

Findings and recommendations with regard to communication ACCC/C/2015/128 concerning compliance by the European Union

Adopted by the Compliance Committee on 17 March 2021¹

I. Introduction

1. On 9 March 2015, non-governmental environmental organizations (NGOs) GLOBAL 2000 and OEKOBUERO – Alliance of the Austrian Environmental Movement (the communicants) submitted a communication to the Compliance Committee of the Convention on Access to Information Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging the failure of the European Union to comply with article 9(3) and (4) of the Convention concerning access to justice regarding state aid decisions and in particular for the approval of state aid for the nuclear power plant project, Hinkley Point C.
2. On 20 May 2015, the communicants provided additional information.
3. On 29 June 2015, the United Kingdom, as an observer, submitted a statement on the preliminary admissibility of the communication.
4. At its forty-ninth meeting (Geneva, 30 June-3 July 2015), after taking into account the information received, the Committee determined on a preliminary basis that the communication was admissible.
5. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 5 October 2015 for its response. The Party concerned subsequently informed the Committee that it had not received the secretariat's letter and the communication was therefore re-forwarded for its response on 22 December 2015.
6. The Party concerned provided its response to the communication on 20 May 2016.
7. On 19 July 2016, NGO Friends of the Earth England, Wales & Northern Ireland provided a statement on the communication as an observer.
8. On 7 September 2016, the communicants provided comments on the Party concerned's response.
9. On 18 November 2016, the Committee sought the parties' views on whether they considered that a hearing would be needed.
10. By emails of 24 and 28 November 2016, both the communicants and the Party concerned stated that they considered that a hearing would be needed.
11. At its fifty-fifth meeting (Geneva, 6-9 December 2016), after taking into account the comments received, the Committee decided that a hearing would be held to discuss the substance of the communication.
12. On 26 February 2018, the communicants submitted an update.
13. The Committee held a hearing to discuss the substance of the communication at its sixtieth meeting (12-16 March 2018), with the participation of the communicants and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication.

¹ This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the findings and conclusions) may take place.

14. On 26 March 2018, the Committee submitted questions to the Party concerned.
15. On 26 June 2018, the Party concerned replied to the Committee's questions.
16. On 20 and 21 July 2018 respectively, NGO ClientEarth, as an observer, and the communicants provided comments on the Party concerned's reply of 26 June 2018.
17. On 26 October 2018, the Party concerned submitted comments on the communicants' statement of 21 July 2018.
18. On 1 February 2019, ClientEarth provided comments on the Party concerned's comments of 26 October 2018.
19. At its sixty-fourth meeting (Geneva, 1-5 July 2019), the Committee, noting the relevance to the present communication of the appeal pending before the Court of Justice of European Union (CJEU) in C-594/18 P *Austria v Commission*, decided to defer its deliberations on the draft findings pending the ruling by the European Court of Justice.
20. On 12 March 2020, the communicants and observer ClientEarth submitted a joint statement on the Committee's decision to defer its deliberations.
21. On 22 September 2020, the CJEU delivered its judgment in C-594/18 P *Austria v Commission*.
22. On 6 November 2020, the communicant OEKOBUERO and observer ClientEarth provided their comments on the CJEU's judgment.
23. On 23 November 2020, the Committee invited the Party concerned to comment on the CJEU's judgment and the comments from OEKOBUERO and ClientEarth thereon. On 7 December 2020, the Party concerned provided its comments.
24. The Committee completed its draft findings through its electronic decision-making on 18 January 2021. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded on that date for comments to the Party concerned and to the communicants. The parties were invited to provide comments by 1 March 2021.
25. The Party concerned provided comments on 24 February 2021 and the communicant OEKOBUERO and observer ClientEarth each provided comments on 1 March 2021.
26. At its virtual meeting on 17 March 2021, the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an official pre-session document for its seventy-first meeting.

II. Summary of facts, evidence and issues²

A. Legal framework

State aid

27. As a general rule, European Union (EU) member States are prohibited, pursuant to article 107(1) of the Treaty on the Functioning of the European Union (TFEU), from providing state aid, as being incompatible with the internal market.³ Should a member State wish to provide state aid, it must invoke a justification for the aid, such as on the basis of article 107(3) TFEU.⁴

28. Article 107(3)(c) TFEU provides that "aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest" may be compatible with the

² This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

³ Party's reply to the Committee's questions, 26 June 2018, para. 17.

⁴ Ibid.

internal market of the EU. The Commission employs a balancing test under this provision to determine whether the aid measures “are necessary and proportionate and if the positive effects for the common objective outbalance the negative effects on competition and trade”.⁵

29. Pursuant to article 108(3) TFEU, member States must notify the Commission of any plans to grant aid and refrain from putting the aid into effect before the Commission has authorized it.⁶ If, after a preliminary investigation, the Commission finds that there are no doubts as to the compatibility of the notified measure, it will decide that the aid is compatible with the internal market.⁷ However, if the Commission has doubts about the measure’s compatibility with the internal market, it will issue a decision (Opening Decision) to initiate a procedure under article 108(2) TFEU. The notifying member State and interested parties will have the opportunity to submit comments on the Opening Decision. Should the Commission consider at the end of this procedure that the aid is not compatible with the internal market, it may not be put into effect.⁸ If the member State does not comply with this decision, the Commission may, under article 108(2) TFEU, refer the matter to the CJEU directly.⁹

Access to justice

Complaint under article 20(2) of Regulation 659/1999

30. At the time of the Commission’s decision approving the state aid measures at issue in this case, Council Regulation 659/1999¹⁰ set out the detailed rules for the application of article 108 TFEU.¹¹ Pursuant to article 20(2) of Regulation 659/1999 any interested party may inform the Commission of any alleged unlawful aid or misuse of aid. It was for the Commission to decide whether there were sufficient grounds to take a view on the information received. Article 1(h) of Regulation 659/1999 defined an “interested party” as “any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations”.

Request for internal review

31. Article 10 of 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 to Community institutions and bodies (the Aarhus Regulation) entitles an NGO meeting certain criteria to make a request for internal review to a Community institution or body that has adopted an administrative act under environmental law. In accordance with article 12 of the Aarhus Regulation, where the Community institution or body fails to act in accordance with article 10(2) or (3), an NGO that made such a request for internal review pursuant to article 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty.

32. Article 2(2) of the Aarhus Regulation states, inter alia, that:

⁵ Communication, annex 1, p. 82.

