ClientEarth

August 2024

Access to justice for state aid decisions contravening environmental law

A legal Q&A for debunking concerns

Background

In March 2021, the Aarhus Convention Compliance Committee, the United Nations body with authority to interpret the Aarhus Convention[1], found the EU in breach of the Aarhus Convention for failing to provide access to justice to the public and environmental NGOs against Commission's state aid decisions breaching environmental law.[2] This conclusion immediately follows a groundbreaking judgment from the Grand Chamber of the Court of Justice of the EU (CJEU) of September 2020 spelling out for the first time that state aid is incompatible with the internal market if the measure or economic activity breaches environmental law and principles; and that the Commission must necessarily check compliance as part of the assessment of the aid measure.[3]

The Compliance Committee recommended that administrative or judicial procedures become available to the public and NGOs for challenging such state aid decisions contravening environmental law. The EU is compelled to comply with these recommendations by international law and EU law.[4]

After a series of public consultations[5], the Commission issued a Communication on 17 May 2023 acknowledging that EU law has to change and that a procedure granting the public access to justice in the matter is necessary.[6] The Commission initiated another round of public consultations in June 2024[7] for the general public, business and public authorities, which should lead to a Staff Working Document and a proposal by the second quarter of 2025.

This Q&A aims at debunking misconceptions about what an access to justice regime would change.

[1] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

[2] Communication ACCC/C/2015/128 was brought by Oekobüro and Global 2000 in 2015. ClientEarth contributed as observer. Submissions and findings are available at: https://unece.org/env/pp/cc/accc.c.2015.128_european-union

[3] Judgment of 22 September 2020, C-594/18P, *Austria v. Commission (Hinkley Point C*)

[4] Article 216(2) TFEU

[5] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13462-Aarhus-Convention-Compliance-Committee-case-on-State-aid-implications-options_en

[6] Commission Communication of 17 May 2023 on the findings adopted by the Aarhus Convention Compliance Committee in case ACCC/C/2015/128 as regards state aid: Analysing the implications of the findings and assessing the options available, COM(2023) 307 final

[7] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14276-EU-environmental-and-State-aid-law-access-to-justice-in-relation-to-State-aid-decisions-regulation-_en

Questions & Answers

***Note to the readers**: this Q&A assumes general knowledge of state aid law and of access to justice rights guaranteed to the public in environmental matters by the Aarhus Convention. Please feel free to consult ClientEarth's two guides on state aid law and on access to justice, as needed.*

[Basic questions]

1. Why does the public need access to justice to challenge state aid decisions?

The EU is founded on the principle of the rule of law.[8] The Charter of Fundamental Rights provides that "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to and effective remedy before a tribunal*…".[9] In its landmark ruling *Les Verts*, the Court proclaimed that "*the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty* …".[10]

EU law requires that aid measures or economic activities benefitting from state aid comply with environmental law. [11] This derives from the principle of integration of environmental protection requirements into the definition and implementation of EU policies set by Article 37 of the EU Charter of Fundamental Rights and Article 11 TFEU.

A 2019 Commission report estimated the cost of poor implementation of EU environmental law at around €55 billion a year.[12] Whereas any person who has standing at the Court of Justice could already allege that a state aid decision contravenes environmental law, those arguments are generally not made by competitors, who naturally focus on more traditional competition law arguments. The public and environmental NGOs acting in the public interest are thus the best placed to raise violations of environmental law that would otherwise be under the radar.

However, there is currently no access to justice for the public and NGOs to hold the EU accountable for state aid decisions that breach environmental law (see Q2 below). To be in line with international law, namely the Aarhus Convention, the EU must enable the public and environmental NGOs to challenge Commission's state aid decisions that may contravene environmental law.

Therefore, designing a new administrative or judicial review procedure for the public and environmental NGOs to have access to justice in this matter is essential in order to both **comply with the Aarhus Convention** – which grants these groups a legal interest in challenging violations of environmental law – and **improve the level of compliance with environmental law across the EU.**

[8] Article 2 of the Treaty on European Union
[9] Article 47 of the EU Charter of Fundamental Rights
[10] Judgment of the Court of 23 April 1986, *Parti écologiste "Les Verts" v European Parliament*, Case 294/83, ECLI:EU:C:1986:166, para. 23
[11] See CJEU (Grand Chamber) judgment of 22 September 2020, *Austria v. Commission (Hinkley Point C)*, C-594/18P, paragraphs 44-45 and 100
[12] European Commission, Directorate-General and Milieu, *The costs of not implementing EU environmental law study : final report*, Publications Office, 2019, https://data.europa.eu/doi/10.2779/192777

2. Isn't there already access to justice against Commission's state aid decisions?

Not widely.

