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From: Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director

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To: Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union

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Subject: 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

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Delegations will find attached document COM(2023) 307 final.

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COM(2023) 307 final

**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**

{SWD(2023) 307 final}

## 1. INTRODUCTION

The European Green Deal is a highly ambitious political priority, involving transformative changes across European economies. It reinforces the EU's commitment to tackling generation-defining challenges in the area of climate and the environment and strengthens the transition to climate neutrality by enhancing the competitiveness of Europe's net-zero industry. Civil society plays a crucial role in this transition, in a number of important ways. One of the ways it plays a role in the transition is by ensuring that the institutions of the EU uphold EU environmental law, through the exercise of their right to access to justice.

The EU and its Member States are parties to the Aarhus Convention on access to information, public participation in decision-making, and access to justice in environmental matters (the 'Aarhus Convention'). The EU is fully committed to compliance with the Aarhus Convention and has implemented its provisions on access to justice in environmental matters in relation to EU institutions and bodies through the Aarhus Regulation<sup>1</sup>. That Regulation was revised in 2021 to provide broader opportunities for NGOs and other members of the public to challenge administrative decisions of EU institutions and bodies where these decisions may contravene EU environmental law.

The revised Aarhus Regulation provides a number of exceptions, including an exception for State aid decisions.

The green transition will not happen without financing, and here State aid plays an important role. The EU's State aid policy and enforcement actions support the green transition<sup>2</sup>. The Guidelines on State aid for climate, environmental protection and energy provide a predictable framework enabling Member States to support green investments by businesses, while minimising the negative effects of this State aid on competition<sup>3</sup>. A number of developments have highlighted the need for a fast and effective system to monitor and control State aid in the EU. These developments include the implementation of: (i) the recovery and resilience framework; (ii) REPowerEU; and (iii) the temporary State aid frameworks put in place to enable Member States to support businesses through both the COVID-19 pandemic and the economic consequences of the Russian war of aggression against Ukraine. With a fast and effective State aid control system, State aid can accelerate the decarbonisation of the EU

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<sup>1</sup> Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, 25.9.2006), p. 13, as amended by Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021, OJ L356 8 10 2021, p. 1.

<sup>2</sup> See, for instance, the *Communication to the Commission Approval of the content of a draft for a Commission Regulation amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty* (so called 'Green Deal GBER amendment') adopted on 9.03.2023 and the *Communication from the Commission Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia*, 2023/C 101/03 OJ C 101, 17.3.2023, p. 3–46.

<sup>3</sup> Communication from the Commission Guidelines on State aid for climate, environmental protection and energy 2022, OJ C80, 18 02 2022, p. 1.

economy and promote the development and uptake of green technologies. Without effective and fast State aid control, there is a risk that sustainable investments will be delayed.

In 2015, the Compliance Committee under the Aarhus Convention (the ‘ACCC’) received a complaint from an environmental non-governmental organisation about a Commission decision on State aid granted to support the development of a new nuclear power plant in a Member State (case ACCC/C/2015/128). Following the examination of this complaint, the ACCC found that the current possibilities for the public to challenge the Commission’s decisions on State aid fail to comply with the EU’s obligations under the Aarhus Convention<sup>4</sup>.

This Communication: (i) sets out the Commission’s assessment of the implications of the ACCC’s findings; and (ii) reports on the public consultation that the Commission organised to explore options for addressing the ACCC’s findings while upholding the EU Treaties and related case-law on State aid control. It also elaborates on the options which will inform the Commission’s approach in the future, in light of its obligations under the Aarhus Convention, taking into account the need for a fast and effective State aid control mechanism in the EU.

## **2. THE LEGAL FRAMEWORK OF THE AARHUS CONVENTION**

### **2.1 The findings of the Aarhus Convention Compliance Committee in case ACCC/C/2015/128 on State aid**

The Aarhus Convention sets out a compliance-review mechanism, for which the ACCC is responsible. On 17 March 2021, the ACCC issued its findings and recommendations on case ACCC/C/2015/128 concerning the possibility for members of the public to challenge decisions on State aid measures taken by the European Commission under Article 108(2) of the Treaty on the Functioning of the European Union (TFEU).

The ACCC’s findings are set out in the paragraphs below.

