Brussels 20 September 2023

Minutes of the hybrid workshop "Access to Justice in State aid: which reforms do we need?" (co-organised by ClientEarth and the Socialists & Democrats group in the European Parliament) *20 September 2023, 14:15 – 16:15, European Parliament conference room Spinelli (ASP) 1G369*

Keynote speaker:

- *MEP Mr Milan BRGLEZ, Member of the European Parliament (S&D)*

Panellists:

- *Ms Vita JUKNE, Head of unit at DG ENV (E.4 – Environmental rule of law & Governance) and Mr Koen VAN DE CASTEELE, Head of unit at DG COMP (A.3 – State aid case support and policy), European Commission*
- *Mr Preben SANDBERG PETTERSSON, Councellor at the Danish Permanent Representation to the EU (speaking in his personal capacity)*
- *Ms Summer KERN, Lawyer at Justice and Environment and NGO Observer to the Bureau to the Aarhus Convention*
- *Ms María SEGURA, founding partner at law firm Clayton & Segura*
- *Ms Bróna HEENAN, Policy Director at the European Round Table for Industry (ERT) (speaking in her personal capacity)*

***Participants (42 online, 14 in person; excluding panellists and organisers)**:*

- *From EU/EEA institutions: members of the European Parliament and State aid enforcement authorities*
- *From public authorities: representatives of Member States and members of ministries*
- *Environmental NGOs*
- *Other non-governmental organisations, including trade and business associations*
- *Law firms, consultants, academics*
- *Think tanks & independent bodies*
- *Industries*

1. Welcome and introduction by ClientEarth

ClientEarth (Ms Juliette DELARUE) thanked MEP Brglez and the S&D group for co-organising and supporting this event and helping keep the topic alive. ClientEarth stressed that it is essential that the European Parliament takes part in this debate. Whether it will need to act as co-legislator, or give an opinion on a Council regulation or monitor the developments in general, it is crucial that the European Parliament, as representative of EU citizens, ensures that their democratic rights, in particular access to justice rights, are secured and effective.

The purpose of the workshop is to discuss how to open access to justice in State aid decisions on environmental matters. There is currently no possibility for NGOs to challenge Commission State aid decisions and the EU was found not to comply with the Aarhus Convention in this regard. It is also the occasion to explore the various options based on the Commission Communication of 17 May 2023 on the findings of the ACCC with regard to State aid decisions, and the suitable solutions.

ClientEarth mentioned that the EU is reminded that by 1 October 2023 it needs to report progress to the Aarhus Convention Compliance Committee (ACCC).

2. Keynote speech by MEP Mr Milan BRGLEZ:

- With the adoption of the EU Green Deal, the EU committed to pursue a sustainable growth strategy. In this transformative process, the State aid mechanism should play a crucial role in financing and speeding up decarbonisation in order to achieve the net zero climate target by 2050.
- Transformative process should not only be "green" but also "just" at the same time – civil society including NGOs and members of public should be able to scrutinize the work of the EU institutions and their policies to ensure compatibility with EU environmental law, also and especially when it comes to the Commission's State aid decisions that basically authorise means of public support to Member State activities on the market.
- Access to justice in environmental matters is an indispensable legal instrument that could further enhance civil society role in the European green and just transition.
- State aid decisions remain exempted under the revised Aarhus Regulation, while a clear political signal was given that co-legislators and the Commission were ready to reopen this issue at a later stage.
- With this in mind, it is perfectly clear that silver bullet solution might be out of reach – a just green transition is not possible neither without an empowered civil society nor without well-functioning financing mechanisms.
- The European Parliament needs to be fully involved as co-legislator in this exercise, especially through its role of representing and expressing the will of the EU citizens and thereby ensuring their rights are truly embedded in the process of aligning the Union's legal order to its obligations under the Aarhus Convention. This was also emphasised as a well-intended request in letter signed in November 2022 to Commissioners Vestager and Sinkevičius by MEPs representing the majority of political groups.
- There is consensus to provide a remedy that civil society can challenge State aid decisions that is adequate, effective and efficient, thereby ensuring a State aid mechanism that is legally certain and predictable. This would not be sufficient at the national level, as it has been proven on many occasions that the process of challenging EU acts at national level is often hindered, especially for NGOs.
- The EU should lead by example in carrying out its international obligations and preserve the functioning of the unique international legal order where fundamental rights are preserved.

