

EU STATE AID DECISIONS AND ACCESS TO JUSTICE

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**The implications
of the findings of the
Aarhus Convention
Compliance Committee
in case C128, and the
options for response by the EU**

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Executive summary

State aid can be a powerful tool to incentivise measures that protect the environment and address climate change. But State aid also has the potential to support projects that undermine the EU's long-term climate and environmental targets; and for that reason, it is regrettable that Commission State aid decisions that breach climate and environmental law are virtually unchallengeable by NGOs and individuals. This absence of accountability is contrary to international law, as has been confirmed by the international compliance body of a Convention binding the Union. It is time for the EU to comply with its international obligations and meet international standards for environmental democracy, accountability and good governance.

Case C128 - the findings confirming EU non-compliance with international law

In case C128, in which two non-governmental organisations argued the European Union failed to provide access to justice to challenge State aid decisions, the Aarhus Compliance Committee found the EU in breach of the Aarhus Convention because the Union failed to provide (a) access to justice for members of the public to challenge Commission decisions on State aid that contravene Union environmental law; and (b) an adequate and effective remedy regarding such decisions. The Committee's findings are well precedented: they are based on (a) earlier Committee findings, which are the official interpretation of the Aarhus Convention and binding on its Parties; (b) the jurisprudence of the Court of Justice of the European Union (in C-594/18P *Austria v. Commission*); and to a lesser extent (c) findings with respect to EU law that are evident, and arguably incontrovertible. This makes it difficult for the EU to argue against the findings. Nevertheless, the Union blocked the endorsement of the findings at the Aarhus Convention Meeting of the Parties. There is, however, some indication that the EU will eventually comply: the Commission is now analysing the implications of the findings and assessing the options available; it will publish an assessment by the end of 2022 and "if appropriate" will come forward with measures to address the issue by the end of 2023. A public consultation is promised for Spring 2022 on the subject.

Implications of C128

The implications of the findings of the Aarhus Compliance Committee are far-reaching, not least because of the way the EU has responded to them. So far, the Union has - in the face of widespread criticism - used its political power to obstruct international decision-making on the findings. The EU's behaviour raises doubt about the good faith of the Union, and is in stark contrast to the Union's commitment to the rule of law, both within the EU and internationally. Moreover, the timing of the Union's opposition to the findings was terrible: the Union's obstruction occurred when the Aarhus Convention was trying to address a particularly flagrant breach of the Convention by Belarus and to establish a rapid response mechanism to protect environmental defenders. The EU undermined its position in key debates, leaving it vulnerable to claims of double standards: this is particularly worrying now in the light of the war in the Ukraine, which has made the Union's moral mandate in international law of paramount importance. In the longer term, the Union's reputation as a reliable partner and leader in international environmental law may well be damaged. What is more, access to justice to challenge state aid decisions that breach environmental law grows increasingly important for a number of reasons:

- the ambition of the Green Deal requires State aid to provide a positive contribution, and not to undermine, environmental protection in the Union;
- the sixth assessment cycle of the Intergovernmental Panel on Climate Change provides a dire warning of the consequences of inaction; and
- the energy price inflation caused by the Ukraine war has led to pressure to increase exploitation of national hydrocarbons as a way of reducing reliance on Russian imports.

The war has also triggered national proposals for new electricity market interventions through State aid; for example, wholesale price caps, which mask the true cost of fossil fuel generation, dampening price signals for energy efficiency and demand-side flexibility. This undermines the objectives of the Fit for 55 and Clean Energy for All packages.

All these considerations highlight the necessity to ensure that State aid decisions do not breach environmental law, which makes it alarming that the EU Commission has stated that it will only propose measures to address the Committee's findings "if appropriate". Measures – that is to say legislative measures - are essential to respond to the Committee's findings. A failure in this regard, would further damage the standing of the EU at a difficult time and harm the Aarhus Convention and its Compliance Committee.

The options for responding to case C128 and complying with international law

The Committee in its findings recommended two alternatives to provide members of the public with access to justice to challenge State aid decisions contrary to environmental law:

- amend the Aarhus Regulation, which purports to implement the Aarhus Convention with respect to EU institutions and bodies;
- or adopt new legislation to provide members of the public with access to justice to challenge State aid decisions.

Of those two alternatives, the amendment of the Aarhus Regulation appears to be the most straightforward and simple: it would clearly comply with the findings in case C128.

It is difficult to provide a thorough analysis of the recommendation to adopt new legislation because it is open-ended and it is impossible to know what new legislation the EU might chose to adopt. If the Union choses to amend the procedural Regulation (Regulation 2015/1589) there will be significant difficulties: in particular, the exclusion of the European Parliament as co-legislator and the necessity for fundamental changes to that Regulation.

Introduction

State aid decisions by the EU Commission may have significant environmental implications - for example with respect to the use of energy, transportation, and major infrastructural projects. What is more, State aid decisions may contribute to, or mitigate, climate change. It is therefore of the utmost importance that there should be the opportunity to challenge those decisions when they do not comply with environmental law. Unfortunately there is an accountability deficit in the European Union. An international Compliance Committee, working under the aegis of a binding treaty found that in case C128¹ the Union failed to comply with binding obligations under international law in two key respects. The EU failed:

- to provide access to justice for members of the public to challenge Commission decisions on State aid that contravene Union environmental law; and
- to provide an adequate and effective remedy regarding such decisions.

This paper discusses the implications of those findings and the options that the EU has to respond to them, including a detailed analysis of the findings. But before that analysis, it may be helpful briefly to describe how the EU's State aid system works, and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention").

The EU State aid system

"State aid" is financial support (for example subsidies, tax breaks, interest-free loans etc.) granted by a government or public authorities to an undertaking (enterprise) that risks distortion of competition and trade in the EU internal market.

As a general rule, under EU law State aid is banned on the grounds that it distorts competition.² Member States are prohibited by Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) from providing State aid, as being incompatible with the internal market, although there are exceptions where State aid may be justified on the basis of Article 107(2) and (3) TFEU.³

Article 108(3) TFEU requires Member States to notify the Commission of any plans to grant aid and refrain from putting the aid into effect before the Commission has authorized it. Each notification triggers a preliminary investigation. If the Commission finds, after such an investigation, that there are no doubts as to the compatibility of the notified measure, it will decide that the aid is compatible with the internal market, which means that the State aid may be given.

¹ Findings and recommendations with regard to communication ACCC/C/2015/128 concerning compliance by the European Union: ECE/MP.PP/C.1/2021/21 at unece.org/sites/default/files/2021-10/ECE_MP.PP_C.1_2021_21_E.pdf

² For the sake of brevity this is a simplification.

³ Article 107(2) TFEU provides certain types of aid are compatible with the internal market, for example "(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned". Emergency aid to remedy the consequences of the COVID-19 pandemic and of the war in Ukraine is often approved under Article 107(2)(b).

Under Article 107(3) certain types of aid may be considered to be compatible with the internal market; for example "(c) 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". This is the provision that is used the most by the Commission to authorise State aid.

If the Commission has doubts about the measure's compatibility with the internal market, it must open a formal investigation procedure engaging the notifying Member State and interested parties who may submit comments, after which the Commission may decide, under Article 108(2), that the State aid is, or is not, compatible with the internal market.⁴

In short, the rule is that a State aid may not be given unless the Commission decides that a State aid is compatible with the internal market.⁵ Such a decision may have significant environmental implications which may be positive or negative, for example where the State aid relates to transport, energy and agriculture.

Member States must ensure that aid beneficiaries and the aid measures they are adopting comply with national and EU environmental law. Nevertheless, it is also for the Commission, as a matter of law, to verify that the aid beneficiaries and measures comply with EU environmental law. The Court of Justice of the European Union (CJEU) has held, in Case C-594/18 P, *Austria v Commission*,⁶ that compliance with environmental law is a compatibility requirement; so the Commission may not decide an aid is compatible with the internal market if that aid breaches environmental law.

The Aarhus Convention, the Compliance Committee, and access to justice

The Aarhus Convention

The text of the Aarhus Convention was finalised in 1998 and the Convention entered into force towards the end of 2001. It was negotiated under the aegis of the United Nations Economic Commission for Europe, one of five regional UN commissions. The Aarhus Convention implements principle 10 of the Rio Declaration⁷, mainly in the UNECE area.⁸ The three pillars of the Convention – relating to freedom of information, public participation and access to justice – are based on the structure of principle 10.

⁴ The Commission makes a decision to initiate a procedure under Article 108(2) TFEU.

The notifying member State and interested parties will have the opportunity to submit comments on the Opening Decision. Should the Commission consider at the end of this procedure that the aid is not compatible with the internal market, it may not be put into effect. If the member State does not comply with this decision, the Commission may, under Article 108(2) TFEU, refer the matter to the CJEU directly.

⁵ To streamline its assessment, the Commission adopts guidelines, such as the recently revised guidelines on state aid for climate, environmental protection and energy 2022. The Commission also adopted a General Block Exemption Regulation (EU) No 651/2014, under which more than 95% of the aid measures can be paid directly by the Member States without notification to, and control of, the Commission.

⁶ Case C-594/18 P, *Austria v Commission*, ECLI:EU:C:2020:742 at curia.europa.eu/juris/document/document.jsf?text=&docid=231405&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1172700

⁷ Principle 10 of the Rio Declaration, which was adopted at the United Nations Conference on Environment and Development in 1992, at which 172 states were represented, and at which over a hundred heads of state were present.

Principle 10 says -

“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.”

*At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. **Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.**”* (Emphasis added)

⁸ There is provision for states outside the UNECE area to become Parties to the Convention

The Convention legally binds the EU and all its Member States.⁹ Here, the provisions of the Convention will not be dealt with at length, but the Convention's Compliance Committee, will be briefly described, as well as a summary of Article 9(3) and (4) of the Convention, which are the key Convention provisions that the Committee were considering in case C128.

The Compliance Committee

Article 15 of the Aarhus Convention requires the Meeting of the Parties of the Convention (the MOP), its main governing body, to establish arrangements for reviewing compliance with the Convention. Acting in accordance with Article 15, the MOP, by Decision I/7, review of compliance¹⁰ (Decision I/7) established the Committee (the Compliance Committee) for the review of compliance by the Parties with their obligations under the Convention.

The Committee is a group of internationally respected legal experts who act in a personal capacity, so they are independent of the countries from which they come, and are not representatives. Committee members are elected, in practice by consensus,¹¹ by the Aarhus Convention Parties, and required to be "of high moral character and recognized competence in the fields to which the Convention relates".¹² The functions of the Committee include considering communications from the public relating to the compliance of Parties to the Convention.¹³ It was one such communication which triggered case C128, which concerned an alleged breach by the EU of Article 9(3) and (4) of the Convention.

Article 9(3) and (4) of the Aarhus Convention

Article 9 of the Convention relates to access to justice. Paragraphs 1 and 2 of that Article provide for access to justice in the context of freedom of information and public participation. Article 9(3) provides for members of the public – that is to say NGOs and individuals¹⁴ - to appeal to administrative or judicial bodies, at the same time allowing Parties to the Convention some flexibility as to its implementation. Article 9(3) provides for members of the public to enforce environmental law either directly in the courts, or by triggering and participating in administrative procedures so as to have the law enforced.

⁹ At unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

¹⁰ ECE/MP.PP/2/Add.2 at unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf

¹¹ So far, Committee members have been appointed by the Aarhus Parties acting in consensus.

It has never been necessary for there to be a vote for the election of Committee members.

¹² Annex to Decision I/7, para. 2

¹³ Annex to Decision I/7, paras 18-23.

¹⁴ Article 2(4) of the Aarhus Convention provides –

"The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups"

Under Article 9(3), members of the public have the right to challenge acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment. Such provisions are not limited to legislation where the environment is mentioned in the title or heading: the decisive issue is whether the provisions somehow relate to the environment. This right to challenge is qualified in some important respects: in particular it does not extend to bodies acting in a judicial or legislative capacity.¹⁵

Parties to the Convention must ensure standing to enforce environmental law for members of the public meeting the criteria, if any, that may exist in national law. Whilst Parties are allowed some discretion as to those criteria, they must exercise that discretion in a way that is consistent with the objectives of the Convention regarding ensuring wide access to justice. For example, parties may not introduce criteria so strict that they effectively prevent all, or almost all, environmental organisations from challenging acts or omissions that contravene national law relating to the environment.

Members of the public may enforce the law directly with respect to alleged violations by either private persons or public authorities. The review procedures for any acts and omissions challenged must enable both the substantive as well as the procedural legality of the alleged violation to be challenged – in other words both the substance of the act or omission and the procedure by which it occurred or failed to occur.

As a basic component of accountability, potentially unlawful actions and omission should be subject to legal review. To this end, members of the public should also be able to challenge acts or omissions of public authorities that contravene provisions of national law relating to the environment. As is discussed below, the Convention explicitly states that the concept of ‘public authorities’ includes the EU’s institutions. “Omissions” in this case includes a public authority’s or institution’s failure to implement or enforce environmental law with respect to other public authorities/institutions or private entities – including, for example, businesses. For the EU and its Member States, “national law relating to the environment” includes EU law relating to the environment.¹⁶

Under Article 9(4) of the Convention, the procedures referred to in Article 9 (including, of course, Article 9(3)), must provide for adequate and effective remedies, including injunctive relief as appropriate. The procedures must be fair, equitable, timely and not prohibitively expensive.

¹⁵ The reason for this exclusion is explained in the Aarhus Convention implementation guide, page 49 -

This is due to the different character of such decision-making from many other kinds of decision-making by public authorities. Regarding decision-making in a legislative capacity, elected representatives are in theory directly accountable to the public through the election process. Regarding decision-making in a judicial capacity, tribunals must apply the law impartially and professionally without regard to public opinion.

¹⁶ See, for example, paragraph 111 of case C128.

Access to justice and State aid decisions

The Compliance Committee considered, in case C128, the issue of whether members of the public had adequate, Aarhus Convention-compliant, access to justice to challenge State aid decisions. This will be considered at some length later on, but by way of introduction¹⁷ it suffices to give a brief explanation of why members of the public have inadequate access to justice with respect to State aid decisions.

CJEU case law, in particular the findings in *Plaumann v Commission*,¹⁸ has long prevented members of the public from challenging a decision of the Commission, including a State aid decision, that is not directed to them. In the case of a State aid decision, a member of the public would have to demonstrate having a direct and individual interest. The Court has so far always required that the market position of the claimant be affected by the aid, which is almost impossible for members of the public to demonstrate.

In theory, it may be open to members of the public to intervene in an existing action for annulment under Article 264(1) TFEU but in practice this possibility to challenge a State aid decision is very limited. First, it depends on the existence of an action, and second, the criteria for intervention are difficult to meet.

Again, there is the theoretical possibility of a State aid being subject to a preliminary ruling under Article 267 TFEU after a member of the public has initiated a case in a national court, but in practice this will depend on access to justice at the national level, which is not always provided, and is at the discretion of the national court. In any event, any access to justice provided under Article 267 is indirect.

Next, any interested party may submit a complaint to inform the Commission of an alleged unlawful aid or misuse of aid under Article 24(2) of Council Regulation 2015/1589 (the procedural Regulation), after which the Commission will follow up the complaint whilst retaining full control of the procedure. But this procedure is merely a formalised complaint procedure and does not amount to an administrative or judicial remedy.

Finally, Regulation (EC) No 1367/2006²⁰ (the Aarhus Regulation) was adopted, amongst other things, to implement the access to justice requirements of the Aarhus Convention with respect to the EU's institutions and bodies, but – as will be discussed at some length below – Article 2(2)(a) of the Regulation excludes State aid decisions from the scope of acts subject to internal review.

¹⁷ A thorough analysis of the issue may be found in Delarue, J., Bechtel, S.D. Access to justice in State aid: how recent legal developments are opening ways to challenge Commission State aid decisions that may breach EU environmental law. *ERA Forum* 22, 253–268 (2021). doi.org/10.1007/s12027-021-00665-7

¹⁸ Case 25-62, *Plaumann & Co. v Commission of the European Economic Community*, ECLI:EU:C:1963:17 at curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=25-62&td=ALL

¹⁹ 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.

²⁰ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies (the Aarhus Regulation): OJ L 264/13, 25.09.2006 at eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006R1367

Part I: the findings in case C128

On 9 March 2015, two non-governmental environmental organisations GLOBAL 2000 and OEKOBUERO – Alliance of the Austrian Environmental Movement (the communicants) submitted a communication to the Compliance Committee arguing that the European Union failed to comply with Article 9 (3) and (4) of the Aarhus Convention. The European Commission decision to approve State aid for the nuclear power plant project, Hinkley Point C, was the impetus for the communication.