Under EU law, Commission's state aid decisions can be challenged:

- Through a direct action for annulment of the decision before the CJEU (Article 263 TFEU). Such actions are open to Member States and to interested parties such as an aid beneficiary, a competitor or a trade association, who justifies being directly (for aid schemes) or directly *and* individually (for individual aid measures) concerned by the grant of aid;
- Indirectly through a reference for preliminary ruling on the validity of a Commission's state aid decision, referred to the CJEU by a national court if that question is relevant to rule on a litigation pending before that national court (Article 267 TFEU).

There is no specific procedure for the public and NGOs to directly or indirectly challenge a state aid decision and the general procedure is not generally available to them. Indeed, the admissibility standard before the CJEU – to be directly (and individually) concerned is so high that in practice, it excludes NGOs who represent a public, not a private interest. No environmental NGO was ever found admissible to directly challenge a state aid decision before the CJEU. The threshold is also very high to intervene in an action brought by a third party, even though some local NGOs have been found admissible to do so in specific cases.[13]

The possibilities for the public and NGOs to bring an action at national level vary but are virtually inexistent in a large number of Member States due to admissibility requirements[14] and there may be additional obstacles such as procedural costs to factor in. Furthermore, even if an NGO is found admissible, there is no guarantee that the national court will refer a question on the validity of a Commission's state aid decision to the CJEU. In any case, an action at national level is not a substitute for a direct action at EU level, according to the Compliance Committee.[15]

Due to these gaps in the EU judicial system, the Compliance Committee found that EU law does not provide access to justice to the public and NGOs for challenging a Commission's state aid decision – and that EU law must change.

[13] For a review of the case law, see 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), at: https://doi.org/10.1007/s12027-021-00665-7

[14] ClientEarth report "Access to justice in State aid matters in EU Member States – Where do NGOs stand?" (May 2023); See also the study conducted by Milieu Consulting Ltd, to be published (https://www.milieu.be/public-participation-and-access-to-justice-in-environmental-matters-in-the-eu-member-states/)

[15] ACCC/C/2015/128 (European Union), para. 123-124

3. Would NGOs be able to challenge any and all state aid?

No. The Aarhus Convention only requires that decisions that may contravene environmental law can be challenged.

It is **not enough that the Commission authorises an aid for an environmentally-harmful activity if that activity complies with the law** (e.g. aid for the restructuring of a gas plant, or for the development of an airport or a chemicals plant which otherwise complies with environmental law).

An administrative review procedure is a legal procedure requiring to **evidence that the law is breached – not only that the environment is harmed.**

The Compliance Committee recommended that EU law provides for access to justice without distinguishing the type of aid measures or the economic activities they support. The issue is thus not limited to the energy sector or to aid measures that relate to the environment.

4. What about the internal market objectives?

The CJEU confirmed in the *Hinkley Point C* ruling[16] that compliance with EU environmental law of aid measures and of the economic activities benefitting thereof **is a condition of compatibility of an aid measure with the internal market**. The Commission must thus check that the measure and the activities comply with environmental law. When it is not the case, the Commission must declare the aid incompatible "*without further examination*". This stems from the principle of environmental integration set by Article 37 of the EU Charter of Fundamental Rights and Article 11 TFEU.

Compliance with environmental law – as well as with EU law in general[17] – is **thus an integral element of compatibility of the aid with the internal market.** In a state aid compatibility assessment, **this element matters as much** as whether the aid is necessary, appropriate, proportionate and does not distort competition to an extent that is not compatible with the common interest – which are some of the other general compatibility criteria of aid measures already assessed by the Commission.

5. Should one fear an increase of litigation?

Moderately. It is undeniable that granting the public and NGOs access to justice will increase risks of litigation for the Commission to some extent. However, this is legitimate in an EU based on the rule of law: (i) it is legally required by both international and EU law, (ii) EU institutions are accountable for complying with the law and (iii) it would contribute to better enforcement of both state aid law and environmental law. The Commission accepts this in its Communication of 17 May 2023.