3. Statements by panellists

3.1 European Commission – DG COMP/DG ENV

- The Commission stressed that access to justice in State aid is a very important topic and the Commission appreciated the possibility to attend this workshop. The Commission is currently in a listening mode as the College of Commissioners is still to take a decision and it cannot prejudice pre-emptively the deliberations of the College.
- The Commission referred to the Commission's Communication on the findings of the ACCC with regard to State aid decisions of 17 May 2023 as the first step towards finding a possible solution but stressed that it is not possible to prejudge work that the Commission will undertake next to find the best solution.

- The Commission highlighted the following specific characteristics of State aid control that need to be kept in mind:
    - State aid control is a bilateral process between the Commission and the Member States, as also confirmed by Union courts.
    - State aid control already encompasses the obligation to ensure compliance with EU law which includes EU environmental law provided there is an indissoluble link (see C-225/91 *Matra v Commission*; Case T-101/18, *Republic of Austria v Commission (Paks II)*).
    - There is a sizeable body of law and State aid decisions – 900 decisions in 2022 and 1000 decisions in 2023 compared to 350 decisions adopted per year before the period of crisis. Concurrently, the number of opening decisions has lowered in the past few years because of the crisis.
- The Commission stressed that access to justice is of paramount importance and recalled the EU's commitment to comply with its international obligations.
- The Commission presented its Communication of 17 May 2023. It stressed that the Commission is currently driven by two key objectives: (i) ensure full compliance with its international obligations under the Aarhus Convention in line with the findings in ACCC/C/2015/128 and (ii) preserve the specificity of State aid control and its effectiveness as one of the tools that can speed up the green transition. To this end, Option 4 (*status quo*) was excluded in the Communication while the other three options were maintained, and no new option was added. The possibility to combine different options was confirmed.
- The Commission presented Options 1 to 3. In relation to Option 2, the Commission clarified that it involves amending the Code of Best Practices combined with amending the Implementing Regulation on State aid notification, which is a legally binding act and would therefore provide the Commission with the legal hook.
- The Commission explained that it is currently preparing an impact assessment, which will include a cost/benefit analysis of the options. This impact assessment will notably take into account (i) the scope of State aid decisions to be covered, (ii) the legal instrument to be used, (iii) the timelines to be retained for the duration of proceedings and (iv) the resources of the institutions.
- The Commission highlighted that transparency of the decision-making process is increased compared to other procedures: the Commission took the additional intermediate step of preparing the Communication, sharing the options considered and including a summary of the stakeholders' consultations, in line with the Better Regulation.
- The Commission stressed that further work would continue, and that the College is in the path of further reflection for narrowing down the options and possible combinations.

3.2 Mr Preben SANDBERG PETTERSSON expressed the following (slide attached to these minutes):

- The question as to how to apply Aarhus Convention to the area of State aid and integrate the two legal systems, is a complex matter.
- A dualistic approach to access to justice in State aid is needed to ensure (i) that NGOs have access to courts to ensure compliance with EU environmental law but also (ii) that there are no additional burden for individual Member States and undertakings.

- Approval for State aid decisions already comprises a lengthy and complicated procedure and there might be a risk that ensuring access to justice in State aid could distort competition and trade in the single market. There are already EU State aid communications which integrate environmental law considerations, such as the new IPCEI Communication which includes *ex ante* rules with environmental conditionalities for approving the aid.
- Applying the Aarhus Convention to State aid proceedings would ultimately have an impact on legal certainty for Member States and beneficiaries and add delays in receiving decision, which is particularly relevant following the COVID-19 pandemic to have a speedy procedure to get approval from the Commission.
- To this end, there is a need for further assessment and impact studies to find the way forward towards a balanced and proportionate solution that does not create new red tape for Member States and undertakings.