The factual background

In 2013 the UK notified the Commission of proposed measures to support the building of Hinkley Point C: two nuclear reactors in Somerset, England. On 18 December 2013, the Commission initiated a formal investigation of the aid. Eventually, on 8 October 2014, the Commission decided to authorise the State aid to Hinkley Point C on the ground that it was compatible with the internal market within the meaning of Article 107 (3) (c) TFEU (the 2014 decision). The Commission found that the *“aid measures aimed at promoting nuclear energy pursue an objective of common interest and, at the same time, can deliver a contribution to the objectives of diversification and security of supply”*.

The alleged breach of the Aarhus Convention in case C128

The Communicants considered that the 2014 decision contravened EU law relating to the environment (namely State aid law, and energy and environmental laws). As such, they should have had the means to challenge the decision, by virtue of Article 9(3) of the Aarhus Convention. However the communicants had no means to challenge the decision, so they alleged breach of Article 9(3). What is more there could be no remedies for the alleged contravention of national law because there was no way to challenge the decision in the first place, so the communicants alleged breach of Article 9(4) too.

This left the Committee with two key issues to consider: whether Article 9(3) of the Convention was applicable to a State aid decision adopted by the Commission, and, if so, whether the communicants had access to justice to challenge such decisions.

The relevant provisions of the Aarhus Convention

Article 9(3) and (4) of the Aarhus Convention provides as follows –

3. ... 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.

4 ... the procedures referred to in [paragraph 3] above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing.

Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

Article 2(2) of the Convention defines “public authority” as follows

2. “Public authority” means:

...

(d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity;

The Aarhus Regulation

The findings relate, amongst other things, to the Aarhus Regulation, which purports to apply the Aarhus Convention to EU institutions and bodies. Title IV of the Regulation (Internal Review and Access to Justice) contains Articles 10 to 12, which provide for access to justice with respect to acts and omissions, by Union institutions or bodies, which contravene environmental law.

Since the C128 findings were adopted, the Aarhus Regulation has been amended by Regulation (EU) 2021/1767²¹ in order to implement the findings in case C32 (but not to implement the findings in case C128).

Case C32: a precursor of C128

In a number of ways case C128 is linked to the earlier case C32, an epic case that required two findings from the Compliance Committee; Part I²² on 14 April 2011, and Part II²³ on 17 March 2017. Some parts of the C32 findings will be discussed later; it suffices here briefly to summarise the case. The Communicants were a group of NGOs who, in 2008, made a series of allegations about the Union’s rules on standing, which, they alleged, fell short of the requirements Articles 9(3) and (4) of the Aarhus Convention. The Committee’s findings had two key components: first, it was considered whether members of the public have adequate standing before the EU Courts, particularly, in the light of the restrictive jurisprudence of those Courts in the application of the ‘individual concern’ standing criterion for private individuals and NGOs that challenge decisions of the EU institutions. Second, the Committee considered whether the Aarhus Regulation (before it was amended by Regulation (EU) 2021/1767) complied with the Convention’s requirements on access to justice and thus compensated for the restrictive jurisprudence.

²¹ Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending 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 356, 8.10.2021, p. 1–7 at eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R1767

The consolidated text is at eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02006R1367-20211028

²² Findings and recommendations with regard to communication ACCC/C/2008/32 concerning compliance by the European Union (Part I): ECE/MP.PP/C.1/2011/4/Add.1 at unece.org/fileadmin/DAM/env/pp/compliance/CC-32/ece.mp.pp.c.1.2011.4.Add.1.e.pdf

²³ Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 concerning compliance by the European Union (Part II): ECE/MP.PP/C.1/2017/7 at unece.org/fileadmin/DAM/env/pp/compliance/CC-57/ece.mp.pp.c.1.2017.7.e.pdf

The essence of the Committee's findings is summarised in paragraphs 121 and 122 of Part II:

Having considered the main jurisprudence of the European Union courts since part I, the Committee finds there has been no new direction in the jurisprudence of the European Union courts that will ensure compliance with the Convention and that the Aarhus Regulation does not correct or compensate for the failings in the jurisprudence.

Accordingly, the Committee finds that the Party concerned fails to comply with article 9, paragraphs 3 and 4, of the Convention with regard to access to justice by members of the public because neither the Aarhus Regulation, nor the jurisprudence of the CJEU implements or complies with the obligations arising under those paragraphs.

The question of whether the EU complied with Article 9(3) and (4) of the Convention with respect to State aid decisions was not considered in case C32; that was addressed in a separate case, namely case C128.

Throughout this paper, all references to the findings of the Committee in case C32 will be references to Part II of those findings, except where there is an express reference to Part I of those findings.

A summary of the C128 findings

Applicability of Article 9(3) of the Aarhus Convention to Commission decisions on State aid

The Committee considered whether Article 9(3) was applicable to a decision by the Commission on State aid, which involved a number of considerations.

Is a State aid decision an “act” under Article 9 (3) of the Convention?

The Committee found that a Commission State aid decision under Article 108 (2) TFEU has legal effect and confers on a Member State the right to implement the State aid, so such a decision was clearly an “act” within the meaning of Article 9 (3).

Does the Commission act as a “public authority” when it acts under Article 108 TFEU?

The Committee held that the Commission is clearly a public authority within the meaning of subparagraph (d) of the definition of “public authority” in Article 2(2) of the Convention because it is an institution of a regional economic integration organisation.²⁴

The EU argued, however, that it was excluded from the definition because when it made a State aid decision it was acting as a “review body” and therefore subject to the exception for “bodies or institutions acting in a judicial or legislative capacity” in the tail to Article 2(2); but that argument was entirely inconsistent with the earlier findings of the Committee in case C32, which held that administrative review bodies were not excluded by the Aarhus Convention definition of public authorities.²⁵

²⁴ The EU is a regional economic integration organisation as referred to in Article 17 of the Aarhus Convention.

²⁵ See paragraph 110 of the findings in case C32.

The Committee therefore rejected the Union's argument that the Commission is excluded from the definition of "public authority" when it assesses the compatibility of a State aid decision with the internal market.

Can a State aid decision "contravene national law relating to the environment" within the meaning of Article 9(3) of the Convention?

Taking into account the decisions of the Court of Justice of the European Union in C-594/18P Austria v. Commission,²⁶ the Committee noted that when an activity of an aid beneficiary contravenes EU law on the environment, the aid measure cannot be declared compatible with the internal market pursuant to Article 107(3)(c) TFEU. See paragraph 100 of the CJEU judgement in particular:

... when the Commission checks whether State aid for an economic activity falling within that sector meets the first condition laid down in article 107 (3) (c) TFEU, [it must] check that that activity does not infringe rules of EU law on the environment. If it finds an infringement of those rules, it is obliged to declare the aid incompatible with the internal market without any other form of examination.

The Commission would thus be breaching this requirement if it authorised a State aid to an activity or aid beneficiary despite a breach of EU environmental law.

The Committee found as follows:

It is clear from the judgment of the Court of Justice that a Commission decision on State aid measures may contravene European Union environmental law, and that this is the case regardless of the justification given for the aid provided by the member State. Consequently, in the light of the Court of Justice's judgment, the Committee considers it beyond argument that State aid decisions can potentially contravene European Union "law relating to the environment", within the meaning of article 9 (3) of the Convention.²⁷

Article 9 (3) – access to administrative or judicial procedures

Having found that Commission State decisions have the potential to fall within the scope of Article 9(3) by virtue of being an act by a public authority which may contravene the provisions of EU law relating to the environment, the Committee considered whether environmental NGOs have access to administrative or judicial procedures to challenge such decisions. The Committee had received submissions regarding the possibilities to challenge State aid decisions through six procedures; internal review under the Aarhus Regulation; complaints under Regulation 659/1999 (now Regulation 2015/1589); the annulment procedure under article 263(4) TFEU; intervening in an ongoing annulment procedure under article 263(4) TFEU; reference for a preliminary ruling under article 267 TFEU; and access to justice regarding subsequent decisions at the Member State level. It considered each possibility in turn.

²⁶ This case also related to the Hinkley Point C case; Austria had standing before the CJEU, in comparison with the communicants in case C128, who had no standing before the Court.

²⁷ See paragraph 111 of the findings in case C128.

1) Internal review under the Aarhus Regulation

The Aarhus Regulation provides a right for internal review: under Article 10 of the Regulation, an NGO meeting certain criteria could request a Community institution or body internally to review an administrative act under environmental law. Where the institution or body fails to act as required by Article 10(2) or (3), which relate amongst other things to the consideration of the request, Article 12 of the Regulation entitles the requesting NGO to institute proceedings before the Court of Justice.

Whilst the Regulation was introduced in order to implement the Aarhus Convention, Article 2(2)(a) of the Aarhus Regulation excludes Commission decisions on State aid from the definition of acts and omissions that may be subject to a request for review by an NGO. The Regulation does not, therefore, provide access to justice as required by the Aarhus Convention.

2) Complaint to the Commission under Articles 1 (h) and 20 (2) of Regulation 659/1999

At the time of the 2014 Decision, Council Regulation 659/1999²⁸ contained the rules for the application of Article 108 TFEU.²⁹ Under Article 20(2) of the Regulation, any “interested party” within the meaning of Article 1(h) of the Regulation could inform the Commission of any alleged unlawful aid or misuse of aid, leaving it to the Commission to take a view on the information received.

The Committee found that although it is possible, in the right circumstances, that an environmental NGO may be recognized as an “interested party” under Article 1 (h) of Regulation 659/1999, such recognition would merely amount to a right to ask for a formal investigative procedure - by the Commission itself - under Article 108(2) TFEU. This would not amount to a right to challenge a State aid decision by the Commission that contravened environmental law, as the Committee had decided in earlier findings:

The right to ask a public authority to take action does not amount to a “challenge” in the sense of article 9, paragraph, 3, and especially not if the commencement of action is at the discretion of the authority.³⁰

The Committee therefore found that a complaint to the Commission under Articles 1 (h) and 20 (2) of Regulation 659/1999 does not provide access to an administrative or judicial procedure as required by Article 9(3) of the Convention.

²⁸ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty. On 15 September 2015, Regulation 659/1999 was superseded by the procedural Regulation.

Article 1 (h) of Regulations 659/1999 and the procedural Regulation are identical.

Article 20(2) of the 1999 Regulation has been superseded by Article 20(4) of the procedural Regulation, which has the same effect.

²⁹ At the time Regulation 659/1999 was adopted, Article 108 TFEU was Article 93 of the Treaty establishing the European Community. It later became Article 88 of that Treaty, and since the Lisbon Treaty, is now Article 108 TFEU.

³⁰ Paragraph 84 of the Findings and recommendations with regard to communications ACCC/C/2013/85 and ACCC/C/2013/86 concerning compliance by the United Kingdom of Great Britain and Northern Ireland: ECE/MP.PP/C.1/2016/10 at unece.org/fileadmin/DAM/env/pp/compliance/CC-55/ece.mp.pp.c.1.2016.10_eng.pdf

3) Annulment procedure under Article 263 (4) TFEU

Article 263(4) TFEU provides that any natural or legal person may institute proceedings:

- (a) *Against an act which is of direct and individual concern to them;*
- (b) *Against a regulatory act which is of direct concern to them and does not entail implementing measures.*

The Committee had already considered at length the annulment procedure under Article 263(4) in case C32,³¹ and found the procedure was insufficient to meet the requirements of Article 9 (3) of the Convention.

4) Intervention in an annulment procedure under Article 263(4) TFEU

The Committee found that an such an intervention “can under no circumstances replace an NGO’s right to independently initiate a challenge to an act or omission that contravenes European Union law relating to the environment, since it is entirely dependent on a third party deciding to bring proceedings under Article 263(4) TFEU”.³²

5) Reference for a preliminary ruling under Article 267 TFEU

Article 267 TFEU gives the Court of Justice jurisdiction to deliver preliminary rulings on the validity and interpretation of EU law.

In case C128, the Committee applied its earlier findings from case C32, in which it held that the procedure of preliminary rulings:

...cannot be a basis for generally denying members of the public access to the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies; nor does the system of preliminary review amount to an appellate system with regard to decisions, acts and omissions by the EU institutions and bodies. Thus, with respect to decisions, acts and omissions of EU institutions and bodies, the system of preliminary ruling neither in itself meets the requirements of access to justice in article 9 of the Convention...³³

6) Access to justice regarding other decision-making procedures at the national level

Whilst the EU argued that there were other opportunities for access to justice regarding the environmental decision-making on Hinkley Point C at various stages, notably through national courts, the Committee found that none of the national procedures would have created the opportunity to challenge the Commission State aid decision.

³¹ Paragraphs 58–78 of the C32 findings.

³² Paragraph 121 of the C128 findings.

³³ Paragraph 90 of Part I of the C32 findings.

The Committee found that the EU was in breach of Article 9(3) of the Aarhus Convention, because there was no 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, that contravene European Union law relating to the environment.

Applicability of Article 9 (4) of the Convention to Commission State aid decisions

It follows from the breach of Article 9(3) of the Convention that the EU also failed to provide an adequate and effective remedy regarding such decisions as required by Article 9(4) of the Convention.

The Committee's findings and recommendations

Following the procedure set out in paragraph 35 of Decision I/7 the Compliance Committee, when it had completed its deliberations, reported to the MOP and made the recommendations that it considered appropriate.

The Committee found that:

(a) 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 that contravene European Union law relating to the environment, the Party concerned fails to comply with article 9 (3) of the Convention;

(b) 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 taken by the European Commission under article 108 (2) TFEU that contravene European Union law relating to the environment, the Party concerned also fails to provide an adequate and effective remedy regarding such decisions as required by article 9 (4) of the Convention.³⁴

In the light of these findings, the Committee recommended:

...that the Meeting of the Parties ...recommends that the Party concerned take the necessary legislative, regulatory and other measures to ensure that the Aarhus Regulation is amended, or new European Union legislation is 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.³⁵

³⁴ The main findings of the Compliance Committee are in paragraph 130 of the C128 findings.

³⁵ The recommendations of the Committee are in paragraph 131 of the C128 findings.

Observations on the C128 findings

What is striking about the C128 findings is that the illegality was so evident. The reasoning of the Committee:

- was based on the Committee's jurisprudence: principally the findings of the Committee in case C32, but also the findings in cases C85 and C86;
- was in the light of the jurisprudence of the CJEU in C-594/18P Austria v. Commission; and
- included findings with respect to EU law that were evident, and arguably incontrovertible: for example it was common ground that the Aarhus Regulation expressly excluded State aid decisions from its scope.³⁶

It seems difficult, therefore, to imagine how the EU might argue that the C128 findings are legally flawed: the EU participated in the MOP's endorsement of the Committee findings in cases C32, C85 and C86; the EU cannot argue against the jurisprudence of its own Court; and it is impossible to dispute some of the fundamental propositions in the findings, for example the exclusion of State aid decisions from the Aarhus Regulation regime and the absence of remedies leading to a breach of Article 9(4).

The events following the adoption of the findings in case C128

Decision I/7: key procedural considerations

At this stage it becomes important to examine how the Committee operates under Decision I/7. After the Committee has considered a communication that triggers a case, it reports to the MOP; the Committee also makes recommendations as it considers appropriate.³⁷ This procedural step is of the utmost importance for two reasons:

³⁶ Other findings that are evident and arguably incontrovertible include the following: a Commission State aid decision is an "act" within the meaning of Article 9(3) of the Aarhus Convention; and the Commission is a "public authority" within the meaning of Article 2(2)(d) of the Convention.

³⁷ Annex to Decision I/7, para. 35.

- first, the Committee may only take very limited measures with respect to a case before its report is considered by the MOP:³⁸ the MOP may take more extensive measures with respect to a Committee report than the Committee itself.³⁹ In this way, Committee findings gain force after the MOP has considered them;
- second, once Committee findings are endorsed, they have legal effect: in the words of the EU Commission, by being endorsed by the MOP Committee findings “...gain the status of official interpretation of the Aarhus Convention and [become] binding on the Parties of the Aarhus Convention and the Aarhus Convention bodies”.⁴⁰ Endorsement by the MOP confirms the legal force of Committee findings.

In short, the Committee’s adoption of findings and recommendations in C128 were not the final word on the case. The findings and recommendations were sent by the Committee to the MOP.

Unlike the Committee, the MOP is a political body comprising representatives of the Parties to the Convention. It meets every four years and makes key decisions, including decisions on Committee findings and recommendations. According to its Rules of Procedure,⁴¹ the MOP is obliged to “make every effort to reach its decisions by consensus”,⁴² and in practice it almost always decides by consensus.⁴³ As a last resort there may be a vote, and where there is, a three quarters majority of the Parties present and voting is required to make a decision. At the time of writing, there are forty seven Parties to the Aarhus Convention. The EU and its Member States have between them 27 votes: more than enough to block a majority vote at the MOP.

