

Comments on the Plan of Action on case ACCC/M/2021/4 (European Union)

1. As an observer on case ACCC/M/2021/4, ClientEarth thanks the Compliance Committee for this opportunity to comment on the plan of action submitted by the Party concerned on 31 July 2022.
2. ClientEarth would like to make the following observations.
3. The Committee had invited the Party concerned to submit “a plan of action, including a time schedule by 1 July 2022 regarding the implementation of the recommendation in paragraph 131 of the Committee’s findings on communication ACCC/C/2015/128 (European Union).”
4. The plan of action submitted by the Party concerned essentially states that it would be “premature” to identify the “measures that will be needed to implement the recommendation in the Committee’s findings”. Rather, the plan of action describes the steps the Party concerned is currently taking to identify these measures.
5. ClientEarth therefore considers that the Commission’s plan does not yet answer the invitation of the Compliance Committee.
6. While ClientEarth is encouraged by the Party’s statement that it remains “committed to constructively work towards” meeting the deadlines set by the Committee, this delay in delivering a clear plan of action is concerning.
7. ClientEarth understands that the preparation of a draft and final plan of action by the Party concerned by a Decision of the Meeting of the Parties serves as a possibility to obtain feedback from the Compliance Committee on whether a possible course of action would suffice to fulfil the recommendations in that case. ClientEarth therefore considers that it would be imperative that the Party concerned updates its plan of actions with the proposed measures it will take to implement the Committee’s recommendations. ClientEarth would wish to then comment on the updated plan.
8. The plan of action appears to suggest that these proposed measures would only become public in the Commission Communication ‘on the findings adopted by the Aarhus Convention Compliance Committee in case ACCC/C/2015/128 as regards state aid: Analysing the implications of the findings and assessing the options available’ (referred to as “Commission Communication” below), which the Party concerned intends to publish by the end of 2022. Should this be a correct reading of the plan, it would be of pivotal importance that the Party concerned remains open to incorporate feedback from the Compliance Committee that it may receive on the options identified in this Communication. The Communication must therefore not constitute a final decision on the measures that the Party concerned will take, neither legally nor practically/politically.
9. It would also be important that the Commission Communication is made public prior to the upcoming 77th meeting of the Compliance Committee (13-16 December 2022), in order to allow for an informed discussion during an open session at that meeting. Even if the Commission Communication does not become available in time for that meeting, ClientEarth would consider it helpful to already

discuss the three possible courses of action that the Party concerned has identified as options 1 to 3 of its ongoing public consultation (see: https://ec.europa.eu/eusurvey/runner/OPC_on_ACCC_Findings) at that meeting. However, in that case it may be necessary to discuss the Commission Communication, as well as an updated plan of action prepared by the Party concerned, during an open session at the Committee's 78th meeting in March 2023 as well.

10. ClientEarth will in the meantime make a submission to the public consultation organized by the Party concerned and will forward it to the Compliance Committee, once it has been finalized. For present purposes, ClientEarth would only like to highlight two points of particular importance that will be reflected in its submission.
11. First, any measures that will be adopted must ensure that an applicant receives a legally binding reply to his/her request or complaint. This is necessary to ensure that rights are created for members of the public concerned to appeal unsatisfactory decisions to the Court of Justice of the European Union. To explain, an action before the EU General Court under Art. 263 TFEU is only open in relation to acts that are intended to produce legal effects vis-à-vis third parties. A reply to an internal review request under Art. 10 Aarhus Regulation (Regulation 1367/2006, as amended) is such a binding decision; its legally binding nature derives from the overarching Regulation. If the reply to the internal review request was not binding, there would be no review procedure that would fulfil the requirements of Art. 9(3) and (4) Aarhus Convention.
12. Second, any review procedure must be available for any contraventions of EU environmental law by state aid decisions. It should not be limited to only certain sectors of aid, certain types of state aid decisions or certain contraventions of EU environmental law. None of these limitations would be compatible with Art. 9(3) Aarhus Convention and accordingly the Committee's findings on communication ACCC/C/2015/128 (EU).

We would like to thank the Committee members and the members of the secretariat for their continued consideration of and engagement on this decision.



Sebastian Bechtel

Senior Law and Policy Advisor, Environmental Democracy

sbechtel@clientearth.org

www.clientearth.org