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COMMISSION STAFF WORKING DOCUMENT
STAKEHOLDER CONSULTATION - SYNOPSIS REPORT

**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**

Accompanying the document

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**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**

{COM(2023) 307 final}

1. INTRODUCTION

This Synopsis Report (the ‘Report’ or ‘Staff Working Document’) provides an overview of the input¹ received by the European Commission following the publication of a Call for Evidence and of an Online Public Consultation (‘OPC’) on 13 July 2022 on the implications of the Aarhus Convention Compliance Committee (‘ACCC’) findings in case ACCC/C/2015/128² and the options available to address those findings.

The Report also summarises the input received during an online stakeholder consultation meeting conducted by Commission services on 9 September 2022 and an *ad hoc* joint expert group meeting with Member State experts from authorities in charge of State aid on the one hand and of Aarhus Convention matters on the other hand, held on 12 September 2022.

The Report accompanies the *Commission Communication COM(2023)307 on the findings adopted by the ACCC in case ACCC/C/2015/128 as regards State aid: Analysing the implications of the findings and assessing the options available.*

2. CONSULTATION

2.1. Consultation objectives

The consultation sought to collect the views of the stakeholders and the public on the existing systems and possible future options for providing members of the public with access to administrative or judicial review regarding State aid decisions by the Commission that may contravene EU environmental law. In the OPC, the Commission has identified and put forward three potential options:

- i. **Option 1**, amendment of the Aarhus Regulation³ to include State aid in the scope of such Regulation. Under this option, State aid decisions adopted by the Commission would be subject to the same review procedures as any other administrative act contravening EU environmental law.
- ii. **Option 2**, amendment of the Code of Best Practices for the conduct of State aid procedure (‘BPC’)⁴ to introduce an internal review process similar to the one applicable under the Aarhus Regulation but adapted to the specificities of State aid control (for instance, shorter deadlines for review requests and replies by the Commission compared to the Aarhus Regulation⁵). This amendment would be combined with a review of the State Aid Implementing Regulation on State aid notifications, requiring Member States to provide the Commission with assurances that the aid measure and the aided activity comply with EU environmental law. The Commission would then be able to revoke a State aid decision if based on incorrect

¹ The contributions received in the context of this consultation cannot be regarded as indicating the official position of the Commission, nor are they binding on the Commission. Additionally, the respondents providing input in the consultation do not reflect a representative sample of the EU population.

² https://unece.org/env/pp/cc/accc.c.2015.128_european-union

³ Regulation (EC) No 1367/2006, as amended by Regulation (EU) 2021/1767.

⁴ Code of Best Practices for the conduct of State aid control procedures, OJ C 253, 19.7.2018, p. 14.

⁵ For reference, under the Aarhus Regulation the review procedure may take between 16 and 22 weeks, further prolonged by months or years if the review reply is challenged in Court.

information from the Member States. It would be complemented by the publication of summaries of notifications that would enable the public to identify and point out possible breaches of environmental law at an early stage of the State aid procedure; and

- iii. **Option 3**, amendment of the State Aid Procedural Regulation⁶ to provide for an internal review process similar to the one under the Aarhus Regulation. This option would have similar parameters to Option 2 in so far as it would include an internal review mechanism with shorter deadlines for review requests and replies by the Commission⁷.

Respondents were also given the opportunity to suggest alternative options not covered by those identified by the Commission during the consultation process, including maintaining the *status quo*.

2.2. Description of the consultation process

On 13 July 2022 the Commission published on the ‘*Have Your Say*’ platform, a ‘*Call for evidence*’ and an OPC questionnaire. The deadline to respond to both the ‘*Call for evidence*’ and the OPC was 5 October 2022. The Commission also organized a meeting with stakeholders on 9 September 2022, followed by a meeting with Member States on 12 September 2022. Across these two consultations, the Commission has received 71 replies – 41 replies for the OPC, submitted via the *Have Your Say* Portal, 11 additional replies⁸ to the OPC, submitted via email, and 19 replies to the *Call for Evidence*. The relevant stakeholder groups that participated in the consultation are outlined below in Table 1.

Table 1: Outline of participating stakeholder groups as defined by the online public consultation

Stakeholder groups	Stakeholders represented
1. EU Member State Public authorities and non-EU Member State authorities	<ul style="list-style-type: none"> • MS national authorities responsible for State aid • MS ministries and authorities responsible for the environment • Municipal/local government authorities • Third country national authority responsible for State aid
2. NGOs	<ul style="list-style-type: none"> • Environmental NGOs • Environmental organisations
3. Businesses	<ul style="list-style-type: none"> • National industry and business associations/Companies/Business organisations
4. Other	<ul style="list-style-type: none"> • General public • Technical experts (academia, environmental consultants and environmental experts) • Lawyers

⁶ 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 (OJ L 248, 24.9.2015, p. 9).

⁷ Other changes proposed under Option 2 concerning an amendment of the Commission’s Implementing Regulation or the publication of the summary of notifications are not envisaged under Option 3.

⁸ Out of 11 replies submitted by public authorities, two were marked as preliminary, one was complementing the reply submitted via the OPC. Also, one environmental organisation submitted a document complementing their reply.