³⁸ Paragraph 36 of the Annex to Decision 7/I provides -

Pending consideration by the Meeting of the Parties, with a view to addressing compliance issues without delay, the Compliance Committee may: (a) In consultation with the Party concerned, take the measures listed in paragraph 37(a); (b) Subject to agreement with the Party concerned, take the measures listed in paragraph 37 (b), (c) and (d).

The paragraph 37(a) measures are limited: “provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention.”

The paragraph 37(b) to (d) measures are more extensive but may only be taken by the MOP “subject to the consent of the Party concerned”. In case C128 the Committee did not take any of the paragraph 37(b) to (d) measures. In any event, these measures could only have been taken with the consent of the “Party concerned” (i.e. the EU). In case C/128, this consent would not have been forthcoming.

³⁹ Under paragraph 37 of Decision I/7, the MOP may -

- Provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention;
- Make recommendations to the Party concerned;
- Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy;
- In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public;
- Issue declarations of non-compliance;
- Issue cautions;
- Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention;
- Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.

The MOP (unlike the Committee with respect to paragraphs 37(b) to (d)) does not need the consent of the party Concerned before it takes measures.

⁴⁰ See recital (5) to Council Decision (EU) 2021/2271 of 11 October 2021 on the position to be taken on behalf of the European Union at the seventh session of the Meeting of the Parties to the Aarhus Convention regarding compliance cases ACCC/C/2008/32, ACCC/C/2015/128, ACCC/C/2013/96, ACCC/C/2014/121 and ACCC/C/2010/54 OJ L 457/6, 21.12.2021 at eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021D2271

⁴¹ The Rules of Procedure of the Meeting of the Parties to the Convention on Access To Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters as set out in the Annex to Decision I/1, Rules of Procedure, ECE/MP.PP/2/Add.2 uncece.org/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.2.e.pdf

⁴² Rule 35(1) of the Rules of Procedure.

⁴³ Only recently was there a vote – at the seventh Meeting of the Parties.

The EU position at MOP 6

The practice up until the sixth Meeting of the Parties (MOP 6) - held in Budva, Montenegro 11–13 September 2017 - had been for the MOP to endorse each set of findings by the Committee where a Party was in non-compliance with its obligations under the Convention. In each and every case, the non-compliant Party respected the findings of the Committee and joined in a MOP decision to endorse findings of non-compliance. This changed at MOP 6, much of which was concerned with case C32. The EU came to that meeting determined to block the endorsement of the findings of the Compliance Committee in case C32.⁴⁴ The EU's negotiating position prior to MOP 6 was set out in a Council Decision:⁴⁵ the MOP should "take note" of the findings of the Compliance Committee, which would mean that the MOP would simply take a neutral position with respect to the findings. Other Parties who opposed the EU's position were unable to muster a consensus to endorse the Committee's findings, and in the spirit of reaching a consensus, MOP 6 decided to postpone the decision-making on the draft decision on case C32 until its next ordinary session.

So there was cause for concern before the seventh Meeting of the Parties, which was hosted in Geneva, Switzerland 18 -20 October 2021.

The EU position at MOP 7

Before MOP 7 there were clear signs that the EU would block endorsement of C128. The EU position seemed to be set about three months before MOP 7, at the culmination of a process that had been going on for many years.

The EU had been struggling to comply with the Committee findings in case C32, where the EU was found to be in breach of Article 9(3) and (4) of the Aarhus Convention. Although the EU had blocked the endorsement of case C32, it had spent the period between MOP 6 and MOP 7 trying to address the non-compliance identified by the Compliance Committee, largely by amendment of the Aarhus Regulation, and on 12 July a political agreement in trilogue was reached on an amendment of the Aarhus Regulation that addressed all of the Compliance Committee's recommendations in case C32 (this amendment became Regulation 2021/1767). The State aid decisions exceptions considered in the case C128 findings - which the Committee adopted in March 2021 - were not addressed by the amendment of the Aarhus Regulation and a Commission acknowledgement of the concerns of the Compliance Committee in this case became part of the political compromise at the trilogue. The Commission position was set out in the COREPER meeting of 20-23 July 2021:⁴⁶

The Commission remains committed to ensuring that the EU respects its international obligations in matters pertaining to the Aarhus Convention and in that context acknowledges the concerns expressed and findings adopted by the Aarhus Convention Compliance Committee in case ACCC/C/2015/128 as regards state aid on 17 March 2021.

⁴⁴ For a brief introduction to the findings in case C32, see page 14 above. A longer account of the case and the issues raised by it may be found in the following article: E. Fasoli, A. McGlone, "The Non-Compliance Mechanism under the Aarhus Convention as 'Soft' Enforcement of International Environmental Law: Not So Soft After All!", in *Netherlands International Law Review* (2018), volume 65, issue 1, pp. 27-53.

⁴⁵ Council Decision (EU) 2017/1346, 17 July 2017 [2017] OJ L 186/15, on the position to be adopted, on behalf of the European Union, at the Sixth session of the Meeting of the Parties to the Aarhus Convention as regards compliance case ACCC/C/2008/32.

⁴⁶ See the summary record of COREPER 12028/21: CRS CRP 28, at data.consilium.europa.eu/doc/document/ST-12028-2021-INIT/en/pdf

The findings call on the EU to 'take the necessary legislative, regulatory and other measures to ensure that the Aarhus Regulation is amended, or new European Union legislation is 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 which contravene EU law relating to the environment, in accordance with article 9(3) and (4) of the Convention'.

The Commission is currently analysing the implications of the findings and assessing the options available. The Commission will complete and publish this assessment by the end of 2022. If appropriate, by the end of 2023, the Commission will 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.

The compromise had been a difficult one to achieve within the EU, and three EU Member States immediately went on the record to register their regret that the State aid issues raised by the Committee in the C128 findings had not been addressed.⁴⁷ The Commission statement has been the bedrock of the EU position with respect to C128 ever since it was made. When the Commission made a proposal⁴⁸ for the EU position to be taken at MOP 7, the statement was referred to several times.⁴⁹

Prior to the MOP 7, the EU took the position that the Commission deliberations – the analysis, the assessment and (perhaps) the proposal for measures – somehow justified the EU blocking the endorsement of the findings in case C128 and using its political muscle to postpone decision making. Recital (13) of Decision 2021/2271 on the position to be taken on behalf of the EU at MOP said:

The Union should declare that the Commission has committed to analyse the implications of the findings of the Compliance Committee, to assess the options available, to complete and publish the assessment and to come forward with measures, if appropriate, to address the issue raised by the Compliance Committee, within the timelines indicated in the statement and taking into account the rules of Union law concerning state aid.

Therefore, the Union should acknowledge the findings of the Compliance Committee in case ACCC/C/2015/128 and propose to the Meeting of the Parties that the adoption of a position on those findings be postponed to the next session of the Meeting of the Parties, rather than endorse those findings... [Emphasis added]

This reasoning was reflected in the formal position of the EU going into MOP 7: the Union was going to postpone the adoption of the findings on case C128. Given the EU's considerable political power it is no surprise that it achieved its objectives.

⁴⁷ See the statement of Luxembourg, Austria and Denmark at the July 2021 COREPER

In a spirit of compromise, Luxembourg, Austria and Denmark are able to accept the agreement on the proposal for a Regulation of the European Parliament and of the Council on amending Regulation (EC) No 1367/2006.

However, Luxembourg, Austria and Denmark regret that the state aid issue has not been addressed in this file and that some important provisions have only been introduced during the trilogue phase without proper assessment and analysis. Luxembourg, Austria and Denmark recall that the Aarhus Convention is an emblematic instrument for environmental democracy.

The European Union and its Member States must continue to show a high level of ambition in this respect also in the light of pending compliance cases.

⁴⁸ Proposal for Council Decision on the position to be taken on behalf of the European Union at the seventh session of the Meeting of the Parties to the Aarhus Convention regarding compliance cases ACCC/C/2008/32 and ACCC/C/2015/128: COM(2021) 532 final at eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021PC0532&rid=4

⁴⁹ See part 3 of the explanatory memorandum to the proposal, and recitals 13 and 15 to, and Article 2 of, the proposal itself.

If we disaggregate the EU position at MOP 7 as set out in Decision 2021/2271, we see the following components:

- the EU respects its international obligations;
- it acknowledges the concerns expressed in the C128 findings;
- the Commission will analyse the findings and assess the options available;
- the Commission will, if appropriate, come forward with proposals to address the issue; and
- any decision on the C128 findings had to be delayed until MOP 8 so that the EU's internal deliberations could be finished.

Whilst this position prevailed at MOP 7, it lacks credibility. There is a clear contrast between on the one hand the purported respect of international law, environmental democracy and accountability and acknowledgement of the C128⁵⁰ concerns, and on the other the flat refusal to permit any decision-making on the case pending the completion of the EU's internal processes. What is more, the EU has used its power to claim for itself a privilege that no other Aarhus Party enjoys: it will not countenance the endorsement of findings until it has worked out whether, and if so how, it will comply with them.

What happened at MOP 7?

Compliance Committee findings with respect to the Union were dealt with in a single decision: Decision VII/8 (f) on compliance by European Union. Although that decision related to several findings, the discussion below will focus only on the way the decision related to cases C32 and C128.

Decision VII/8 (f) and case C32

As far as case C32 was concerned, the outcome at MOP 7 was broadly satisfactory. Following the co-legislators' agreement of 12 July 2021, the contents of the prospective amendments of the Aarhus Regulation had become known to the Compliance Committee. In its report on the implementation of request ACCC/M/2017/3, the Committee found that the agreement, if enacted in the form prior to the opening of MOP 7, would fulfil the Committee's recommendations in case C32. Those findings were endorsed by the MOP.⁵¹ The MOP also noted the imminent entry into force – on 28 October 2021 – of the amendment of the Aarhus Regulation, and considered that “upon its entry into force the Party concerned will have fully met the requirements of paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (part II)”.⁵² With the issues raised in case C32 resolved, the EU lifted its block on the endorsement of the C32 findings, which the MOP duly endorsed, and after many years the case was brought to a close.

The MOP decision did not, however, resolve the issues raised by case C128.

⁵⁰ See Article 2 of Decision 2021/2271.

⁵¹ See paragraph 4 of Decision VII/8 (f).

⁵² *Ibid*, paragraph 5.

Case C128 at MOP 7

The Union adhered to the position it had agreed before MOP 7 and blocked adoption of the Committee findings in case C128, despite concerns expressed, notably from Norway, Switzerland and ECO Forum. The protest by the latter was particularly strong:

The European ECO-Forum condemns the position taken by the European Union, leaving no choice to the Meeting of the Parties but to postpone the endorsement of the Committee's findings as regards case ACCC/C/2015/128. It recalls with concern the similarly deplorable position the European Union took at the sixth session to postpone endorsement of the findings on communication ACCC/C/2008/32. In particular in view of this repetition, the European ECO Forum emphasizes that the European Union is a Party to the Convention like all other Parties and, as such, must abide by its duties under international law.

The European ECO-Forum's youth organization further particularly deplores this lack of respect for the rule of law, as it endangers the environmental democracy rights that are crucial to challenge the European Union's continued failure to adequately address the climate and biodiversity crisis, with grave consequences for the rights of younger generations. The European ECO-Forum therefore calls upon all Parties to the Convention to ensure that this decision remains exceptional and does not establish a practice under the Convention.

Any reference to C128 was expunged, by the MOP, from Decision VII/8 (f). Instead, the MOP agreed to include the following text, with regard to draft Decision VII/8f, in its report:

In the spirit of reaching consensus, considering exceptional circumstances, the Meeting of the Parties exceptionally decided, by consensus, to postpone the decision-making on the Committee's findings and recommendations on communication ACCC/C/2015/128 (European Union) to the next ordinary session of the Meeting of the Parties to be held in 2025. The Meeting of Parties stresses that this exceptional decision shall in no way establish a practice under the Convention. The Meeting of the Parties also requested the Committee to review any developments that have taken place regarding the matter, and to report to the Meeting of the Parties accordingly.

In this context, the Party concerned stated that it reaffirms its commitment to implement its obligations under the Convention.⁵³

The MOP's request to the Committee to review developments has already led to a follow up process.

⁵³ Paragraph 5 of the Report of the seventh session of the Meeting of the Parties: ECE/MP.PP/2021/2 at unece.org/sites/default/files/2022-02/ece.mp_pp_2021.2_aec_1.pdf

Action to follow up the MOP request

The EU's plan of action

Since MOP 7, the MOP request to the Committee has been given the number ACCC/M/2021/4 European Union.⁵⁴ The EU was requested to attend the Compliance Committee's open session at its 73rd meeting (14 December, 2021) and was sent an information note on a plan of action, and a template for the plan. On 29 March 2022, the Commission communicated its draft plan of action on the implementation of C128.⁵⁵ The plan of action contained an outline of the steps necessary to implement the proposed measures to fulfil the Committee's recommendations in case C128:

...during spring 2022, the Commission aims to publish a call for evidence and a public consultation questionnaire. Respondents will have three months to reply to the public consultation.

The aim of this exercise is to collect evidence and views from stakeholders in order to assess the implications of the findings and analyse the options available. The output at this first stage, following this exercise, and by the end of 2022, is expected to be the adoption of a Commission Communication 'on the findings adopted by the Aarhus Convention Compliance Committee in case ACCC/C/2015/128 as regards state aid: Analysing the implications of the findings and assessing the options available'.

Any further steps for 2023 will depend on the comments received during this public consultation, further analysis by the Commission, and the outcome of the final assessment contained in the Communication. Therefore, any information on next steps beyond 2022 would be premature at this stage.

The final version of the action plan will be updated to include links to the call for evidence and public consultation questionnaire referred above.

The position of the European Parliament

Meanwhile, the European Parliament has been consistently pressing for the concerns in the C128 findings to be addressed. In May 2021, shortly after the adoption of those findings and well before MOP 7, the Parliament adopted an amendment to the Aarhus Regulation, which did not survive the trilogue, to provide for access to justice for members of the public to challenge State aid decisions.⁵⁶ The Parliament remains concerned: their position was reiterated in their resolution on the Guidelines on State aid for climate, environmental protection and energy (CEEAG), paragraph 30 of which recalled:

⁵⁴ which can be found on the Aarhus Convention website at unece.org/env/pp/cc/accc.m.2021.4_european-union

⁵⁵ Request M4 - EU plan of action.pdf (europa.eu)

⁵⁶ See Amendment 24 of Amendments adopted by the European Parliament on 20 May 2021 on the proposal for a regulation of the European Parliament and of the Council Amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 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 (COM(2020)0642 – C9-0321/2020 – 2020/0289(COD)) at europarl.europa.eu/doceo/document/TA-9-2021-0254_EN.html

...that in its findings in case ACCC/C/2015/128 adopted on 17 March 2021, the Aarhus Convention Compliance Committee (ACCC) found the EU to be non-compliant with Article 9(3) and (4) of the Aarhus Convention due to the fact that it is currently impossible for civil society to challenge State aid decisions taken by the Commission under Article 108(2) TFEU, which may contravene EU law relating to the environment; calls on the Commission and the Council to show full commitment to the EU's international obligations on environmental justice...

Part II: the implications of the C128 findings

State aid and environmental protection

Recent developments in policy and law

The European Green Deal is a top political priority for the Union and has the objective of transforming the EU into a fair and prosperous society with a modern, resource-efficient and competitive economy, where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use, while leaving no one behind.

Recently the climate ambitions of the Commission were enshrined in the 2019 European Green Deal Communication⁵⁷ which identified an objective of no net emissions of greenhouse gases by 2050.

With a view to identifying a path to climate neutrality by 2050, the Commission has also proposed to reduce net greenhouse gas emissions by at least 55 % by 2030 compared to 1990 levels.⁵⁸ Those targets have legal force by virtue of the European Climate Law.⁵⁹ And the Climate Law “Fit for 55” package introduces legislative proposals to support that objective.⁶⁰

⁵⁷ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions ‘The European Green Deal’, COM(2019) 640 final at eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN

⁵⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘Stepping up Europe’s 2030 climate ambition Investing in a climate-neutral future for the benefit of our people’, COM(2020) 562 final.

⁵⁹ Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (OJ L 243, 9.7.2021, p. 1).

⁶⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Fit for 55”: delivering the EU’s 2030 Climate Target on the way to climate neutrality’, COM(2021) 550 final.

The necessity for financial support

Appreciable investment is required to realise the ambitions described in the Green Deal Communication. For example, it has been calculated by the Commission that the new 2030 targets will require €390 billions of annual investment compared to the levels in 2011-2020.

That is in addition to the further annual investment of €130 billion a year for the other environmental objectives.⁶¹ This vast investment will require both private and public funding.