⁶ Party’s response to the communication, para. 14.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty. On 15 September 2015, Regulation 659/1999 was superseded by 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. Article 1(h) of Regulations 659/1999 and 2015/189 are identical.

¹¹ At the time of the adoption of Regulation 659/1999, article 108 TFEU was article 93 of the Treaty establishing the European Community. It later became article 88 of that Treaty, and since the Lisbon Treaty, is now article 108 TFEU.

Administrative acts and administrative omissions shall not include measures taken or omissions by a Community institution or body in its capacity as an administrative review body, such as under:

(a) Articles 81, 82, 86 and 87 of the [EC] Treaty (competition rules).

33. Since the adoption of the Lisbon Treaty, articles 81, 82, 86 and 87 of the EC Treaty have been replaced by articles 101, 102, 106 and 107 TFEU respectively.

Annulment procedure

34. In accordance with article 263(4) TFEU, any natural or legal person may institute proceedings:

(a) Against an act which is of direct and individual concern to them, or

(b) Against a regulatory act which is of direct concern to them and does not entail implementing measures.¹²

Preliminary ruling procedure

35. Article 267 TFEU provides:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) The interpretation of the Treaties;

(b) The validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

B. Facts

36. In 2013, the United Kingdom passed an Energy Act that included a framework for using “Contracts for Difference” and other measures to guarantee revenue streams to producers of nuclear energy and to offer a specific rate of return above market conditions. The United Kingdom shortly thereafter announced plans to use this framework to support the building of two nuclear reactors in Somerset, England, known as Hinkley Point C.¹³

37. On 22 October 2013, the United Kingdom notified the Commission of its proposed measures.¹⁴ The United Kingdom claimed that the notified measure was aimed at three objectives of common interest, namely decarbonization, security of supply and diversity of generation, and at addressing the related market failures.¹⁵ With respect to decarbonization, the United Kingdom submitted this was a common objective pursuant to article 191 TFEU and the Emissions Trading Scheme Directive.^{16,17}

¹² Additional information from the communicants, 20 May 2015, p 3.

¹³ Communication, p. 2.

¹⁴ Communication, annex 1, p. 64.

¹⁵ Ibid., p. 83.

¹⁶ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

¹⁷ Communication, annex 1, p. 83.

38. On 18 December 2013, the Commission informed the United Kingdom in its Opening Decision that it had decided to initiate the procedure under article 108(2) TFEU regarding the above measures.¹⁸ In its Opening Decision, the Commission stated that:

While Art 191 TFEU establishes that the preservation, improvement and protection of the environment must be regarded as objectives of EU policy, it is unclear whether such an objective can be immediately applicable to low-carbon generation as defined by the UK. In particular, while certain generation technologies emit less carbon emissions, their impact on the environment might nonetheless be considered substantial. This seems particularly true of nuclear generation, due to the need to manage and store radioactive waste for very long periods of time, and the potential for accidents.¹⁹

39. The Commission also stated that a support mechanism which is specific to nuclear energy generation might crowd out alternative investments in technologies or combinations of technologies, including renewable energy sources, which may have occurred in the absence of the notified measure.²⁰ The Commission thus concluded that “it is not clear at this stage on whether the notified measure can be argued to be aimed at a common EU objective in terms of environmental protection in general and decarbonisation in particular”.²¹

40. The Commission further stated that the aid measures have “the potential to decrease the incentives to invest in demand-side measures, including storage, energy efficiency and energy saving measures”.²²

41. In the course of the procedure under article 108(2) TFEU, the United Kingdom submitted its comments on the Opening Decision, in which it reiterated that “new nuclear” would be an important part of the United Kingdom’s energy mix, which would help achieve a decarbonised, secure and diverse electricity supply at an affordable cost.²³ A number of interested parties also submitted comments.²⁴

42. On 8 October 2014, after considering the comments received, the Commission adopted a decision authorising the state aid to Hinkley Point C on the ground that it was compatible with the internal market within the meaning of article 107(3)(c) TFEU (the 2014 Decision).²⁵ In its decision, the Commission found “that the aid measures aimed at promoting nuclear energy pursue an objective of common interest and, at the same time, can deliver a contribution to the objectives of diversification and security of supply”.²⁶

43. On 10 October 2017, the Court of Justice in C-640/16 P, *Greenpeace Energy v Commission* denied Greenpeace Energy, a competing renewable energy producer, standing to challenge the 2014 Decision.²⁷ The Court held that an individual who is not directly and individually concerned, within the meaning of the second limb of the fourth paragraph of Article 263 TFEU, by a Commission decision authorising the grant of State aid “is not deprived of effective judicial protection, since he may challenge that aid before the national courts and, in that context, raise pleas challenging the validity of that decision”.²⁸

44. On 12 July 2018, the General Court in T-356/15 *Austria v Commission* ruled that the Commission did not need to consider environmental protection, the precautionary principle or the polluter pays principle in the 2014 Decision.²⁹ Austria thereafter appealed the judgement to the Court of Justice.

¹⁸ Ibid., p. 62.

¹⁹ Ibid., p. 83.

²⁰ Ibid.

²¹ Ibid.

²² Ibid., pp. 95-96.

²³ Communication, annex 2, para. 172.

²⁴ Ibid., para. 76.

²⁵ Communication, p. 3 and annex 2, pp. 2 and 76.

²⁶ Communication, annex 2, para. 374.

²⁷ Update from the communicant, 26 February 2018, p. 1.

²⁸ Party’s comments on the Committee’s draft findings, 24 February 2021, para. 8.

²⁹ Party’s comments on the communicants’ comments of 21 July 2018, 26 October 2018, para. 16.

45. In its judgment of 22 September 2020 in C-594/18 P *Austria v Commission*, the Court of Justice (Grand Chamber) held, *inter alia*, that:³⁰

100. [...] 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, [it must] 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.

C. Domestic remedies

46. The Party concerned submits that the communication should be found to be inadmissible for failure to exhaust domestic remedies under paragraph 21 of the annex to decision I/7.³¹ It submits that remedies were available under both EU and national law and the communicants should not be allowed to circumvent these remedies by appealing directly to the Committee.³²

47. The communicants submit that they have not pursued domestic remedies as they have been effectively blocked from challenging the 2014 Decision.³³ The communicants' arguments as to why no domestic remedies are available are summarized in paragraphs 68 to 88 below.