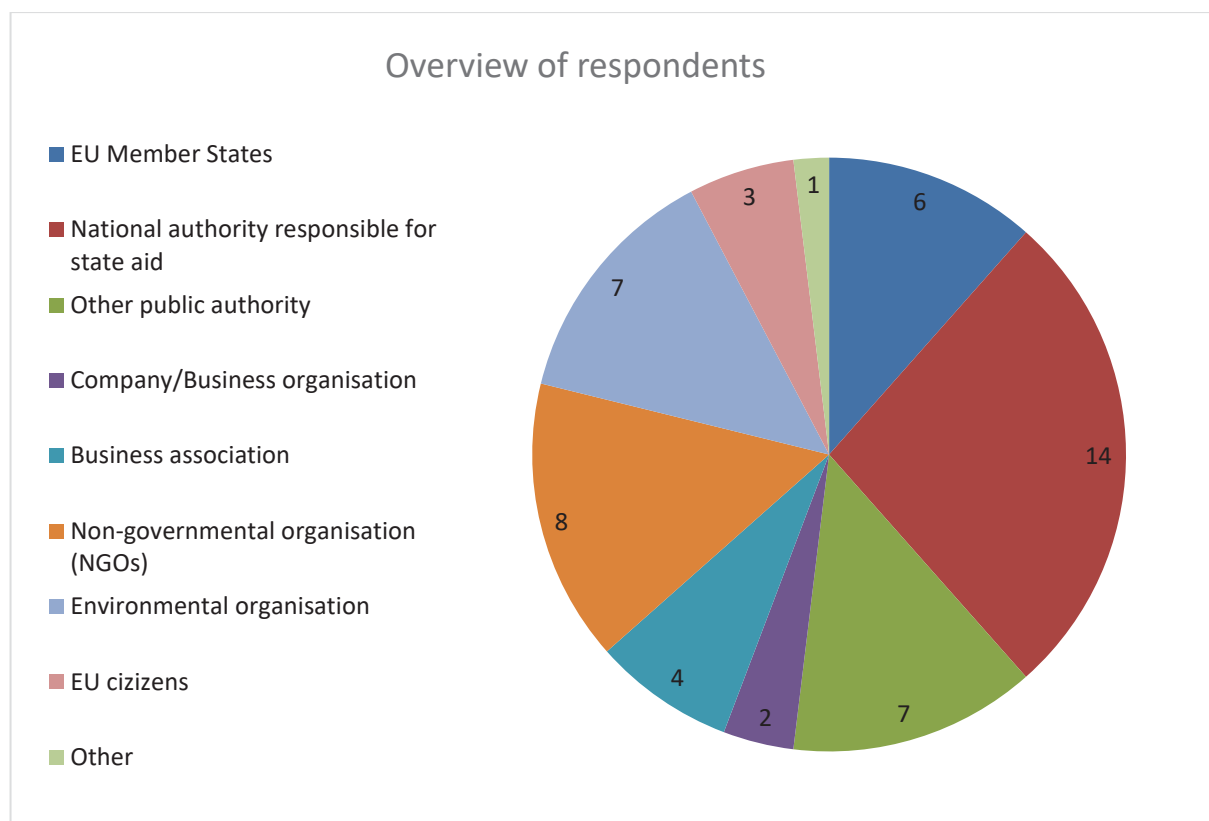
Source: OPC Survey 2022

2.2.1. Online public consultation (OPC)

The OPC received replies from 52 respondents including replies received both on the ‘*Have Your Say*’ platform (41 replies) and outside this platform (11 email contributions⁹). The Staff Working Document reports on all these contributions in a consolidated fashion. The statistics and graphs take into account all replies received, whether via email or through the platform, provided that the relevant information was included in the replies. The two largest groups of respondents were, on the one hand, public authorities, mostly State aid, and some environmental and other authorities (52%, or 27, of the 52 replies) and, on the other hand, environmental NGOs and environmental organisations (29%, or 15, of the 52 replies) (see *Graph 1*). Companies/business organisations/associations and individuals/citizens, account for 6 and 3 of the replies respectively. One reply was also received from a law firm.

⁹ The following Member States submitted contributions expressing views by e-mail: Austria, Greece, Germany, Denmark, France, Portugal, Romania, Italy, Malta and Luxembourg. Malta’s and Luxembourg’s positions were marked as preliminary, and therefore, will not be included in the detailed statistics and graphs provided in this Report. Authorities from Austria submitted two contributions separately, one on behalf of the Federal Ministry for Climate Action, and one on behalf of Federal Ministry for Work and Economy representing State aid authorities. The submissions from Greece and Romania came from their respective national State aid authorities and the submission from Germany came from the Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection, representing national authority responsible for environment. Malta’s preliminary position was submitted by the Environment Resources Authority. The contribution from Luxembourg was submitted by the Ministry of Economy. Denmark, France, Portugal and Italy each presented a consolidated position on behalf of its Member State. Italy has submitted contributions both via the Have Your Say portal (on behalf of the national authority responsible for State aid) and via email (on behalf of the Italian Republic); for purposes of the detailed statistics, the Italian contribution will be counted once. With the exception of Federal Ministry of Climate Action of Austria, all the submissions submitted via email were received after the OPC had closed. During the preparatory process the Commission also received additional submissions/position papers from an environmental NGO (ClientEarth).

Graph 1: Overview of respondents to the OPC



In terms of geographical scope, 27 public authorities from 18 Member States¹⁰ and one country outside the EU, Norway, replied to the OPC. The 15 NGOs submitting replies to the OPC included environmental organisations and networks active on the European level on access to justice matters, as well as some national environmental organisations. Among the business organisations replying, one sectoral association has a significant EU outreach.

