

26 October 2023

To the attention of the Aarhus Convention Compliance
Committee
By email at: aarhus.compliance@un.org

ClientEarth AISBL
60 Rue du Trône
(3ème étage), Box 11,
1050 Ixelles, Belgique

Association Justice and
Environment, z.s.
Udolní 33, 602 00 Brno,
Czechia

Comments on the Progress Report on request ACCC/M/2021/4 (European Union)

As observers on case ACCC/M/2021/4, Justice and Environment and ClientEarth thank the Compliance Committee for this opportunity to comment on the progress report submitted by the Party concerned on 26 September 2023. We would like to make the following observations.

The State of Play

The progress report provided by the Party concerned reports on the adoption of the European Commission's Communication COM(2023)307 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, adopted on 17 May 2023 (Commission's Communication). We provide some brief comments on the Commission's Communication, which we also attach to these observations for the Compliance Committee's convenience (Annex 1).

For the sake of completeness, we would like to inform the Compliance Committee that another activity took place on 20 September 2023, in the form of a workshop organised by ClientEarth and the Socialists & Democrats political group in the European Parliament. The purpose of this workshop was precisely to discuss the Commission's Communication and the ways forward. The workshop was well attended (56 participants excluding the speakers) and with a representative group of stakeholders including the European Commission, the European Parliament, representatives of Member States, civil society, industry associations, academia and legal practitioners. We attach the minutes of this workshop to these observations, for the Compliance Committee's information (Annex 2).

We wish to acknowledge that the Commission's participation in this event, and its engagement with us CSOs and other stakeholders demonstrates a high level of commitment to the MOP follow up process which can serve as a model for other Parties.

Furthermore, even though the discussions at this event on 20 September 2023 were lively and fruitful, we can report that there was still a debate amongst certain categories of stakeholders (in particular Member States representatives and academia) about the necessity for opening access to justice for the public in state aid matters that may contravene environmental law. We regret that there seems to be, still, misunderstandings about the legal effects of the Aarhus Convention in the EU legal order and misconceptions about allegedly irreconcilable regimes. We are deeply

concerned that these misunderstandings and misconceptions may contribute to slowing down the progress the Party concerned can make in implementing the Committee's findings and recommendations on communication ACCC/C/2015/128 (C-128).

In this regard, Justice and Environment and ClientEarth deeply regret that the progress report fails to demonstrate meaningful progress since the adoption of the Compliance Committee's findings on C-128 and the submission of the Party concerned's plan of action of 31 July 2022.

To recall in this regard is the fact that the European Commission had committed that "*if appropriate, by the end of 2023, the Commission will come forward with measures to address the issue.*" As the Commission's Communication confirms, the "do nothing" option is off the table, as this would fail to address the Committee's findings of noncompliance. It is accordingly of great concern to us that the Party concerned has failed to provide a timeline for its next steps to implement the Committee's findings and recommendations on C-128. We invite the Committee to request of the Party concerned that it provide such a timeline, as this could assist not only the European Commission in its endeavours, but also the Committee and us observers and other stakeholders, who are trying to feed into and review this process in a productive way.

Similarly, we note with regret that the Commission's progress report is vague at multiple points and here, too, we would call for clarifications as to the next steps, particularly with a view to the upcoming European Parliament elections and the appointment of the Commission in 2024 (during which legislative work is largely put on hold) and, most importantly, the time-limit set of 1 October 2024 for the Party concerned to report on compliance ahead of the next Meeting of the Parties in 2025. Whereas the progress report contemplates an impact assessment of the options - in addition to the Communication of 17 May 2023 already taking stock of the replies to the public consultation - there is no information about this process. It is similarly vague about the next steps that made the Compliance Committee observe, in its comments on the plan of action the Commission provided on 8 December 2022, that "*it is not possible for the Committee to conclude that the measures proposed in the plan of action, in its current form, will be appropriate to fulfil the recommendation in paragraph 131 of the findings on communication ACCC/C/2015/128.*"

Comments on the Commission's Communication

Given that the Commission's Communication reflects that the Commission is only in the very preliminary stages of its implementation of the Committee's findings and recommendations on C-128, we consider it would be premature to comment in depth on the measures the Commission is considering. However, Justice and Environment and ClientEarth would like to make the following brief observations, as the Party concerned's progress report refers to this document and it is the most recent substantive step the Commission has undertaken towards implementation.

First, we greatly appreciate the language in this document that the EU must, and is, committed to comply with the Aarhus Convention. We similarly appreciate that the Commission acknowledges with respect to the study it commissioned by Milieu Consulting regarding access to justice in state aid cases at the Member State level, that its findings are complementary, and not an alternative

solution, to address the compliance issues identified by the Compliance Committee at the EU level.¹²

By contrast, we consider that the Communication contains some questionable language when suggesting the lack of access to justice and its relation to the green transition and its financing by state aid.³ Most likely the aid measures that will fall victim of a possible legal remedy – in case access to justice will be guaranteed for state aid cases – will not be those linked to the green transition, since they are the least likely to contravene EU environmental law. But even if this scenario happens, a good cause (namely the green transition) is never an excuse for the breach of rule of law, and the lack of access to justice is clearly such a breach.