*By failing to provide access to administrative or judicial procedures for members of the public to challenge decisions on State aid measures taken by the European Commission under Article 108(2) TFEU which contravene EU law relating to the environment, the EU fails to comply with Article 9(3) of the Convention.*

*By failing to provide any procedure under Article 9(3) of the Convention through which members of the public are able to challenge decisions on State aid measures by the European Commission under Article 108(2) TFEU which contravene EU law relating to the environment, the EU also fails to provide an adequate and effective remedy regarding such decisions as required by Article 9(4) of the Convention.*

The ACCC also made the following recommendation in its findings.

*The Party concerned [should] take the necessary legislative, regulatory and other measures to ensure that the Aarhus Regulation is amended, or new European Union legislation is*

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<sup>4</sup> For the findings and related case information, see [https://unece.org/env/pp/cc/accc.c.2015.128\\_european-union](https://unece.org/env/pp/cc/accc.c.2015.128_european-union).

*adopted, to clearly provide members of the public with access to administrative or judicial procedures to challenge decisions on State aid measures taken by the European Commission under Article 108 (2) TFEU that contravene European Union law relating to the environment, in accordance with Article 9(3) and (4) of the Convention.*

Following up on the findings of the ACCC, the Commission restated its commitment to ensuring that the EU respects its international obligations in matters pertaining to the Aarhus Convention and acknowledged the concerns expressed in the findings adopted by the ACCC. The Commission committed to analysing the implications of the findings and assessing the options available and stated that, if appropriate, by the end of 2023, it would come forward with measures to address the issue, in light of the obligations of the EU and its Member States under the Aarhus Convention and taking into account the rules of Union law concerning State aid.<sup>5</sup>

On 21 October 2021, at the EU's request, the Meeting of the Parties of the Aarhus Convention postponed the endorsement of the findings in case ACCC/C/2015/128 until the next ordinary Meeting of the Parties in 2025.

## **2.2 Implementation of the Aarhus Convention's requirements on access to justice in relation to EU institutions and bodies**

The Aarhus Convention was adopted in 1998 under the auspices of the UNECE. Today it has 46 Parties, including the European Union. It is the leading UN Convention on environmental democracy, transparency, public participation, and access to justice in environmental matters. In its Article 9(3), the Aarhus Convention provides that *'each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment'*.

The Convention therefore operationalises the idea that the public is, and should remain, a driving force of the green transition, and should have the means to actively involve itself in the development and implementation of new policies. Access to justice in environmental matters, both via the Court of Justice of the European Union (CJEU) and the national courts<sup>6</sup>, is a way to strengthen the role which civil society can play as a watchdog in the democratic space.

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<sup>5</sup> The Commission statement was announced at the third and final political trilogue on the Proposal for the revised Aarhus Regulation and is available at [https://www.europarl.europa.eu/meetdocs/2014\\_2019/plmrep/COMMITTEES/ENVI/DV/2021/08-31/Commissionstatement-stateaid\\_EN.pdf](https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/ENVI/DV/2021/08-31/Commissionstatement-stateaid_EN.pdf)

<sup>6</sup> Article 19(1) of the Treaty on European Union (TEU) requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. Access to justice in environmental matters is also relevant in the context of Articles 41 and 47 of the Charter of Fundamental Rights of the EU and helps provide legal certainty.

While it is the Commission's duty as guardian of the Treaties to proactively monitor compliance with EU environmental laws, individuals and NGOs can also play a crucial role in identifying potential breaches of EU environmental law by submitting complaints to the Commission. Where they believe that the Commission has itself taken a decision which breaches EU environmental laws, the Aarhus Regulation allows environmental NGOs (and also, as of 29 April 2023, other defined 'members of the public') a right to request an internal review of EU administrative acts if such acts breach EU environmental law. The reply of the EU institution or body can be challenged before the CJEU<sup>7</sup>.

However, since the adoption of the Aarhus Regulation in 2005, certain acts (or omissions) of the Commission or other EU institutions or bodies acting as a review body are exempted from the internal review mechanism. These include: acts adopted (or omissions) (i) under Articles 101, 102, 106, and 107 of the Treaty (competition rules); (ii) in infringement proceedings; (iii) in Ombudsman proceedings; and (iv) in OLAF proceedings<sup>8</sup>.