D. Substantive issues

Effect of the declarations upon ratification by the Party concerned

48. The Party concerned claims the declarations it made upon signature and approval of the Convention indicate that the institutional and legal context of the EU needs to be taken into account. The Committee has a legal duty by virtue of these declarations to treat the EU differently from other Parties.³⁴

49. It submits that the role of the Commission to authorize or refuse state aid in the context of the internal market is a unique feature of EU law³⁵ and that the CJEU has held that the concepts in the Convention have to be given a meaning which takes into account the specific features of the EU.³⁶ The view that the Convention applies to state aid decisions entails an interpretation of the Convention that goes against the specific legal and institutional features of the EU.³⁷

50. The Party concerned states that the Committee's previous findings where these declarations were taken into account is not conclusive of their meaning in the present case, given that in those findings the Committee was considering the delimitation of powers between the EU and its member States regarding EU directives.³⁸ In contrast, in the present case, "no compulsory intervention [on] the Member States can take place after a Commission decision on State aid, the national authority being perfectly free to not implement the

³⁰ C-594/18 P *Austria v Commission*, para. 100. See also paras. 42-47.

³¹ Party's response to the communication, paras. 19-26.

³² *Ibid.*, paras. 19 and 24.

³³ Communication, p. 19.

³⁴ Party's reply to the Committee's questions, 26 June 2018, para. 11.

³⁵ *Ibid.*

³⁶ *Ibid.*, para. 12.

³⁷ Party's comments on the communicants' comments of 21 July 2018, 26 October 2018, para. 7.

³⁸ *Ibid.*, para. 11.

Commission decision in the sense of not granting the aid measure”.³⁹ It submits that the communication is therefore inadmissible.⁴⁰

51. The communicants contend that the Party concerned’s reliance on the declarations in the present case is misplaced. The case concerns the ability to challenge acts and omissions of EU institutions directly and which, under the very terms of the declarations, were made subject to the Convention. The Party concerned is bound as a matter of EU and international law to uphold its obligations under the Convention.⁴¹

52. Observer ClientEarth states that referring to a statement of an institution which forms part of its internal order, namely the CJEU, in order to modify its international law obligations is clearly impermissible.⁴²

Whether the Commission is a “public authority” – articles 2(2) and 9(3)

53. The Party concerned submits that the European Commission acts as a review body when it takes decisions under article 108(2) TFEU.⁴³ The 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 of such aid.⁴⁴ The Commission's task under Article 17(1) of the Treaty on European Union 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. Therefore, when the Commission adopts decisions under article 108(2) TFEU, it acts as a review body and thus it cannot be considered to fall within the scope of article 2(2) of the Convention.⁴⁵ It claims therefore that the communication is inadmissible under paragraph 20(d) of the annex to decision I/7 for being incompatible with the provisions of the Convention.⁴⁶

54. The communicants submit that articles 3 and 9 of the Convention include within their scope acts carried out in a judicial capacity, as these two articles place the Convention’s obligations not on public authorities, but upon the Party itself.⁴⁷

55. The communicants claim that, in any event, the exclusion of bodies or institutions acting in a judicial capacity in article 2(2) of the Convention does not include bodies acting as an administrative review body. The distinction between an authority acting in a judicial capacity and as an administrative review body is a meaningful one. The Party concerned’s response illustrates this distinction, as it highlights the Commission’s role under state aid law as an authorising or permitting body.⁴⁸ The communicants do not dispute that the Aarhus Regulation excludes state aid decisions. To the contrary, it is this exclusion, taken together with the failure of the Party concerned to provide any other review mechanisms, that fails to comply with the Convention.⁴⁹

56. Finally, the communicants and observer ClientEarth submit that in its findings on communication ACCC/C/2008/32 (European Union) (Part II), the Committee has observed that the wording of the Convention provides no support for the proposition that an

³⁹ Ibid.

⁴⁰ Ibid., para. 12.

⁴¹ Communicants’ comments on the Party’s reply to the Committee’s questions, 21 July 2018, para. 4.

⁴² Observer (ClientEarth) comments on the Party’s reply to the Committee’s questions, 20 July 2018, para. 7.

⁴³ Party’s response to the communication, paras. 13-16.

⁴⁴ Ibid., para. 14.

⁴⁵ Ibid., paras. 13 and 16.

⁴⁶ Ibid., paras. 17-18.

⁴⁷ Communication, p. 16.

⁴⁸ Communicants’ comments on the Party’s response to the communication, 7 September 2016, p. 2.

⁴⁹ Ibid., pp. 2-3.

administrative review is somehow acting in a judicial capacity, but rather the wording of the Convention leads to the opposite conclusion.⁵⁰

Whether state aid decisions are “acts” under article 9(3)

57. The communicants submit that whilst Parties have some discretion under article 9(3) of the Convention as to who may bring a challenge, there is no discretion as to what can be challenged.⁵¹

58. The Party concerned asserts that it has no obligation under the Convention to grant review of state aid decisions to environmental NGOs.⁵² This follows from the title of the Convention and its article 1, which show that the objective of the Convention 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.⁵³ The 2014 Decision is based on article 108(2) TFEU, which concerns EU competition rules. Article 9(3) does not give NGOs the right to challenge any decision that has some – direct or indirect – impact on the environment, like the promotion of nuclear energy versus wind energy and there are remedies available regarding the environmental decision-making aspects of the 2014 Decision, which include the environmental impact assessment, strategic environment assessment, habitats and planning and permitting processes. The Convention should not become a vehicle to challenge policy choices by overstressing the interpretation of environmental acts under its ambit.⁵⁴

59. The United Kingdom, as observer, submits that the Commission’s decision-making role regarding the 2014 Decision relates to competition matters rather than environmental matters and aims to avoid distortion of competition rather than considering environmental impact.⁵⁵ The communicants allege lack of access to justice in relation to a non-environmental decision that cannot be characterized as a provision of “national law relating to the environment” for the purposes of article 9(3) of the Convention.⁵⁶ The communicants have not demonstrated that matters such as the status of Euratom, security of supply offered by nuclear energy and questions of market failure and state intervention in relation to nuclear energy are relevant to the Convention.⁵⁷

60. Observer ClientEarth reiterates the communicants’ claim that the only decisive factor for the applicability of article 9(3) is whether the act or omission in question has the potential to contravene national (i.e. EU) law relating to the environment.⁵⁸

“Contravene provisions of national law relating to the environment” – article 9(3)

61. The communicant OEKOBUEIRO and observer ClientEarth submit that, through its judgment of 22 September 2020 in C-594/18 P *Austria v Commission*, the Grand Chamber of the CJEU unequivocally confirmed that the Commission’s state aid decisions need to comply with rules of EU law on the environment. 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 therefore fall under the scope of article 9(3) of the Convention.⁵⁹

⁵⁰ Communicants’ opening statement for the hearing at the Committee’s sixtieth meeting, 14 March 2018, para. 8, and observer (ClientEarth) comments on the Party’s reply to the Committee’s questions, 20 July 2018, para. 7.