3.3 Ms Summer KERN expressed the following (slides attached to these minutes):

- It is appreciated that the Commission's Communication recognises that maintaining the *status quo* is not an option and that change is needed.
- Support to Option 1 as it would follow the model used to address the Committee's earlier findings and recommendations in ACCC/C/2008/32.
- Strongly opposed Option 2. Although there could be meaningful changes through code that could contribute to establish better access to justice and penalties, Option 2 would not be sufficient, on its own, to address the findings of ACCC on case ACCC/C/2015/128.
- Option 3 is more complicated. While there may be meaningful advantages, it may also lead to complications. It would require a thorough rewriting of the Council Procedural Regulation to ensure access to justice is truly available and that remedies are adequate and effective, in line with the Convention.
- Adapting some or all of these instruments may be a possible solution. This could include measures aimed at improving transparency and better, more timely inputs, which could help avoid the need for litigation in the first place.
- However, what is clear is that the chosen means must result in the full implementation of the findings and recommendations in ACCC/C/2015/128, so that Commission's State aid decisions under art. 108 § 2 TFEU can be challengeable and adequate, and effective remedies made available.
- This is a matter of urgency as the EU faces a deadline of 1 October 2023 to provide a progress report to the Committee and all measures to be taken and reported to Committee no later than 1 October 2024.
- It would be disastrous for the EU not to meet these deadlines and must at all costs avoid 3rd repeat of havoc at a MOP by blocking endorsement of ACCC's findings and recommendations. Otherwise, the EU's authority to stand for rule of law and a champion for environmental democracy rights will suffer irrevocably and not only will this have devastating effects within the EU Member States, but to other non-EU parties to the Aarhus Convention and beyond during this critical time in history.

3.4 Ms María SEGURA expressed the following:

- Tensions can be found between access to information and justice on one hand and the bilateral nature of State aid control on the other hand.
    - To ensure the public has access to review procedures, the Aarhus Regulation would have to be amended as State aid decisions are currently excluded from its scope.
- State aid control is a bilateral procedure between Member States and the Commission. Not even beneficiaries have a role in the procedure although business secrets by beneficiaries are disclosed to the Commission for consideration for assessment of compatibility.
- It is still to be decided whether it would be possible to review decisions adopted at the end of the preliminary or investigative procedure (opened because the Commission had doubts about compatibility). Strictly speaking, the ACCC findings concern decisions taken under art. 108 § 2 TFEU but the fact remains that the administrative acts that should be subject to review under the Aarhus Convention are those that can be challenged before the Courts, where there is an issue regarding third parties' admissibility.
- The important role of third parties in State aid procedures is recognised through the notion of interested parties in Article 1(h) of Council Procedural Regulation, which remains the same compared to the old regulation. However, the amendment to Article 24 of Council Procedural Regulation makes it so that today it is nearly impossible for others but competitors to the beneficiaries of aid to submit comments to the Commission.
- The first suggested change would be to return to the older version of the Council Procedural Regulation as the more compliant one to ensure access to justice. Changing the definition/interpretation of the notion of "interested party" in Article 1(h) would be insufficient in itself: the only route of success to challenge a Commission State aid decision would be with an action for annulment under Article 263 TFEU and the *Plaumann* test is difficult to pass.
- As clarified in recent judgment in *Paks II*, the General Court stated that an obligation for the Commission to take a definitive position on the existence or not of a breach of EU law, within the context of a State aid procedure, would conflict with the rules on procedural guarantees. This is similar to the approach proposed by AG Hogan in *Hinkley Point C*.
- In relation to the role of national courts, the Commission seems to put a lot of pressure on national proceedings although the questions raised in ACCC/C/2015/128 concerned EU institutions and as such these cannot be addressed at the level of Member States. National courts can have a role in the enforcement of GBER aid though, the case law made it clear that national courts are empowered to examine whether national authorities correctly implement block exemption regulations.
- It is necessary to continue discussions to find an appropriate solution.