### **3. WHAT ARE THE SPECIFICITIES AND MAIN ELEMENTS OF EU STATE AID CONTROL?**

State aid control is a cornerstone of the functioning of the EU internal market. It aims to limit distortions of competition arising from decisions by Member States to grant State aid, and thereby aims to ensure a level playing field for undertakings operating in the EU. When assessing the implications of – and options for dealing with – the ACCC findings, the Commission must therefore take into account the need to maintain an efficient and reliable State aid system.

#### **1.1. Overview of the EU system of State aid control**

State aid control in the EU is based on provisions in the TFEU, secondary legislation and case-law. While the EU's policy on State aid contributes to other EU objectives, including in the field of environment (e.g., by authorising aid for the promotion of renewable energy), its main objective is to ensure a level playing field and prevent subsidy races<sup>9</sup>. State aid control is

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<sup>7</sup> The Aarhus Regulation allows environmental NGOs and, as of 29 April 2023, also other members of the public meeting certain criteria, to challenge, in an administrative review procedure, administrative acts adopted by any EU institutions or bodies in any policy area if the applicants can show that these acts contravene EU environmental law. Members of the public may submit review requests within eight weeks of the adoption, notification or publication of the contested act, whichever is the latest. The internal review process would therefore commence within eight weeks of the adoption, notification, or publication of the Commission State aid decision. The review is conducted by the Commission DG which prepared the contested act in consultation with other Commission DGs and takes 16 to 22 weeks. If the internal review decision is then challenged before the EU courts, the judicial review may add several months or year(s) to the process.

<sup>8</sup> The exception follows from the Aarhus Convention, which provides an exception for public bodies acting in a judicial capacity. When assessing decisions by Member States to grant State aid, the Commission acts as a review body, independent and impartial, as guardian of the EU Treaties. The Commission's role when reviewing State aid decisions is therefore akin to that of a judicial body. However, this interpretation put forward by the EU was rejected by the ACCC in case ACCC/C/2015/128, as regards State aid control.

<sup>9</sup> See, in that regard, C-594/18 P, *Commission v Austria*, paragraph 26: 'Article 107(3)(c) TFEU does not require planned aid to pursue an objective of common interest [such as the protection of the environment] in order to be declared compatible with the internal market'.

meant to protect the internal market against distortions of competition arising from Member States' decisions to grant selective advantages to certain undertakings.

The procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State responsible, in the light of its obligations under EU law, for granting the aid.<sup>10</sup> The State aid procedure establishes a bilateral relationship between the Commission and the Member State, which is apparent not only from the structure of Article 108(3) TFEU,<sup>11</sup> but also from the role of interested parties in the context of the procedure laid down in Article 108(2) TFEU.<sup>12</sup>

The EU and its Member States have different powers as regards State aid. It is always Member States which decide which economic activities should receive State aid as a matter of national policy (within the limitations of the applicable legal framework, including EU environmental law). It is therefore at national level that policy considerations become relevant, when the decision to grant the aid is taken.

In State aid matters, assessment of the compatibility of Member States' measures with the internal market falls within the exclusive competence of the Commission, subject to review by the EU judicature. The Commission has laid down in State aid guidelines and frameworks how it will carry out this assessment. The Council State aid Procedural Regulation<sup>13</sup> (the 'Procedural Regulation') lays down both the procedural rules to be followed, and the type of decisions the Commission adopts when assessing State aid measures. These decisions include: (i) decisions finding that a measure does not constitute State aid; (ii) decisions not to raise objections; (iii) decisions to initiate the formal investigation procedure pursuant to Article 108 (2) TFEU; and (iv) decisions closing the formal investigation procedure finding that either the measure does not constitute aid, or that it can be authorised ('final positive decision') or that it cannot be authorised ('final negative decision').

While the focus of State aid control is the protection of the internal market against distortions of competition, as a general matter of coherence within the EU legal order, the Commission must also ensure that State aid is not contrary to other provisions of EU law, including EU environmental law. If a State aid measure is contrary to EU law, and provided the relevant requirements set out in the case-law are met<sup>14</sup>, the Commission cannot authorise the aid. That follows from the *Braesch and Others* and the *Hinkley Point C* judgment and earlier case-law

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<sup>10</sup> *Ex multis*, Judgment of 11 November 2021, *Autostrada Wielkopolska v Commission and Poland*, C-933/19 P, EU:C:2021:905, paragraph 60 and the case law cited.