2.2.2. Call for evidence

The ‘Call for evidence’ received submissions from 19 respondents.¹¹ Environmental NGOs submitted the majority of the responses (ten replies). Individuals/citizens submitted five replies. Public authorities, academia, and business stakeholder respondents each submitted 1 reply, in addition to 1 reply from a public interest group.

¹⁰ The public authorities in EU Member States included public authorities in: Poland (4 public authorities), Hungary, Bulgaria, Czechia, Latvia (4 public authorities), Lithuania, Austria (2 public authorities), Germany, Greece Luxembourg, Malta, Romania, Finland, France, Denmark, Italy and Sweden. They expressed their views mainly on behalf of national, regional, or sectoral public administrations responsible for State aid matters, with a few expressing views of authorities responsible for environmental protection. Only Finland, France, Denmark, Italy and Sweden indicated that they participate in the survey on behalf of the Member State as a whole.

¹¹ [Aarhus Convention Compliance Committee case on State aid: implications/options \(europa.eu\)](https://european-council.europa.eu/media/en/press-communications/inline-photos/2021/04/11/Aarhus_Convention_Compliance_Committee_case_on_State_aid_implications_options_europa.eu)

2.2.3 Meetings with Member States and stakeholders

The Commission organised a virtual meeting on 9 September 2022 open to all interested stakeholders. The meeting was attended by 32 participants, primarily environmental NGOs with a few representatives from business associations, academia, law firms and public authorities.¹² Furthermore, the Commission organised an *ad hoc* joint meeting between Member State experts from the competition/State aid policy area and from the environmental policy area (Aarhus Expert Group), held on 12 September 2022.¹³

3. RESPONSES

1.1. Short Summary of the OPC

The respondents were asked to provide answers to the questions grouped under the following sections: ‘*Experience with existing administrative and judicial remedies relating to a plan or decision of a Member State to grant an aid measure or a Commission decision authorizing State aid*’, ‘*Options for further scoping the access to justice for environmental NGOs and other members of the public*’ and ‘*Impact of options*’.

The OPC revealed opinions are **divided in two main groups**, i.e., environmental NGOs and most of the public authorities responsible for environmental protection (preferring Option 1 ‘Amendment of the Aarhus Regulation’) on the one hand, and most of the public authorities responsible for State aid as well as companies/business associations (primarily preferring to maintain the *status quo*) on the other hand.

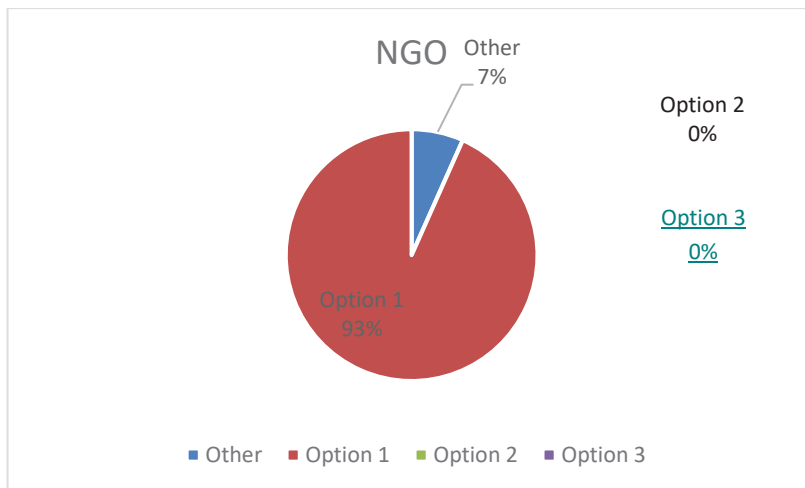
As for **broad categories of views**, most of the environmental NGOs (86%, or 13 out of 15 respondents) preferred Option 1. On the other hand, most of the public authorities (67%, or 16 out of 24 respondents) and companies/business associations (83% or 5 out of 6 respondents) prefer the option ‘Other’ (see *Graph 2*). By ‘Other’ most of these public authorities (75% of these authorities, or 12 out of 16 respondents, typically those responsible for State aid matters at national, regional or sectoral level) and companies/trade association (80% or 4 out of 5 respondents) mean ‘maintaining the *status quo*’. Only 21% of the public authorities (or 5 out of 24 respondents) would, as their ‘first preference’, chose Option 1 (amendment of the Aarhus Regulation). Options 2 or 3 (‘Amendment of the BPC’ or ‘Amendment of the State aid Procedural Regulation’) would come as their ‘second preference’. For companies/business associations, the ‘first preference’ would be maintaining the *status quo* (67%, or 4 out of 6 respondents), followed by ‘Option 3’ (amendment of the State aid Procedural Regulation), and Option 2 (BPC).