⁵¹ Communication, pp. 17-18.

⁵² Party’s response to the communication, para. 10.

⁵³ *Ibid.*, para. 11.

⁵⁴ Party’s reply to the Committee’s questions, 26 June 2018, paras. 9-10.

⁵⁵ Observer (United Kingdom) statement, 29 June 2015, paras. 2-3.

⁵⁶ *Ibid.*, paras. 4-5.

⁵⁷ *Ibid.*, paras. 6-8.

⁵⁸ Observer (ClientEarth) comments on the Party’s reply to the Committee’s questions, 20 July 2018, para. 4.

⁵⁹ Update from communicant (Oekobuero) and observer (ClientEarth), 6 November 2020, paras. 2 and 8.

62. OEKOBUERO and ClientEarth claim that the judgment's reference to "activities in the nuclear energy sector and under the scope of the Euratom Treaty" does not mean that the Court's judgment is in any way limited to that sector. Article 37 of the Charter of Fundamental Rights, Article 11 TFEU and general principles of EU law are applicable to all activities of EU institutions. Article 194(1) TFEU is applicable to all activities in the energy sector, nuclear or otherwise.⁶⁰

63. OEKOBUERO and ClientEarth further submit that 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). The judgment therefore confirms that state aid measures in other areas, whatever policy objective they pursue, need to comply with EU law relating to the environment.⁶¹

64. Lastly, OEKOBUERO and ClientEarth submit that it is immaterial that the CJEU did not find that there had been a violation of EU law in that case; 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 (i.e. EU) law relating to the environment.⁶²

65. The Party concerned submits that the CJEU's judgment in *Austria v Commission* is more nuanced than claimed by the communicant. 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 was 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.⁶³

66. The Party concerned states that the Court furthermore 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. The distinction between compliance with binding rules of EU environmental law and general principles of EU environmental policy 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 a choice of national policy, taken at national level. 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. 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. Environmental NGOs that consider that an aided activity violates the Convention can challenge the national act granting state aid, which is the relevant policy decision.⁶⁴

67. Finally, the Party concerned submits that the Convention does not require access to justice against measures that have "the potential to contravene" but against measures "which contravene" environmental law. The communicants wrongly assume that state aid decisions have direct effect even though they have to be further implemented by the member States. The concrete effect of the Commission's state aid decision as regards compliance with environmental law will always be contingent upon a further measure being taken at national level.⁶⁵

⁶⁰ Ibid., para. 9.

⁶¹ Ibid., para. 10.

⁶² Ibid., para. 11.

⁶³ Comments from the Party concerned, 7 December 2020, paras. 8-9.

⁶⁴ Ibid., paras. 10-13.

⁶⁵ Party's comments on the communicant's comments of 21 July 2018, 26 October 2018, para. 29.

“Access to administrative or judicial procedures” – article 9(3)

68. The communicants claim that the public is blocked from access to administrative and judicial procedures to challenge the 2014 Decision on the basis of the Aarhus Regulation and relevant decisions of the CJEU.⁶⁶

69. The Party concerned reiterates its claim that it has no obligation under the Convention to provide for review of decisions taken by bodies acting in a “judicial” capacity such as state aid decisions and that its system of access of justice regarding state aid decisions in any event fully complies with the Convention.⁶⁷

Internal review under the Aarhus Regulation

70. The communicants accept that article 10(1) of the Aarhus Regulation gives NGOs meeting certain criteria the possibility to request an internal review of administrative acts. However, article 2(2) of the Aarhus Regulation expressly excludes state aid decisions from the scope of acts that can be subject to review.⁶⁸

71. The Party concerned concurs that article 2(2) of the Regulation excludes state aid decisions from the scope of review.⁶⁹ The Regulation, however, is only one remedy available to individuals for ensuring compliance with EU environmental law.⁷⁰

Complaint under articles 1(h) and 20(2) of Regulation 659/1999

72. Concerning the possibility of “interested parties” to complain to the Commission so as to trigger a formal investigative procedure under article 108(2) TFEU, ClientEarth notes that the Commission has interpreted “interested parties” under article 1(h) of Regulation 659/1999 to exclude NGOs and to cover only those persons whose market position or that of their members can be affected. Even more narrowly, on 3 May 2018, the European Ombudsman held that in order to be considered an “interested party” under article 1(h) of Regulation 659/1999, “one needs to demonstrate that the alleged State aid affects one’s competitive position or that of the persons or firms one represents”.⁷¹

73. The Party concerned contests that only persons whose market position has been affected can be “interested parties” under article 1(h) of Regulation 659/1999. It gives examples of cases in which the Commission initiated an investigative procedure under article 108(2) TFEU on the basis of complaints by, among others, an association of tenants, an association of electricity consumers and a local environmental NGO.⁷²

Annulment procedure under article 263(4) TFEU

74. The communicants submit that as environmental NGOs they do not have standing before the CJEU under article 263 TFEU.⁷³

75. The Party concerned concedes that environmental NGOs do not have standing to bring an action for annulment on the basis of article 263(4) against state aid decisions such as the 2014 Decision, which was adopted after a formal investigation procedure that offered interested parties the opportunity to present their observations.⁷⁴

76. The Party concerned notes that, in its judgment in T-373/15 *Ja zum Nürburgring v European Commission*, the General Court held the NGO applicant qualified as an “interested party” under article (1)(h) of Council Regulation No. 659/1999 and on that basis granted it standing under article 263(4) TFEU to challenge the Commission’s decision not to undertake an investigative procedure under article 108(2) TFEU. Though the case is under appeal before

⁶⁶ Communication, p. 15.

⁶⁷ Party’s response to the communication, paras. 34-35.

⁶⁸ Communication, p. 15.

⁶⁹ Party’s response to the communication, para. 16.

⁷⁰ *Ibid.*, para. 33.

⁷¹ Observer (ClientEarth) comments on the Party’s reply to Committee’s questions, 20 July 2018, para. 30.

