for the promotion of nuclear power at the expense of renewable energy sources. The State Aid Decision would furthermore implicate not only EU State aid law, but EU environmental and energy laws as well.
29. In this respect, the EU underlines that the review of the compatibility assessment undertaken by the Commission in the State Aid Decision is a matter solely for the EU Courts.⁶

⁶ Pursuant to standing case law, the review by the EU judicature of the compatibility assessment made by the Commission is confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers. See e.g. Case C-290/07 P, *Commission v Scott*, paragraph 66 and the case-law cited therein.

30. Any allegation of a breach of EU law is beyond the scope of the Convention and not a matter to be dealt with by the ACCC. Under the terms of Article 1 of the Aarhus Convention, *"each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."* Furthermore, according to Article 3(1) of the Aarhus Convention, *"[e]ach Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention."*
31. The EU does not consider that it has to reply to any allegations of a breach of EU law which are clearly outside the scope of review by the ACCC.

b) On the alleged violation of Article 9(3) and (4) of the Aarhus Convention

32. Concerning allegations that are formulated with regard to obligations under the Aarhus Convention, the Communicants claim that the State Aid Decision at stake would contravene Article 9(3) and (4) of the Convention. Notably, the public would be blocked from access to effective administrative or judicial remedies against the State Aid Decision. In this respect, at page 16 of the Communication, the Communicants contest the EUCJ case-law in Case C-401/12P, *Vereniging Milieudefensie e.a.*, which declared that Article 9(3) of the Aarhus Convention is not directly applicable.
33. First, the Commission notes that it cannot be disputed that Article 9(3) requires the further adoption of measures by Contracting Parties. Moreover, the CJEU judgment cannot be interpreted as being exhaustive on this issue, because the subject-matter of this case was confined to the application of the Aarhus Regulation. As the CJEU held in the above-mentioned appeal judgment (paragraph 60), the right to internal review under the Aarhus Regulation is *"only one of the remedies available to individuals for ensuring compliance with EU environmental law."*

34. Second, the Union reiterates that it has no obligation under the Aarhus Convention - which excludes bodies acting in a judicial capacity - to provide for administrative or judicial review possibilities in view of the State Aid Decision at all.
35. In any event, the system of access of justice in the EU complies with Article 9(3) and (4) of the Aarhus Convention.
36. This system ensures that acts and/or omissions by the institutions, bodies, offices and agencies can be challenged before the EU courts under Article 263(4) TFEU. On the one hand, under the terms of paragraph 4, "*[a]ny natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.*" Judicial review, on the other hand, can also be ensured by the courts and tribunals of the Member States through the possibility of challenging, by a plea of illegality, acts of general scope requiring implementing measures before national courts and by the system of preliminary references to the CJEU in that respect.
37. In Case *T & L Sugars Ltd*⁷, the CJEU recognised this possibility and declared that, with regard to regulatory acts that entail implementing measures, judicial review of compliance with the EU legal order is ensured irrespective of whether those measures were adopted by the EU or the Member States. Natural or legal persons who are unable, because of the conditions governing admissibility laid down in Article 263(4) TFEU, to challenge a regulatory act of the EU directly before the EU judiciary, are protected against the application to them of such an act by the ability to challenge the implementing measures which the act entails (see paragraph 30 of the judgment and the case-law cited therein).
38. It is also stated that, where responsibility for the implementation of an act lies with the institutions, bodies, offices or agencies of the EU, natural or legal persons are entitled to bring a direct action before the EU judiciary against the implementing acts under

⁷ Judgment of 28 April 2015 in Case C-456/13 P, *T & L Sugars Ltd et Sidul Açúcares, Unipessoal Lda v. European Commission, Council of the European Union and the French Republic*.

the conditions stated in Article 263(4) TFEU, and to plead in support of that action, pursuant to Article 277 TFEU, the illegality of the basic act at issue.

39. Where that implementation is a matter for the Member States, those persons may plead the invalidity of the basic act at issue before the national courts and tribunals and cause the latter to request a preliminary ruling from the CJEU, pursuant to Article 267 TFEU⁸.
40. The CJEU thus clarifies that the conditions of admissibility laid down in Article 263(4) TFEU must be interpreted in the light of the fundamental right to effective judicial protection, but such an interpretation cannot have the effect of setting aside those conditions, which are expressly laid down in the Treaty (paragraph 44 of judgment C-456/13 P; see also, to that effect, judgment in *Inuit*, paragraph 98 and the case-law cited). However, judicial review of compliance with the EU legal order is ensured, as can be seen from Article 19(1) TEU, not only by the CJEU but also by the courts and tribunals of the Member States. The TFEU has, by Articles 263 TFEU and 277 TFEU, on the one hand, and Article 267 TFEU, on the other, established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the EU judicature.⁹
41. That obligation on the Member States was reaffirmed by the second subparagraph of Article 19(1) TEU, which states that Member States "*shall provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law*".¹⁰ That obligation also follows from Article 47 of the Charter as regards measures taken by the Member States to implement Union law within the meaning of Article 51(1) of the Charter (paragraph 50 of the judgment).
42. In conclusion, the TFEU has established a complete system of remedies and procedures intended to ensure the control of the lawfulness of acts of the institutions

⁸ Judgments in *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, paragraph 93, and *Telefónica v Commission*, C-274/12 P, paragraph 29.

⁹ See judgments in *T & L Sugars*, paragraph 45, in *Inuit*, paragraphs 90 and 92, and *Telefónica*, C-274/12 P, paragraph 57.

¹⁰ See judgment in *Inuit*, paragraph 101.

by entrusting this control to the EU judicature, acting in cooperation with national courts, where appropriate. The different possibilities of access to justice are therefore in line with the Aarhus Convention and in particular its Article 9(3) which expressly refers to "*administrative or judicial procedures*", implying that the Parties may decide to implement this provision by means of either type of procedure or by a combination of both. Therefore, the EU fulfils its obligations under Article 9(3) and (4) of the Aarhus Convention in case the ACCC considers, *quod non*, that State aid decisions in the environmental area are subject to the Aarhus Convention.

43. In any event, the Communicants had also other opportunities for access to justice in relation to the environmental decision-making aspects of the construction of Hinkley Point C in relation to the various stages (environmental impact assessment, strategic environmental assessment, habitats, planning and permitting processes provided by EU legislation such the SEA Directive¹¹, the EIA Directive¹² or the Habitats Directive¹³). In its submissions of 29 June 2015 on PRE/ACCC/C/2015/128, when this Communication was still at the stage of a pre-communication and not yet declared admissible, the UK already outlined this aspect by stating that "*[t]he purpose of the Commission's role in giving approval to a state aid scheme is to avoid the distortion of the competition in the market that is harmful to citizens and companies in the EU. A development with an environmental impact is subject to decisions, and associated opportunities for legal review, potentially including EIA, SEA, habitats, planning and permitting processes.*"
44. For the reasons set out above, the EU considers the Communicants' arguments on the alleged violation of Article 9(3) and (4) of the Aarhus Convention as unfounded.

¹¹ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197 of 21.7.2001, p. 30.

¹² Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, OJ L 124 of 25.4.2014, p. 1.

¹³ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206 of 22.7.1992, p. 7.

IV. CONCLUSION

45. In view of the above considerations, the EU requests the ACCC to dismiss the Communication as inadmissible, or, on a subsidiary basis, to declare it as unfounded.