Graph 2: ‘First preference’ by respondents in the OPC

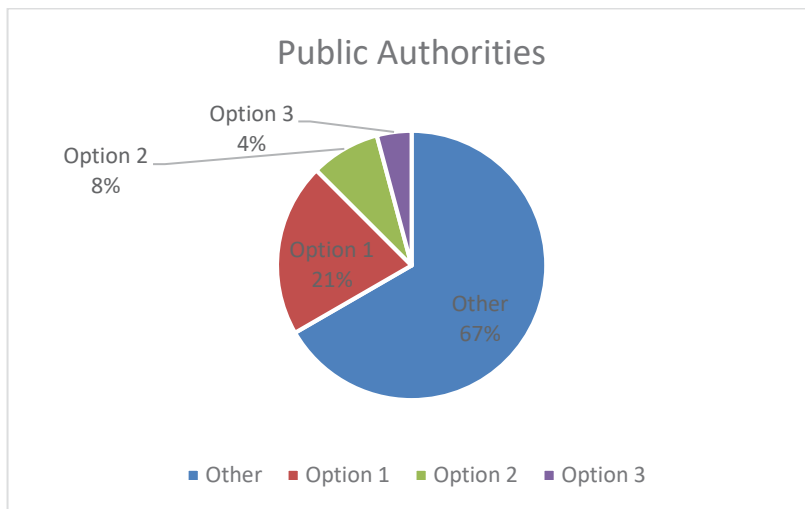
¹² For the minutes of the stakeholder meeting, see [Circabc \(europa.eu\)](https://circabc.europa.eu)

¹³ For the minutes of the joint Expert Group meeting, see [Register of Commission expert groups and other similar entities \(europa.eu\)](https://registerofcommissionexpertgroupsandothersimilarentities.europa.eu)

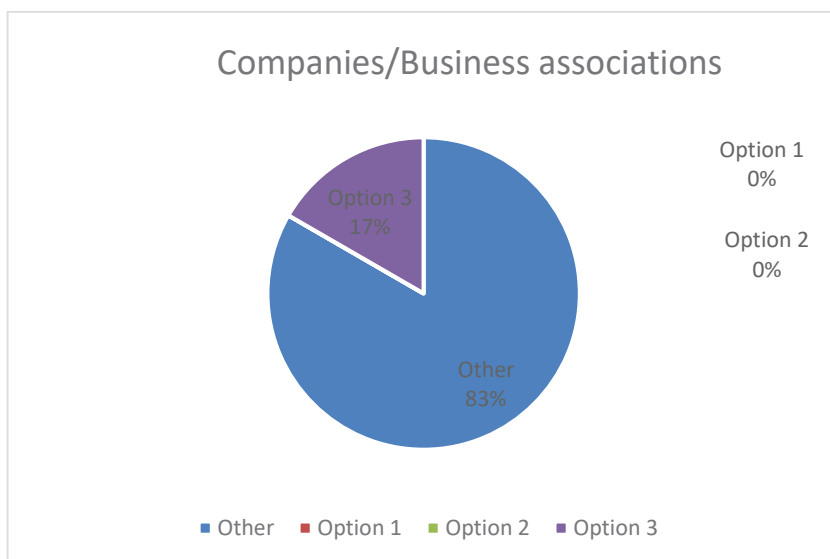
'First preference' of NGOs



'First preference' of Public authorities

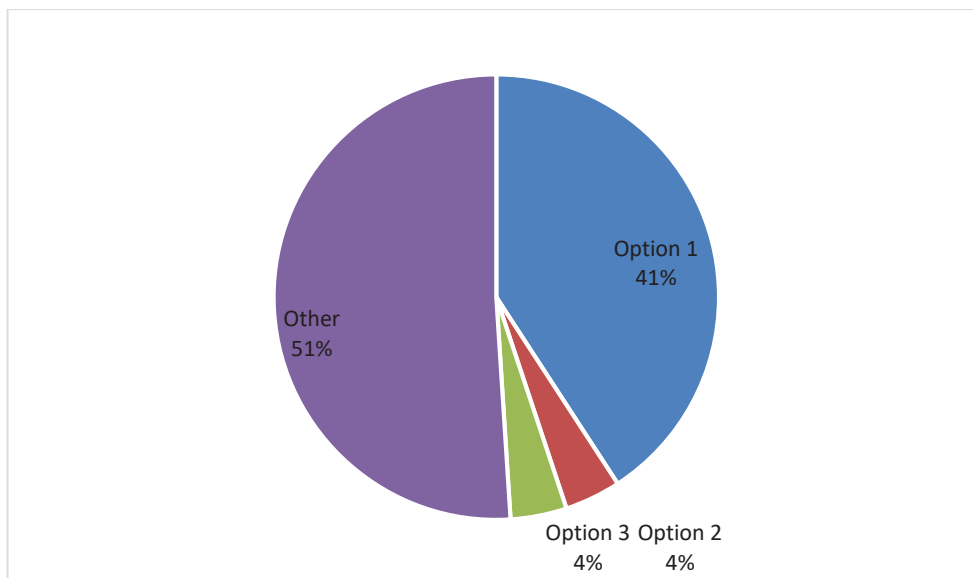


'First preference' of companies/business associations



In **terms of options**, just over half of the respondents have put forward as their ‘first preference’ the option ‘Other (including maintaining the *status quo*)’ (51%, or 25 out of 49 respondents) (see *Graph 3*), followed by Option 1 (‘Amendment of the Aarhus Regulation’) (41%, or 20 out of 49 respondents). Options 2 and 3 (amendment of the BPC and the State aid Procedural Regulation) were – overall - not given ‘first preference’, but they featured as ‘second choices’ (Option 2 with 4%, or 2 out of 49 respondents and Option 3 with 4%, or 2 out of 49 respondents). More granularly, a majority of those who responded ‘Other’ would like to keep the *status quo* (64% of these respondents or 33%, or 16 out of 49 respondents), while the rest prefer a combination of options (e.g., Option 1 and Option 2 on ‘transparency’), or other solutions.