The role of State aid in supporting the Green Deal

State aid rules have an important role⁶² to play in facilitating Green Deal objectives, and the Green Deal communication promises the revision of State Aid Guidelines, in particular of the State aid guidelines for environmental protection and energy,

...to reflect the policy objectives of the European Green Deal, supporting a cost-effective transition to climate neutrality by 2050, and [to] facilitate the phasing out of fossil fuels, in particular those that are most polluting, ensuring a level playing field in the internal market. These revisions are also an opportunity to address market barriers to the deployment of clean products.

An effective State aid regime is required to supervise the necessary support from national governments both to avoid distortion of competition and to address the potential adverse effects that State aid may have on the environment. The revised State aid guidelines that were anticipated by the Green Deal communication took the form of the new Guidelines on State aid for climate, environmental protection and energy (CEEAG), published on 27 January 2022. These apply to State aid granted to facilitate the development of economic activities in a manner that improves environmental protection, as well as certain activities in the energy sector. The Guidelines provide for the criteria under which the Commission will assess whether aid may be authorised; they set out the conditions under which State aid granted by Member States in the field of climate, environmental protection and energy may be considered compatible with the internal market and the criteria for the Commission to assess such State aid. They are intended to create a flexible framework to help Member States provide the necessary support to achieve Green Deal objectives in a targeted and cost-effective manner.

⁶¹ Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions 'The EU economy after COVID-19: implications for economic governance', COM(2021) 662 final.

⁶² See, for example, the Climate Action Network Europe response to public consultation on the revised Climate, Energy and Environmental Aid Guidelines, 2 August 2021 at caneurope.org/can-europe-response-public-consultation-revised-climate-energy-environmental-aid-guidelines-ceeag/

CAN Europe welcomes the initiative of bringing State aid guidelines for climate, energy and environmental protection (CEEAG) in line with the EU's climate commitments. We strongly believe that a new state aid regime is required to boost the EU's climate ambition and fulfil its commitment under the Paris Agreement to limit global temperature rise to 1.5°C. The revision of CEEAG can be a powerful tool if it has the right elements to incentivise rapid deployment of renewables based on the energy efficiency first principle – as a horizontal guiding principle of European climate and energy governance.

In the words of the Commission Press release,⁶³ the CEEAG:

...include sections to support the decarbonisation of the economy in a broad and flexible manner open to all technologies that can contribute to the European Green Deal, including renewables, energy efficiency measures, aid for clean mobility, infrastructure, circular economy, pollution reduction, protection and restoration of biodiversity as well as measures to ensure security of energy supply. The rules aim at helping Member States meet their ambitious EU energy and climate targets, at the least possible cost for taxpayers and without undue distortions of competition in the Single Market.

In the course of 2021-2022, the Commission also undertook to revise several other sets of state aid guidelines that have an impact on the environment, notably guidelines for regional aid (that include a bonus for regions included in territorial just transition plans), on fisheries and on agriculture and forestry. The Commission is reviewing “[its] whole portfolio of state aid rules, to make sure they’re in line with our green goals”.⁶⁴

Recovery from the COVID-19 pandemic: the Commission’s Recovery and Resilience Facility (RRF)

Meanwhile the Commission has provided a massive financial assistance package, the Recovery and Resilience Facility (RRF) – running to €675.5 billion in grants and loans - to support Member States’ economies by providing financial assistance to help Member States recover from the economic damage caused by the Covid-19 pandemic. The assistance will be used to support investment in public works projects, and to accelerate Member States’ economic recovery.

To benefit from the RRF, each Member State presents to the Commission a recovery and resilience plan that includes a “coherent package of reforms and public investment projects,” including a minimum expenditure of 37% on climate action. Of the seven “flagship areas”⁶⁵ to which Member States must contribute, three are environmental: future-proof clean technologies; improving the energy and resource efficiency of public and private buildings; and technologies to accelerate the use of sustainable, accessible and smart transport, charging and refuelling stations and the extension of public transport.

According to Commission guidance “...State aid rules fully apply to the measures funded by the Recovery and Resilience Facility. Therefore, Member States should ensure that all reforms and investments comply with the relevant EU State aid rules and follow all State aid procedures...”⁶⁶ The Commission has published guiding templates to assist Member States in the design of their national plans under the RRF.⁶⁷ The assessment of aid measures under RRF national plans will be streamlined under the CEEAG and other relevant State aid guidelines.

⁶³ State aid: Commission endorses the new Guidelines on State aid for Climate, Environmental protection and Energy Brussels, 21 December 2021

⁶⁴ Executive Vice-President Vestager’s keynote speech at the 25th IBA Competition Conference, delivered by Inge Bernaerts, Director, DG Competition, September 2021 at ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en

⁶⁵ The “flagships” are set out in the Commission’s Annual Sustainable Growth Strategy 20212 - Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank – Annual Sustainable Growth Strategy 2021, COM/2020/575 final, at eur-lex.europa.eu/legal-content/en/TXT/?qid=1600708827568&uri=CELEX:52020DC0575

⁶⁶ Page 18, Commission staff working document - guidance to member states recovery and resilience plans. Brussels, 22.1.2021 SWD(2021) 12 final at ec.europa.eu/info/sites/default/files/document_travail_service_part1_v2_en.pdf

⁶⁷ ec.europa.eu/competition-policy/state-aid/coronavirus/rrf-guiding-templates_en

The effect of State aid on the environment

State aid decisions can have an appreciable impact on the environment and on environmental policies, including the Green Deal objectives. Whilst the CEEAG concentrates on improving environmental protection, State aid decisions may also have an adverse impact on the environment if they support developments that cause, for example, loss of biodiversity, damage to natural habitats or species, water pollution, degradation of soil, pollution of the air or greenhouse gas emissions (for instance by supporting fossil fuels at the expense of cleaner alternatives).

There have often been instances where the granting of an aid has caused unease, because of potentially adverse environmental effects. To give just two examples, in 2019, there was a decision to allow State aid for a Sofia waste incinerator⁶⁸ despite authoritative evidence that Bulgaria was failing to meet recycling targets.⁶⁹ That resulted in concern that the State aid, and subsequent construction of the incinerator, would make it likely that recyclable materials would be burnt.⁷⁰ And in another case it has been argued that State aid compensating for the closure of coal and lignite plants in Germany may not be necessary, appropriate or proportionate to the objective of reducing CO₂ emissions and air pollution.⁷¹ There is a concern that because of the State aid, compensation payments will go to coal operators rather than communities trying to move past coal.⁷²

State aid may also produce harm indirectly, by reducing energy market signals for efficiency, demand-side flexibility and electrification. This adversely affects the business models of climate innovators and other supply-chain entities, at a time when Europe urgently needs to scale up these sectors to tackle the ongoing climate crisis and the immediate gas crisis triggered by the invasion of Ukraine. The impacts mentioned above are not mutually exclusive, direct market interventions also have indirect market consequences.

In view of the potential environmental effects of State aid, it is important that environmental law is applied to Commission State aid decisions, and that the Commission is made accountable in this respect through access to justice.

As we have seen, both the Compliance Committee and the CJEU have found that State aid decisions may contravene environmental law, and the CJEU has found that the Commission may not declare a State aid compatible with the internal market where that aid contravenes environmental law.

There are more specific limitations on particular State aid. For example, the CEEAG is designed to end fossil fuels subsidies, which are unlikely to have a positive assessment by the Commission under State aid rules because of their negative environmental effects, and measures involving new investments in natural gas are unlikely to be approved unless it is demonstrated that the investments are compatible with EU climate targets.

⁶⁸ State Aid SA. 54042 (2019/N) Bulgaria- Sofia waste-to-energy project/ cogeneration unit with recovery of energy from RDF Brussels, 25.11.2019 C(2019) 8528 final at ec.europa.eu/competition/state_aid/cases/1/202010/282528_2135956_134_2.pdf

⁶⁹ Commission staff working document- The early warning report for Bulgaria: Brussels, 24.9.2018 SWD(2018) 413 final at eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018SC0413&from=EN

⁷⁰ bankwatch.org/blog/eu-state-aid-rules-must-finally-end-environmentally-harmful-subsidies-for-energy-projects

⁷¹ No money for old lignite ; Is compensation for German lignite operators legally possible? ClientEarth October 2019 at clientearth.org/media/h4sdu4mo/no-money-for-old-lignite-clientearth-legal-analysis-ce-en.pdf

Also see Contribution to State aid SA.53625 (2020/N) Germany Compensation of RWE and LEAG for lignite phase-out. CAN Europe June 2021 at caneurope.org/can-europe-contribution-to-state-aid-sa-53625-2020-n-germany-compensation-of-rwe-and-leag-for-lignite-phase-out/

⁷² clientearth.org/latest/latest-updates/news/should-german-coal-companies-get-cash-to-close/

In view of the necessity of State aid to comply with environmental law, paragraph 11 of the CEEAG provides:

Member State authorities should ensure that the aid measure, the conditions attached to it, the procedures for adopting it and the supported activity do not contravene Union environmental law. Member State authorities should also ensure that the public concerned has the opportunity to be consulted in decision-making on aids. Finally, individuals and organisations should be given the opportunity to challenge the aid or measures implementing the aid before national courts where they can adduce evidence that the Union environmental laws are not complied with.

A footnote to this paragraph makes it clear that the paragraph is urging Member States to comply with the Aarhus Convention. The footnote says:

See the Commission Notice on access to justice in environmental matters (OJ C 275, 18.8.2017, p. 1) with regard to the implementation at national level of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

Unfortunately, this passage only relates to environmental democracy at the national level; there is no equivalent exhortation to subject the Commission itself to transparency and access to justice, which is scarcely surprising in the light of Union resistance to the C128 findings. Yet clear added value could be brought to enforcement of environmental law by legal challenges at the level of the EU institutions, as well as at the national level.

The environmental benefits of access to justice are admirably summarised in the September 2019 Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters (the Milieu Study), which was prepared for DG Env by consultants and is available on the Commission website:⁷³

Access to justice in environmental matters plays an important role in the implementation and enforcement of EU environmental legislation, both at EU and Member State level. The public's ability to review and challenge environmental decision-making – including the right to information and participation – is a key component of environmental governance in the EU..... Court cases brought by environmental organisations tend to be based on solid reasons and consideration and are more successful than an average case, which suggests that such lawsuits have a fundamental role in the enforcement of environmental law.⁷⁴

This contribution to enforcement should be recognised as particularly valuable against a background of simultaneous and competing pressures on energy and agricultural policy: on the one hand, the work of the Intergovernmental Panel on Climate Change (IPCC) emphasises the dangers of inaction on climate change, whilst on the other hand war in the Ukraine drives up energy and food prices and creates pressure on European states to use their own fossil fuels and postpone action to reduce animal herd levels to reduce agricultural emissions.

⁷³ Milieu Consulting, Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters: Final report (September 2019, 07.0203/2018/786407/SER/ENV.E.4), available at: ec.europa.eu/environment/aarhus/pdf/Final_study_EU_implementation_environmental_matters_2019.pdf

⁷⁴ Page 159 of the Milieu Study.

IPCC – Sixth Assessment Report

The IPCC prepares comprehensive Assessment Reports about knowledge on climate change, its causes, potential impacts and response options. The IPCC is now in its sixth assessment cycle, during which it is producing the Sixth Assessment Report, with contributions by its three Working Groups. The report of Working Group II on impacts adaptation and vulnerability⁷⁵ was approved by the 195 member governments of the IPCC in February 2022. The message from the report was stark: “Human-induced climate change is causing dangerous and widespread disruption in nature and affecting the lives of billions of people around the world, despite efforts to reduce the risks. People and ecosystems least able to cope are being hardest hit” in the words of the IPCC press release.⁷⁶ The Chair of the IPCC, Hoesung Lee, drove home the message:

This report is a dire warning about the consequences of inaction. It shows that climate change is a grave and mounting threat to our wellbeing and a healthy planet. Our actions today will shape how people adapt and nature responds to increasing climate risks.

But whilst an international body was stressing the overwhelming importance of action, other developments have put pressure on governments to delay, or even reverse, action to mitigate climate change.

The Russian invasion of Ukraine and energy prices

Since the start of the war in the Ukraine, there have been rapid and dramatic increases in the price of hydrocarbons. That price inflation has been particularly damaging in Europe, which is heavily reliant on Russian exports of coal, oil and gas: Europe receives around 70% of Russia’s exports of gas and half of its oil exports.⁷⁷

This sudden increase in the price of energy has raised fears that action to mitigate climate action could fall down the list of political priorities, particularly because there has been a trend in some quarters to argue for an increase in the exploitation of national hydrocarbons as a way of reducing reliance on Russian exports.

In Germany, Mark Helfrich, the spokesperson for energy policy for the Christian Democrats has apparently argued that German efforts to phase out coal should be suspended in response to the emergency.⁷⁸ It also seems that a temporary reopening of coal plants in Italy is being considered.⁷⁹ Other commentators have argued that the crisis requires a re-think of domestic energy policy. For example the UK lobbyists Net Zero Watch has argued that unless the UK government encourages further exploration in the North Sea and explores shale gas resources, the UK will become “impotent in the face of Putin’s energy war”.⁸⁰

⁷⁵ Climate Change 2022: Impacts, Adaptation and Vulnerability. Working Group II Contribution to the IPCC Sixth Assessment Report at [ipcc.ch/report/sixth-assessment-report-working-group-ii/](https://www.ipcc.ch/report/sixth-assessment-report-working-group-ii/)

⁷⁶ [report.ipcc.ch/ar6wg2/pdf/IPCC_AR6_WGII_PressRelease-English.pdf](https://www.report.ipcc.ch/ar6wg2/pdf/IPCC_AR6_WGII_PressRelease-English.pdf)

⁷⁷ See the official US data at US Energy Information Administration [eia.gov/international/analysis/country/RUS](https://www.eia.gov/international/analysis/country/RUS)

⁷⁸ [olderburger-onlinezeitung.de/nachrichten/union-verlangt-sofortige-aussetzung-des-kohleausstiegs-81152.html](https://www.olderburger-onlinezeitung.de/nachrichten/union-verlangt-sofortige-aussetzung-des-kohleausstiegs-81152.html)

⁷⁹ [ansa.it/sito/videogallery/italia/2022/02/25/ucraina-draghi-possibile-la-riapertura-delle-centrali-a-carbone_7602d830-53b0-4242-8238-2fbd164a708f.html](https://www.ansa.it/sito/videogallery/italia/2022/02/25/ucraina-draghi-possibile-la-riapertura-delle-centrali-a-carbone_7602d830-53b0-4242-8238-2fbd164a708f.html)

⁸⁰ [netzerowatch.com/revitalise-north-sea-exploration-and-start-fracking-or-lose-putins-energy-war-for-good%EF%BF%BC/](https://www.netzerowatch.com/revitalise-north-sea-exploration-and-start-fracking-or-lose-putins-energy-war-for-good%EF%BF%BC/)

As the pressure increases to use domestic fossil fuels as a response to the energy crisis, the utmost vigilance is required to monitor State aid to ensure they are not used to subsidise activities that would undermine European efforts to bring down emissions of greenhouse gases.

In this regard, the EU should choose the most effective option to respond to the C128 findings in order to allow challenges to unlawful State aid decisions, because the invasion and resultant sanctions starkly underline the need for strong commitments, institutions and processes to act as safeguards against countries deprioritising climate action and moving back to problematic energy sources in the face of energy security concerns, which in the long term will bolster resilience. Climate action should be strengthened rather than weakened by the crisis; and in accordance with a rules-based system and in the face of grave wartime violations of international law.

Climate innovation and the clean energy transition

Well designed and necessary aid plays a vital role in the energy transition, for example by providing support for renewable energy generation and other nascent clean technologies and supply chains, which would otherwise not be ready in time to meet climate targets. Equally, misconceived or badly designed aid schemes pose a serious threat to decarbonisation and climate progress, which may result in breaches of environmental law. This is a complex area, which requires specialist expertise and a careful assessment of the facts and relevant law, on a case-by-case basis. The following section discusses a number of issues showing the relationship between State aid on the one hand and climate innovation and the clean energy transition on the other. For the most part, there is a focus on potential contraventions of law relating to the environment because of the subject matter of the findings in case C128 and Article 9(3) of the Aarhus Convention.

The impact of State aid on climate innovation and the clean energy transition

As we have seen, the CEEAG is intended to support decarbonisation of the economy in a manner that is open to all technologies. The Guidelines take into account the requirements of the Clean Energy for All Package,⁸¹ and the objectives of the European Green Deal and Fit for 55 Package, including the new EU emissions targets.

What is more, to achieve global climate objectives, the International Energy Agency's 2050 Roadmap report highlighted the need for accelerated electrification of sectors such as heat and transport, with electricity counting for 50% total energy consumption by 2050.⁸²

Power sector decarbonisation relies on climate innovation, including demand-side flexibility resources such as demand response,⁸³ energy efficiency and storage; and rapid integration of intermittent renewable energy resources.

