Case ACCC/2015/128

EU statement following the Communicant's 6 November 2020 Update concerning the judgment of the Court of Justice of the EU in Case C-594/18 P, *Commission v Austria*

7 December 2020

I. Introduction

1. Proceedings in Case ACCC/2015/128[1] had been stayed until recently pending the judgment of the Court of Justice of the EU of 22 September 2020 in Case C-594/18 P, *Commission v Austria*[2]. *Commission v Austria* concerned an appeal against a judgment of the General Court upholding the legality of a State aid decision on the compatibility with the Treaty according to Article 107(3)(c) TFEU of measures adopted by the United Kingdom to support the construction of a new nuclear power plant in Hinkley. The EU Courts confirmed the Commission's assessment that the State aid in support of the production of nuclear energy can be declared compatible with the internal market.

2. Following the delivery of the judgment in Case C-594/18 P and the 23 November 2020 communication from the Committee's secretariat of the Communicant's Update of 6 November (the "Update"), the EU understands that the procedure has now restarted.

3. As invited by the Committee on 23 November 2020, the EU replies as follows to the Communicant's Update.

II. The effects of the judgment in case C-594/18 P on Case ACCC/2015/128

a) The views of the Communicant

4. The Communicant makes two points in its Update as regards the judgment in Case C-594/18 P. In the first point, it claims that the Commission's state aid decisions can contravene EU environmental law and therefore will fall under the scope of Article 9(3) of the Aarhus Convention. The Communicant refers to potential breach of the obligations stemming, inter alia, from Articles 11 and 194(1) TFEU and 37 of the Charter of Fundamental Rights of the European Union on the protection of the environment (points 2, 6 and 7 of the Update).

5. Second, according to the Communicant, Article 2(2) of the Aarhus Regulation, by excluding State aid decisions from the scope of the reviewable administrative acts, would prevent the EU from complying with Article 9(3) of the Aarhus Convention (points 10-12 of the Update).

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[1] https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2015128-european-union.html.

[2] http://curia.europa.eu/juris/document/document.jsf;jsessionid=01CA94793B8A1ED2F23D7C11BB50C55A?text=&docid=231405&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=16604713

6. The EU respectfully submits that both these claims are unfounded.

b) The Judgment of the Court and its references to EU environmental law

7. It should be recalled from the very outset that the judgment of the Court clarified how and to which extent breaches of other rules of Union law (i.e. rules other than rules of EU State aid law) can prevent the Commission from deciding that State aid measures are compatible with the internal market as per Article 107(3)(c) TFEU.

8. As regards the first point recalled in section a) above, the EU submits that the judgment is more nuanced than claimed by the Communicant. The Court stated :

"*as is apparent from the examination of the third part of the first ground of appeal, the requirement to preserve and improve the environment, expressed inter alia in Article 37 of the Charter and in Articles 11 and 194(1) TFEU, and the rules of EU law on the environment are applicable in the nuclear energy sector. It follows that, when the Commission checks whether State aid for an economic activity falling within that sector meets the first condition laid down in Article 107(3)(c) TFEU, noted in paragraph 19 of the present judgment, it must, as has been stated in paragraphs 44 and 45 hereof, check that that activity does not infringe rules of EU law on the environment. If it finds an infringement of those rules, it is obliged to declare the aid incompatible with the internal market without any other form of examination*".[3]

9. The Court then referred to the need for the Commission to assess that the State aid measures notified by the Member State respect environmental law, and it is in this sense that it took into account the need to assess also whether breaches of these provisions occurred. That said, the Court did *not* state that State aid decisions adopted by the Commission under Article 107(3)(c) TFEU can be in breach of EU environmental law. Instead, what the Court said is that where the aided activity violates a rule of EU environmental law, the Commission may not authorize the State aid in question. This verification of compliance of the aided activity with EU environmental law is not part of the discretionary assessment of the Commission pursuant to Article 107(3)(c) TFEU. Rather, it is a distinct and preliminary question. The Commission only gets to exercise its discretion if the aided activity complies with EU environmental law. A violation of EU environmental law leads to the automatic prohibition of the aid.

10. Furthermore, the Court made it clear that when exercising its discretion under Article 107(3)(c) TFEU, there is no obligation on the Commission to take general principles (as opposed to binding rules) of EU environmental policy into account in its assessment. In particular, the Court held that when carrying out the balancing of positive and negative consequences of the aid, the Commission may limit its analysis to the impact on the internal market. According to the Court, the Commission does *not* have to "*take into account the extent to which those measures are detrimental to the implementation of the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability*"[4].