Graph 3: Overall first choice of all respondents in the OPC



Details of the views of the respondents, as expressed in the OPC, are provided below.

1.1.1. Experience with existing administrative and judicial remedies relating to a plan or decision of a Member State to grant an aid measure or a Commission decision authorizing State aid

The OPC results revealed that the majority of the respondents have **not made use of the existing administrative and judicial remedies relating to a plan or decision of a Member State to grant an aid measure or a Commission decision authorizing State aid**. Only five respondents (5 of 49) indicated that they had made use of the possibility to express their views on plans or decisions of a Member State to grant aid to an economic activity, where they considered that the aid or the project contravened EU environmental law, before the competent national authority: two environmental organisations, one EU citizen, and two NGOs.

Only 8 of 49 respondents replied that they had made use of the possibility to express their views on matter of the compliance of a State aid decision with EU environmental law in the **administrative procedure before the Commission**. 35 of 49 respondents replied that they had not made use of the possibility to express their views on matter of the compliance of a State aid decision with EU environmental law in the administrative procedure before the Commission as they were either not aware of the possibilities under the State aid rules to express concerns (7 of 35), or their aim was to submit a complaint but did not have standing to complain about the granting of an unlawful State aid or alleged misuse of aid (2 of 35), or providing other reasons for not having made use of this possibility (26 of 35). 6 respondents did not provide information on this subject.

None of the respondents indicated that they had made use of a possibility to **challenge a national measure by which the State grants aid before a national court** for alleged violations of EU environmental law. One respondent indicated that it had made use of a possibility to challenge a Commission decision authorizing State aid before a national court and one respondent indicated that it had made use of a possibility to bring a challenge against a Commission decision authorizing a State aid measure before the General Court.

Some respondents representing NGOs expressed doubts in relation to the capacity to challenge Commission State aid decisions before national courts and voiced concerns on the difficulties faced when challenging State aid measures and decisions in national jurisdictions. One such respondent noted that national courts are not empowered to determine if an aid measure is compatible with EU (environmental) law. In the latter's view, while action before national courts can be complementary, it would not be a substitute for adequate remedies against Commission decisions.

1.1.2. Options for further scoping access to justice for environmental NGOs and other members of the public

23 of the 49 OPC respondents, the majority of which were environmental organisations or NGOs (15 of 23), expressed the view that, beyond the opportunities already available, there is a **need for additional means of challenging Commission State aid decisions** (as recommended by the ACCC in ACCC/C/2015/128), whereas 20 out of 49 respondents, the majority of which were public authorities (13 of 20), asserted that there is no need for additional measures and that *status quo* should be maintained instead. 6 of the 49 respondents did not express their views on this subject. All the respondents benefitted from the option to explain their answers.

Some respondents, in particular environmental NGOs as well as environmental consultants, some academics, and some public authorities emphasised the importance of providing sufficient access to justice in environmental matters, taking into account the recommendations of the ACCC and ensuring compliance with international commitments under the Aarhus Convention. Many NGOs and environmental organisation respondents argued that there are no meaningful legal avenues which give NGOs the ability to challenge Commission State aid decisions and cited the findings in ACCC/C/2015/128 as evidence of this. One NGO stated that it was 'systematically' not recognised as an 'interested party' in State aid proceedings

before the Commission. As result, their complaints are considered ‘market information’ by the Commission. In relation to challenges of State aid decisions at the national level, almost all the respondents representing NGOs highlighted that there are significant administrative and financial obstacles preventing them from challenging State aid measures before the competent national authority in their respective Member States. Among the obstacles cited by these respondents were the lack of transparency in administrative procedures, high costs, administrative burdens, and legal barriers in relation to standing.

Most of the public authorities argued that the existing legal framework already allows for the possibility to challenge Commission State aid decisions. One respondent explained that members of the public (including environmental NGOs) have access, at national level, to an administrative or judicial review of the decision to grant State aid on the basis of national law. They were seconded by two companies making the same point and asking that State aid be assessed separately from compliance with EU environmental law. One company also indicated that the relevant departments of the Commission are competent to assess compliance with environmental regulations as part of the interservice consultations. Some public authorities highlighted that the national remedies that environmental NGOs have at their disposal may not only concern national aid granting acts but may also involve Commission approval decisions, as individuals and legal entities may request a national court to bring an action before the CJEU for a ruling on the validity of EU acts pursuant to Article 267 TFEU. One public authority indicated that, in their view, the judgment of the Court of Justice in *C-594/18 Austria v. Commission*,¹⁴ cited by the ACCC in its findings in [ACCC/C/2015/128](#) and by the environmental NGOs indicates that Commission decisions on State aid cannot in themselves infringe environmental rules, since any infringement would, in their view, result from the subsidised economic activity and not from the Commission decision to authorise aid.

Many State aid authorities and business associations emphasized the bilateral nature of State aid procedure which takes place only between the Commission and the Member States and pointed out that environmental NGOs cannot acquire rights affecting such bilateral character. Also, most State aid authorities were of the view that the procedure for the examination of State aid measures by the Commission, including those relating to environmental protection in its current form is already complex and time-consuming. The respondents were therefore concerned that extending the scope of the Aarhus Regulation to State aid procedures would further prolong these procedures, thus delaying the moment at which the State aid decision becomes definitive. This could discourage much needed private investment for green transformation of the EU economy and could equally delay time-sensitive financial support, in particular, in times of crisis, such as the COVID-19 and the Russian military aggression against Ukraine. Most of these stakeholders indicated their preferred option is to maintain the *status quo*. Respondents stressed that efficiency and procedural simplicity should be prioritised; they argued that an internal review procedure for State aid decisions would entail lengthy and complex decision-making procedures. One respondent elaborated that it is in the

¹⁴ Judgement in *C-594/18 Austria v. Commission* of 22 September 2020, ECLI:EU:C:2020:742.

interests of all Member States to ensure the widest and simplest possible public involvement in environmental issues. In case such involvement is not sufficient, the solution should not affect the existing State aid control framework.