3.5 Ms Bróna HEENAN expressed the following:

- There are concerns about what access to justice in State aid would mean to the internal market.
- The ideal outcome would not be amending the Code of Best Practices, as there would be no legal certainty and no possibility to ensure access to administrative and judicial review. From a purely legal perspective, it is not a solution at all.
- Industry wants quick decisions to create, innovate, move forward and be successful on the marketplace both within and outside the EU. The fact that previous CJEU cases rolled on for 10 and 20 years, with some rulings coming up with solutions that surprised everybody, makes it hard for the industry to predict what will happen.
- The solution might lie in ensuring access to EU courts within a specific period of time (this could be via urgent/*ex parte* proceedings or some form of interim measures). However, to effectively work in practice, it would be necessary to expand on what the interested party has knowledge of (the proceedings being bilateral between Commission and Member States), how much time it takes to obtain the necessary information (broader access to file) and confidentiality issues. This would require resources, changes to procedural rules and take into account the risk of investments in EU being jeopardised.

4. Guided discussions moderated by ClientEarth with the panellists and the audience

4.1. Bilateral character of the procedure between the Commission and Member States

Question/opening remark (ClientEarth, Juliette DELARUE): based on the bilateral character of the State aid procedure (between the Commission and the Member States), even beneficiaries of aid do not have access to these discussions. A system of access to justice enabling review at the end of final procedures would still be legitimate. The bilateral character does not exempt anyone to comply with the law; final decisions must comply with the law.

Mr Preben SANDBERG PETTERSSON expressed that:

- The bilateral procedure has been developed for many years since the Treaty of Rome; it has very specific characteristics and there is case law in this regard.
- It is difficult to only review State aid decisions *ex ante* based on environmental approaches, an *ex post* examination would be needed, but this is lengthy.
- State aid decisions would need to be rapid, otherwise it is difficult for governments and beneficiaries to wait. Time would need to be found to make these reviews and this is not helpful for the level playing field nor the single market.
- Not in favour of amending the Aarhus Regulation (Option 1) but rather more in favour of adapting the Code of Best Practices.

Ms María SEGURA added that:

- The bilateral procedure is very important in State aid control (which is a very specific "animal" compared to antitrust), especially since the State intervenes in the economy and decides for some undertakings to have a competitive advantage for a specific reason. The Commission has obligations under the Aarhus Convention to accommodate a review but there are also clear constraints from the State aid procedure and there are advantages with the bilateral aspect of the procedure.
    - However, there is a need for a pragmatic approach. The Commission very often needs to carry out complex assessment and needs to face off competitors as well as other parties: it could benefit from information from other stakeholders that would be relevant for its assessment.
    - There are therefore elements in favour of going away from the current spirit of the bilateral character of the procedure, since this would be beneficial for the quality of the decision making process.
- Ensuring level playing field is also key.

Ms Summer KERN commented that:

- Note the use of the expression "level playing field" and the concerns that it raises.
- But the danger with the bilateral character of the procedure is precisely that it can result in a system where there is no level playing field. The lack of transparency and access to information means that preferential, different treatment can occur in one case, but not occur in another.
- Transparency of the bilateral forum would help to give the possibility to challenge decisions which are in violation of environmental law since those decisions can threaten the level playing field. A real level playing field can only be attained where all States abide equally to the same laws regarding the environment.
- Moving away from the bilateral approach could lead not only to a better decision making process, but also better decisions. The Commission has already been helped by NGOs which have been providing information in the course of the decision making process; opening up the procedure can only help ensure better decision-making in the future.

Mr Preben SANDBERG PETTERSSON reacted and commented that:

- There would be limited instances where State aid decisions would violate environmental law, hence the need for a proportionate approach.