⁷² Party’s comments on the communicants’ comments of 21 July 2018, 26 October 2018, footnote 19.

⁷³ Additional information from the communicants, 20 May 2015, pp. 2-9.

⁷⁴ Party’s comments on the communicants’ comments of 21 July 2018, 26 October 2018, paras. 21-22.

the CJEU, the judgment shows that an NGO has the possibility to demonstrate that its interests might be affected by the granting of aid, and thus to challenge a decision by the Commission not to open a formal investigation of that aid.⁷⁵

NGOs as interveners

77. The Party concerned submits that, while environmental NGOs do not themselves have standing to bring an action for an annulment under article 263(4) TFEU, they can be admitted as interveners in an annulment procedure brought by another party. This is demonstrated by the intervention by Greenpeace Spain in T-57/11 *Castelnou Energía v Commission*.⁷⁶

78. The communicants and observer ClientEarth submit that being an intervener in an ongoing annulment procedure in no way meets the requirements of article 9(3) of the Convention and, moreover, in *Castelnou* the General Court adopted a very narrow interpretation of which NGOs were entitled to intervene.⁷⁷

Preliminary ruling procedures under article 267 TFEU

79. The Party concerned states that natural or legal persons who do not fulfil the conditions for a direct action under article 263(4) TFEU can challenge the validity of the decision before the national courts and ask the latter to request a preliminary ruling from the CJEU under article 267 TFEU. The CJEU confirmed this in C-640/16 P, *Greenpeace Energy v European Commission*, in relation to the 2014 Decision itself.⁷⁸

80. The Party concerned claims that NGOs have unlimited access to national courts and can ask the national court to refer a matter to the CJEU under article 267 TFEU.⁷⁹ It provides the Committee with various cases in which national courts made a preliminary reference to the CJEU regarding the validity of a Commission state aid decision. It concedes that none of these cases were brought by an NGO.⁸⁰

81. The Party concerned refers in particular to the 17 September 2020 judgment in C-212/19, *Compagnie des pêches de Saint-Malo*, in which the CJEU, following a reference for a preliminary ruling contesting the validity of a Commission decision on state aid, declared the Commission decision invalid.⁸¹ It submits the case illustrates the effectiveness of challenging the legality of state aid decisions before national courts, which then refer the matter to the CJEU for a preliminary ruling under article 267 TFEU.

82. The communicants point out that in its findings on communication ACCC/C/2008/32 (Part I),⁸² the Committee found that the preliminary ruling procedure in article 267 TFEU had drawbacks and fails to compensate for the CJEU's strict jurisprudence regarding standing in annulment procedures under article 263 TFEU.⁸³ Furthermore, it is far from clear that NGOs and other members of the public will be granted standing in the national courts and that their complaint would be pursued adequately. Courts do refuse to refer and even where they do, appeals within the national judicial system are prone to considerable costs and delays. Moreover, the decision of a national court following a preliminary ruling is generally only applicable within the referring member State, which is of concern as the 2014 Decision sets a dangerous precedent. The preliminary ruling procedure is an incomplete and imperfect means of accomplishing what should be accomplished in a direct action to the CJEU, namely the adjudication of claims involving breaches of EU laws by EU actors with EU-level consequences.⁸⁴

⁷⁵ Party's comments on the communicant's and observer's update of 6 November 2020, 7 December 2020, para. 29.

⁷⁶ Party's reply to the Committee's questions, 26 June 2018, para. 43.

⁷⁷ Communicants' comments on the Party's reply to the Committee's questions, 21 July 2018, para. 6 and Observer (ClientEarth) comments on the Party's reply to Committee's questions, 20 July 2018, para. 21.

⁷⁸ Party's reply to the Committee's questions, 26 June 2018, paras. 44-45.

⁷⁹ *Ibid.*, para. 45.

⁸⁰ *Ibid.*, para. 36.

⁸¹ Party's comments on the communicant's and observer's update, 7 December 2020, paras. 33-35.

⁸² ECE/MP/C.1/2011/4/Add.2, para. 68.

⁸³ Communicants' additional information, 20 May 2015, p. 9.

⁸⁴ *Ibid.*, p. 10.

83. The communicants moreover point out that none of the preliminary ruling cases cited by the Party concerned indicate that NGOs or the public concerned have appropriate access to justice to challenge acts or omissions in state aid cases which relate to the environment, which is the thrust of the communication. To the contrary, the cases underscore that NGOs and others trying to serve the public interest are entirely blocked because the claimants in these cases are almost exclusively competitors, beneficiaries of state aid who disputed the amount of aid owed or complained of having to return such aid, or States. This is unsurprising considering that for preliminary ruling cases there must always be a pending lawsuit at the national level, and standing is generally only accorded to those having an economic interest (or suffering an injury) related to such aid.⁸⁵

84. Regarding the Party concerned's submission that the communicants could have challenged the matter before the United Kingdom courts, observer Friends of the Earth England, Wales and Northern Ireland submits that the Committee has found the United Kingdom to be in non-compliance with article 9(4) of the Convention and that this breach has not been remedied yet. The communicants would thus be subject to costs of up to £10,000 if they had brought this case and lost, which would likely be a big deterrent, particularly when it is highly unlikely that the United Kingdom court would consider it had jurisdiction to hear the matter.⁸⁶

85. Observer ClientEarth submits that NGOs are not systematically admitted to bring cases before a national court, national courts do not have full jurisdiction on state aid matters, and existing caselaw on state aid decisions confirms a lack of access to the CJEU despite article 267 TFEU, in particular as there are serious difficulties in convincing national courts to refer.⁸⁷ ClientEarth provides a table of all then-available preliminary rulings on state aid matters related to energy and environment. Of the sixteen rulings only two cases questioned the validity of the Commission's state aid decision and none featured an NGO plaintiff.⁸⁸

86. Finally, ClientEarth refers to the 6 November 2018 judgment by the Grand Chamber in *C-622/16 Scuola Elementare Maria Montessori v Commission*, which it submits makes clear that the existence of implementing measures which could be challenged before EU or national courts on the ground of article 267 TFEU must be assessed by reference to the position of the person pleading the right to bring proceedings under the third limb of article 263(4). As NGOs and members of the public by their nature are not beneficiaries of the aid measure at stake, they cannot be recipients or addressees of implementing measures in that sense. This, ClientEarth submits, constitutes a formidable hurdle to access national courts and subsequently EU courts using article 267 TFEU.⁸⁹

Access to justice regarding other procedures

87. The Party concerned submits that the communicants had opportunities for access to justice in relation to the environmental decision-making aspects of Hinkley Point C, such as in the context of the procedures on environmental impact assessment, strategic environmental assessment, habitats, and planning and permitting.⁹⁰

88. The communicants allege that the fact that a decision authorising state aid is independent from and does not entail that the project will be actually realised is immaterial to the question of whether environmental NGOs have access to justice to challenge state aid decisions as such.⁹¹

⁸⁵ Communicants' comments on the Party's reply to the Committee's questions, 21 July 2018, paras. 35-38.

