

Comments on the Committee's draft findings and recommendations of 18 January 2021 with regard to communication ACCC/C/2015/128

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

1. The Observer ClientEarth wishes to thank the Committee for the preparation of the draft findings. We consider that, besides certain small formal issues set out below, the draft findings accurately reflect the legal situation and draw the right conclusions based on it. Therefore, our comments below are not of such nature as to require a substantive amendment to the draft findings.
2. We first address several formal issues before using this opportunity to make some more general observations about these draft findings and the, in our view, regrettable stance adopted by the Party concerned.

Formal issues

3. When analysing the draft findings we have come across the following formal issues that we would like to bring to the attention of the Committee.
4. Paragraph 27 of the draft findings should indicate that the parties were invited to provide their comments by 1st March 2021, not 8 March 2021.
5. At paragraph 33 and subsequent paragraphs, references to Council Regulation 659/1999 should be replaced 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, 2015 OJ L 248/9.
6. At paragraph 80, the reference to the Party concerned's claims on this point could be added in a footnote. The reference is: "Comments on the communicant's and observer's update of 06.11.2020, 7.12.2020, para. 29".

More general observations

7. We note that throughout the procedure the Party concerned has regrettably adopted a very defensive stance. The procedure before the Committee is intended to be non-confrontational and assist the Parties to comply with a Convention that they have ratified. The compliance mechanism depends on the cooperation of all the Parties to the Convention and, to this date, in most cases the Parties have taken a productive approach in their dealings with the Committee.
8. It is therefore concerning to see that the Party concerned appears to insist on a number of issues that in part have been clarified in different contexts previously or have been clarified by the courts of the Party concerned. We will focus our observations on four issues that have been particularly contentious throughout these proceedings: (1) decisions adopted in the capacity of an administrative review mechanism; (2) the potential for EU state aid decisions to contravene EU environmental law; (3) the EU's declaration upon signature; and (4) preliminary references under Article 267 TFEU. We hope that these additional explanations can be of benefit for the resolution of this case, also with a view to the eventual implementation of the Committee's findings.

1. Decisions adopted in the capacity of an administrative review mechanism

9. Article 2(2) Aarhus Convention specifies that bodies and institutions acting in a judicial or legislative capacity are not to be considered “public authorities” for the purposes of the Convention. Since Article 9(3) applies to acts and omissions of public authorities and private persons, this provision does not apply to a body acting in a judicial or legislative capacity. In its findings on case ACCC/C/2008/32 (part II), the Committee explains that an administrative review function cannot be considered as either a “legislative” or a “judicial” function.¹
10. This should be rather uncontroversial, both in theory as well as in its application to this specific case.
11. As to the theory, if an act is adopted in a legislative capacity, it is endowed with greater democratic legitimacy. Therefore, certain legal systems do not permit judicial review of legislative acts, others do so only based on very limited grounds (such as violation of the Constitution). For instance, it is difficult to imagine that an act of Parliament would be reconsidered by way of an administrative review with a possible appeal to the court. It would be unclear which authority could conduct such a review and how it could be politically legitimized.
12. Equally, if the Convention would require a specific administrative or judicial review procedure of an act adopted in a judicial capacity, including by different applicants than those of the dispute that gave rise to the judicial decision, the organization of the national court system would be brought into disarray. For instance, if a permit applicant would appeal against a decision of a public authority before an administrative court and the court overrules the public authority, arguably misapplying environmental law, an application of Article 9(3) to this dispute would require a right for members of the public to challenge the judgement of the administrative court by way of administrative or judicial proceedings. The administrative court would moreover be the defendant in these court proceedings, which is hardly practical.
13. Applied to this specific case, it is apparent that the Commission does not act in either a legislative or judicial capacity. It is also clear that state aid decisions are not comparable to the acts described in the previous paragraph.
14. As regards legislative capacity, the Treaties define the legislative procedures (Article 288 TFEU) and Commission state aid decisions are not included. Nor is there any indication that they would benefit from the same democratic legitimacy described above.
15. As regards judicial capacity, the Commission’s state aid decisions are frequently the subject of court challenges by potential aid recipients or competitors before the Court of Justice. There is no contradiction in that: the Commission acts as the defendant and seeks to justify its decision, the Court tests whether the Commission has exceeded the discretion accorded to the Commission by the Treaties. This is an entirely regular review of an administrative decision, which is very much comparable to other reviews of decisions of an administrative authority.
16. Despite this, it is regrettable that the Party concerned has continued to insist that the exclusion of bodies acting in an administrative review capacity is to be considered to fall under Article 2(2), last sentence, Aarhus Convention. In this regard, it is important to remember that the fact that a body is considered a public authority for the purposes of the Convention does not mean that all of its acts and omissions must be subject to review under Article 9(3) Aarhus Convention. Rather, only those acts and omissions that have the potential to contravene environmental law must be subject to review. This

¹ Paras 108-110.

means that for instance, Ombudsman decisions and OLAF decisions could still be excluded on that basis.