⁸¹ The clean energy for all package comprises 8 laws, adopted in 2018 and 2019, to move the EU away from fossil fuels towards cleaner energy. See energy.ec.europa.eu/topics/energy-strategy/clean-energy-all-europeans-package_en

⁸² International Energy Agency. (2021). Net Zero by 2050: A roadmap for the global energy sector. [iea.blob.core.windows.net/assets/beceb956-0dcf-4d73-89fe-1310e3046d68/NetZero2050-ARoadmapfortheGlobalEnergySector_CORR.pdf](https://www.iea.org/assets/energy/NetZero2050/NetZero2050-ARoadmapfortheGlobalEnergySector_CORR.pdf)

⁸³ Article 2(20) of the Electricity Directive defines demand response as "[T]he change of electricity load by final customers from their normal or current consumption patterns in response to market signals, including in response to time-variable electricity prices or incentive payments, or in response to the acceptance of the final customer's bid to sell demand reduction or increase at a price in an organised market as defined in point (4) of Article 2 of Commission Implementing Regulation (EU) No 1348/2014, whether alone or through aggregation."

State aid will play an important role in delivering those objectives. However, in granting aid approval in accordance with the CEEAG, there is a risk of creating self-fulfilling prophecies by “picking winners” – supporting particular sectors of the economy or companies - and undermining innovative clean technologies that would, without intervention, provide the most efficient market solution. That creates a danger of breaching the Energy Efficiency First Principle.⁸⁴

What is more, whilst a State aid may, in many cases, appear sound in principle the details can be complicated and likely to cause problems. Market distortions might therefore not be immediately obvious, especially when a State aid has an impact on new market entrants, which have less access to public affairs and lobbying resources, compared with incumbents.

In short, there are a number of risks to climate innovation and energy transition created by State aid. Specific examples may be found in the Annex to this paper.

Climate innovator State aid challenges

As we have seen, there is limited scope to challenge State aid decisions. Complaints under the procedural Regulation may be brought by “interested Parties”, which may include new entrant innovators. But for the following reasons, it is neither efficient nor feasible to leave it to new entrant innovators to bring cases to prevent the introduction of State aid that breaches environmental law.

First, viable commercial claimants might not yet exist because the relevant market does not offer a viable business proposition, for example due to existing competition barriers and incomplete implementation of the Clean Energy for All Package,⁸⁵ which means third party intervention may be necessary.

Second, where new entrant innovators do exist, they are often at an early stage in their development, and do not have secure financing, in-house legal teams or enough staff capacity to launch and maintain litigation. They may be unable or unwilling to bring forward challenges. Innovators may be dependent on political goodwill and even grant funding from the authorities providing the aid. Litigation is hugely time-consuming, stressful and distracting for commercial leadership teams, who are in the business of climate technology, not law. Legal action may repel would-be investors and board members, not only because of adverse cost risks but also because these individuals and funds tend to support multiple entities in the same niche sector. They can therefore face conflicts of interest if an entity challenges the existence of an aid mechanism while another entity in their portfolio is a beneficiary of that mechanism.

⁸⁴ The Efficiency First principle was enshrined in the 2019 Governance Regulation; the European Commission published recommendations and guidelines for this decision-making philosophy in September 2021. The principle prescribes prioritising investments in demand-side resources whenever they would deliver better value at lower cost than investments in energy infrastructure, fuels and supply-side options.

⁸⁵ A March 2022 market monitoring report by the European demand-side flexibility trade association smartEn analysed Clean Energy Package implementation across a sample of Member States. It found that very little progress had been made since 2020 on key market reform measures to provide inclusive market access to demand-side resources and to ensure that price signals incentivise system efficiency. smartEn. (2022). The implementation of the electricity market design to drive demand-side flexibility, 2nd Edition. smarten.eu/wp-content/uploads/2022/03/The_implementation_of_the_Electricity_Market_Design_2022_DIGITAL.pdf.

Finally, and crucially, in circumstances where market actors (of whatever size) are in a position to challenge a State aid decision, they rarely – if ever- focus their arguments on environmental law breaches. Naturally, market actors will focus on market and competition-related arguments, so their ability to access EU courts does not in fact, necessarily enable topics of public interest to be brought to the court's review. This is also not the main focus of trade associations which, even if they have legal standing, are duty-bound to prioritise the collective commercial needs of their membership, which often includes beneficiaries of the aid in addition to the locked-out innovators. Conversely, environmental NGOs have this precise purpose – to protect the public and environmental interest - but do not currently have access to the court.

The challenge of addressing the C128 findings

The first EU rules on State aid were driven by industrial policy and focused in particular on the coal and steel sectors. In time, State aid rules came to be considered as an internal market instrument. Articles 107 and 108 TFEU prohibit State aid in principle because of the potential of State aid to distort competition; and so the Commission has tended to focus in its assessments on distortion of competition and whether an aid is needed to remedy a market failure, rather than ensuring that aid measures contribute to, or at least do not harm, policies and regulations relating to climate and energy. The Commission has been reluctant to exercise its wide discretion in State aid matters to align national aid measures with EU climate and energy objectives when aid measures have objectives which are not principally related to climate or energy.⁸⁶

As far as environmental law more generally is concerned, state aid guidelines and decisions focus on verifying that a project complies with specific environmental legislation of direct relevance - such as Directive 2008/98/EC on waste for waste installations, Directive 2000/60/EC establishing a framework in the field of water policy for hydropower projects, or Directive 2002/49/EC relating to the assessment and management of environmental noise for motorways - rather than verifying whether activities and beneficiaries comply with environmental law at large. Where the State aid concerned does not have a clear an obvious impact on the environment, even within the energy sector, there does not appear to be any evidence that the Commission checks compliance with environmental law by aid beneficiaries.

It seems that the Commission is content to delegate to national courts the responsibility for checking compliance with EU law by the member States, or to use infringement proceedings against Member States when they breach EU law.

The C-594/18P ruling establishes the Commission's general obligation to check whether aid measures comply with Union law; the Court made it very clear that this obligation also applies to EU environmental law and principles (notably the precautionary, sustainability, prevention and polluter pays principles). Additionally, in the case C128 findings, the Compliance Committee noted that it was clear from that judgement that a Commission decision on State aid measures may contravene European Union environmental law, regardless of a Member State's justification of the aid provided by the member State.

There may be challenges in verifying the compliance of State aid with environmental law and it may be particularly problematic when there are many prospective beneficiaries.

⁸⁶ For a fuller analysis, see A State Aid Framework for a Green Recovery: Mainstreaming climate protection in EU State aid law. ClientEarth and Agora Energiewende at clientearth.org/media/c45naoms/2020-09-30-a-state-aid-framework-for-a-green-recovery-coll-en.pdf

In order to address the challenges, the current practice of the Commission will need to change. Stakeholders have attempted to address this need by developing guidelines and recommendations for checking compliance.⁸⁷ It is, of course, for the Commission and the other EU institutions to determine just how compliance with environmental law is checked, but in any event it is clear that from the C-594/18P ruling and C128 findings is the Commission is obliged to check such compliance and this obligation is judiciable: the Compliance Committee left no doubt that administrative or judicial procedures must be put in place to allow members of the public to challenge State aid decisions that may contravene environmental law.

The power of the EU

On any measure, the EU is the most powerful of the Parties to the Aarhus Convention. For example, it is clear beyond doubt that the EU has enough political power to simply prevent the Aarhus Convention MOP from adopting Compliance Committee findings. At MOP 6, the EU used its legal and political power to block the adoption of the Committee's findings on case C32. And again, at MOP 7 the EU blocked the adoption of the findings on case C128.

Whilst the Union is bound, like any other Party, to comply with its legal obligations under the Aarhus Convention, it has – when expedient in cases C32 and C128 – treated compliance as a political choice; and in particular has not ruled out the possibility of doing nothing in response to the C128 findings.

The threat of continued resistance by the EU to the findings in case C128.

As we have seen, Decision 2021/2271 states that the Commission, with respect to case C128, has “committed to come forward, **if appropriate**, by the end of 2023, with measures to address the issue, in light of the obligations of the Union and its Member States under the Aarhus Convention and taking into account the rules of Union law concerning State aid” [emphasis added].

The conditionality of this commitment is disappointing. The Commission expressly leaves open the possibility that it may not be “appropriate” to come forward with measures to address the findings, and in the absence of “measures” – most obviously a legislative proposal – from the Commission the EU will almost certainly not comply with the findings.

So there is a threat hanging over the MOP: the EU may decide simply to do nothing to address the C128 findings and, it must follow, to continue to block the endorsement of the C128 findings by the MOP.

There will later be a discussion of the ways the EU may respond to the C128 findings. For the time being, it suffices to note that EU action, with respect to both cases C32 and C128, raises the question of whether the Union is acting with “good faith” in the MOP.

⁸⁷ clientearth.org/latest/documents/why-the-hinkley-point-c-ruling-obliges-to-implement-the-green-deal-in-state-aid-practice/

Good faith

In human interactions, the words “good faith” are used to describe honesty and sincerity of intention. But in international law, good faith has a larger meaning: it is the bedrock of, and an essential obligation under, international law.

The principle of good faith in international law

The importance of the principle was highlighted in the nuclear test case of 1974, in which the International Court of Justice found that the governing principle of international law in terms of creation and performance international obligations is good faith.⁸⁸ The principle refers to honesty, loyalty and reasonableness, guarantees the prohibition of the abuse of power and provides equitable solutions in legal relationships between sovereign states. It is enshrined in Article 26 (Pacta sunt servanda) of the Vienna Convention on the Law of Treaties of 1969.

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

The conduct of the EU in cases C32 and C128

The conduct of the EU, in dealing with Committee findings that are inexpedient to the Union, raises the issue of good faith. As far as case C32 is concerned, the EU blocked endorsement of the findings – strongly arguing against them – until two things happened: first the Union found itself in a position able to comply with those findings due to internal political developments; and second, the Committee was prepared to confirm that the prospective amendment of the Aarhus Regulation fulfilled the requirements of the findings.⁸⁹

Only at that stage was the Union ready to see the findings endorsed. The findings, of course, had not changed; indeed once they were adopted on 17 March 2017 there was no procedure for their amendment. What had changed in the period between their adoption and their endorsement by MOP 7 in 2021 was the position of the EU and its readiness to comply with the findings.

It should go without saying that all Parties – including and especially the EU – should have been prepared to respond to the findings on the basis of whether they were sound in law, not on the basis of whether it was feasible and/or desirable to comply with them; to block the endorsement of the findings because they were inexpedient suggests bad faith.

The Union has highlighted that the C128 findings are based to a large extent on case C32; for example in its comments on the draft C128 findings the Union stated:

⁸⁸ Nuclear Tests Case (Australia v France) (Merits) [1974] ICJ Rep 253.

⁸⁹ See paragraph 146 of the Report of the Compliance Committee on compliance by the European Union 31 August, ECE/MP.PP/2021/51 at unece.org/sites/default/files/2022-01/ECE_MP.PP_2021_51_E.pdf

The EU wishes ... to recall that the findings in Case 2008/32/ACCC, on which the Committee heavily relied in the Draft Findings, have not yet been adopted by the Meeting of the Parties.⁹⁰

What is more, the reasons given by the EU for rejecting the C128 findings relied strongly on the Union's rejection of the C32 findings. It said about the former:

The Committee's disregard of (i) the Commission's role as an administrative review body, (ii) the delimitation of competences as between Member States and the Commission in matters pertaining to state aid, and (iii) of the preliminary ruling procedure make it impossible for the EU to accept the Draft Findings of the Committee as proposed.⁹¹

Points (i) and (iii) related directly to the reasoning in the C32 findings.

As we have seen, it is indeed the case that there is a strong connection between the two sets of findings, and a Party that could not accept the reasoning of C32 might not be able to accept the reasoning in the latter case. But conversely, once a Party could accept the C32 reasoning it would be difficult to resist the bulk of the C128 findings. The EU, however, has been obdurate in its determination to block C128, notwithstanding its participation in the endorsement of the findings in case C32.

Following the endorsement of the C32 findings by the MOP, it seems difficult to argue, or to accept, that the Union's continued opposition to the endorsement of C128 findings is based on considered legal argument concerning the EU's obligations under the Aarhus Convention with respect to State aid decisions. The EU has been unwilling or unable to extract itself from the political compromise reached at the July 2021 COREPER. In short, the EU's conduct suggests that it is ready to use its considerable political power to block Committee findings that are difficult for it, and to be the only Aarhus Convention party to do so and that is not consistent with good faith .

The rule of law

More generally, the reaction of the EU to inexpedient findings from the Compliance Committee sits uneasily with the Union's internal issues concerning the rule of law: the restriction of the arbitrary exercise of power by subordinating it to well-defined and established laws.

The importance of the rule of law to the EU

The Union has developed from an economic community to a Union of fundamental values in the past decades. The rule of law, which had long played an important role in the case law of the CJEU, is enshrined in Article 2 of the TEU, which provides that:

⁹⁰ See the EU comments on the draft findings received from the Aarhus Convention Compliance Committee (Committee) on 18 January 2021 at unece.org/sites/default/files/2021-02/frPartyC128_24.02.2021_comments_findings.pdf.

⁹¹ Ibid, paragraph 32 (conclusions of the EU comments)

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

What is more, the Charter of Fundamental Rights of the European Union, which was granted the status of primary law by Article 6(1) TEU, puts into operation the rule of law. Article 47 of the Charter in particular provides for the right to effective remedy and judicial protection.

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented...

The EU's institutions naturally emphasise the importance of the rule of law; for example the Commission's website says: *"Rule of law guarantees fundamental rights and values, allows the application of EU law, and supports an investment-friendly business environment. It is one of the fundamental values upon which the EU is based on".*

And within this context, judicial independence is particularly important. Consider, for example, this passage from the Commission's communication on the rule of law (Further strengthening the Rule of Law within the Union State of play and possible next steps)⁹² (the rule of law communication):

When national rule of law safeguards do not seem capable of addressing threats to the rule of law in a Member State, it is a common responsibility of the EU institutions and the Member States to take action to remedy the situation. As well as the common obligation to defend EU values, there is a common interest in tackling issues such as threats to Constitutional Courts or judicial independence before they can compromise the implementation of EU law, policies or funding.

Moreover, the political and legal importance of the rule of law in the EU continues to grow, not least due to recent cases in the CJEU. Following high profile cases concerning judicial independence⁹³ and the unlawful restriction of the property rights on grounds of nationality or residence,⁹⁴ there have been two further significant cases, Case C 156/21, Hungary v European Parliament and Council of the European Union⁹⁵ and Case C 157/21, Poland v European Parliament and Council.⁹⁶

⁹² Brussels, 3.4.2019 COM(2019) 163 final at ec.europa.eu/info/sites/info/files/rule_of_law_communication_en.pdf

⁹³ Case C 192/18, Commission v Republic of Poland, ECLI:EU:C:2019:924 at curia.europa.eu/juris/document/document.jsf?jsessionid=50FC8137514CD5E829E3C6E49192455F?text=&docid=219725&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=338977

⁹⁴ Case C 235/17, Commission v Hungary ECLI:EU:C:2019:432 at curia.europa.eu/juris/document/document.jsf?docid=214283&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=334380

⁹⁵ Case C 156/21, Hungary v European Parliament and Council, ECLI:EU:C:2022:97 at curia.europa.eu/juris/document/document.jsf?text=&docid=254061&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2604794

⁹⁶ Case C 157/21, Poland v European Parliament and Council, ECLI:EU:C:2022:98 at curia.europa.eu/juris/document/document.jsf?text=&docid=254062&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2608624

The significance of the latter two cases is shown by the very large number of interventions: Poland and Hungary supported each other; and the Parliament and the Council were supported by the Commission and 10 Member States. What is more, the Court - at the Parliament's request - dealt with the findings following the expedited procedure. The cases were heard by the full Court because of the fundamental issues they raised with respect to the protection of the union budget in the face of breaches of the principles of the rule of law. The Poland and Hungary cases related to two challenges to Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (the conditionality Regulation).⁹⁷ Without going into the detail of the cases, it suffices for the purposes of this paper to identify the most striking findings of the CJEU on the rule of law.

The Court found that the values in Article 2 TEU – which include the rule of law - go to the identity of the Union and need defending. In paragraph 127 of the Hungarian case, the Court found:

The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.

The Court also considered the clarity of the concept of “rule of law” and in particular whether the definition of “rule of law”, as defined in Article 2(a) of the conditionality Regulation,⁹⁸ is conceptually certain and consistent. The court held:

...while it is true that Article 2(a) of the contested regulation does not set out in detail the principles of the rule of law that it mentions, nevertheless recital 3 of that regulation notes that the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection and separation of powers, referred to in that provision, have been the subject of extensive case-law of the Court. The same is true of the principles of equality before the law and non-discrimination...

