

**Case ACCC/2015/128**

**EU comments on the draft findings received from the Aarhus Convention Compliance Committee (Committee) on 18 January 2021**

**I. Introduction**

1. In Case ACCC/2015/128<sup>1</sup>, the EU has received the draft findings (the 'Draft Findings') from the Aarhus Convention Compliance Committee (the 'Committee') and would like to submit the following comments.
2. While being committed to ensure compliance with the requirements of the Aarhus Convention, the EU considers appropriate to clarify certain inaccuracies in the Draft Findings and to recall certain elements of the EU position that regrettably were not taken into account by the Committee.
3. The EU wishes also to recall that the findings in Case 2008/32/ACCC, on which the Committee heavily relied in the Draft Findings, have not yet been adopted by the Meeting of the Parties.
4. With regard to the Committee's statement that the *'text has been drafted on the assumption that the European Union agrees with the Committee making recommendations in accordance with paragraph 36(b) of the annex to decision I/7'* and the Committee's request to explicitly indicate in our reply if this is not the case, the EU would like to confirm that it is indeed not in a position to accept the Committee making direct recommendations to it under para 36(b) in this matter at this stage. The EU considers therefore that a decision should be made with regard the findings at the Meeting of the Parties, as is the usual procedure.

**II. Clarifications**

5. Several aspects of the EU State aid procedures are not correctly reported in the Draft Findings. In part, this is because the principles recalled by the Court of Justice of the EU in its judgment of 22 September 2020 in Case C-594/18 P, *Commission v Austria* are inaccurately reported<sup>2</sup>. This case 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, Hinkley Point C.
6. First, in paras 32 and 108 of the Draft Findings, the Committee mixes up the procedure for existing aid and new aid. The language *'abolish or alter'* is not relevant

---

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

<sup>2</sup> <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>

for new aid, but only for existing aid. Indeed, as regards new aid, the rule is that the national measure granting the aid cannot be put in place if the Commission does not authorize it (Article 108(3) TFEU).

7. Second, the '*detailed rules*' mentioned in para 33 of the Draft Findings are laid down in Regulation 2015/1589,<sup>3</sup> and not in Regulation 659/1999 anymore.<sup>4</sup>
8. Third, the reference to the Order of the Court of 10 October 2017, Case C-640/16 P, *Greenpeace Energy v Commission* in para 46 of the Draft Findings is truncated; the Committee limits the reference to the judgment to the lack of standing of the NGO to challenge the Commission Decision. The Committee omitted to mention that the Court clearly added the following, emphasising the role of the preliminary ruling procedure in ensuring effective access to justice (French text only):

*'un particulier qui n'est pas directement et individuellement concerné, au sens de l'article 263, quatrième alinéa, deuxième branche, TFUE, par une décision de la Commission autorisant l'octroi d'une aide d'État n'est pas privé de protection juridictionnelle effective, dès lors qu'il peut contester cette aide devant les juridictions nationales et, dans ce contexte, soulever des moyens mettant en cause la validité de ladite décision'* (para 61, emphasis added).

9. Fourth, in para 107 of the Draft Findings, the Committee wrongly reports that the State aid decision of the Commission is about the measure's compatibility '*with EU law*', as if the decision were the result of a legality review based on EU environmental law. On the contrary, the compatibility that is assessed in the decision is '*with the internal market*', i.e. an economic and legal assessment targeted in particular on the effects of the State aid measures the national authorities want to adopt.
10. Indeed, as explained in prior EU submissions, a control on compliance with EU environmental law is a distinct and preliminary question vis-à-vis that assessment of compatibility with the internal market. The Commission only gets to exercise its discretion if the aided activity complies with EU environmental law.<sup>5</sup>

### III. Further remarks

11. The EU is concerned about the Committee's misconceptions regarding (i) the preliminary ruling procedure, (ii) the nature of the State aid decisions and (iii) the relevance of the Declaration submitted by the EU upon signature and approval of the Convention (the 'Declaration'). These three points will now be addressed.