<sup>11</sup> Judgment of 1 June 2006, *P & O European Ferries and Diputación Foral de Vizcaya v Commission*, C-442/03 P and C-471/03 P, EU:C:2006:356, paragraph 103 and the case law cited.

<sup>12</sup> *Ex multis*, Judgment of 11 November 2021, *Autostrada Wielkopolska v Commission and Poland*, C-933/19 P, EU:C:2021:905, paragraph 65 and the case law cited.

<sup>13</sup> 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.

<sup>14</sup> *Ex multis*, Judgment of 22 March 1977, *Iannelli & Volpi*, 74/76, EU:C:1977:51, paragraph 14: 'Those aspects of aid which contravene specific provisions 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'.

of the EU Courts<sup>15</sup>. In particular, the EU Court has noted that where the modalities of an aid measure are so indissolubly linked to the object of the aid that it is impossible to evaluate them separately, their effect on the compatibility or incompatibility of the aid viewed as a whole must of necessity be determined in the light of the procedure prescribed in Article 108 TFEU. In practice, the Commission systematically conducts internal consultations of its DGs before authorising the aid with a view to identifying any inconsistencies with other areas of EU law.

## **1.2. Ongoing assessment to identify the types of State aid decisions that are relevant in the context of the ACCC findings in case ACCC/C/2015/128**

The Commission notes that the ACCC concluded in its findings in case ACCC/C/2015/128 that the EU is in breach of the Aarhus Convention with regard to State aid decisions adopted by the Commission under Article 108(2) TFEU. The ACCC referred, in that context, to final decisions allowing the Member State to implement the aid following a formal investigation procedure in which the Commission publicly stated its doubts about the compatibility of the aid with the internal market and invited interested parties to provide their views.

For the sake of completeness, the Commission sought the views of stakeholders in the online public consultation on the types of State aid decisions which could be relevant to address the ACCC's findings: (i) by their types as specified in the Procedural Regulation; and (ii) by their compatibility grounds, specified in soft law, such as guidelines and frameworks.

The Commission will further assess the feedback received in the online public consultation and whether other types of decisions would also be relevant to address the breach identified by the ACCC.

In particular, the Commission will assess whether any possible future review mechanism should apply: (i) to decisions to open the formal investigation; (ii) to decisions finding that the measure does not constitute aid; and (iii) to final negative decisions. However, the first category of decisions is provisional in nature. For the latter two categories of decisions, the issue of the Commission decision's compliance with environmental law should in principle also not arise: (i) either because the decision concludes that the measure at stake does not amount to State aid; or (ii) because any potential non-compliance with EU environmental law would in any event not change the nature of the conclusions (aid not authorised).

Similarly, the Commission will further assess whether all compatibility grounds under the TFEU are relevant to address the ACCC's findings in case ACCC/C/2015/128, taking into account the EU's obligations under the Aarhus Convention, and the need to preserve the specificities of State aid control. The ACCC findings in case ACCC/C/2015/128 concerned aid for the development of a nuclear power station, in which the Commission initiated the formal investigation procedure under Article 108(2) TFEU and adopted a final positive

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<sup>15</sup>Judgment of 31 January 2023, *Commission v Braesch and Others*, C-284/21 P, EU:C:2023:58, paragraphs 96 to 99 and the case law cited; Case C-594/18 P, *Commission v Austria*, para. 100, Judgment of 15 June 1993, *Matra v Commission*, C-225/91, EU:C:1993:239, paragraph 41.



decision on the basis of the compatibility grounds set out under Article 107(3)(c) TFEU<sup>16</sup>. While the recommendations of the ACCC broadly refer to all Commission State aid decisions adopted under Article 108(2) TFEU, the focus of the findings is therefore State aid to facilitate the development of a particular project or activity susceptible to infringing EU environmental law.

In its assessment, the Commission will take into account the objective of the Aarhus Convention of ensuring access to justice with regard to acts that may contravene environmental law.

### **1.3. Possibilities for third parties to hold the Commission accountable for State aid decisions**

Third parties can play an important role in State aid procedures, first at the administrative and then at the judicial stage, especially if they can show their interests might be affected by the granting of aid<sup>17</sup>.