Those principles of the rule of law, as developed in the case-law of the Court on the basis of the EU Treaties, are thus recognised and specified in the legal order of the European Union and have their source in common values which are also recognised and applied by the Member States in their own legal systems.⁹⁹

In short, the cases establish that the rule of law defines the identity of the Union and must be defended by the EU; and that the rule of law is a legally robust and certain concept, having as its source the common values of the Union.

⁹⁷ OJ 2020 L 433I, p. 1.

⁹⁸ The conditionality Regulation definition is as follows

‘the rule of law’ refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU

⁹⁹ Paragraphs 236 and 237 of the Hungarian case.

The rule of law at the international level

What is more, the EU is strongly committed to compliance with its international legal obligations and to the international rule of law. As the Commission's communication on the rule of law (Further strengthening the Rule of Law within the Union State of play and possible next steps)¹⁰⁰ states, "The rule of law is ... one of the principles guiding the EU's external action."

Indeed Article 21 of the Treaty on European Union (TEU), clearly requires the EU's international policies and actions to consolidate and support the rule of law:

The Union's action on the international scene shall be guided by ... respect for the principles of the United Nations Charter and international law.

The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

... consolidate and support democracy, the rule of law, human rights and the principles of international law

The requirement with respect to the international rule of law is matched by a personal commitment by President von der Leyen:

There can be no compromise when it comes to defending our core values. Threats to the rule of law challenge the legal, political and economic basis of how our Union works.¹⁰¹

C32, C128 and the rule of law

The Union's external action with respect to cases C32 and C128 is difficult to reconcile with the EU's legal and political commitments to the rule of law. As demonstrated, the Aarhus Compliance Committee is an independent body, the members of which are appointed by the MOP, which is responsible for review of compliance of Aarhus Convention Parties with their obligations, and it should follow that the EU would support the body and respect its findings. And yet the EU has failed to give the Committee consistent support, and in some cases has been actively hostile to its work.

¹⁰⁰ Brussels, 3.4.2019 COM(2019) 163 final at ec.europa.eu/info/sites/info/files/rule_of_law_communication_en.pdf

¹⁰¹ A Union that strives for more My agenda for Europe - Political Guidelines for the Next European Commission 2019-2024, by candidate for President of the European Commission, Ursula von der Leyen at ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf

For example, after the Committee adopted its findings in case C32, the EU continued to challenge them.¹⁰² Eventually, the EU was prepared to join the consensus of the Aarhus MOP in endorsing the findings, the effect of which, as the EU Commission accepts, was to make them legally binding. The EU's eventual acceptance of the endorsement of the findings was a positive step. But in contrast, the deliberate delays by the Union over a number of years, hindering the endorsement of the findings in an unprecedented way, is not consistent with the importance of the value attached to the rule of law in the TEU.

There is a clear dissonance between, on the one hand, the EU's championing of judicial independence, and on the other, its indifferent and dismissive treatment of an independent body with responsibilities to assess compliance with international law. There is a heavy irony in that, considering the Commission's role as guardian of the EU treaties.¹⁰³

The problem is that history is now repeating itself: the EU has already started to treat the C128 findings in the same way that it treated the earlier C32 findings. Indeed there is a possibility that the Union may take even more disruptive action, by failing to act on the C128 findings at all. Indeed, the EU's approach to the C32 and C128 findings is glaringly inconsistent with the Union's approach to the rule of law. On the one hand, the Union takes a strong stand internally. For example recital (3) of the conditionality Regulation:

The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union (the 'Charter') and other applicable instruments, and under the control of independent and impartial courts. It requires, in particular, that the principles of legality implying a transparent, accountable democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts; and separation of powers, be respected.

And yet in cases C32 and C128, the Union has undermined the findings of an independent and impartial body, namely the Compliance Committee; its processes for engaging with the findings fell far short of transparency and legal certainty, and it has arbitrarily used its power in the Aarhus MOP in an arbitrary way to delay and/or deny access to justice to challenge the acts of EU institutions. Moreover it has consistently used its political influence to compromise and delay a legal process resulting in findings on compliance with an international treaty.

¹⁰² After the failure to secure consensus for the endorsement of the C32 findings, MOP 7 requested the Compliance Committee to review any developments that had taken place regarding the matter and to report to the Meeting of the Parties accordingly (see paragraph 63 of the MOP 7 report). The MOP request was given the reference ACCC/M/2017/3 European Union. Various documents filed by the Union with respect to that MOP request may be found at unece.org/env/pp/cc/accc.m.2017.3_european-union. As late as 1 February 2021, the EU was complaining that "...the Committee disregards fundamental elements of the EU legal order flowing from the special character of the EU as a Party to the Convention, which leads the Committee to draw erroneous conclusions": see EU comments on the draft advice of the Aarhus Convention Compliance Committee regarding the request ACCC/M/2017/3 (EU) in case ACCC/C/2008/32 1 February 2021, at unece.org/sites/default/files/2021-02/frPartyM3_01.02.2021_comments.pdf.

¹⁰³ Article 17(1) TEU provides that the Commission "... shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union..."

Belarus at MOP 7

The EU's conduct with respect to the C128 findings was also particularly important because of its effect on another issue that caused difficulties at MOP 7: the non-compliance of Belarus. This issue was prominent at MOP 7, and has had unprecedented and dramatic effects that continue to reverberate throughout the international community.

Background

MOP 6 had adopted Decision VI/8c compliance by Belarus with its obligations under the Convention, which concerned failures to fulfil requirements of the earlier Decision V/9c, and which endorsed the findings of the Committee on communication ACCC/C/2014/102¹⁰⁴ concerning the harassment and persecution of nuclear activists.

Before MOP 7, the Committee received further information from the communicant in case C102 – Ecohome, an environmental NGO - which informed the Committee that the Ministry of Justice had filed proceedings before the Supreme Court of Belarus seeking the liquidation of the Ecohome. The Committee requested Belarus to explain why liquidation proceedings had been commenced and to immediately reconsider any steps intended to silence a communicant exercising its rights under the Convention.

The Supreme Court nevertheless liquidated the communicant with immediate effect. As a response to that liquidation, the Committee decided to make a supplementary report to the seventh session of the Meeting of the Parties on the implementation of Decision VI/8c.¹⁰⁵ Paragraph 61 of the supplementary report said:

...the Committee finds that the liquidation of Ecohome on 31 August 2021 constitutes a further incident of persecution, penalization and harassment under article 3 (8) of the Convention by the Party concerned. In this regard, the silencing by the Party concerned of a communicant actively engaged in the Committee's follow-up procedure is a particularly flagrant case of non-compliance with article 3 (8).

The Committee continued:

63. Given the gravity of the Party concerned's actions, the Committee recommends ... the Meeting of the Parties decides...

¹⁰⁴ ECE/MP.PP/C.1/2017/19

¹⁰⁵ Supplementary report of the Compliance Committee on compliance by Belarus (ECE/MP.PP/2021/61) at unece.org/sites/default/files/2021-10/ece.mp_pp_2021.61_eng_ac.pdf

(i) To “suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention”¹⁰⁶

The Aarhus Convention bureau¹⁰⁷ had already prepared a draft decision for the MOP on Belarus’ non-compliance; in the light of the Committee’s supplementary report, the bureau amended that draft to include suspension of rights and privileges. Whilst Decision I/7 has long provided for such suspension to be a remedy in the event of non-compliance,¹⁰⁸ the remedy had until then never been used. And although other non-compliance mechanisms under other environmental treaties have similar remedies available, the use of those remedies are very rare indeed. Thus, the proposal to suspend Belarus was very high profile, unprecedented and constituted a dramatic step to address “a particularly flagrant case of non-compliance”.

MOP 7 - Belarus and environmental defenders

Decision VII/8c: Compliance by Belarus with its obligations under the Convention

Belarus - with the support of the representatives of Armenia, Kazakhstan, Kyrgyzstan and Tajikistan – opposed the procedure that led to the Committee’s supplementary report, and the amendment of the draft Decision. The EU, Norway, Switzerland and the UK – as well as several NGOs – supported the Bureau’s proposal.

It proved impossible to achieve consensus at MOP 7 on the Belarus Decision, despite lengthy consultations, and the MOP therefore decided to vote on the Decision. The Decision was adopted by 34 votes to 4, with the EU exercising 27 votes (which was the number of its Member States that were Parties to the Convention).

The Decision was therefore taken to “...suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to [Belarus] under the Convention”,¹⁰⁹ effective on 1 February 2022 unless Belarus reinstated Ecohome.¹¹⁰

Not only was the Decision unprecedented; the vote was too. The MOP had until then always been able to make decisions by consensus. The adoption of the Decision has been followed by warnings from Belarus that it might consider withdrawing from the Aarhus Convention.

¹⁰⁶ An alternative action – involving a further report and a possible extraordinary session of the MOP – was also proposed by the Committee but was not operationalised by the MOP.

¹⁰⁷ The Convention Bureau was established by virtue of rule 22 of the Aarhus Convention rules of procedure. The Bureau’s functions include preparing for the Meetings of the Parties.

¹⁰⁸ Annex to Decision I/7, para 37(g).

¹⁰⁹ Paragraph 7, Decision VII/8c Compliance by Belarus with its obligations under the Convention.

See Report of the seventh session of the Meeting of the Parties Addendum, Decisions adopted by the Meeting of the Parties (ECE/MP.PP/2021/2/Add.1) at unece.org/sites/default/files/2022-02/ECE_MP.PP_2021_2_Add.1_E_aec.pdf

¹¹⁰ Belarus did not reinstate Ecohome, and so the suspension took effect on 1 February 2022.

Decision VII/9 on the rapid response mechanism

MOP 7 also made a Decision establishing a rapid response mechanism for the protection of environmental defenders.¹¹¹ This mechanism is an innovation: it is the first specifically safeguarding environmental defenders to be established within a legally binding framework either under the United Nations system or other intergovernmental structure. Without going much into the detail of the Decision, it was clearly considered by the MOP to be of the utmost importance, as we can see from the recitals:

Recognizing the critical importance of establishing and maintaining a safe environment that enables members of the public to exercise their rights in conformity with the Convention,

...

Alarmed by the serious situation faced by environmental defenders, including, but not limited to, threats, violence, intimidation, surveillance, detention and even killings, as reported by States Members of the United Nations, and by intergovernmental and non-governmental organizations and other stakeholders,

Cognizant of the existing challenges, such as fear of reporting such cases, impunity and difficulty in uncovering the identity of those behind the ordering and conducting of such acts,

The MOP, the EU and Belarus

Given the importance of Decisions VII/8c (compliance by Belarus) and VII/9 (environmental defenders) – adopted respectively to address a flagrant breach of the Convention and to protect environmental defenders against significant threats – it would have been desirable to have the EU at the heart of MOP support for these two proposed Decisions.

But whilst the EU was unwavering in its support of the two Decisions, the Union itself was weakened and vulnerable to criticism. In MOPs 6 and 7, the EU had blocked the endorsement of the findings in cases C32 and C128, and other Parties had – in an effort to preserve consensus – been prepared to delay decisions on the two cases; and yet at MOP 7, Parties were prepared to force a vote on compliance by Belarus. The difference in this regard between the treatment of Belarus and the EU was emphasised by the former, protesting against the MOP vote on its non-compliance:

Today the meeting of the parties, at the suggestion of the Committee on Compliance with the Convention, by voting takes a hasty decision and excessive, confrontational measures against Belarus. We firmly believe that decisions should be taken by consensus. Non-consensus solutions cannot and will not be of any importance to the Parties to the Convention.

¹¹¹ Decision VII/9 Rapid response mechanism to deal with cases related to Article 3 (8) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

Nor can we fail to express serious concern about the trend of applying double standards on the Convention in recent years. For the second time in a row, the meeting of the parties, at the suggestion of the EU, postpones for another four years a decision on its violation of the provisions of the Convention.¹¹²

Belarus also raised the issue of consensus with respect to the Decision on environmental defenders. As reported in paragraph 72 of the MOP 7 report:

The Meeting of the Parties provisionally adopted draft decision VII/9 on a rapid response mechanism to deal with cases related to article 3 (8) of the Aarhus Convention.... Through that decision, the Meeting of the Parties decided to hold its extraordinary session in 2022 to elect the independent Special Rapporteur on environmental defenders. The representative of Belarus made a statement in that regard and the Meeting of the Parties decided to include the following text in the report of its seventh session to reflect said statement: "Belarus reserves its position that it may not recognize the candidature of a special rapporteur not elected through consensus."

There is no suggestion in this paper that the EU's conduct with respect to cases C32 and C128 was in any way equivalent to Belarus' conduct, for example with respect to case C102. But the Union's failure to accept Compliance Committee findings and its use of the MOP's practice of consensual decision making undermined its credibility at MOP 7, and may yet provide assistance to any Party that objects to a particular candidate for special rapporteur.

Moreover the EU damaged its credibility by undermining the independence of the Compliance Committee in order to deny its citizens access to justice to challenge its institutions and bodies, whilst championing judicial independence and the access to justice elsewhere.

What is more, there may be damage to the Union's standing in other international forums. A statement made by Youth and Environment Europe (YEE),¹¹³ an observer at MOP 7, explained the probable effects of the Union's behaviour:

By failing to endorse all the findings of the Compliance Committee, including on the case C128, the EU, and with that its Member States, are eroding that trust and are risking to establish an extremely problematic practice. Taking out a reference to C128 [from the draft decision on EU compliance] does not resolve the issue but merely ignores it and delays it for four more years - at a time when environmental issues have never been more urgent.

International law is not to pick and choose - the EU and its Member States doing so is utter hypocrisy and undermines the EU's credibility on all fronts...

¹¹² This is a translation of the statement by Andrei Khudyk (Minister for Natural Resources and Environmental Protection of Belarus) delivered at MOP 7 regarding the adoption of Decision VII/8c on compliance by Belarus. See paragraph 37 of the Report of the Joint High-level Segment ECE/MP.PP/2021/16-ECE/MP.PRTR/2021/2, at unece.org/sites/default/files/2022-02/ECE.MP_PP_2021.16_ECE.MP_PRTR_2021.2_aec.pdf

The EU's reputation as a reliable partner in multilateral environmental law: accountability, credibility and global leadership

The EU has assumed legal obligations under multilateral environmental agreements for many years, at the global, regional and sub-regional levels. Those agreements cover many environmental matters: climate change, the ozone layer, biodiversity, nature conservation, desertification, hazardous chemicals and wastes, air pollution, marine protection, environmental impact assessment and industrial accidents, for example.

In all these fields, the EU – in many cases rightly – sees itself as an influential supporter of international collaboration in the field of environmental protection and a global leader promoting sustainable development. For example, in the field of climate change the EU describes itself as follows:

The Union is a global leader in the transition towards climate neutrality, and it is determined to help raise global ambition and to strengthen the global response to climate change, using all tools at its disposal, including climate diplomacy.

The Union should continue its climate action and international climate leadership after 2050, in order to protect people and the planet against the threat of dangerous climate change, in pursuit of the long-term temperature goal set out in the Paris Agreement and following the scientific assessments of the IPCC, IPBES, and the European Scientific Advisory Board on Climate Change, as well as the assessments of other international bodies.¹¹⁴

And yet, in the case of the Aarhus Convention the Union has undermined itself by special pleading, being the only Party that delays the endorsement of inexpedient findings with respect to its non-compliance. In the Aarhus MOP this is a feasible course of action because the Union wields considerable power at that regional level; and it can only harm the EU's reputation in global forums if it is seen as a Party that abuses that power for short-term political reasons.

The EU's position is also inconsistent with the growing recognition in the international community that “environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy human rights, including the right to life”,¹¹⁶ an issue that has been championed by YEE.¹¹⁷

¹¹³ At unece.org/sites/default/files/2022-01/MoP7_European_ECO_Forum%20statements.pdf

¹¹⁴ Recitals 16 and 17 to Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’), OJ L 243, 9.7.2021, p. 1–17 at eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021R1119

¹¹⁶ The resolution 48/13 of the UN Human Rights Council on the right to a clean, healthy, and sustainable environment: A/HRC/RES/48/13 at documents-dds-ny.un.org/doc/UNDOC/GEN/G21/289/50/PDF/G2128950.pdf?OpenElement

¹¹⁷ See, for example, yeenet.eu/the-un-human-rights-council-recognition-of-a-right-to-a-healthy-environment

Part III: the obligation to comply with the Aarhus Convention

The necessity to comply with the Aarhus Convention

As we have seen, Decision 2021/2271 clearly indicated that a particularly aggressive response from the Union to the C128 findings is on the table: the Commission (if it is appropriate) may come forward with no proposal for legislation – no proposal either to amend the Aarhus Regulation or to introduce a new regime applying Article 9(3) and (4) of the Convention to State aid decisions.