#### ***a) The preliminary ruling procedure as a means of judicial review of EU State aid decisions***

---

<sup>3</sup> Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, on OJ L 248/9 of 24.9.2015.

<sup>4</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union, in OJ 1999 L 83, 27.3.1999, p.1.

<sup>5</sup> See EU statement of 7 December 2020, para 9.

12. In order to argue that the preliminary ruling procedure is not a compensation for a lack of direct access to the EU Courts under Article 263(4) TFEU, the Committee relies on its previous findings in case ACCC/2008/32, in which the Committee concluded that the preliminary ruling procedure does not meet the requirements of Article 9 of the Convention.<sup>6</sup> As the Committee based its arguments only on a mere referral to the first Part of those findings, considered to be *'equally applicable'* also to the present case,<sup>7</sup> and this without any further explanation, the EU takes the view that the assessment followed by the Committee in paras 127-129 of the Draft Findings is substantially flawed.
13. First, the Committee dismisses the relevance of the preliminary ruling procedure by stating that this procedure *'cannot be a basis for generally denying members of the public access to the EU Courts'* (para 127).
14. However, no evidence of such general denial of access to EU Court is ever provided by the Committee, nor is this claimed by the communicant. On the contrary, individuals and other members of the public have access to justice in the Member States in case of breach of their rights or impairment of their interests. As regards environmental NGOs, the EU has provided the Committee with abundant evidence of cases in which NGOs have been admitted to have access to national courts, and this precisely in matters concerning State aid decisions adopted by the Commission. The EU respectfully recalls para 48 and following of its Replies of 26 March 2018.<sup>8</sup>
15. It is clear from Article 267 TFEU that national courts can always make a preliminary reference to the Court and that if they are judges of last instance they must make such a reference.<sup>9</sup> Applicants can then have access to the Court of Justice on the basis of Article 267 TFEU; they do not have limitations as regards the arguments they can make before the Court, and the procedure does not have any costs before the Court of Justice.
16. Hence, it is entirely unjustified for the Committee to dismiss the relevance of the preliminary ruling procedure merely on account of an unsubstantiated allegation of a general denial for members of the public to get access to justice within the framework of a preliminary ruling procedure.
17. Second, the fact that the system of preliminary rulings cannot amount *'to an appellate system'* as regards decisions and acts of the EU institutions (para 128 of the Draft Findings) is also not correct, given that the grounds of validity of EU measures under Article 267 TFEU are exactly the same as the grounds for judicial review under Article

---

<sup>6</sup>Para 90 of the First Part of the findings in case ACCC/2008/32 quoted in para 104 and footnote 102 of the Draft Findings.

<sup>7</sup> Draft Findings, para 129.

<sup>8</sup>[https://unece.org/DAM/env/pp/compliance/C2015-128\\_European\\_Union/Correspondence\\_with\\_the\\_Party\\_concerned/frPartyC128\\_26.06.2018.pdf](https://unece.org/DAM/env/pp/compliance/C2015-128_European_Union/Correspondence_with_the_Party_concerned/frPartyC128_26.06.2018.pdf)

<sup>9</sup> See para 31 of the Further Reply of the EU of 21 July 2018 [https://unece.org/DAM/env/pp/compliance/C2015-128\\_European\\_Union/Correspondence\\_with\\_the\\_Party\\_concerned/frPartyC128\\_26.10.2018.pdf](https://unece.org/DAM/env/pp/compliance/C2015-128_European_Union/Correspondence_with_the_Party_concerned/frPartyC128_26.10.2018.pdf)

263(4)TFEU,<sup>10</sup> and the effects of a preliminary ruling on validity are *erga omnes*, akin to a judgment annulling an act of EU secondary law.<sup>11</sup>