A State aid practitioner and professor intervened and stressed that:

- Back in the days, State aid law was decided by the Member States, not the Commission; the target should therefore be the Member States, not the Commission. The Commission should talk to all Member States and can propose, but then the Member States should decide; the solution for changing the rules should be legislative only.
- Even competitors (or trade unions) do not have access to justice, therefore the question is why would we treat NGOs better than competitors. Competitors are not protected as they have only constructed some access via the case law over time since

Member States have refused to change the law and open access to justice for competitors. The CJEU also has a limit to what it can do due to the Treaty.

- Member States are the ones initiating State aid; the Commission should protect competition on the market and ask Member States to create better systems of State aid relating to environment. However, the goal of State aid law is not to protect the environment.
- Appreciates that we should consider better access to justice for (environmental) NGOs, but questions what should be done in relation to social aspects, workers, etc.
- Changing the Aarhus Regulation would be essential but emphasis should also be put on Member States.

A representative of a Member State permanent representation to the EU added that:

- The Code of Best practice is binding but only on the Commission.
- Regarding the nuclear power plant cases, there were narrow questions about environmental compliance.
- The Commission has different procedures for tackling different problems: it is only when there is an inextricable link so strong between environmental law and State aid law that some environmental aspects can be part of the State aid assessment. There are number of cases where compliance of environmental law is not initially at risk, thus there is a need for a reasonable approach in terms of access to justice.
- Need for fast decisions but also to strike a balance between the issues.

A State aid consultant reacted and commented that:

- The emphasis should indeed be placed on Member States with measures and best practices in place (e.g. with the insertion of a mention in relation to compliance with environmental law in the notification form, to ensure that both project developers and Member States comply with environmental law).
- The solution should also be in avoiding the need for litigation: there is a need for measures *ex ante* to ensure compliance with EU environmental law (since often the project has already begun and the possibilities of appeal and internal review request arise when the project will probably be already completed).
- Transparency should be increased by requiring Member States to report *ex post* to the Commission and the public via State aid registries listing the measures taken and their compliance with environmental law.

ClientEarth (Juliette DELARUE) added that:

- ClientEarth is in favour of preventing litigation in general; the less cases there are, the better.
- For an *ex ante* control to be effective though, there are indeed a number of reforms to make including improving transparency of the notifications and an effective system of checking compliance with environmental law.
    - In fact, transparency at national level and complete State aid registers (in open access) have been a long lasting demand from ClientEarth. ClientEarth accepts that the Member States may be reluctant to improve the system in this manner.
- Nevertheless, as confirmed by the CJEU, the Commission has obligations *on its own* to ensure compliance with environmental law, as part of its State aid control prerogatives. The Commission's decisions should still be subject to administrative

and/or judicial review for controlling that these obligations are well-performed; this is a distinct matter from improving the State aid control *ex ante*.

- National courts are not competent to assess the validity of Commission's decisions, the preliminary ruling system is not sufficient and from the studies conducted by Milieu Consulting,[1] ClientEarth[2] and Justice and Environment,[3] it appears that there is almost no access to courts at national level for NGOs. In any case, the Communication of 17 May accepts that access to justice at national level is a different question from access to justice at EU level.
- On standing, competitors actually can, to some extent, access to the EU courts. In response to the point that environmental NGOs would get a more favourable treatment if we were to implement the findings of the ACCC, ClientEarth highlighted that the legal basis for this specific treatment is the Aarhus Convention that indeed, only covers members of the public and environmental NGOs, not other interest groups. ClientEarth has no objection in principle to limit access to justice to environmental NGOs and members of the public only; but such an extension of the scope of claimants is not addressed by the ACCC findings under discussion.

Ms María SEGURA reacted and commented that:

- There is merit in an *ex ante* approach for committing to comply with environmental law. The Commission only has the information provided by the Member States (that they are willing to provide). It is worth also drawing attention to the Commission about information which may not be available to it. There is certainly room for giving the possibility to bring environmental law concerns to the knowledge of the Commission.

A representative of a Member State permanent representation to the EU raised a practical question:

- Query what to do with Member States who notify general schemes? As a notifying Member State, it is impossible to predict who will apply and be the beneficiaries of the aid at the very end and in order to ensure proportionality of the aid.