It seems almost certain that a failure by the EU to adopt a legislative response to the case C128 findings would be accompanied by the Union's continuing to block consensus on the endorsement, because it would be perverse to decide not to comply with the findings only to join in the endorsement of the findings by MOP 8.

A failure by the EU to comply with its obligations under the Aarhus Convention would be both legally and politically untenable.

It would be legally untenable because, short of withdrawal from the Convention, there is no justification or defence for failure to comply and it would not be viable for the Union to argue that the C128 findings are so badly flawed that they should not be adopted. What is more it would be extraordinarily politically damaging for the EU to continue to block the adoption of the findings.

In international law, is there any defence to, or justification of, non-compliance by the EU?

The Union has not sought to claim that it is not – temporarily or permanently – bound by Article 9(3) and (4) of the Aarhus Convention, nor has it argued that its breaches of the Convention are not “wrongful”. Neither claim would succeed because, notwithstanding the pressures discussed above - including war, economic difficulties and the pandemic - there is nothing that would allow the EU to get out of its Aarhus obligations or to argue that any breach of those obligations could be mitigated in some way.

Nevertheless, and for the sake of completeness, there will now be a brief discussion as to whether there is any argument in international law which would provide a justification for failure by the EU to comply with its obligations.

The Vienna Convention on the Law of Treaties (VCLT)

The VCLT provides a number of grounds on which a Party may no longer be bound by an international agreement, none of which are relevant to the EU's obligations arising under the Aarhus Convention. It would take a separate and lengthy paper to discuss all the grounds on which a Party might seek to argue that it is no longer bound by a treaty, but for the purposes of this paper it suffices to discuss the following.

Article 57 VCLT

Article 57 allows for the suspension of the operation of a treaty where the treaty allows it. There is no provision in the Aarhus Convention which allows for Parties temporarily to suspend their obligations under the Convention.

Article 57 also provides for the suspension of the operation of a treaty at any time with the consent of all the Parties after consultation, but there is no such proposal for such consent on the table and it seems inconceivable that it would be.

Article 67 VCLT

Article 67 provides for Parties to invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty. But this is interpreted narrowly and requires the following:

- the change must not have been foreseen by the Parties to the treaty;
- the existence of those circumstances must have constituted an **essential basis of the consent of the parties to be bound by the treaty**; and
- the effect of the change **is radically to transform the extent of obligations still to be performed under the treaty**.

Without going into the detail of the provisions, it is clear that Article 67 provides no grounds for arguing that Article 9(3) and (4) of the Aarhus Convention do not apply to the Union.

Is it possible to argue that the Union's failure to implement Article 9(3) and (4) is not "wrongful" as a matter of international law?

Also for the sake of completeness, it may be worth mentioning that the rules set out in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts,¹¹⁸ which reflect customary international law and practice, provide for consequences for an internationally wrongful act (a breach of an international obligation). Those consequences include an obligation to cease the act, and to provide for remedies such as restitution and compensation and countermeasures.

Certain circumstances can justify a breach of an international obligation, precluding the wrongfulness of the act. (To be clear, if a breach of an international obligation is not "wrongful" that does not mean that no breach took place; it simply means that the consequences provided for in the Articles do not follow the breach.)

¹¹⁸ The Articles were commended to the attention of Governments by the United Nations General Assembly. See UNGA Res 56/83, Responsibility of States for Internationally Wrongful Acts (28 January 2002) UN Doc A/RES/56/83, Annex.

Force majeure

In the event of force majeure a breach of an international obligation will not be wrongful. Article 23 provides that force majeure is the “occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation”. It is extremely difficult to establish force majeure because of the stringency of the test in Article 23, and in any event it is clear -without further discussion- that it is not materially impossible for the EU to comply with Article 9(3) and (4) of the Convention.

Necessity

Article 25 allows for a State to invoke necessity as a ground for precluding the wrongfulness of an act, but only where the act “is the only way for the State to safeguard an essential interest against a grave and imminent peril”, which clearly does not apply in the case of the EU’s breach of Article 9(3) and (4) of the Convention as considered in case C128.

The viability of doing nothing to implement the C128 findings

The credibility of continuing to argue that the C128 findings are flawed.

It is difficult to imagine how the EU could argue with any credibility that the C128 findings are so badly flawed that there are sound legal reasons for continuing to block their endorsement at successive MOPs. The C128 findings are robust and in large part based on the C32 findings and the jurisprudence of the CJEU. The EU can hardly argue against the jurisprudence of its own court. And whilst the Union argued against the adopted C128 findings because of their reliance on C32 reasoning, the endorsement of the C32 findings by MOP 7 (including of course the EU) is a game-changer. It is no longer an option for the Union to deny the validity of the C32 findings now that they have been adopted by the MOP. There are vanishingly small grounds for the EU to fight C128 findings on legal grounds.

The credibility of long term resistance to the C128 findings

During the long deliberations on case C32, the EU continued trenchantly to argue against the validity of the Committee’s adopted findings for some years.¹¹⁹

¹¹⁹ See, for example the EU comments on the draft advice of the Aarhus Convention Compliance Committee regarding the request ACCC/M/2017/3 (EU) in case ACCC/C/2008/32 1 February 2021 at unece.org/sites/default/files/2021-02/frPartyM3_01.02.2021_comments.pdf

... there are serious concerns that the Committee disregards fundamental elements of the EU legal order flowing from the special character of the EU as a Party to the Convention, which leads the Committee to draw erroneous conclusions. The EU’s special character is recognised by the Convention and was further explained when the EU signed and later ratified the Convention. The EU has restated the need to take into account this specificity in the Declaration made at the Meeting of the Parties in Budva in 2017.

This disregard is regrettable, considering the detailed legal explanations, good faith efforts and constructive exchanges at the 25 November 2020 open session, where both the EU and the communicant had an opportunity to make their case to the Committee, and answer questions...

Doing nothing to implement the C128 findings and continuing to block them at MOP 8 would be even worse than the EU approach to C32. It would involve long term suspension of the C128 findings for a period of eight years or more, and would risk irreversible damage to the Aarhus Convention and its compliance committee at a moment in history when democratic values are under attack - even within Europe itself. The importance of the EU's response to C128 cannot be understated.

The political damage associated with a failure to comply with the C128 findings

In any event, if the EU persevered with its obstruction that would simply amplify all the concerns that have already been discussed above at some length. The Union's good faith would continue to be called into question; the EU would weaken its credibility as a champion of the rule of law, it would lose more of its moral authority in Aarhus Convention matters, and its reputation as a reliable partner in multilateral environmental law would be damaged. The Union would also continue to attract stringent criticism. Consider this intervention from the EEB at MOP 7:

With the sole exception of the C32 findings that were presented at MOP-6 in Budva, every finding of non-compliance since the Compliance Committee was established in 2002 has been endorsed by the Meeting of the Parties by consensus and therefore with the support of the EU and its Member States. There is a good reason why this should be so: the MoP established the Compliance Committee, by consensus, for the express purpose of reviewing compliance by Parties with their obligations under the Convention. The MoP has elected the members of the Compliance Committee, being 'persons of high moral character and recognised competence in the fields to which the Convention relates', again always by consensus, including with the active support of the EU.

What distinguishes it from any individual Party or any configurations of Parties is its independence. Democratic governments accept the findings of such independent bodies that they themselves have put in place even when they do not agree with them. And even while acknowledging and indeed stressing that the Committee is not a court, the analogy of a government that only support the decisions of a court when they do not go against the government is nonetheless apposite.

When the EU blocked the endorsement of the C-32 findings at the MoP-6 in 2017, it led to the worst crisis under the Convention since its adoption in 1998 and caused considerable damage to the EU's credibility and reputation as well as to the function of the compliance mechanism under the Aarhus Convention. The EU showed it was willing to recklessly jeopardise not only the compliance mechanism but the Convention itself in its efforts to prevent greater public accountability of the EU institutions. The EU's new proposal implies that it has learned nothing from this. If it is not rejected by the MoP, it will send a message to the world that there is one rule for the EU and another for all other Parties.

The arguments against blocking the endorsement of the C128 findings at MOP 8, and doing nothing to implement them, are tellingly powerful, and it is imperative that the EU's internal deliberations allow it to find a way of complying with the findings and taking the necessary measures – either the amendment of the Aarhus Regulation or the adoption of new legislation – to comply with them.

Part IV: the options available for responding to case C128

Recommendations of the Committee

As we have seen, in case C128 the Committee proposed a MOP recommendation that *“the Party concerned take the necessary legislative, regulatory and other measures to ensure that the Aarhus Regulation is amended, or new European Union legislation is adopted, to clearly provide members of the public with access to administrative or judicial procedures to challenge decisions on State aid measures...”*.

The Committee’s recommendation therefore contains two alternatives: first, the amendment of the Aarhus Regulation and second, the adoption of new legislation to provide for access to justice.

Of the two, the amendment of the Aarhus Regulation is the most straightforward and simple, although there are some complications with respect to Article 106 TFEU which will be discussed below.

The second alternative is intangible because it is open-ended. In theory there may be any number of ways to legislate to provide members of the public with access to administrative or judicial procedures to challenge State aid decisions. It is difficult to anticipate quite how the EU might chose to legislate if it were not to amend the Aarhus Regulation. Nonetheless, one possibility, which is considerably less attractive than amendment of the Aarhus Regulation, will be discussed below.

Amendment of the Aarhus Regulation

Article 10(1) of the Regulation allows for access to justice by providing for internal review of an “administrative act”, or “administrative omission” within the meaning of Article 2(1)(g) and (h) respectively. But Article 2(2) provides for a number of exclusions from the definition of administrative acts and omissions:

Administrative acts and administrative omissions shall not include measures taken or omissions by a Community institution or body in its capacity as an administrative review body,¹²¹ such as under:

¹²¹ This general exception of administrative review bodies is inconsistent with the Aarhus Convention. As the Compliance Committee has found in paragraph 110 of its findings on case C32 -

Article 9, paragraph 3, of the Convention provides for access to administrative or judicial procedures, but the tail to article 2, paragraph 2, of the Convention excludes from the definition of “public authority” “bodies acting in a judicial or legislative capacity”, but not bodies acting in the capacity of an administrative review body. The conclusion that must be drawn is clear: the Convention distinguishes between judicial and administrative procedures, and excludes public authorities only when they act in a judicial capacity, but not when they act by way of administrative review.

Referring to its earlier jurisprudence, the Committee returned to this issue when considering whether the Commission acted as a “public body” within the meaning of the Convention when it acted under Article 108 TFEU; in paragraph 107 of its findings in case C128 the Committee said -

...without examining in detail whether the acts and omissions of each of the procedures listed in article 2 (2) of the Aarhus Regulation should be subject to challenge under article 9 (3), the Committee makes clear, that contrary to what the Party concerned claims, there is no general exception in article 2 (2) of the Convention for decisions taken by administrative review bodies..

That said, this paper will be confined to a discussion of the options available to comply with the findings in case C128, and will not explore the more general exemption of administrative review bodies from the scope of the Aarhus Regulation.

- (a) Articles 81, 82, 86 and 87 of the Treaty (competition rules);
- (b) Articles 226 and 228 of the Treaty (infringement proceedings);
- (c) Article 195 of the Treaty (Ombudsman proceedings);
- (d) Article 280 of the Treaty (OLAF proceedings).

The applicability of Article 2(2)(a) to competition rules

The scope of Article 2(2)(a) of the Aarhus Regulation refers to the Articles in the Treaty Establishing the European Community (TEC). But the TEC has, of course, been superseded by the Treaty on the Functioning of the European Union (TFEU), which means the Article numbers referred to are obsolete. A list of the equivalent Articles in the TFEU appears below.

TEC Articles	TFEU Articles
Article 81	Article 101
Article 82	Article 102
Article 86	Article 106
Article 87	Article 107

The scope of Article 2(2)(a) is broad: not only does it exclude decisions under Article 108(2) of the TFEU from administrative acts,¹²² it also excludes measures and omissions covered under a number of provisions of the TFEU competition chapter. Articles 101, 102 and 106 TFEU are in Section 1 of that Chapter, which includes rules applying to undertakings, and Article 107 is in Section 2 (Aids granted by States).

What amendments to the Aarhus Regulation are required?

If the EU decides to amend the Aarhus Regulation in order to address the concerns expressed in the C128 findings, it will be necessary for the Union to provide access to justice to members of the public to challenge Commission State aid decisions. This has two components. First it will be necessary to amend Article 2(2)(a) to exclude the exception related to Article 107 TFEU (Article 87 TEC). Second, it will be necessary to amend Article 2(2)(a) to exclude at least part of the exception related to Article 106 TFEU (Article 86 TEC).

Exclusion of the exception related to Article 107 TFEU (Article 87 TEC)

This can be dealt with briefly, although it is one of the most important parts of the paper: **in order to address the concerns in the C128 findings by amendment of the Aarhus Regulation, the reference, in Article 2(2)(a) of the Regulation, to Article 107 TFEU (Article 87) must be deleted.**

¹²² As a matter of fact, decisions under Article 108 TFEU are not expressly excluded by Article 2(2)(a) because neither that Article, nor its predecessor Article 88 TEC, is listed in Article 2(2)(a) of the Aarhus Regulation. Nevertheless it seems prudent to ignore this omission because in case C128 it was common ground between the communicants and the Party concerned that Article 2(2)(a) excludes Commission decisions on State aid under Article 108 (2) TFEU from the definition of acts and omissions that may be subject to a request for review by an NGO under Articles 10–12 of the Aarhus Regulation.

Exclusion of at least part of the exception related to Article 106 TFEU (Article 86 TEC)

Paragraphs (1) and (2) of Article 106 TFEU (Article 86 TEC) provide as follows:

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

Where the Commission makes a decision with respect to the compatibility of the internal market of a State aid to a service of general economic interest (SGEI) within the meaning of Article 106(2) TFEU, that decision is made under Article 108(2) TFEU, which is expressly applied to SGEIs by Article 106(1) TFEU.

It follows that when the Compliance Committee found that “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 that contravene European Union law relating to the environment, the Party concerned fails to comply with article 9 (3) of the Convention” that finding related, inter alia, to SGEI State aid decisions.

What is more, the Compliance Committee findings in case C128

- that State aid decisions are “acts” under Article 9(3) of the Aarhus Convention, and
- that State aid decisions may “contravene provisions of national law relating to the environment” within the meaning of Article 9 (3) of the Aarhus Convention

must apply to State aid decisions relating to SGEIs.

In short, there is no lawful reason to exempt SGEI State aid decisions from the access to justice requirements of the Aarhus Convention.

It follows that the exception, in Article 2(2)(a) of the Aarhus Regulation, of Article 106 TFEU (Article 86 TEU) is inconsistent with the findings of the Compliance Committee, insofar as that exception relates to the rules related to aid granted by states, namely the rules in Articles 107 to 109 TFEU (Articles 87 to 89 TEC).

Accordingly, in Article 2(2)(a) of the Regulation, the exception relating to Article 106 TFEU (Article 86 TEU) should either be deleted entirely, or should be retained with express provision to the effect that it does not apply with respect to the rules in Articles 107 to 109 TFEU (Articles 87 to 89 TEC).

Adoption of new EU legislation to implement Article 9(3) and (4) with respect to decisions on State aid measures

There will be no long conjectural discussion here of the ways in which new EU legislation could address the C128 findings. This is for two reasons. First, the number of theoretical possibilities is large. Second, the easiest and clearest way to address the C128 findings is to amend the Aarhus Regulation, and it may well be the case that if the Union decides to comply with those findings, that it will amend the Regulation.

Nevertheless, the procedural Regulation was considered in case C128. In particular, and as we have seen, the Compliance Committee considered the predecessor of Regulation 2015/1589 - namely Regulation 659/1999 - and found that it did not provide the possibility to challenge a Commission's decision, since the complaint mechanism merely authorises the complainant to ask the Commission to take action i.e. investigate an aid measure.

It may therefore be worthwhile to discuss the viability of the amendment of that Regulation; and in particular the challenges and disadvantages that could be associated with such an amendment.

Procedural issue: the exclusion of the European Parliament as co-legislator.

Any amendment of the procedural Regulation would have a legal base of Article 109 TFEU, and would therefore be adopted using the special legislative procedure, which would mean the exclusion of the European Parliament as co-legislator. That would be unfortunate for two reasons.

First, the directly elected Parliament should act as co-legislator with respect to legislation addressing an access to justice and environmental democracy deficit in the EU; the EP should not be relegated to a mere consultative role.