Some State aid authorities suggested that State aid review procedures were not the appropriate fora for reviewing EU environmental law compliance, and that there were other mechanisms for ensuring such compliance. They asserted that the State aid review procedure is a mechanism which has as its purpose the protection of the competitiveness of the internal market, meaning that issues related to EU environmental law are not of relevance in this context. They highlighted that there are already existing mechanisms to ensure compliance with EU environmental law, which ought to be relied on. They also highlighted that the Commission has an obligation to ensure compliance of the aid with EU environmental law as a matter of consistency with other areas of EU Law¹⁵, and that NGOs have the possibility to challenge Member State decisions to grant State aid at national level, where such decisions are taken. The views communicated by State aid authorities were largely reflected by State aid beneficiary respondents, and the industry respondents, who were sharing the same conclusions.

In addition, one public State aid authority respondent urged the Commission to take into account the fact that in case of schemes, the beneficiary might not be known at the time of the adoption of the Commission decision, making it unlikely, in their view, that relevant information about any potential infringement of EU environmental law would be available in such cases. One State aid authority asserted that Member States are not obliged to implement the measures approved the Commission. If a Commission decision is based on incorrect information provided by the Member State, the Commission may revoke the decision according to the Procedural Regulation. The respondent proposed that the involvement of the NGOs could be foreseen in the context of the formal investigations rather than preliminary examination, coupled with the one-month period allowed to third parties to express their views. In this way, the impact on the overall decision-making process would be limited and legal uncertainty reduced.

Regarding **which of the State aid decisions should be concerned by the initiative (compatibility grounds indicated)**, 26 out of 49 of the respondents, including 8 out of 24 public authorities (two national authorities responsible for State aid, two Member States and four other public authorities) were of the view that all State aid decisions by the Commission that meet the definition of an administrative act under the Aarhus Regulation should be concerned, whereas 17 of 49 of the respondents, including 10 out of 24 public authorities (eight national authorities responsible for State Aid and two Member States) did not support

¹⁵ *Ex multis*, Judgment of 22 March 1977, *Iannelli & Volpi*, 74/76, EU:C:1977:51, paragraph 14: « *Those aspects of aid which contravene specific provision of the Treaty (...) may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately so that their effect on compatibility or incompatibility of the aid viewed as a whole must therefore of necessity be determined in the light of the procedure prescribed in Article 93* »

this view and stated that none of the decisions have to be subject to review. Also, 6 out of 49 did not provide an answer.

Some respondents considered limiting the State aid decisions under review. One of the public authorities suggested that only decisions relating to environmental, public health and safety impacts should be covered. In addition, other public authorities recommended to exclude from the review cases where compliance with environmental law is not relevant, as well as measures under Article 107(3)(b) of the TFEU and rescue aid. Eight out of 24 public authorities (seven of them representing national State aid authorities and one – other public authority) were of the view that State aid decisions approved under the Commission Communication on Guidelines on State aid for Climate, Environmental protection and Energy (2022) and State aid decisions approved under the Commission Communication on Guidelines on Regional State aid should not be concerned¹⁶, while nine out of 24 public authorities (four of them representing national state aid authorities, two – Member States, three – other public authorities) had the contrary view. Regarding State aid decisions approved on the basis of other guidelines (or compatibility grounds), the replies to this question showed clear division between the respondents representing public authorities: while some respondents reiterated their views that all State aid decision should be included, others held to their opinion that none of the State aid decisions should be touched by this initiative, urging to maintain the *status quo*.

Regarding the **types of Commission State aid decisions which should be concerned by this initiative (legal basis indicated)** opinions were equally divided. Most NGO respondents stated that such a review procedure should not be limited to certain types of State aid decisions or certain contraventions of EU environmental law, as none of these limitations would be compatible with Article 9(3) of the Aarhus Convention and accordingly the ACCC findings in ACCC/C/2015/128. In their view, the scope of review should cover any State aid which may contravene environmental law, notwithstanding under which Guidance document such aid is considered. These respondents argue that *Hinkley Point C judgment* of the EU Court of Justice shows that it is not only decisions under the Commission Communication on Guidelines on State aid for Climate, Environmental protection and Energy that are relevant to the protection of the environment in the context of State aid.

On the other hand, eight public authorities disagree with subjecting any type of State aid decision to an internal review, while the remaining public authorities are pleading for a limitation of the decisions under internal review. Here respondents' views are split, as regards the inclusion or exclusion of each type of decision.

Lastly, NGOs acknowledged that some cases are urgent, such as those involving aid during a pandemic, and here the work to assess environmental compliance is more challenging. However, one NGO stressed in the stakeholder meeting that even for urgent files, Member States should provide minimum information and there should be a possibility for review.

¹⁶ Commission Communication on Guidelines on regional State aid (2021/C 153/01).