[3] Paragraph 100 of the judgment, emphasis added.
[4] Paragraph 102 of the judgment, emphasis added.

11. The distinction between compliance with binding rules of EU environmental law on the one hand and general principles of EU environmental policy on the other hand reflects the division of competences between the EU and its Member States in the design of State aid schemes. The decision which economic activities receive State aid is taken at national level, and reflects a choice of national policy. That policy can be environmental, energy-related, social, transport-related, etc. The grant of State aid implements therefore a national policy choice of a Member State. Hence, it is only at national level that policy considerations, such as the protection of the environment, become relevant, when the aids are actually granted. (Incidentally, this is also confirmed to some extent by the wording of the Aarhus Convention itself, which for those aided activities that depend from the grant of a permit or the release of a plan already provide for a right of judicial review against those plans and permits, as indicated in Articles 6 and 9(2) of the Convention.)

12. The purpose of State aid control is limited to protecting the internal market against distortions of competition that may arise from national decisions to grant State aid for implementing national policy choices.

13. As a result of that division of competences, environmental NGO that consider that an aided activity is in violation of the Arhus Convention can always challenge the national act granting State aid, which is the relevant policy decision.

14. As to the second point raised in the Update and recalled in section a) above, the EU disagrees that State aid decisions have to be included in the scope of application of the Aarhus Regulation. The Court confirmed that Article 107(3)(c) TFEU indicates that two requirements have to be met in order to declare an aid compatible: first, the aid must be intended to facilitate the development of certain economic activities or of certain economic areas; second, the aid must not adversely affect trading conditions to an extent contrary to the common interest.[5]

15. If a rule of EU environmental law is violated by the aided activity, the aid cannot be authorized. However, as already explained above, that assessment is extraneous to the exercise, by the Commission, of its powers under Article 107(3)(c) TFEU. It is, in other words, a preliminary point of coherence within the EU legal order. Just as the Commission cannot authorise state aid that would infringe any other provision of the Treaty,[6] the Commission also cannot authorise a state aid measure that would infringe EU environmental law.

16. The exercise of discretionary powers under Article 107(3)(c) TFEU is focused on considerations concerning the internal market. Indeed, the Court confirmed that the principle of protection of the environment and environmental law "*cannot be regarded as precluding, in all circumstances, the grant of State aid for the construction or operation of a nuclear power plant*".[7]

[5] Paragraph 19 of the Judgment.
[6] Judgment of 15 June 1993, *Matra v Commission*, C-225/91, EU:C:1993:239, paragraph 41.
[7] Paragraph 49 of the Judgment.

III. Article 2(2) of the Aarhus Regulation is in compliance with the Convention

17. The Communicant claims (see paras 12-14 of the Update) that the Commission should amend Article 2(2) of the Aarhus Regulation to ensure compliance with the Aarhus Convention. The EU submits that this claim is unfounded.

18. As indicated in recital 11 of the Aarhus Regulation, in the procedures listed in Article 2(2) thereof the Commission reviews the compatibility in general of national measures with the Treaty. The Court confirmed in its judgment in Case C-594/18 P that this is precisely what occurs as regards the adoption of decisions on the basis of Article 107(3)(c) TFEU, when it stated that the Commission "*checks whether State aid for an economic activity falling within that sector meets the first condition laid down in Article 107(3)(c) TFEU*".[8]

19. In the same manner, the Commission reviews or checks that the aided activity, decided and authorized on the basis of the relevant provisions of EU and national environmental law at the level of the Member State, complies with binding rules of EU environmental law.

20. It follows that there is no support from the judgment at hand for the view that the Commission should amend Article 2(2) of the Aarhus Regulation to ensure compliance with the Aarhus Convention.

21. Indeed, the exception for state aid in the Aarhus Regulation is based on the ground that the Commission is acting as a review body. This exception complies with the Aarhus Convention, which provides an exception for public bodies acting in a judicial capacity. An aid measure is, in all situations, without exception, provided by the authorities of a Member State. The ultimate decision-maker is in all cases a national authority.