2. The potential of EU State Aid Decisions to contravene EU environmental law

17. According to the Party's submissions, EU state aid decisions allegedly do not have the potential to violate EU environmental law. The Party concerned seems to suggest that there is a strict separation, whereby the Commission only considers competition matters in isolation, while it is not concerned with the compliance with EU environmental law.
18. This is incorrect as a matter of law. Based on the EU Treaties, in particular Article 11 TFEU, the Commission is always bound to ensure compliance with EU environmental law. This has been explained very clearly by the court of the Party concerned (C-594/18 P *Austria v Commission*), as referred to in para. 114 of the draft findings. To hold otherwise would undermine the unified application of EU law.
19. The same judgement also confirms that the Court will verify whether the Commission has ensured compliance with these obligations when reviewing a state aid decision. It is therefore clear that the Commission is under a judiciable obligation to ensure compliance with EU environmental law. The only question that remains is therefore who has standing to enforce this obligation, rather than whether this obligation rests on the EU Commission.
20. It should also be emphasized that in practice the EU Commission does check (albeit not systematically) compliance with EU environmental law, demonstrating that it is aware of these legal requirements. This can be shown by the notification forms that the Commission requires the EU Member States to complete, which specifically inquire, in respect of certain categories of aid, whether the Member States ensure compliance with EU environmental law, such as Environmental Impact Assessment.² Equally, the Commission does address compliance with EU environmental law in certain state aid decisions. The Commission also implements these legal obligations in its own Guidelines. For instance, the Commission's state aid guidelines for environmental protection and energy (EEAG)³ explicitly state that specific state aid must comply with EU Water and Waste legislation (paras 117 and 118); and the current draft guidelines on "Important Projects of Common European Interest" state that such a "*project must respect the 'do no significant harm' principle and ensure the phasing out of environmentally harmful subsidies, as recalled by the European Green Deal*" (para. 21 – see also para. 15).⁴ To be clear, we do not intend to raise new evidence at this stage and fully accept if the Committee cannot consider these documents as part of its deliberations. Our only intention is to demonstrate that the EU Commission is already seeking to implement its obligation to ensure compliance with EU environmental law in certain instances and the findings of the Committee are therefore entirely compatible with existing practice.

² See: https://ec.europa.eu/competition/state_aid/legislation/forms.html

³ Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0628\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0628(01))

⁴ Draft Communication from the Commission - Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, available at: https://ec.europa.eu/competition/consultations/2021_ipcei/draft_communication_en.pdf

21. It is therefore regrettable that the Party concerned appears to object so fundamentally to the fact that the EU Commission is under a legal obligation to comply with EU environmental law, even though this has been so explicitly confirmed by the CJEU and can be evidenced in practice. The applicability of Article 9(3) Aarhus Convention should therefore not be in doubt.

3. The declaration upon approval of the Party concerned

22. Upon signature, the Party concerned has made a declaration on the application of the Aarhus Convention. As regards access to justice, the declaration states:

*“[...] the European Community declares that it has already adopted several legal instruments, binding on its Member States, implementing provisions of this Convention and will submit and update as appropriate a list of those legal instruments to the Depositary in accordance with Article 10 (2) and Article 19 (5) of 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. [...] The European Community is responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force.”*
(emphasis added)

23. The declaration makes clear that the EU Member States remain, for the time being, responsible for the adoption of the necessary measures to implement Article 9(3) Aarhus Convention as regards the omissions by private persons and public authorities, except for those by the institutions of the EU. Since state aid decisions are adopted by the EU Commission, this part of the declaration is irrelevant to the present dispute. Moreover, the Aarhus Regulation does address acts of EU institutions and bodies, including specifically state aid decisions, albeit in a way that does not comply with the Convention. This part of the declaration does not therefore oust the application of the Convention to the present case.

24. This is best illustrated by the Committee’s findings on communication ACCC/C/2014/123 (European Union). These findings were adopted on 24 May 2017 and the Party concerned did not make any comments on the draft findings, apparently accepting the reasoning of the Committee. The Committee concluded that the Party concerned did not fail to comply with the Convention for having failed to adopt a Directive on access to justice to challenge acts of private persons and public authorities of the Member States. The basis for these findings was that the EU had declared that the Member States remain responsible for the implementation of these obligations until such time as there is EU law in force, such as a directive on access to justice. Once the EU would have adopted such a directive, the Committee could very well review it but for now, the EU is not the responsible Party for these obligations. This can be clearly contrasted with EU state aid decisions, where relevant legislation exists (the Aarhus Regulation) and the EU Member States are not responsible for these decisions and the obligation to provide access to justice in respect of them.

25. It is therefore surprising that the Party concerned still refers to its declaration in this context, considering in particular that the Committee has considered and interpreted the declaration already at length.