At the administrative stage, third parties qualifying as interested parties may submit comments on a Commission decision to open the formal investigation procedure<sup>18</sup>. Provided they fill in the compulsory complaint form, third parties can also submit complaints about State aid granted by Member States without prior notification, or about State aid used by the beneficiary in breach of the conditions set out in the relevant State aid decision<sup>19</sup>. Irrespective of their status as interested parties, third parties including environmental NGOs may in any event act as a valuable source of information throughout the procedure, including by signalling possible breaches of EU environmental law.

As regards judicial control over State aid decisions, and provided they qualify as an interested party, third parties can bring a challenge directly before the General Court against a State aid decision not raising objections, with a view to triggering a formal investigation procedure. However, as regards the possibility to challenge a final positive decision (i.e., the type of decision which the ACCC found the EU to be in breach of the Aarhus Convention), the conditions for admissibility are detached from the notion of interested party<sup>20</sup> and the so-called *Plaumann* test of ‘individual concern’ applies in full<sup>21</sup>. In that context, the possibility

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<sup>16</sup> SA.34947 (2013/C) (ex 2013/N). Article 107(3)(c) concerns ‘aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest’.

<sup>17</sup> According to Article 1(h) of the Procedural Regulation, ‘interested party’ means any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.

<sup>18</sup> Article 6(1) of the Procedural Regulation, Article 24(1) of the Procedural Regulation.

<sup>19</sup> Article 12(1) of the Procedural Regulation, Article 24(2) of the Procedural Regulation.

<sup>20</sup> In addition, the participation of the applicant as an interested party in the formal procedure leading to the adoption of the challenged decision has no bearing, on its own, on the admissibility of the action: case T-236/10, paragraph 44. See also case T-764/15, *Deutsche Lufthansa*, paragraph 100.

<sup>21</sup> Case 25/62, *Plaumann v Commission*: ‘Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.’

for an association to argue it has *locus standi* based on an interest of its own is construed narrowly

Third parties, including environmental NGOs, can challenge the legality of EU State aid decisions before national courts if they have standing under national law<sup>22</sup>. In particular, and in accordance with national procedural rules, they can make the argument that the Commission State aid decision, which is a necessary precondition for the national act conferring the advantage, is illegal<sup>23</sup>. As a result, the national courts may, following a preliminary reference to the Court of Justice, ask the Court to declare the Commission State aid decision invalid<sup>24</sup>.

The Commission considers that national authorities and courts play a particularly important role in ensuring access to justice in State aid decisions. Member States decide when and to whom they grant State aid. Access to justice in Member States therefore remains an important element of the architecture under the Aarhus Convention, and an internal review by the Commission cannot replace that.

As set out in the Commission Communication on improving access to justice in environmental matters in the EU and its Member States<sup>25</sup>, it is crucial for many Member States to take further action to improve compliance with the Aarhus Convention. Weaknesses and obstacles for NGOs at national level, including insufficient standing and high litigation costs, partly explain the push to add new requirements at the EU level. Without affecting its work to address the findings of the ACCC, the Commission is conducting a further study on this matter, with the title '*Collecting and updating information on public participation and access to justice in environmental matters in the EU Member States in case Member States adopt decisions on state aid*'. The study is assessing whether projects in receipt of State aid can be challenged effectively by NGOs at the Member State level in cases of alleged breaches of EU environmental law. As the study addresses issues at national level, its findings will be complementary, and not an alternative solution, to address the compliance issues identified by the ACCC at EU level.

## **4. CONSULTATION PROCESS**

### **4.1 Object of the consultation**

On 13 July 2022, the Commission published on the 'Have your say' portal a call for evidence and an online public consultation. The deadline to reply was set for 5 October 2022. On 9 September 2022, the Commission organised a virtual meeting open to all interested stakeholders (e.g. environmental NGOs, academics, law firms, public authorities)<sup>26</sup>, followed

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<sup>22</sup> Case C-212/19, *Compagnie des pêches de Saint-Malo*.

<sup>23</sup> Order in Case C-640/16 P *Greenpeace Energy v Commission*, paragraphs 60-61.

<sup>24</sup> *Idem*. See also para. 27 of the Commission Enforcement Notice Communication from the Commission Notice on the enforcement of State aid rules by national courts 2021/C 305/01 C/2021/5372, OJ C 305, 30.7.2021, pp. 1-28.