⁸⁶ Observer (Friends of the Earth England, Wales and Northern Ireland) statement, 19 July 2016, p. 3.

⁸⁷ Observer (ClientEarth) comments on the Party's reply to Committee's questions, 20 July 2018, paras. 22-26.

⁸⁸ *Ibid.*, para. 29 and annex.

⁸⁹ Observer (ClientEarth) comments on the Partys comments of 26 October 2018, 1 February 2019, paras. 21-22.

⁹⁰ Party's response to the communication, para. 43.

⁹¹ Communicants' comments on the Party's reply to the Committee's questions, 21 July 2018, para. 7.

“Adequate remedies” - article 9(4)

89. The communicants submit that the Party concerned fails to comply with article 9(4) of the Convention because in the absence of any remedy, no “adequate remedy” is provided by the Party concerned.⁹²

90. The Party concerned submits that on the basis of the arguments advanced above, it complies also with article 9(4) of the Convention.⁹³

III. Consideration and evaluation by the Committee

91. The European Union signed the Convention on 25 June 1998 and approved it through Council Decision 2005/370/EC of 17 February 2005. The European Union has been a Party to the Convention since 17 May 2005.

Admissibility

92. The Party concerned disputes the admissibility of the communication on various grounds, including:

(a) The declarations made by the Party concerned upon signature and approval of the Convention means that the Party concerned has no obligations under the Convention with respect to the matters addressed in the communication;

(b) The communication is outside the scope of the Convention and thus inadmissible under paragraph 20(d) of the annex to decision I/7;

(c) The communicants have failed to exhaust remedies provided under the laws of the Party concerned and the United Kingdom and the communication is thus inadmissible under paragraph 21 of the annex to decision I/7.⁹⁴

Declarations upon signature and approval

93. With respect to the Party concerned’s first submission, the Committee considers it useful to set out the relevant wording of the declaration made by the Party concerned upon approving the Convention:

In particular, the European Community also declares that the legal instruments in force do not cover fully 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 private persons and public authorities other than the institutions of the European Community as covered by article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations.⁹⁵

94. The Committee has already considered the effects of the above declaration in its findings on communication ACCC/C/2015/123 (European Union), namely:

the effect of the declaration by the Party concerned is that it assumes obligations to the extent that it has European Union law in force; member States remain responsible for the implementation of obligations that are not covered by European Union law in force.⁹⁶

⁹² Communication, p. 4.

⁹³ Party’s response to the communication, para. 44.

⁹⁴ Ibid., paras. 9-27, 43.

⁹⁵ Party’s reply to the Committee’s questions, 26 June 2018, footnote 3.

⁹⁶ ECE/MP.PP/C.1/2017/21, para. 89.

95. The Party concerned's declaration states that its legal instruments in force do not fully cover the obligations in article 9(3) with respect to acts and omissions by private persons and public authorities "other than the institutions of the European Community as covered by article 2(2)(d) of the Convention". The present case does not concern the state aid measures by the member States themselves but the decisions on those measures taken by the European Commission, which is unarguably an institution of the Party concerned.

96. More specifically, article 108(2) TFEU explicitly requires the European Commission to review the compatibility with the internal market of existing and proposed state aid measures by member States and to decide either that the state aid measure is compatible or otherwise that it should be abolished, altered or not put into effect.⁹⁷ The Committee considers that the Party concerned thus clearly has law in force with respect to decisions by the European Commission on state aid, and the Party concerned has therefore assumed obligations under the Convention in this regard. The Committee accordingly does not find the communication inadmissible on this ground.

Scope of the Convention

97. Concerning the Party concerned's second submission, the Committee considers that the Party concerned has not demonstrated that the communication is so clearly outside the Convention that it should be declared inadmissible from the outset. Thus, the communication is not inadmissible on this ground.

Use of domestic remedies

98. Finally, the Committee examines the Party concerned's submission that the communication is inadmissible because the communicants have failed to exhaust the remedies available to them under EU and United Kingdom law.

99. The Party concerned asserts that the communicants could have brought judicial review in the United Kingdom courts against the United Kingdom's state aid measures, and in those proceedings, requested a reference for a preliminary ruling to the CJEU regarding the Commission's decision under article 108(2) TFEU.⁹⁸

100. The Committee recalls its findings on communication ACCC/C/2008/32 (European Union) (Part I), in which it held that, "with respect to decisions, acts and omissions of EU institutions and bodies, the system of preliminary ruling neither in itself meets the requirements of access to justice in article 9 of the Convention nor compensates for the strict jurisprudence of the EU Courts".⁹⁹ The legal system of the Party concerned has not changed in this respect.

101. Given the above, the Committee does not find the communication to be inadmissible for failure to use domestic remedies.

Concluding remarks on admissibility

102. In the light of the foregoing, the Committee finds the communication to be admissible.

Article 9 (3) – applicability to decisions by the European Commission on state aid

Whether a state aid decision is an "act" under article 9(3)

103. A decision by the Commission under article 108(2) TFEU has the important legal effect of declaring that a state aid measure is compatible with the internal market. It is final in that it endows the respective member State with the right to implement the measure. The Committee therefore considers that a decision on state aid measures by the Commission under article 108(2) TFEU is clearly an "act" within the meaning of article 9(3) of the Convention.

⁹⁷ Party's response to the communication, para. 14, and Party's comments on the Committee's draft findings, 24 February 2021, para. 6.

⁹⁸ Party's comments on the communicants' comments of 21 July 2018, 26 October 2018, para. 25.

⁹⁹ ECE/MP.PP/C.1/2011/4/Add.1, para. 90.

Whether, when acting under article 108 TFEU, the Commission acts as a “public authority”

104. The Party concerned is a Party to the Convention in its capacity as a regional economic integration organization. The definition of “public authority” in article 2(2) of the Convention includes, in subparagraph (d), “the institutions of any regional economic integration organization referred to in article 17 which is a Party to the Convention”. Accordingly, the Commission, as an institution of the Party concerned, is a “public authority” under article 2(2) of the Convention, and thereby for the purposes of article 9(3) of the Convention also.