Regarding the options put forward for consultation, the following views have been expressed:

Option 1

Almost all NGO respondents were in support of Option 1, by virtue of its perceived capacity to accommodate the concerns raised by the ACCC¹⁷. The NGO respondents argue that it is necessary to take EU environmental law into account during review procedures for all State aid decisions, given the potential damage of supported activities to the environment. Therefore, they asserted that State aid decisions must be amenable to a review procedure under the auspices of the Aarhus Regulation under which justiciable rights can be asserted. One NGO appraised it as a ‘small, surgical amendment’, offering a relatively simple and efficient means of resolving the issues highlighted in ACCC/C/2015/128.

In contrast, most of the respondents from State aid authorities and State aid beneficiaries expressed significant concerns about adding further procedures or layers to the already complex State aid process and argued in favour of finding solutions that would not further complicate the process at the EU level. They expressed reservations in relation to Option 1, arguing that the internal review mechanism would render the State aid process more complex and time consuming than it is in its current structure. Some also made the point that State aid control should not serve to detect infringements of EU environmental law, because there are other procedures available for these purposes. A national industry association representing State aid beneficiaries commented that the Aarhus review procedure could increase legal uncertainty and thereby deter private investments that are meant to accelerate the green transition. It could also constitute double legislation, on top of existing environmental regulations and decisions (such as environmental permits) which can already be challenged by the public and NGOs at national level. However, two State aid authorities who replied considered that this option would ensure more certain access to administrative or judicial procedures for environmental NGOs and, one of them added, compliance with the Aarhus Convention. Yet, they also highlighted that this option affects legal certainty and legitimate expectation for Member States, stakeholders, and State aid beneficiaries, possibly prolonging litigation in connection to that financing.

Option 2

The NGO respondents unanimously regarded Option 2 as the least preferable means of responding to the findings of the ACCC (aside from maintaining the *status quo*). NGOs asserted that the measures which are ultimately adopted must guarantee that applicants will receive a legally binding reply in response to a request or complaint. This is necessary to ensure that rights are created for members of the public concerned to appeal unsatisfactory internal review decisions to the Court of Justice of the European Union. Some NGOs have

¹⁷ One NGO preferred Option ‘Other (including maintaining the *status quo*)’, explaining that their preferred option would include Option 1, the review of the Aarhus Regulation, in combination with the transparency provisions in Option 2. Another NGO also marked ‘Other (including maintaining the *status quo*)’ but explained that it has no specific preference and it would like the EU to take action to help protect the environment.

highlighted that 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. Many NGOs expressed the view that Option 2 would not provide such justiciable rights. In their analysis, the Commission would not be able to take a decision with legal effects pursuant to the BPC, that they can further challenge in Court based on Article 263 TFEU. This option would therefore be incapable in their view of addressing the concerns raised by case ACCC/C/2015/128. However, some NGOs have suggested that while Option 2 cannot in their view, in its own right address the findings of the ACCC findings in case ACCC/C/2015/128, elements of it such as the possibility of environmental NGOs to comment on published meaningful summaries of State aid notifications (subject to agreement by Member States) could still be of value as a complementary measure to be applied in tandem with Options 1 or 3, and that it could help to increase transparency in the State aid decision-making process.

Most of the public State aid authorities and State aid beneficiaries having preferred maintaining the *status quo* as their ‘first choice’ indicated that Option 2 would be their ‘second best’ solution. Most of State aid authorities highlighted it as offering a wider degree of flexibility to the Commission in terms of adoption and revision, preventing any further delays due to additional procedures, with possible damaging consequences on private investments. The Commission would also keep better control of the design of the procedure, including by limiting the types of decisions subject to review and reducing the time window in which a decision can be appealed and the time for the review itself. Those respondents viewed these aspects as essential for safeguarding legal certainty and legitimate expectations for Member States and beneficiaries. Others from this stakeholder group highlighted that this option avoids the creation of new administrative burdens, preserving legal certainty and legitimate expectations. However, some respondents expressed concerns that, in spite of its flexibility, this option would not address the concerns of the ACCC in case ACCC/C/2015/128. An industry representative suggested that a solution based on increasing transparency and monitoring the decisions subject to review, while maintaining efficiency and limiting administrative burden, is needed.

Option 3

In general, NGOs and environmental organisations expressed the view that the approach suggested in Option 3 could address the concerns highlighted in ACCC/C/2015/128. This would in their view be due to its capacity to create justiciable rights. However, doubts were expressed across this stakeholder group because the creation of a second, separate mechanism for reviewing State aid decisions would likely be both inefficient and confusing. It was also highlighted by one NGO that the creation of a new review mechanism under the State aid Procedural Regulation would be complex. Consequently, NGOs were reluctant to put their full support behind Option 3, going on to cite concerns of uncertainty as to its results, and suggesting that it would first be necessary to have a clearer idea of how the Procedural Regulation would be amended.

Few public authorities considered Option 3 as the ‘second best’ option, considering that Option 2 could offer similar advantages to the State aid Procedural Regulation in terms of safeguarding the specificities of State aid control.