<sup>25</sup> COM (2020) 643 final.

<sup>26</sup> For details from the meeting, see minutes [Circabc \(europa.eu\)](https://circabc.europa.eu).

by an ad hoc joint meeting between Member State experts from the competition/State aid policy area and the Aarhus Expert Group on 12 September 2022<sup>27</sup>.

The Commission consulted the public and stakeholders on three scenarios ('Options'), as well as the possibility to identify a fourth scenario 'Other' (including maintaining the status quo). All three Options on which the public was consulted included the possibility for the public to challenge Commission decisions, while Options 2 and 3 were framed taking into account the specificities of State aid control.

- Option 1: Amending the Aarhus Regulation to include State aid decisions within its scope. 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.
- Option 2: Amending the Best Practices Code (BPC) for the conduct of State aid control procedures<sup>28</sup> to introduce an internal review mechanism 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 with the Aarhus Regulation<sup>29</sup>). 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 it turned out to be based on incorrect information from the Member States. Option 2 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.
- Option 3: Amending the Procedural Regulation to introduce an internal review mechanism 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 Commission<sup>30</sup>.

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<sup>27</sup> For details from the meeting, see minutes [Register of Commission expert groups and other similar entities \(europa.eu\)](#)

<sup>28</sup> The Best Practice Code is a Commission Communication providing guidance to the Member States, aid beneficiaries and other stakeholders on how State aid procedures work in practice. It aims to make State aid procedures as transparent, simple, clear, predictable, and timely as possible, while also improving procedures where appropriate.

<sup>29</sup> 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.

<sup>30</sup> 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.

Considerations referred to under 3.2 as regards limitations on the scope of decisions to be reviewed, by type or legal basis, are potentially relevant for all three options identified above, therefore also including Option 1.

#### **4.2. Results of the consultation process**

The call for evidence and the online public consultation generated limited – albeit informative – feedback from stakeholders<sup>31</sup>. The consultation has revealed that opinions are divided into two main groups. Nearly all environmental NGOs and most public authorities responsible for environmental protection preferred Option 1, an amendment of the Aarhus Regulation. On the other hand, most public authorities responsible for State aid as well as most companies/business associations preferred to maintain the status quo. Public authorities responsible for State aid accounted for the largest number of respondents, followed by NGOs, businesses, companies, and other respondents (citizens, lawyers).

Those favouring Option 1 emphasised the importance of providing sufficient access to justice in environmental matters for all types of State aid decisions and ensuring compliance with international commitments under the Aarhus Convention. According to them, the EU must address the findings and recommendations of the ACCC. Compliance with the EU's international obligations under the Aarhus Convention was also highlighted by the few Member States providing a consolidated position drafted by both their environmental and State aid authorities. The same Member States said that the State aid process should not be delayed, and that due regard should be paid to legal certainty and legitimate expectations for State aid beneficiaries and Member States.

Furthermore, most of the stakeholders with a preference for Option 1 emphasised that this option would have the advantage of applying to State aid an existing regime, thereby ensuring, in their view, coherence and consistency between all areas of EU law by including them all in the Aarhus Regulation. Environmental NGOs also criticised Option 2 (Amendment of the Best Practices Code) because in their view such an instrument would not create new legal rights for environmental NGOs and would not sufficiently guarantee that the Commission's reply could then be challenged before the General Court, as would be required under the Aarhus Convention. Instead, their view was that the Code merely describes Commission practices.

On the other hand, most public authorities responsible for State aid as well as all business stakeholders and business associations expressed significant concerns about adding further procedures or administrative layers to the already complex State aid process. Most of these stakeholders indicated that their preferred option was to maintain the status quo, with no consequences for the State aid procedure. In their view, Option 1 (amending the Aarhus Regulation) risks 'crowding out' investments by delaying the moment at which the State aid decision becomes definitive. This could discourage much-needed private investment for the

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<sup>31</sup> There were 19 replies to the call for evidence, and 49 to the online public consultation. For details, see Commission Staff Working Document SWD(2023)307.

green transition of the EU economy. Other respondents from this group were of the view that such an extra layer of accountability was not needed, in view of both: (i) the Commission's obligation to ensure compliance of the aid with EU environmental law as a matter of consistency with other areas of EU law<sup>32</sup>; and (ii) the possibility for NGOs to challenge Member State decisions to grant State aid at the national level, where such decisions are taken. Some stakeholders argued that the Member States are also not obliged to implement the aid even if authorised by the Commission, underlining the division of powers between the Commission acting as a 'review body' and the Member States deciding which activities should be aided and eventually taking the decision to grant the aid.

