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Sent: Thursday, September 22, 2022 3:15 PM
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Subject: Re: Request ACCC/M/2021/4 (European Union) - plan of action

Dear Aarhus Secretariat

Thank you for your email of 29 August.

The European Union has now prepared an action plan which includes a public consultation questionnaire. My comments go to the questionnaire itself: in particular I fear that it does not aim at implementation of the Committee's recommendations and steers consultees towards unsatisfactorily vague options.

Failure to aim for implementation of the Committee's recommendation

As you remind us, the European Union was invited by the Committee to submit a plan of action regarding the implementation of the recommendation in paragraph 131 of the Committee's findings on communication ACCC/C/2015/128.

It is therefore disappointing that the consultation does not aim at implementation of that recommendation. Indeed, the questionnaire expressly and repeatedly invites consultees to consider as an option doing nothing at all to implement the recommendation: questions 13 to 19 expressly raise the possibility of "maintaining the status quo".

It is as if the Union is free to frame its own policy on State aid decisions regardless of its international obligations. For example, the Committee has found that the EU is in breach of Article 9(3) of the Convention by failing to provide access to administrative or judicial procedures for members of the public to challenge Commission State aid measures that contravene European Union law relating to the environment; yet question 7 asks whether there is a *need* for *additional* means of challenging Commission State aid decisions, rather than acknowledging the legal requirement to remedy the failure to provide access to justice.

In short, the consultation does not discuss how to implement the Committee's recommendation; instead it invites a discussion of whether the recommendation should be implemented.

Unsatisfactory Options

The questionnaire is tendentious: it steers consultees towards the view that there are particular reasons to separate out Commission State aids decisions from "administrative acts" within the meaning of Article 2(1)(g) of the Aarhus Regulation, and to adopt specific measures to provide access to justice to challenge such decisions.

The questionnaire raises a number of factors that appear in the Commission's view to militate against implementation of the recommendation by amendment of the Aarhus Regulation, including the following: Union law, in particular the existing State aid rules and procedures (in question 15); legal certainty (question 16); legitimate expectations (question 17); and delays affecting the granting and the implementation of State aid (question 18).

As a matter of law the EU may, as the Committee expressly states, adopt new European Union legislation to clearly provide members of the public with access to administrative or judicial procedures to challenge Commission State aid decisions. But unfortunately the two main options proposed as an alternative to amendment of the Aarhus Regulation are unsatisfactory. These options are Option 2: Amendment of the Best Practices Code and Option 3: Amendment of the Procedural Regulation.

Option 2 is not fully developed: the language describing the Option is vague and the Commission stresses that all elements are subject to change. But it seems that any configuration of Option 2 would be soft law, creating no new rights beyond those already established by the TFEU, the procedural and implementing Regulations, and their interpretation by the EU Courts. In particular it is difficult to understand how this Option could provide for review by the EU Courts.

Option 3 is also not fully developed - it is unclear what its final contents would be. Whilst more concrete than Option 2, it contains "possibilities" and offers a review mechanism "similar" to the one under the Aarhus Regulation. It is therefore not possible for consultees to take a view on whether Option 3 would meet the concerns expressed in the C128 findings.

To summarise, the consultation steers consultees towards two Options which cannot be properly assessed because they are so vague. Option 2 would almost certainly fail to implement the Committee's recommendation. Option 3 may or may not implement that recommendation, and any consultees supporting that latter option may find that, once the option is fleshed out it fails to comply with the EU's obligations under international law.

kind regards

Alistair McGlone