18. Further, as regards admissibility, contrary to the direct and individual concern required under Article 263(4) TFEU, the preliminary ruling procedure relies on national procedural law, because the request for the ruling is made by the national court. In these national fora both individuals and environmental NGOs can have access to courts of law.
19. The Committee failed to substantiate its disregard of the relevance of the preliminary ruling procedure both in the present draft findings and in its findings and advice in Case 2008/32/ACCC. It could therefore not validly reiterate its conclusion – drawn in Part I of its findings in Case 2008/32/ACCC – that the preliminary ruling procedure does not meet the requirements of Article 9 of the Aarhus Convention.
20. Failing to understand such an essential feature of the EU legal system and of its system of judicial protection puts a very serious doubt on the soundness of the Committee's assessment with regard to the EU's compliance with the requirements of the Aarhus Convention.

***b) Commission State aid decisions are not 'administrative acts' within the meaning of Article 2(1)(g) of the Aarhus Regulation considering Article 2(2) thereof***

21. The Committee's reasoning that State aid decisions cannot be considered as measures taken by a body acting in a capacity of an administrative review body is flawed in several respects.
22. In paras 110-112 of the Draft Findings, the Committee refers once more to (this time the second part of) its findings in Case 2008/32/ACCC, to consider that Article 2(2) of the Convention would exclude from the notion of '*public authority*' only judicial and legislative bodies. Thus, according to the Committee, the Convention would apply also to decisions and procedures concerning administrative review.
23. It is useful to recall the nature of the State aid procedure according to Article 108 TFEU. Pursuant to the wording of Article 108(1) (existing aid) and 108(3) (new aid), and considering the procedural provisions of Article 108(2) TFEU, it is clear that the activity the Commission carries out is not '*active administration*'<sup>12</sup>. On the contrary, these Treaty provisions clearly confirm that the Commission reviews national measures aiming at granting or having granted State aid, which may indeed contravene environmental law. It is precisely within this meaning that the Commission acts as an

---

<sup>10</sup> Judgment in Joined Cases 73/63 et 74/63, *Internationale Crediet, Rotterdam et Putterskoek*, EU:C:1964:8 (reply to the admissibility of the third question).

<sup>11</sup> Judgment in Case 66/80, *Spa International Chemical Corporation*, EU:C:1981:102, para 13: '*although a judgment of the court given under article [267] of the Treaty declaring an act of an institution, in particular a Council or Commission regulation, to be void is directly addressed only to the national court which brought the matter before the court, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give*'; Order in Case C-421/06 P, *Fratelli Martini & C. SpA*, EU:C:2007:662, para 54.

<sup>12</sup> Opinion of AG Mengozzi in Case C-425/07 P, *AEPI aos v Commission*, ECLI:EU:C:2008:660, para 47.

instance of review of national measures. This very same qualification holds true also as regards the other situations provided for in Article 2(2) of the Aarhus Regulation (infringements, antitrust procedures and OLAF investigations).

24. The Committee failed to address this very specific feature of the EU legal system completely, and introduced a qualification - that of a '*permitting body*'<sup>13</sup> - which exists neither in the Treaty nor in the Aarhus Convention.
25. Indeed, so far as the exclusion from the notion of '*public authority*' of a body acting in its '*judicial capacity*' is concerned, it is clear that this exclusion is not limited to judicial bodies, considered as such, but it is defined following a functional approach, i.e. by looking at the '*capacity*' in which a body acts, and therefore at the nature of its function. The reference to the '*judicial mechanisms*' in the eighteenth paragraph of the preamble of the Convention, and not to the judiciary as such, confirms this conclusion. As a further confirmation of this conclusion, the Aarhus Implementation Guide makes the exclusion of bodies acting in a judicial capacity contingent upon the nature of their decision-making procedure, and not upon the qualification as '*courts of law*' in the legal system of the Contracting Party: '*[b]odies or institutions acting in a legislative or judicial capacity are not included in the definition of public authorities. This is due to the different character of such decision-making from many other kinds of decision-making by public authorities*'.<sup>14</sup>
26. In this regard, the definition of the capacity in which the body acts and the nature of its decision-making procedure have to be interpreted by taking into account the way in which the Treaty has defined the competencies of the EU institutions. As already indicated in previous EU submissions, such a further consideration confirms that the Commission is acting as a review body. The Commission's tasks, in its capacity as a review body, 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.<sup>15</sup>
27. The assumption that only judicial review (and not also administrative review) is excluded by the notion of '*public authority*' is not consistent with the context and purpose of the Convention. Indeed, Article 2(2) of the Aarhus Regulation indicating that decisions adopted at the end of an administrative review procedure are out of the scope of the Convention, is fully in line with the wording and purpose of the Convention.