Ms Summer KERN pointed out that:

- There has to be a way to check that the mechanism works and verify that the commitments made in terms of compliance with environmental law actually happen.

ClientEarth (Juliette DELARUE) specified that:

- There are monitoring obligations on Commission, but query how much monitoring actually is happening. In the Code of Best Practices, there is the possibility to revoke decisions but no example is to be found in registers.

[1] See https://www.milieu.be/public-participation-and-access-to-justice-in-environmental-matters-in-the-eu-member-states/.
[2] Available at https://www.clientearth.org/latest/documents/access-to-justice-in-state-aid-matters-in-eu-member-states-where-do-ngos-stand/.
[3] Available at https://justiceandenvironment.org/publications/?_selection_2=state-aid.

The Commission explained that:

- The Commission does a sizeable effort in doing monitoring. There are no revocation decisions to be found because in reality Member States would much rather prefer a voluntary process of recovery rather than a revocation (which would entail process that is very heavy for the Commission and Member States). The voluntary recovery would be norm in such cases, and the Commission still reminds Member States of their commitment in that regard.

4.2 Scope of State aid decisions at stake

Question (ClientEarth, Juliette DELARUE): do you believe there is room for opening access to justice only for certain types of aid or decisions, from a legal perspective and why?

Mr Preben SANDBERG PETTERSSON suggested that:

- It would be helpful to have a pilot project concerning energy aid, before considering providing the possibility to review this type of aid in environmental law terms.

Ms Summer KERN pointed out that:

- All decisions should be challengeable since all administrative acts may potentially contravene environmental law.
- Many State aid decisions are being taken and no NGO has the capacity to go against all decisions; there is accordingly a misplaced concern about opening up the floodgates, as these NGOs would only pursue those cases that clearly contravene environmental law.
- Not only final decisions should have adequate remedies.

A State aid consultant added:

- As pointed previously, query whether the ACCC not only targets final decisions following the opening of an in-depth investigation since its review concerns administrative acts that can be challenged before the Courts.

An academic/professor added:

- The ACCC made it clear that there are no provisions to exclude some categories of decisions. There is a mismatch between the requirements of the Aarhus Convention and EU law. Article 192 and 194 TFEU are also often used as an excuse to distinguish energy and environmental cases.

5. Remarks from online participants

A State aid practitioner and professor commented:

- In order to ensure an effective energy transition, there is a need for increased transparency (providing honest and clear information) and to move fast. Access to information is vital so that one can trust that there would be a clean energy transition.
- Many provisions in legislations and the EU Charter of Fundamental Rights provide rights to clean air and healthy environment and those rights should be effective; State aid rules should be interpreted accordingly.
- We need to be more creative in finding solutions on this topic.

An academic/professor suggested the following (in the chat):

- *"Can we approach in our discussion the issue of how to find solutions for implementing Aarhus. I think we have first to determine what is the scope if Aarhus implementation, i.e. to which State aid decisions the Aarhus rights must be given. I think, merely procedural ones and negative ones may not be subject to Aarhus rights.*
- *Second, there is need to determine which ways and means to be used to implement Aarhus, i.e. how to give NGOs access to COM procedures once a notification of State aid has been submitted.*
- *And then, for giving access NGOs access to the Court, there appears to be need to establish specific rules in one of the State aid regulations. Is that a doable approach for finding solutions, in order to structure the discussion?"*

6. Closing remarks

The Commission concluded that it was a rich discussion and that they will have to reflect a lot on this. It also noted that over the last two years, the Commission received at least 34 requests for internal review in all areas of EU law covered by the Aarhus Regulation.

Mr Preben SANDBERG PETTERSSON reminded that better regulation and reducing reporting obligations for undertakings should be taken into account in order not to create additional administrative burden for undertakings.

Ms Summer KERN expressed that the workshop went beyond expectations in terms of discussions and reiterated that remedies need to be effective and adequate.

Ms María SEGURA stressed the importance of finding a reasonable way to include compliance of environmental law in State aid procedures and wished the Commission as successful outcome.