Most respondents in this group argued that, if the status quo cannot be maintained, the option to amend the BPC (Option 2) would be the most flexible solution, in which the specificities of State aid could be taken into account in a flexible way. The other possibility would consist in the amendment of the Procedural Regulation. Further arguments in favour of Option 2 included that the amendment of the BPC would be easier and faster to implement. These respondents argued that the Commission would keep better control of the design of the existing review procedures, including by: (i) limiting the types of decisions subject to review; (ii) reducing the time window in which a decision can be appealed; and (iii) reducing the time spent on the review itself. Those respondents viewed these aspects as essential for safeguarding legal certainty and legitimate expectations for Member States and beneficiaries. Others arguing in favour of Option 3 as a 'second best' solution considered that amending the Procedural Regulation could offer similar advantages to Option 2 in terms of safeguarding the specificities of State aid control, while providing more legal certainty than a 'soft law' instrument like the BPC.

During the consultation process, few stakeholders identified alternative options for dealing with the findings of the ACCC. One option put forward was a suggestion to amend the scope of the definition of 'interested party' in the Procedural Regulation to specifically include 'environmental NGOs and other members of the public'. However, the ACCC has assessed this option and concluded that it would not be sufficient to meet the requirements of Article 9(3) of the Aarhus Convention unless these interested parties were also clearly provided with the right to challenge the decision taken by the Commission as a result of the formal investigation procedure.

Furthermore, one Member State suggested that the Commission should set up an independent body that meets the requirements of the Aarhus Convention. However, the Commission has concerns about the complexity of this arrangement and its added value compared with other options. In addition, this arrangement might also be difficult to reconcile with the existing role of the EU institutions, where the Commission has the power to enforce State aid control and supervise compliance with EU environmental legislation, as guardian of the Treaty and under the sole control of the EU Courts.

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<sup>32</sup> See footnote 9 above.

Finally, some stakeholders raised the idea that elements of certain options could be combined in a separate option.

## 5. CONCLUSIONS

The outcome of the consultation process strengthens the need for further careful assessment to find an optimal solution to address the findings of the ACCC on the review of State aid decisions in the light of the EU's obligations under the Aarhus Convention while taking into account the specificities of State aid. The stakeholders' positions are divided between two sides. On one side, most State aid authorities and businesses call for the maintenance of the status quo (or alternatively favouring Option 2 as the most flexible approach that would make it possible to preserve the specificities of State aid control). On the other side, nearly all environmental NGOs and most public authorities responsible for environmental protection support Option 1, removing the exemption for State aid under the Aarhus Regulation. Some stakeholders underline the benefits of Option 3, as another legislative option.

There is broad consensus, however, that the EU must be fully compliant with the Aarhus Convention. There is also a strong demand that any new review mechanism to ensure access to administrative or judicial review must preserve the specificities of State aid and its effectiveness, including the speed of the EU procedures.

The Commission concludes that ensuring compliance with the ACCC findings in case [ACCC/C/2015/128](#) requires an adjustment to the existing legal framework or equivalent measure. The Commission concludes that the status quo would raise issues of compliance with the ACCC findings, taking into account the EU's obligations under the Aarhus Convention.

At this stage, the Commission is keeping all three options identified in the public consultation open and may also consider a combination of options. Finally, the Commission concludes that any adjustment of the existing framework should be designed so as to both preserve the efficiency of State aid control and complement in the most efficient manner the possibilities for review at national level, while simultaneously taking into account the EU's obligations under the Aarhus Convention.

As for the next steps, the Commission will analyse the impacts, including costs and benefits, of possible measures in an impact assessment according to the 'better regulation' rules. This would include scrutinising: (i) the instrument to be amended; (ii) the scope of State aid decisions subject to review; (iii) the duration of the procedures, in particular in cases where the implementation of the State aid decision is urgent and (iv) the resource implications for the EU institutions and bodies concerned.