Second, the EP has consistently championed the importance of implementing the Aarhus Convention in general, and complying with the findings of case C128 in particular; and should not be marginalised because any exclusion of the EP as co-legislator would make it less likely that the concerns in the C128 findings would be fully addressed.¹²³

¹²³ It is also worth noting that if the EU decided to implement the C128 findings by amending the procedural Regulation, the Union would eschew the opportunity to make other amendments to the Aarhus Regulation that are necessary but not entirely within the scope of the C128 findings. For example, the general exception of administrative review bodies at large in Article 2(2) of the Aarhus Regulation is inconsistent with the Aarhus Convention. As the Compliance Committee has found in paragraph 110 of its findings on case C32 -

Article 9, paragraph 3, of the Convention provides for access to administrative or judicial procedures, but the tail to article 2, paragraph 2, of the Convention excludes from the definition of "public authority" "bodies acting in a judicial or legislative capacity", but not bodies acting in the capacity of an administrative review body. The conclusion that must be drawn is clear: the Convention distinguishes between judicial and administrative procedures, and excludes public authorities only when they act in a judicial capacity, but not when they act by way of administrative review.

Legal issues

In the event of any amendment of the procedural Regulation, at the very least two provisions of that Regulation will need to be considered: Articles 1(h) and 24(2). The latter will be discussed first.

Art. 24(2) procedural Regulation

Article 24(2) provides:

Any interested party may submit a complaint to inform the Commission of any alleged unlawful aid or any alleged misuse of aid...

The Commission shall send a copy of the decision on a case concerning the subject matter of the complaint to the complainant.

In the event of a complaint under Article 24(2) of the Regulation, it is for the Commission to decide whether there are sufficient grounds to take a view on the information received. Article 1(h), which will be discussed later, defines interested party.

The complaints mechanism merely allows a complainant to ask the Commission to take action i.e. investigate an unlawful aid measure (which has not been examined by the Commission) or a misuse of aid by the beneficiary or the State (after the Commission has authorised the aid). After a complaint, the Commission controls the Article 24(2) process and makes a decision itself. Article 24(2) does not provide for an administrative or judicial procedure to challenge a State aid decision by the Commission, but merely provides a mechanism for formal complaints – to be determined by the Commission itself – for interested parties. For these reasons, the Compliance Committee found that the equivalent of Article 24(2) does not allow an interested party to challenge a State aid decision by the Commission that contravened environmental law.

It follows that if the Union is to use Council Regulation 2015/1589 as a means to implement Article 9(3) and (4) of the Convention, an amendment of Article 24(2) - and/or a replacement of, or supplement to that provision - will be required because as it stands Article 24(2) is a wholly inadequate for the purposes of implementing Article 9(3) and (4) of the Aarhus Convention.

It is also worth bearing in mind that any amendment to or replacement of Article 24(2) would raise difficult policy questions for the Union. The amendment/replacement would need, amongst other things, to provide to access to justice to members of the public to challenge State aid decisions that contravene provisions of EU environmental law. That would raise a policy question: would members of the public also be given access to justice to challenge State aid decisions that contravened other (i.e. non-environmental) provisions of EU law? Or would there be a two-tier regime, with stronger rights (under the amendment/replacement) for breaches of environmental law, and a weaker regime with respect to non-environmental law?

“Interested party”: Article 1(h)

In the event of an adequate amendment/replacement of Article 24(2), it would be necessary to consider the scope of Article 1(h) of the 2015 Regulation, which provides:

(h) ‘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.

In case C128, the Compliance Committee did not need to consider whether the definition of “interested party” was sufficiently broad to implement Article 9(3) and (4) of the Convention, because it found that the complaint procedure provided by Article 20(2) of Regulation 659/1999 – the equivalent of Article 24(2) of Regulation 2015/1589 – was inadequate to offer judicial or administrative review. The Committee left open the question of whether environmental NGOs fell within the scope of Article 1(h). In paragraph 117 of its findings, the Committee said:

...even if an environmental NGO is indeed recognized to be an “interested party” under article 1 (h) of Regulation 659/1999, a mere right to ask for a formal investigative procedure by the Commission under article 108 (2) TFEU does not meet the requirements of article 9 (3) of the Convention...

Nevertheless, if the EU is to comply with the C128 findings, it will need to give access to justice to members of “the public” (i.e. to “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups” – see Article 2(4) of the Aarhus Convention) in order to meet the requirements of Article 9(3), which requires Parties to “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...”.

At first glance, Article 9(3) appears to give a wide discretion to Parties to establish criteria in national law that members of the public must meet in order to enjoy access to justice. But, as the Compliance Committee has found, that margin of discretion is not unlimited. For example, in its findings on communication ACCC/C/2005/11 (Belgium), the Committee considered the criteria for standing under Article 9(3) and held that:

The Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action (actio popularis) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment.

Accordingly, the phrase “the criteria, if any, laid down in national law” indicates a self-restraint on the parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception. One way for the Parties to avoid a popular action (“actio popularis”) in these cases, is to employ some sort of criteria (e.g. of being affected or of having an interest) to be met by members of the public in order to be able to challenge

a decision. However, this presupposes that such criteria do not bar effective remedies for members of the public. This interpretation of article 9, paragraph 3, is clearly supported by the Meeting of the Parties, which in paragraph 16 of decision II/2 (promoting effective access to justice) invites those Parties which choose to apply criteria in the exercise of their discretion under article 9, paragraph 3, "to take fully into account the objective of the Convention to guarantee access to justice."¹²⁴

Suppose, then, the EU decided to implement the findings in case C128 by providing access to justice to "interested parties" in order to implement Article 9(3) of the Convention. Would this effectively bar all or almost all environmental organisations from challenging acts and omissions?

The views of the EU, and of ClientEarth (who intervened) on the breadth of the meaning of "interested parties" was set out in paragraphs 71 and 72 of the C128 findings:

71. Concerning the possibility of "interested parties" to complain to the Commission so as to trigger a formal investigative procedure under article 108 (2) TFEU, ClientEarth notes that the Commission has interpreted "interested parties" under article 1 (h) of Regulation 659/1999 to exclude NGOs and to cover only those persons whose market position or that of their members can be affected. Even more narrowly, on 3 May 2018, the European Ombudsman held that, in order to be considered an "interested party" under article 1 (h) of Regulation 659/1999, "one needs to demonstrate that the alleged State aid affects one's competitive position or that of the persons or firms one represents".

72. The Party concerned [i.e. the EU] contests that only persons whose market position has been affected can be "interested parties" under article 1 (h) of Regulation 659/1999. It provides examples where the Commission initiated an investigative procedure under article 108 (2) TFEU on the basis of complaints by, among others, an association of tenants, an association of electricity consumers and a local environmental NGO.

In the light of those observations, providing access to justice for "an interested party" (as interpreted by the Commission) to challenge State aid decisions would be too narrow a criteria for standing for the purposes of Article 9(3) of the Convention. It is common ground that an interested party must be someone whose market position has been affected; this is not consistent with the presumption of access to justice, or the objective of the Convention to guarantee access to justice.

Moreover, it would be difficult for the Union to justify a standing criterion for challenges to State aid decisions, as it is currently applied, that would be considerably less liberal than the criteria used in the amended Aarhus Regulation, which, for example, provides for standing for independent non-profit-making organisations that have the primary objective of promoting environmental protection in the context of environmental law (provided other conditions about the time it has been in existence and its objectives and activities are met) and also, in certain circumstances, for members of the public which have sufficient public interest.

In short, providing for access to justice for "interested parties" within the meaning of Article 1(h) of Regulation 2015/1589 as interpreted by the Commission, would be too narrow to meet the requirements of Article 9(3) of the Convention with respect to standing.¹²⁵

¹²⁴ ECE/MP.PP/C.1/2006/4/Add.2, para. 35 and 36.

¹²⁵ For an analysis of the words "interested parties", and a recommendation of an amendment of Article 1(h) of the procedural Regulation, see pages 14 and 15 of Competition policy supporting the Green Deal, ClientEarth, November 2020 at clientearth.org/media/kthkuhb4/clientearth-reply-to-call-competition-policy-and-green-deal_20-11-2020.pdf

Conclusion

Whilst the implications of case C128 are significant and complex, the Union has a simple and effective option to respond to the case. This option - amendment of the Aarhus Regulation - was recommended by the Compliance Committee and proposed by the European Parliament over a year ago. Any properly designed amendment will meet the concerns expressed by the Committee in its findings.

Annex: Examples of energy transition and climate risks imposed by State aid

Price regulation and capacity subsidies

Market interventions, such as capacity mechanisms (which grant power plants “availability” payments, in addition to their wholesale energy revenues, for being on stand-by) and price caps, have the potential to mask the true cost of polluting fossil fuel energy generation, deterring investment in less polluting alternatives and preventing customers from realising the full value of energy efficiency and demand-side flexibility to manage and optimise energy consumption.

In addition, wholesale price floors prevent negative pricing, which could otherwise reward flexible customers for increasing electricity consumption at times of peak wind or solar generation, reducing grid congestion and fully utilising renewable generation assets.

These interventions undermine climate law objectives because phasing out fossil fuels and quickly ramping up demand-side resources (including energy efficiency, flexibility and onsite renewables) are essential to achieving a net zero emissions energy system (and a nearly zero emissions power system) by 2050.

Energy capacity subsidies (including capacity mechanisms), are often designed in ways that favour conventional fossil generation over less established, cleaner demand-side solutions. For example, the UK capacity market - the UK government’s policy for ensuring security of electricity supply - was intended to be technology neutral, but the original design explicitly limited demand-side capacity to one year contract lengths (regardless of capital expenditure), while new fossil gas generation was granted up to 15-year contracts. It also implicitly favoured fossil generation by imposing a minimum size threshold for entry to the scheme of 2MW – a size threshold that can easily be met by generators, but which aggregators of small-scale demand-response capacity claimed posed a serious barrier to entry for them. The UK Government amended the scheme in 2020¹²⁶ in an attempt to reduce barriers for cleaner demand-side resources, following a successful application by a demand-side flexibility innovation company to challenge a Commission State aid decision.¹²⁷

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²⁶ Capacity Market: Government response to consultation on future improvements, UK Government, May 2020. assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886147/Future_improvements__emission_limits_and_coronavirus_easements_-_government_response_to_consultations.pdf

¹²⁷ Case T-793/14 Tempus Energy Ltd and Tempus Energy Technology Ltd v Commission, ECLI:EU:T:2018:790 at curia.europa.eu/juris/document/document.jsf?text=&docid=207792&doclang=EN

Aid for energy infrastructure

State aid for energy infrastructure that rewards hydrogen readiness risks prematurely backing a technology that is still unproven on environmental (and cost) grounds, at the expense of cleaner, more efficient technologies, which would allow us to achieve climate neutrality faster.

Current evidence suggests that producing renewable, so-called “green” hydrogen from electrolysis for domestic usage is extremely wasteful compared with using renewable power directly to run electric heat pumps or electric vehicles. It takes about five times more wind or solar electricity to heat a home with hydrogen than it takes to heat the same home with an efficient heat pump.¹²⁸

This concern is amplified when aid is awarded to energy infrastructure that may perpetuate the use of fossil fuels, including hydrogen that is not from renewable sources. Such aid has the potential to distort the market in favour of fossil-based options and lock in potentially unneeded expensive infrastructure for longer.¹²⁹

This is a new category of State aid and the impact is yet to be seen. Environmental advocates have expressed concerns that the CEEAG safeguards may not be applied in a way that undermines climate targets and avoids stranded assets.¹³⁰ Given the vested fossil fuel interests, their national lobbying capacity and the political pressure on Member States to act fast in relation to Russia, accountability and access to justice will be of the utmost importance, to limit environmental harm caused by these imminent and crucially important State aid decisions.

Cost exemptions for energy intensive users

Some State aid measures exempt industrial energy intensive users (EIUs) from paying their full share of energy costs and policy levies. This increases the burden on the remaining customer base, resulting in higher household costs which exacerbates energy poverty and risks public backlash against the clean energy transition. Moreover, policy levies are often imposed on electricity bills rather than gas bills. Leaving households with a larger share of these costs creates a disincentive for electrification – and decarbonisation - of end uses such as heat.

Currently, EIUs are the consumer group with the largest ready-to-use technical demand-side flexibility potential. State aid measures which exempt EIUs from paying a proportion of energy costs inevitably reduce or remove price signals for efficiency and flexibility. This undermines climate goals. EIUs should be rigorously incentivized to be flexible and price-responsive, to reduce imported gas dependence, integrate variable renewables and lower energy emissions – all of which is essential to achieving climate neutrality in industrial and energy sectors by 2050.

¹²⁸ Calcea, N. (2020, 16 September). Heat pumps are on the rise in Europe. Energy Monitor. energymonitor.ai/sector/heating-cooling/heat-pumps-are-on-the-rise-in-europe; Keating, D. (2020, 16 September). Who's slowing down the electric car? Energy Monitor. energymonitor.ai/sector/transport/whos-slowing-down-the-electric-car; Agora Energiewende (2019). Heat decarbonisation, energy efficiency, and sector integration. agora-energiewende.de/en/projects/heat-decarbonisation-energy-efficiency-and-sector-integration/; Rosenow, J. (2020, 30 September). Heating homes with hydrogen: Are we being sold a pup? Regulatory Assistance Project. raponline.org/blog/heating-homes-with-hydrogen-are-we-being-sold-a-pup/

¹²⁹ The term ‘lock in’ is not defined in the CEEAG so there is not a clear set of guidelines for Member States or the Commission to deal with this issue.

¹³⁰ For example, see p.9 of ClientEarth’s Briefing on the CCEAG, The new State aid guidelines for climate, environmental protection and energy 2022, December 2022. clientearth.org/latest/documents/briefing-on-the-ceeag/

Given the inherent risks of EIU cost exemptions, it is essential that, where such aids remain in place, a robust connection is made between the award of exemptions and commitments to reduce fossil energy consumption and increase energy efficiency and flexibility. In March 2022, the Commission released a Communication on a Temporary Crisis Framework for State aid measures to support the economy following the invasion of Ukraine.¹³¹ The Communication proposes new categories of aid for industrial energy customers, including energy cost relief for EIUs. It is notable that the “requirements related to environmental protection or security of supply” listed at paragraph 24 of the Communication are simply exhortatory: Member States are merely “invited to consider” imposing such requirements when introducing national aid schemes. This leaves it open for national emergency measures to be introduced as State aids without ensuring sufficient safeguards to mitigate adverse environmental impacts.

Aid to accelerate fossil plant closure

In general, undertakings should not be compensated for, or sheltered from, poor investment decisions in the face of climate science. Such protection for undertakings is not aligned with the polluter pays principle and reduces incentives for others to be socially responsible and to take timely action to manage climate and other risks. Many energy companies have failed to protect shareholders, workers and the public from climate risks (including stranded asset risks) which have been known about for decades. Communities may need support through the transition with dedicated funding, but this support should be given to citizens not energy companies.

Nevertheless the necessary speed of energy market decarbonisation means that high-carbon generation that may appear in the short term to be economic will have to be shut down progressively to accommodate the accelerated expansion of zero-carbon resources and to achieve climate targets. This may justify State aid measures, allocated through a transparent, non-discriminatory and competitive process. It is, however, imperative that any payment schemes to incentivise early fossil fuel exit should only be granted to genuinely profitable companies, not failing plants, and that subsidies should be limited in time and scope to the minimum intervention necessary.

Badly designed schemes may create incentives for fossil plants to remain in the market longer than would otherwise be economically viable in the anticipation of being paid off. Such schemes also use public funds that would be better spent supporting clean alternatives, for example energy efficiency. State aids for fossil fuel phase out should be the last resort; regulatory portfolio standards for the orderly and prospective phase out of fossil energy, combined with the proposed ETS carbon pricing reform, should be used in the first instance. Member States should also be required to have fully implemented market measures under the Clean Energy for All Package, before applying for aid. Again, the policy design and enforcement of such safeguards are important to get right, to minimise energy market distortions that undermine cleaner energy resources and climate objectives.

¹³¹ European Commission, C(2022) 1890 final, Brussels, 23 March 2022. eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CI.2022.131.01.0001.01.ENG



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Alistair McGlone is an international environmental law consultant, currently working with the European Climate Foundation on access to justice and climate change. He has for many years been involved with the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access To Justice In Environmental Matters: he was a member of the Convention's Compliance Committee and the curator on two cases (cases C32 and C123) that related to whether the European Union complied with its obligations concerning access to justice; he was the head of the UK delegation during the negotiation of the Convention; and he also chaired a number of negotiating groups, including the one that set up the Compliance Committee. He had a long career as a UK official, which included being a Legal Director at UK Department of the Environment and the head of its international law team.

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