22. The exception takes into account the specificities of the EU legal order and in particular, the special role of the European Commission as the guardian of the Treaties. In this regard, the EU also refers to paragraph 12 of its submission of 26 June 2018. [9]

23. The Convention applies to the EU taking its specific nature and competences as a '*regional economic integration organisation'* into account. The EU declared the EU's extent of competencies in the declarations submitted by time of signature and ratification. EU Member States have only conferred to the Commission, in Article 108(3) TFEU, the competence to review national policy decisions to grant State aid in order to prevent undue distortions of trading conditions. The competence for deciding on the design of the State aid measure remains with the Member State.

24. The exception granted for Commission state aid decisions under the Aarhus Regulation is similar to other exceptions granted under the Aarhus Regulation for EU

[8] Paragraph 100 of the judgment, emphasis added.
[9] https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2015-128_European_Union/Correspondence_with_the_Party_concerned/frPartyC128_26.06.2018.pdf

institutions acting as review bodies. These include exceptions to allow the Commission to investigate infringements of EU law by Member States, or to allow the European Anti-Fraud Office (OLAF) to investigate fraudulent activities. Other examples of similar exceptions allow the Commission to investigate price fixing by companies or to decide on mergers and acquisitions with potential harmful effects on the EU market.

25. All these tasks require a high degree of independence and impartiality. In large part precisely for this reason of preserving independence and impartiality, the Aarhus Convention provides a specific exception for the case when a public body is acting in a judicial capacity. The Aarhus Convention Implementation Guide provides the rationale for this exception. As explained in the Implementation Guide, the exception serves to preserve independence and impartiality for the judiciary. The exception, as also explained in the Implementation Guide, also helps protect the rights of parties to court procedures (or similar procedures). See Implementation Guide, on page 49: *'Regarding decision-making in a judicial capacity, tribunals must apply the law impartially and professionally without regard to public opinion. Many provisions of the Convention are not suitable to be applied directly to bodies acting in a judicial capacity, given the need to guarantee an independent judiciary and to protect the rights of parties to judicial proceedings.'*

26. Taking into account the specificities of the EU legal order, thus, the same considerations of the need for independence and impartiality justify the exemption of the State aid review and decisions adopted by the Commission: the Commission is mandated to be a review body, independent and impartial, as guardian of the EU Treaties.

IV. In the alternative: NGOs already have access to administrative and judicial review of State aid decisions in compliance with Article 9(3) of the Convention

27. Even if Article 9(3) of the Arhus Convention were to be applicable to State aid decisions, *quod non*, the State aid administrative procedure and the judicial review of State aid decisions are in full compliance with Article 9(3) of the Arhus Convention.

28. The EU acknowledges the role that NGOs may play in State aid procedures, first at the administrative and then at the judicial stage.

29. First, as to the administrative proceedings concerning the adoption of a State aid decision, the EU informs the ACCC that, in the *Ja zum Nürburging* case, the General Court of the EU recognised an NGO as an interested party within the meaning of Article (1)(h) of Regulation 659/1999.[10] As a result, said NGO could bring a challenge

[10] According to this provision « *any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid are to be regarded as an 'interested party'*" and the Court has clarified that that criterion is met where a party "*might submit to the Commission comments which might possibly be taken into account by the Commission in the course of the formal investigation procedure provided for in Article 108(2) TFEU*" (Judgment in Case T-373/15 *Ja zum Nürburging*, paragraph 87). For an environmental NGO, that is the case, because it may submit comments concerning violations of EU environmental law, which the Commission has to assess.

against a State aid decision not raising objections directly before the General Court. The case is under appeal before the Court of Justice of the EU, but it shows that an NGO has the possibility to demonstrate that its interests might be affected by the granting of aid, and thus become admissible to challenge a decision not opening the formal investigation of that aid.

30. The EU therefore submits that there are appropriate possibilities for participating in State aid administrative procedures, at an earlier stage, and with greater effectiveness than what an ex-post internal review request under the Aarhus Regulation could produce.

31. Second, with regard to the judicial control exercised by the Court of Justice over EU State aid decisions, the EU recalled in its submission of 26 June 2018, referred to above, that NGOs can challenge the legality of EU State aid decisions before national courts.

32. In this regard, the EU wishes to up-date the Compliance Committee on the latest developments in the case-law of the Court of Justice and to rebut certain arguments made by the Observer ClientEarth, in particular in its observations of 1 February 2019.