Moreover, we disagree with an approach that the Commission's Communication appears to take,⁴ putting legal remedies and investments into opposing positions, and regret that this sentiment was again voiced in the 20 September 2023 workshop. Fast state aid control may not be appropriate or desirable, and the exercise of access to justice, albeit taking longer, may result in a better functioning system that ensures the appropriate use of state aid, the avoidance of breaching EU environmental laws through the use of state aid, and increases legal certainty for all parties in the long run. Similarly, we are concerned about the emphasis the Commission's Communication places on what it calls the "bilateral relationship between the Commission and the Member State", as if it would exempt the outcome of these bilateral relationships, namely decisions with legal effects, from compliance with environmental law and ultimately, could exempt them from review.⁵ This is ultimately a distraction from the fact that, as the Compliance Committee found, and as the Commission's Communication accepts, the status quo, in which members of the public are entirely blocked from challenging state aid decisions, fails to comply with the Convention.

Finally, we signal our concern that the Commission's Communication potentially indicates that the exclusion of state aid decisions from the remit of the Aarhus Regulation is justified under article 2(2) of the Convention. As the Commission concedes at the close of footnote 8, the Commission put forth this interpretation in the course of the proceedings on C-128, and the Compliance Committee considered and rejected it.⁶

In relation to the 'options' the Party concerned is exploring in the Commission's Communication, we note with concern that 'Option 2' as proposed by the Party concerned would consist in providing for an access to justice mechanism in the European Commission's Code of Best Practices – without explaining what this mechanism would look like, and only indicating this would be coupled with a review of the State Aid Implementing Regulation on State aid notifications.⁷ In the public consultation, a number of stakeholders, including Justice and Environment and

¹ Commission's Communication, p. 8.

² Justice and Environment and ClientEarth both undertook their own studies as to the Member State level, concluding that access to justice in state aid cases is almost entirely blocked and that reform is needed. However, as these issues are outside of the scope of the Committee's findings and recommendations on C-128, we will not discuss our conclusions with the Committee further.

³ Commission's Communication, p. 1.

⁴ Id. p. 2.

⁵ Id. p. 5.

⁶ Id. p. 4, and fn. 8.

⁷ Commission's Communication, p. 9.

ClientEarth, criticised this option for the Code of Best Practices as not being an instrument capable of creating an access to justice regime that would result in a Commission decision with legal effects that members of the public and NGOs could then validly challenge before the CJEU. At the workshop on 20 September 2023, the Commission indicated that their proposal would rather be to amend the State Aid Implementing Regulation on State aid notifications, to empower the Commission to adopt such a regime. This is not, strictly speaking, what the Commission's Communication says, however. At this stage of the proposal and without having seen an express wording about this possible measure, we can only reiterate our position, expressed in the public consultation as well as in our respective observations on the Party concerned's plan of action in September 2022, that any measure that will be adopted must ensure that applicants receive a legally binding reply to their request or complaint. This is necessary to ensure that rights are created for members of the public concerned to appeal unsatisfactory replies to the CJEU.

We also highlight that the proposals falling under 'Option 3' to shorten the time-limits for members of the public to submit their review requests – and for the European Commission to reply to them⁸ – compared to what is currently available under the Aarhus Regulation would need to be carefully assessed in light of the requirements under Article 9(4) of the Aarhus Convention that procedures must provide for adequate and effective remedies. In 2021, the time-limits for internal review requests under Article 10 of the Aarhus Regulation were prolonged precisely because they were too short for the public to submit a request, and for the institutions to reply to them. Adequate procedural time-limits are particularly important in State aid matters given the absence of public information on ongoing notification procedures and the legal presumption of confidentiality of documents that are part of the procedure⁹, making it difficult for members of the public to be able to identify risks of contravention to environmental law. Thus, in this context, we regret the ever-recurring mention in the Commission's Communication of the need for "fast and effective" state aid control, and consider that it is diverting attention from the fact that here we are dealing with a legality problem, i.e., the EU legal order is in non-compliance with the requirements of the Aarhus Convention; and omits that control can only be effective if adequately performed against legal obligations including compliance with environmental law.

Concluding Remarks

We would like to reiterate our serious concern about the slow progress taken to date by the Party concerned in implementing the Compliance Committee's findings and recommendations on C-128 and stress our readiness to continue engaging with the Commission and other stakeholders so as to achieve a timely and adequate implementation. Finally, we would like to thank the Compliance Committee members and members of the secretariat for their continued consideration of and engagement on this MOP request and stand ready to provide further information, if requested.

⁸ Id. p.9.

⁹ See e.g. judgment of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 61

Juliette Delarue
Senior Environmental Democracy lawyer/juriste
ClientEarth

[REDACTED]
www.clientearth.org

Summer Kern, Senior Lawyer and Csaba Kiss, Coordinator
Justice and Environment

[REDACTED]
<https://justiceandenvironment.org/>