105. The Party concerned, however, contends that when taking a decision under article 108(2) TFEU the Commission is acting as a “review body” within the exception in the definition of “public authority” in article 2(2) of the Convention for “bodies or institutions acting in a judicial or legislative capacity”. It submits this is made clear by article 2(2) of the Aarhus Regulation which excludes measures taken by EU institutions acting as an “administrative review body”. It claims that the Commission is accordingly not acting as a “public authority” for the purposes of article 9(3) of the Convention.¹⁰⁰

106. As an initial remark, the Committee is not convinced that the Commission, when acting under article 108 TFEU, is carrying out an “administrative review procedure” in the sense in which that term is used in the Convention. On this point, the Committee notes the statement by the Party concerned that its “state aid administrative procedure complies with the requirements of article 6 of the Aarhus Convention”.¹⁰¹ In the Committee’s view, the Commission’s procedure under article 108 indeed appears more akin to that of a permitting body. However, nothing turns on this point here, because the issue before the Committee is not whether or not the Commission is acting as an “administrative review body” when it takes a decision under article 108 TFEU but rather, whether it is acting in a “judicial or legislative capacity”.

107. Regarding that distinction, in its findings on communication ACCC/C/2008/32 (European Union) (Part II), the Committee unequivocally held that:

Article 9, paragraph 3, of the Convention provides for access to administrative or judicial procedures, but the tail to article 2, paragraph 2, of the Convention excludes from the definition of “public authority” “bodies acting in a judicial or legislative capacity”, but not bodies acting in the capacity of an administrative review body. The conclusion that must be drawn is clear: the Convention distinguishes between judicial and administrative procedures, and excludes public authorities only when they act in a judicial capacity, but not when they act by way of administrative review.¹⁰²

108. Accordingly, without getting into a detailed examination of whether the acts and omissions of each of the various procedures listed in article 2(2) of the Aarhus Regulation should be subject to challenge under article 9(3),¹⁰³ the Committee makes clear that contrary to what the Party concerned claims, there is no general exception in article 2(2) of the Convention for decisions taken by administrative review bodies. The Committee accordingly concludes that, when acting pursuant to article 108 TFEU, the Commission is indeed a public authority under article 2(2) of the Convention, and thus is likewise a public authority for the purposes of article 9(3).

Whether a state aid decision can “contravene national law relating to the environment”

109. Regarding whether the 2014 Decision, and state aid decisions more generally, can potentially contravene “national law relating to the environment”, the Committee considers that the judgment of 22 September 2020 by the Court of Justice (Grand Chamber) in C-594/18 P *Austria v Commission* provides useful clarity on this point.

110. In that judgment, the Court of Justice inter alia held:

¹⁰⁰ Party’s response to the communication, paras. 13-16.

¹⁰¹ Party’s reply to Committee’s questions, 26 June 2018, para. 33.

¹⁰² ECE/MP.PP/C.1/2017/7, para. 110.

¹⁰³ *Ibid.*, para. 111.

42. ... 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).

43. The same is true of provisions of secondary EU law on the environment. Thus, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1), under which certain projects are subject to an environmental impact assessment, applies to nuclear power stations and other nuclear reactors (see, to that effect, judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 76).

44. Furthermore, the Court has already held that State aid which contravenes provisions or general principles of EU law cannot be declared compatible with the internal market (see, to that effect, judgment of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraphs 50 and 51).

45. 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.

111. The Court of Justice further specified that:

100. ... 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, [it must] 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.

112. It is clear from the judgment of the Court of Justice that a decision on state aid measures by the Commission may contravene EU environmental law, and that this is the case regardless of the justification given for the aid provided by the member State. As a consequence, in the light of the Court of Justice’s judgment, the Committee considers it beyond argument that state aid decisions can potentially contravene EU “law relating to the environment”, within the meaning of article 9(3) of the Convention.

Article 9 (3) – access to administrative or judicial procedures

113. The Committee next examines whether environmental NGOs have access to administrative or judicial procedures to challenge decisions on state aid measures by the Commission under article 108(2) TFEU which contravene EU law relating to the environment.

114. The Committee has received submissions in the present case regarding the possibilities to challenge state aid decisions through the following procedures:

(a) Internal review under the Aarhus Regulation;

- (b) Complaint to the Commission under articles 1(h) and 20(2) of Regulation 659/1999;
- (c) Annulment procedure under article 263(4) TFEU;
- (d) Intervening in an ongoing annulment procedure under article 263(4) TFEU.
- (e) Reference for a preliminary ruling under article 267 TFEU;
- (f) Access to justice regarding subsequent decisions at the Member State level.

115. The Committee examines each of these below.

Internal review under the Aarhus Regulation

116. It is common ground between the parties that article 2(2)(a) of the Aarhus Regulation excludes decisions on state aid taken by the Commission under article 108(2) TFEU from the definition of acts and omissions which may be subject to a request for review by an NGO under articles 10-12 of the Aarhus Regulation.

Complaint to the Commission under articles 1(h) and 20(2) of Regulation 659/1999

117. The Party concerned has cited several examples in which environmental NGOs have been recognized as “interested parties” under article 1(h) of Regulation 659/1999 and thus entitled to inform the Commission, pursuant to article 20(2) of that Regulation, about allegedly unlawful aid. However, the decision whether to commence a formal investigative procedure under article 108(2) as a result of that information rests at the discretion of the Commission. In this regard, the Committee recalls its findings on communications ACCC/C/2013/85 and ACCC/C/2013/86 (United Kingdom), in which it held:

The right to ask a public authority to take action does not amount to a “challenge” in the sense of article 9, paragraph, 3, and especially not if the commencement of action is at the discretion of the authority.¹⁰⁴

118. Accordingly, even if an environmental NGO is indeed recognized to be an “interested party” under article 1(h) of Regulation 659/1999, a mere right to ask for a formal investigative procedure by the Commission under article 108(2) TFEU does not meet the requirements of article 9(3) of the Convention. Moreover, a right to ask the Commission to carry out an investigative procedure under article 108(2) TFEU is far from a right to challenge the decision consequently taken by the Commission under article 108(2) as a result of that investigative procedure.