Option ‘Other (including the option of maintaining the status quo)’

Most of the replies from the national State aid authorities and State aid beneficiaries expressed the view that the existing system already satisfactorily complies with the Aarhus Convention, and that the EU should not change anything, thus maintaining *status quo*. They also argued that all of the options put forward, including Option 2, are a disproportionate administrative burden. Most of the State aid authorities and State aid beneficiaries that replied indicated a firm opposition to the development of any new procedures which might prolong the State aid review process. As a result, there was strong support for maintaining the *status quo*. This group of respondents mainly expressed a preference for maintaining the existing arrangements as this would also ensure that the Member State and the beneficiary have legal certainty and legitimate expectations that the aid measure is feasible and will not be subject to a review by an EU institution or court within a reasonable time. One respondent highlighted that failing this, a preference for Option 2 would come second to maintaining the *status quo* as it represents the least intrusive option of the three. State aid experts expressed similar concerns and showed similar preferences in their written submissions as State aid beneficiaries.

The unanimous consensus among NGO respondents was that maintaining the *status quo* in the State aid decision-making process is not a viable option, as it does not implement, or respond to, the findings of the ACCC, and therefore, fails to comply with the Aarhus Convention. It was argued that maintaining the *status quo* is insufficient as, in their view, there are currently no administrative or judicial mechanisms available for NGOs and other members of the public to challenge Commission State aid decisions. They stressed the importance of compliance with international law, and the need to uphold the rights of EU citizens. Among the NGO submissions, concerns were expressed over the fact that the *status quo* was being contemplated at all.

A few respondents suggested an **alternative**, hybrid approach blending some elements from both Options 1 and 2 (i.e., transparency). Another alternative approach was put forward by a Member State, involving the introduction of a separate opportunity to complain to an independent body fitting the requirements of the Aarhus Convention, whilst remaining separate from the State aid notification procedure. The respondent explained that the main reason why the existing options proposed by the Commission are not justifiable is because they entail a disproportionate prolongation of the State aid procedure and encouraged the Commission to examine alternatives that could be implemented without encumbering the notification procedure.

1.1.3. Ranking of the options

In the OPC, respondents were asked to **rank the options** from most to least preferred (see Graph 4). Respondents were also asked to identify which of the options would best ensure

effective access to justice, regard for Union law and State aid procedures, legal certainty and legitimate expectations, and efficiency in the granting and implementation of State aid. Stakeholders expressed divergent opinions:

As regards **ensuring an effective access to justice for environmental NGOs and other members of the public:**

- 39% (19 of 49) of all respondents (all environmental organizations (7), and nearly all NGOs (6), some public authorities (5) and one EU citizen chose Option 1;
- 47% (23/49) of the respondents (majority of the public authorities (13), three business associations, two companies/business organisations, two NGOs, two EU citizens and one other respondent chose the Option ‘Other (including the option of maintaining the *status quo*)’. Out of those choosing this Option, 61% (14 respondents) chose the option where the *status quo* was maintained.
- One business association preferred Option 3 and none of the respondents chose Option 2 as their first option.
- 12% (6 respondents) did not provide an answer for this question.

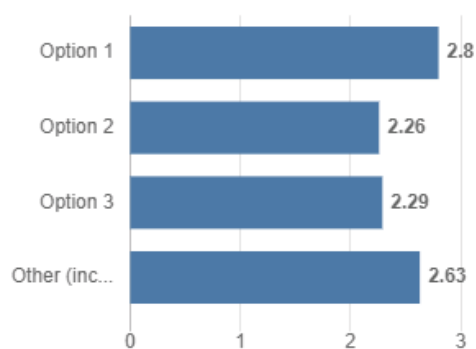
As regards the **options** which would have **best regard of Union law, in particular the existing State aid rules and procedures**, regarding the options which would best ensure **legal certainty** for those concerned by the State aid decision, in particular the Member States, regarding the options which would best **ensure legitimate expectations** for the beneficiaries of State aid and regarding the options which would **minimise any delays** affecting the granting and the implementation of State aid:

- 33% (16/49) of the respondents (all environmental organizations (7), almost all NGOs (one choosing Option ‘Other (including maintaining the *status quo*)’ by which it meant Option 1 in combination with option 2 transparency elements), two public authorities and one EU citizen chose Option 1.
- 51 % (25/49) of the respondents (majority of the public authorities (15), three business associations (3), two companies/business organisations, two NGOs, two EU citizens and one other respondent expressed preference for Option ‘Other (including the option of maintaining the *status quo*)’).
- 4% (2/49) of the respondents (one business association and one public authority) chose Option 3 and none of the respondents chose Option 2 as ‘best ensuring’ the above-mentioned outcomes.
- 12% (6/49) respondents did not provide an answer for this question.

Overall, almost all of the NGOs and environmental organisations (one choosing Option ‘Other (including maintaining the *status quo*)’ by which it meant Option 1 in combination with option 2 transparency elements) preferred Option 1, which ensures a procedure which is consistent with the process already in place for administrative decisions in other policy areas. In their view, Option 1 would have a similar effect to Option 3, in ensuring justiciable rights in the State aid review procedure, without requiring a large overhaul of the process as foreseen under Option 3. It also carries with it greater certainty, as there is more clarity as to how Option 1 would be implemented, as compared to Option 3.

On the other hand, almost all State aid public authorities, and every State aid beneficiary was of the view that all options put forward by the Commission would prolong the State aid review procedure unnecessarily, with consequences for legal certainty and legitimate expectations. Overall, while a preference was shown among these stakeholder groups for Option 2, it was secondary to maintaining the *status quo*.

*Graph 4: Chart reflecting the support for each of the options based on rankings indicated in the OPC on 'EU Platform'*¹⁸



Source: OPC Survey ('EU Platform')

¹⁸ Where rankings have been provided by contributors.