4. Preliminary rulings

26. As regards preliminary references, the Committee has already addressed the Party's argument regarding the possibility to rely on the preliminary ruling procedure to contest the validity of EU acts at length in the first part of its findings on communication ACCC/C/2008/32. These findings were adopted in April 2011 and did not cause much opposition from the Party concerned at that time. The Committee has reiterated some of the arguments in the second part of its findings and in its advice on request ACCC/M/2017/3.
27. The argumentation behind this is too long to restate at this stage. However, one observation is perhaps of particular importance to demonstrate that this argumentation is flawed. The reason given by the Court of Justice as to why competitors can challenge EU state aid decisions directly based on Article 263 TFEU as opposed to having to go through the preliminary ruling procedure has been that an applicant should not be required to violate the law in order to be able to go to court. This same reasoning applies to an environmental NGO, which would have to first wait for a specific law to be breached and environmental harm to arise before being able to address the court. The Party's arguments therefore do not seek to uphold a fundamental tenet of the European Union legal order. They simply reflect a political decision as to whether to implement this access to justice right for environmental NGOs as foreseen by the Convention, or not.
28. Specifically as regards state aid matters, we further reiterate that the EU Commission's state aid decisions on the one hand, and national aid measures on the other, are different categories of administrative acts adopted by different authorities. These two different categories of decisions are capable of breaching EU law on the environment if compliance of activities is not adequately checked by, respectively, the EU Commission and national granting authorities. As such, both categories must be subject to administrative and judicial review in accordance with Article 9(3) and 9(4) of the Convention. The EU therefore cannot avail itself of the existence of remedies at national level to avoid offering adequate remedies at EU level; especially since a national level of review cannot cover the EU Commission's State aid decisions.
29. By way of further context related to challenging national state aid measures in national courts, the Commission released a draft revised "Notice on the enforcement of State aid rules by national courts" on 22 January 2021.⁵ It implicitly confirms the ACCC's findings that preliminary rulings in State aid matters are not a sufficiently adequate judicial remedy for members of the public under Article 9 of the Convention.
30. Preliminary rulings are subject to the admissibility of plaintiffs to bring a case. This depends on national procedural rules, based on the principle of procedural autonomy of Member States. As confirmed by the Commission's draft Notice, "*In application of the principle of procedural autonomy, Member States apply their national rules on legal standing to national litigation concerning State aid, provided that these respect the principles of equivalence and effectiveness.*"⁶ The draft Notice does recommend that national courts admit other types of claimants showing another interest (para. 24-25). However, the draft does not explicitly recommend to national court to find members of the public

⁵ This new Notice would replace the current one of 2009, is under a public consultation until 16 April 2021 and is available at:

https://ec.europa.eu/competition/consultations/2021_sa_enforcement_notice/enforcement_notice_en.pdf

⁶ Commission draft Notice on the enforcement of State aid rules by national courts of 22 January 2021, para. 21

and NGOs admissible for claims alleging breaches of environmental law by activities supported by State aid.

31. Besides legal standing, which is not guaranteed by the EU legal system, the level of control of State aid decisions by national courts is clearly inadequate to ensure an effective remedy under Article 9 of the Convention. National courts do not have the power to rule on the compatibility of an aid with the internal market, and compliance of an activity with its environmental law obligations is one of such conditions of compatibility. National courts also do not have the power to rule on the validity of a Commission's State aid decision, only the CJEU is competent to do so. Lastly, the Enforcement Study (2019) confirms that *"a number of country reports in Annex 3 have stressed that parties often prefer to submit a complaint to the Commission rather than starting court proceedings, since the outcome of private actions can be very uncertain and costly."*
32. All this leads to the conclusion that even if the possibility to challenge a national State aid measure before a national court exists, the system does not offer the possibility to directly challenge a EU Commission's state aid decision before a national court in the absence of a preliminary ruling. At the same time, there is evidence to suggest that preliminary rulings are not referred by national courts in practice and that claimants prefer to act directly before the Commission⁷ – where they would not benefit from any internal or judicial review procedure as required by Article 9 of the Convention.
33. It is therefore regrettable that the Party concerned repeatedly defers to the preliminary ruling procedure, instead of ensuring that the internal review mechanism is adequate. It is particularly concerning that the Party concerned insists on the theoretical possibility to obtain a validity reference without engaging at all on the practical barriers that make this route unusable for members of the public. This shows a disregard for the concerns of citizens that the institutions of the Party concerned are meant to serve.

Conclusion

34. In conclusion, the Observer ClientEarth supports the Draft Findings in their current form, subject to our minor remarks at paragraphs 4 to 6 of this note.

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⁷ Out of the total 49 cases analysed by the Enforcement Study on recovery matters, only 5 involved references for preliminary ruling to the CJEU, i.e. 10%. For private enforcement (claims for suspending or terminating unlawful aid), the percentage of cases referred for preliminary rulings is only 13%. The absence of reference for preliminary rulings implies that there is ultimately no judicial review of the validity of Commission's State aid decisions by the CJEU following actions brought at national level. See Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, figures 13, 14 and 27

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