33. In particular, the judgment of 17 September 2020 in Case C-212/19, *Compagnie des pêches de Saint-Malo*, illustrates the effectiveness of challenging the legality of State aid decisions before national courts, which then refer the matter to the Court of Justice by virtue of a preliminary reference for validity pursuant to Article 267 TFEU. In that judgment, the Court of Justice, following a preliminary reference contesting the validity of a Commission decision on State aid, declared the Commission decision invalid.

34. The applicants before the national court, according to the Court of Justice, were not certain to be able to bring a direct action against the State aid decision before the General Court. They were hence, from a procedural point of view, in the precise same situation as an environmental NGO. This shows that the control of legality of State aid decisions via preliminary references for validity is effective.

35. In addition, it is not correct, as the Observer ClientEarth claims in its observations of 1 February 2019, that there is no national implementing measure to challenge before the national courts. The granting of an aid always inevitably requires a national act actually conferring the advantage, as the Court of Justice has set out in *Greenpeace Energy v Commission*.[11] That measure can be challenged before the national court, based on the argument that the Commission State aid decision, which is a necessary precondition for the national act actually conferring the advantage, is illegal. In other words: in case of a decision authorising a State aid measure, the Communicant can challenge that decision incidentally before a national judge, as illustrated by the Court of Justice in *Greenpeace Energy v Commission*.[12] As shown by *Compagnie des pêches de Saint-Malo*, that mechanism is also an effective mechanism.

[11] Order in Case C-640/16 P, paras. 60-61.
[12] Cited above.

36. To complete the picture concerning judicial proceedings, the EU already recalled the right of NGOs to intervene in judicial proceedings concerning the legality of State aid measures. It refers in this regard to paragraph 43 of its contribution of 26 June 2018, referred to above.

37. This shows that full legal protection is guaranteed within the EU legal system pursuant to Article 19 TEU.

V. Conclusion

38. The EU is hopeful to have provided the ACCC with the necessary clarifications and elements showing the proper consequences of the CJEU judgment in Case C-594/18 P, as well as of the recent developments in the case-law of the CJEU, in particular in Case T-373/15 *Ja zum Nürburging* and in Case C-212/19, *Compagnie des pêches de Saint-Malo*.

39. In addition, the EU reiterates that Article 2(2) of the Aarhus Regulation provides an exception for State aid decisions on the grounds that the Commission takes these decisions as a controller of the conformity of national policy decisions on aids provided by the Member States with the common EU rules protecting competition in the internal market. If an aid measure decided by a Member State supports an activity which is not compliant with environmental rules, the aid measure can be challenged at national level, where the policy decision to grant the aid is taken.

40. Taking into consideration the specificities of the EU legal system, this exception complies with the Aarhus Convention, which provides an exception for public bodies acting in a judicial capacity, in order to ensure independence, impartiality, and protect the rights of parties to State aid procedures.

41. In any event, an NGO whose interests are affected can participate in the administrative procedure in order to ensure that any violation of rules of EU environmental law is brought to the attention of the Commission before it takes a final decision on the authorisation of the State aid. If the Commission decides to authorize the State aid without opening a formal investigation procedure, the NGO can challenge that decision before the General Court of the EU in order to safeguard its procedural right to participate in the procedure.[13]

42. Furthermore, such an NGO can challenge the Commission decision authorizing the State aid after a formal investigation procedure. For Commission decisions authorizing State aid schemes, it can bring such a challenge directly before the Court of Justice, as rightly explained by the Observer ClientEarth in paragraphs 15 and 16 of its observations of 1 February 2019.[14] For Commission decisions concerning individual

[13] Judgment in Case T-373/15 *Ja zum Nürburging*, paragraphs 73-94, and case-law quoted.

[14] As the present case does not concern a State aid scheme, but an individual aid, the Commission refrains from rebutting in detail the (unfounded) claims in paragraph 18 of that communication. It suffices to say that the final decision violates the interest of the NGO, and therefore, it would seem that the criterion of direct concern is also met for the NGO.

aid, such as in the present case, the challenge has to be brought before the national judge, as explained in Case C-640/16 P *Greenpeace Energy v Commission*.[15]

43. Therefore, even if a Commission State aid decision fall within the scope of application of Article 9(3) of the Arhus Convention, the EU submits that it fully complies with that provision.

44. The EU thus maintains its position as expressed in its submission on 26 June 2018.[16]

[15] Order in Case C-640/16 P, paras. 60-61.
[16] Cited above.