ClientEarth ÖKOBÜRO ALLIANCE OF THE ENVIRONMENTAL MOVEMENT

6 November 2020

Update on communication ACCC/C/2015/128 (European Union)

Dear Honourable Members of the Compliance Committee, distinguished members of the secretariat,

1. On 22 September 2020, the Court of Justice of the European Union (CJEU) published its judgement on Case C-594/18 P *Austria v Commission*.[1] Given that the Committee had decided to defer its deliberations in relation to communication ACCC/C/2015/128 (European Union) pending this Court ruling,[2] we would like to provide the Committee with our assessment of the meaning of the judgement for the communication.

2. As set out in more detail below, in its judgement **the Grand Chamber of the CJEU unequivocally confirms that the Commission's state aid decisions need to comply with rules of EU law on the environment**.

3. The Court first held that the applicant's arguments that the aid did not comply with Article 107(3)(c) TFEU for not serving an objective of common interest or with Article 106a(3) Euratom Treaty could not succeed.[3] As the Court held, Article 107(3) TFEU does not make compatibility of aid under that provision dependent on it serving an objective of common interest. Accordingly the fact that the aid did not serve certain common interests, such as relating to environmental protection, is immaterial. Moreover, the Court considered that Article 106a(3) Euratom Treaty did not incorporate environmental protection principles either, hence a failure to consider environmental protection could also not amount to a violation of that provision.

4. Crucially then for the present dispute, the Court held that independently of these provisions, the Commission is still bound by, *inter alia*, Article 37 Charter of Fundamental Rights, Article 11 TFEU and Article 194(1) TFEU, which establish horizontally applicable obligations of environmental protection:

   "*In particular, as the Republic of Austria, supported by the Grand Duchy of Luxembourg, in essence submits, Article 106a(3) of the Euratom Treaty cannot oust the application of, inter alia, Article 37 of the Charter, which states that 'a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development', Article 11 TFEU, according to which 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, and Article 194(1) TFEU, according to which Union policy on energy must have regard for the need to preserve and improve the environment. Accordingly, the requirement to preserve and improve the environment, expressed in both the Charter and the FEU Treaty, as well as the principles relied on by the Republic of Austria, which flow from it, are applicable in the nuclear energy sector (see, by analogy, judgment of 27 October 2009, ČEZ, C-115/08, EU:C:2009:660, paragraphs 87 to 91).*"[4]

[1] ECLI:EU:C:2020:742. See Annex to this update.
[2] Report of the 64th meeting of the Compliance Committee, ECE/MP.PP/C.1/2019/5, para. 31.
[3] Annex to this update, paras 39-40.
[4] Ibid, para. 42.

5. This is exactly the argument made by the communicant and the observer ClientEarth in their submissions; in previous submissions, both had listed Article 11 TFEU and Article 194(1) TFEU as examples of national (i.e. EU) law related to the environment, which state aid decisions need to respect.[5]

6. The Court further holds that equally provisions of secondary EU law as well as general principles of EU law need to be complied in order for state aid to be compatible with the internal market.[6] This also supports the arguments of the communicant and the observer; in their earlier submissions, both had listed general principles[7] and EU secondary law[8] as further examples of national (i.e. EU) law related to the environment, which state aid decisions can potentially breach.

7. In light of all the foregoing, the Grand Chamber concludes:

   "It follows that, since Article 107(3)(c) TFEU applies to State aid in the nuclear energy sector covered by the Euratom Treaty, ***State aid for an economic activity*** *falling within that sector* ***that is shown upon examination to contravene rules of EU law on the environment cannot be declared compatible with the internal market pursuant to that provision*** (emphasis added).[9]

   Even more clearly:

   " *In that regard, it should be recalled that, 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.* (emphasis added)[10]

8. The Court's statements are an almost literal affirmation that the **Commission's state aid decisions can contravene national (i.e. EU) law related to the environment and fall therefore under the scope of Article 9(3) of the Convention**.

9. To be clear, the fact that the Court refers in this statement to activities in the nuclear energy sector and under the scope of the Euratom Treaty should not be read to indicate that the Court's judgement is in anyway limited to that sector. The Court only reiterates this point to show that the application of these provisions is not ousted by Article 106a(3) Euratom Treaty.[11] Article 37 Charter of Fundamental Rights, Article 11 TFEU and general principles of EU law are applicable to all activities of the European Union institutions. Article 194(1) TFEU is applicable to all activities in the energy sector, nuclear or otherwise.

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[5] Communication, pp. 3 and 9-10, Communicant's comments on Party concerned's reply of 26.06.2018, dated 21.07.2018, paras 9-11 and Observer's comments on Party concerned's reply of 26.06.2018, dated 20.07.2018, paras 38-42 and 52.
[6] Annex to this update, paras 43-44.
[7] Communicant's comments on Party concerned's reply of 26.06.2018, dated 21.07.2018, paras 18-22. Observer's comments on Party concerned's reply of 26.06.2018, dated 20.07.2018, paras 44-47.
[8] Observer's comments on Party concerned's reply of 26.06.2018, dated 20.07.2018, paras 48-50.
[9] Ibid, para. 45. See also the preceding paragraphs.
[10] Ibid, para. 100.
[11] Annex to this update, para. 41.

Finally, EU secondary law will apply depending on its content to specific areas of EU law but certainly not only to the nuclear sector.

10. The CJEU's ruling is also not limited to aid measures that are directly pursuing an environmental objective (the aid to construct Hinkley Point C was not) or that are assessed under the State aid guidelines for environmental protection and energy (the aid was assessed under Article 107(3)(c) TFEU directly).[12] **The judgement therefore confirms in a general manner that also state aid in other areas, whatever policy objective they pursue, need to comply with EU law related to the environment**.[13]

11. Finally, it is immaterial that the CJEU did not find that there had been a violation of such rules in the specific case[14]; for the purpose of the Convention the sole question is whether the Commission's state aid decisions have the potential to contravene rules of national (or, in this case, EU) law related to the environment.

12. **The Court's judgement therefore demonstrates that Article 2(2)(a) Aarhus Regulation prevents the compliance with the Party concerned with Article 9(3).**

13. Considering that the Party concerned has proposed an amendment of the Aarhus Regulation on 14 October 2020, it will be crucial that in the context of this legislative procedure Article 2(2) is amended directly to remedy this non-compliance. Otherwise, the Party concerned would have to re-open the Regulation once again as soon as the Meeting of the Parties has introduced the Committee's findings on communication ACCC/C/2015/128.

14. Since the Committee should now be in a position to continue its deliberations, we would consider it crucial and timely that the Committee does so with a view to obtain the Committee's findings while the Aarhus Regulation amendment process is still ongoing.

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[12] This confirms that the Party concerned' replies of 26 June 2018 to the Committee's questions of 26 March 2018, at paras 17, 22, 24, 25, 32 and 57 must be disregarded for not being in line with the CJEU's judgement in *Austria v. Commission* (C-594/18P).
[13] This is not contradicted by para. 49 of the ruling. Here the Court merely confirms that principles of environmental law as such do not preclude a Member State from choosing its energy sources. When an energy source is selected and financially supported by a Member State, it is an economic activity which must comply with EU laws relating to the environment and the aid cannot be found compatible with the internal market if those laws are breached by the activity.
[14] Ibid, paras 48-50.