Ms Bróna HEENAN stressed that it is equally important to create an environment attractive to investment (not chase investments away to places outside the EU) and preserve jobs.

ClientEarth (Ms Juliette DELARUE) noted from the discussions that there are calls for (i) effective State aid control procedure to make sure that it is sped up, (ii) adequate and effective remedies in case of risk of non-compliance, and (iii) a proportionate approach.

From ClientEarth' perspective, compliance with environmental law should not be seen as a burden but as an investment for the future. In order to eliminate situations where there is a risk of breaching environmental law and of leaving in the legal order decisions which are not compliant and create environmental impacts; these would not ensure legal certainty for

stakeholders. ClientEarth looks forward to the analysis and is eager to see what comes next and how to contribute to it.

Even though the decision on how to proceed is in the hands of the Commission, the Commission should not be alone in the process. Other stakeholders are involved in ensuring compliance of the EU with international law obligations. There is time pressure due to the deadlines at stake.

Preben Sandberg Pettersson

Counsellor, Danish Permanent Representation to the EU

18 September 2023

The Aarhus Convention (1998) and State Aid

I have a dualistic approach to the application of the Aarhus Convention on state aid decisions

- **It is about given NGOs power to initiate a procedure regarding the EU-Commission legal acts and decisions on state aid and effective access to bring them to the EU courts to examine the compatibility with EU environmental law.**
- **My Member State is a strong believer in effective enforcement of EU environmental law and provisions.**
- **Of course Member state must comply with EU environmental law and provisions.**
- **But state aid decisions concerns the individual Member state and specific beneficiaries that has got state aid approved – and the purpose is to comply with the state aid provisions in the treaty, not to distort competition and trade.**
- **The Aarhus procedure will introduce an extra layer of control at the EU -level**
- **I am therefore concerned about application of the Aarhus convention on the state aid regime – as this can have impact on legal certainty, in particular for Member states and beneficiaries – and prolong the process time for state aid decisions and enforcement.**
- **The matter is still under consideration and no solution has been found.**
- **It is a 1 : 1 at the moment and the way forward is further assessments and impact studies.**

Access to Justice in State Aid: which reforms do we need?

Reflections by OEKOBUERO (Justice and Environment Austria)

Hybrid workshop at the European Parliament (Brussels) on 20 September 2023

Summer Kern, Lawyer,

and NGO Observer to the Bureau of the Aarhus Convention

JUSTICE AND ENVIRONMENT
European Network of Environmental Law Organizations

The Impetus

Why did we go to the Compliance Committee?

- 2014 decision approving state aid for Hinkley Point C
- Major precedent
- State aid decisions´ability to violate EU environmental laws
- Status quo, being totalled barred from bringing any legal challenges violates article 9(3) and (4) of the Convention

The (non)options

- **Status quo <u>not</u> an option**, as Communication itself makes clear

- **Option 1 (the Aarhus Regulation)** → Generally support; follows model for C32 case; not inconsistent with the EU legal order
- **Option 2 (Code of Best Practices)** → Oppose; some changes could be positive for overall system for state aid, but would create no real access to justice and proper remedy
- **Option 3 (Procedural Regulation)** → Complicated, but also some potential benefits...would need significant amendments to ensure can truly challenge state aid decisions and have proper remedy

A way forward? – Option 4

- Adapting some or all of these instruments
- Measures to improve transparency, timely inputs, and secure more legal certainty/less litigation
- Ultimate minimum requirement: Fulfill the findings and recommendations on C128

The Urgency

- October 1 2023 reporting deadline to Compliance Committee
- October 1 2024 deadline: All measures must be taken and reported to Committee to be considered for MOP in 2025
- Must at all costs avoid 3rd repeat of havoc caused by EU failing to comply and blocking endorsement of findings and recommendations
- All credibility to stand for rule of law/champion for environmental democracy rights at risk
- Devastating effects in EU Member States, non-EU Parties to the Convention, and beyond

Thank you for your attention! I look forward to a thoughtful and engaging discussion

Summer Kern

[redacted]

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