***c) Incorrect assessment of the relevance of the Declaration submitted by the then EC upon signature and approval of the Convention (the 'Declaration')***

28. The EU takes the view that the Committee failed to address the relevance of the Declaration submitted by the then EC upon signature and approval of the Convention,

---

<sup>13</sup> Para 110 of the Draft Findings.

<sup>14</sup> Aarhus Implementation Guide, [https://unece.org/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf), page 48, first line (emphasis added).

<sup>15</sup> EU statement of 7 December 2020, Section III.

as regards the role of national courts and as regards the role of the Commission in the State aid procedure under Article 108 TFEU.

29. More precisely, the Committee in para 99 of the Draft Findings dismissed the reference to the Declaration and to the statement contained therein that the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by public authorities '*other than the institutions of the European Community*' fall primarily within the competence of the Member States.<sup>16</sup> The Committee states in para 99 of the Draft Findings that the Declaration would not be relevant given that State aid decisions are '*unarguably*' acts of the Commission.
30. However, in the EU's view, the Declaration remains relevant. This is because so far as the granting of the aid is concerned, contravention of environmental law within the meaning of Article 9(3) can only occur concretely when the Member State concerned grants the aid. Against this contravention access to justice is granted at national level and, to the extent that this contravention is linked with the decision of the Commission, the national court has the obligation to make a preliminary reference on validity to the Court of Justice, as recalled above.
31. In this regard, it should also be recalled that courts of law of Member States are ordinary courts of EU law,<sup>17</sup> since they daily enforce EU environmental law. As the Court already recalled, judicial and administrative procedures concerning environmental law fall '*primarily*' within the scope of Member States law.<sup>18</sup>

#### **IV. Conclusion**

32. The Committee's disregard of (i) the Commission's role as an administrative review body, (ii) the delimitation of competences as between Member States and the Commission in matters pertaining to state aid, and (iii) of the preliminary ruling procedure make it impossible for the EU to accept the Draft Findings of the Committee as proposed. Indeed, these assumptions rely on wrong interpretations of both Articles 108 and 267 TFEU respectively.
33. We respectfully submit that the Committee cannot bind the EU or its institutions in the exercise of their internal powers, to a particular – and in our view, erroneous - interpretation of the rules of EU law, including essential features of the founding Treaties of the EU.<sup>19</sup>

---

<sup>16</sup> See the quote in para 97 of the Draft Findings.

<sup>17</sup> Opinion 1/09, Unified Patent Litigation System, EU:C:2011:123, para 80.

<sup>18</sup> Joined Cases C-401/12 P to C-403/12 P, *Council and Commission v Vereniging Milieudefensie a.o.s.*, EU:C:2015:4, paragraph 60; Joined Cases C-404/12 P and C-405/12 P, *Council and Commission v Stichting Natuur en Milieu a.o.s.*, EU:C:2015:5, paragraph 52.

<sup>19</sup> Opinion 2/13, ECHR, EU:C:2014:2454, para 184 and case-law quoted therein, which provides that '*any action by the bodies given decision-making powers by the ECHR .... Must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law (see Opinions 1/91, EU:C:1991:490, paragraph 30 to 35, and 1/00, EU:C:2002:231, paragraph 13).*'