119. Based on the foregoing, it is clear to the Committee that a complaint to the Commission under articles 1(h) and 20(2) of Regulation 659/1999 does not provide access to an administrative or judicial procedure to challenge a decision on state aid measures by the Commission under article 108(2) TFEU.

Annulment procedure under article 263(4) TFEU

120. The Committee recalls that in its findings on communication ACCC/C/2008/32 (Part II), it examined at some length the possibilities for members of the public to bring an annulment procedure under article 263(4) TFEU and concluded that article 263(4), as currently interpreted by the CJEU, is insufficient to meet the requirements of article 9(3) of the Convention.¹⁰⁵

121. In the present case, the Party concerned cites the General Court’s judgment in *Ja zum Nürburgring* as an example of a case in which an NGO, albeit not an environmental NGO, was recognized to have a direct and individual concern under article 263(4) TFEU to challenge a decision by the Commission not to commence a formal investigative procedure under article 108(2) TFEU. The Committee notes that this judgment is currently under appeal and it cannot be known at this point what the outcome will be. The Committee considers that, if this judgment is upheld on appeal, and is interpreted and followed in the future to recognise

¹⁰⁴ ECE/MP.PP/C.1/2016/10, para. 84.

¹⁰⁵ ECE/MP.PP/C.1/2017/7, paras. 58-78.

environmental NGOs as having a direct and individual concern under article 263(4) TFEU so as to be able to challenge decisions on state aid by the Commission under article 108(2) TFEU, then this could potentially meet the requirements of article 9(3) of the Convention. However, since the judgment itself did not concern an environmental NGO nor a challenge to a decision taken by the Commission under article 108(2) TFEU, the Committee considers that the judgment in *Ja zum Nürburgring* does not in itself demonstrate that environmental NGOs have standing under article 263(4) to challenge a decision on state aid measures by the Commission under article 108(2) TFEU.

Intervening in an ongoing annulment procedure under article 263(4) TFEU

122. The Party concerned refers to the possibility for NGOs to intervene in judicial proceedings before the CJEU in support of one of the parties to the case in accordance with article 40(2) of the Statute of the CJEU.¹⁰⁶ The Committee notes however that this possibility can under no circumstances replace an NGO's right to independently initiate a challenge to an act or omission that contravenes EU law relating to the environment, since it is entirely dependent on a third party deciding to bring proceedings under article 263(4) TFEU.

Reference for a preliminary ruling under article 267 TFEU

123. With respect to the preliminary ruling procedure in article 267 TFEU, in its findings on communication ACCC/C/2008/32 (Part I), the Committee noted that:

While it is not possible to contest directly an EU act before the courts of the member States, individuals and NGOs may in some States be able to challenge an implementing measure, and thus pursue the annulment by asking the national court to request a preliminary ruling of the ECJ. Yet, such a procedure requires that the NGO is granted standing in the EU member State concerned. It also requires that the national court decides to bring the case to the ECJ under the conditions set out in [the Treaty].¹⁰⁷

124. In those findings, after taking into account the above, the Committee made clear that:

While the system of judicial review in the national courts of the EU member States, including the possibility to request a preliminary ruling, is a significant element for ensuring consistent application and proper implementation of EU law in its member States, it cannot be a basis for generally denying members of the public access to the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies; nor does the system of preliminary review amount to an appellate system with regard to decisions, acts and omissions by the EU institutions and bodies. Thus, with respect to decisions, acts and omissions of EU institutions and bodies, the system of preliminary ruling neither in itself meets the requirements of access to justice in article 9 of the Convention, nor compensates for the strict jurisprudence of the EU Courts.¹⁰⁸

125. The caselaw cited by the Party concerned in the present case does not address the concerns regarding the preliminary ruling procedure identified by the Committee in its findings on communication ACCC/C/2008/32 (Part I). The Committee accordingly considers these findings to be equally applicable to the present case.

Access to justice regarding other decision-making procedures at the national level

126. The Party concerned submits that the communicants had other opportunities for access to justice with respect to the environmental decision-making on Hinkley Point C at various stages, including the stages of environmental impact assessment, strategic environmental assessment and habitats, planning and permitting processes.

127. The Committee points out that at none of the procedures or stages identified by the Party concerned would the communicants have been able to challenge the decision taken by the European Commission under article 108(2) TFEU. The possibilities for members of the

¹⁰⁶ Party's reply to the Committee's questions, 26 June 2018, para. 43.

¹⁰⁷ ECE/MP.PP/C.1/2011/4/Add.1, para. 89.

¹⁰⁸ *Ibid.*, para. 90.

public to have access to justice with respect to these other procedures are thus irrelevant to the present case.

Concluding remarks

128. In light of the above, the Committee finds that, by failing to provide access to administrative or judicial procedures for members of the public to challenge decisions on state aid measures taken by the European Commission under article 108(2) TFEU which contravene EU law relating to the environment, the Party concerned fails to comply with article 9(3) of the Convention.

Article 9(4) – adequate and effective remedies

129. In the light of its finding in paragraph 128 above, the Committee finds that, by failing to provide any procedure under article 9(3) of the Convention through which members of the public are able to challenge decisions on state aid measures by the European Commission under article 108(2) TFEU which contravene EU law relating to the environment, the Party concerned also fails to provide an adequate and effective remedy regarding such decisions as required by article 9(4) of the Convention.

IV. Conclusions and recommendations

130. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

131. The Committee finds that:

(a) By failing to provide access to administrative or judicial procedures for members of the public to challenge decisions on state aid measures taken by the European Commission under article 108(2) TFEU which contravene EU law relating to the environment, the Party concerned fails to comply with article 9 (3) of the Convention;

(b) By failing to provide any procedure under article 9(3) of the Convention through which members of the public are able to challenge decisions on state aid measures taken by the European Commission under article 108(2) TFEU which contravene EU law relating to the environment, the Party concerned also fails to provide an adequate and effective remedy regarding such decisions as required by article 9(4) of the Convention.

B. Recommendations

132. The Committee, pursuant to paragraph 35 of the annex to decision I/7, recommends that the Meeting of the Parties, pursuant to paragraph 37(b) of that annex, recommends that the Party concerned take the necessary legislative, regulatory and other measures to ensure that the Aarhus Regulation is amended, or new European Union legislation is adopted, to clearly provide members of the public with access to administrative or judicial procedures to challenge decisions on state aid measures taken by the European Commission under article 108(2) TFEU which contravene EU law relating to the environment, in accordance with article 9(3) and (4) of the Convention.