[16] See CJEU (Grand Chamber) judgment of 22 September 2020, *Austria v. Commission (Hinkley Point C*), C-594/18P, para. 44-45 and 100
[17] See e.g. Judgment of 15 April 2008, *Nuova Agricast Srl v Ministero delle Attività Produttive*, C-390/06, para. 51 (on compatibility with general principles of EU law including the principle of equal treatment).

Statistically, 96 internal review requests have been submitted to the Commission in various matters since the EU Aarhus Regulation was adopted in 2006[18]: this is an average of 5.3 per year. Since November 2021, when administrative acts of general scope became subject to review, 48 requests were filed against only 26 Commission administrative acts. Out of the 14 that were filed against acts supporting wind-power, 13 were found *inadmissible* by the Commission. The large majority of the requests target the approval of toxic active substances in breach of EU chemicals regulations and the polluter pays principle, as well as support to fossil fuels in contravention of the climate targets.

By comparison, an average of 2500 state aid decisions have been adopted by the Commission each year between 2006 and 2024.

6. How can we mitigate risks of litigation?

Risks can be mitigated by ensuring that aid measures are assessed adequately against environmental law. Confirming compliance of the measure or of the supported activity **early on** in the notification process is a good practice and will be key to ensuring that final state aid decisions are lawful. This can primarily be done by aid beneficiaries and public authorities, ensuring they collect all relevant information when notifying an aid measure to the Commission; and by the Commission when assessing the measure.

Increasing transparency of the process would also help the public and NGOs to identify possible errors early in the process and call on their Member State or the Commission to correct any breach before the state aid is approved, thereby preventing future litigation. Transparency can improve (i) at national level, by publishing information on aid measures and consulting the public more widely on important measures; and (ii) at EU level, by publishing summaries of notification forms (redacting confidential business information), as it is done for instance in merger cases.[19]

[18] As of 25 July 2024, as reported in the Commission's repository.
[19] See also Code of best practices for the conduct of the state aid procedure, para. 44 providing for the possibility to publish summaries of notifications under the streamlined procedure, although this is not being used.

[What businesses need to know]

7. Would a new review procedure delay the grant of state aid to an enterprise?

Legally speaking, no. The Compliance Committee only recommended to provide for an *ex-post* review procedure – after a decision is taken – and did not recommend that the public is allowed to intervene earlier in the procedure (although in our opinion, this would greatly facilitate the identification of potential breaches of environmental law, see Q6 above).

Under EU law, challenges of EU acts including state aid decisions **are not suspensive**.

It means that while litigation is ongoing, the decision under challenge remains in force and applies normally until it is reviewed or annulled, as the case may be.

This is equally valid for a direct action against a Commission's state aid decision before the CJEU (that Member States or undertakings can already bring); a reference for a preliminary ruling on the validity of a Commission decision (referred by a national court); or an internal review request of an act adopted by the Commission (although those are not yet available in state aid matters).

None of the options proposed by the Commission in its Communication of 17 May 2023 to address the Compliance Committee findings would be suspensive by nature (see Q13 for the options).

In practice, it implies that **the Commission will continue adopting its state aid decisions and that Member States can continue granting aid as soon as it is approved by the Commission**. **Projects can thus receive aid and go ahead immediately**. The decision of a Member State to hold granting an aid authorised by the Commission, or of a potential aid beneficiary not to apply for or to spend the aid whilst a challenge is pending, would be decisions pertaining only to the Member State or the aid beneficiary and will not be a result of any legal requirement of EU law.

A new administrative review procedure against a Commission decision will thus not impact the grant of aid from a legal point of view.

Nonetheless, additional compliance checks may be performed by the Commission during the assessment of the state aid in order to ensure its decisions are legally grounded and do not breach environmental law. **This can only improve the level of compliance and of trust in the system, in the interest of legal certainty for all – authorities, businesses and the public alike.**

8. What about legal certainty and legitimate expectations?

In basic terms, the principle of legal certainty protects vested rights and legitimate expectations of those who acted in good faith against a sudden change of legislation or against a sudden reversal or withdrawal of a decision that granted them rights.

It does not mean that an unlawful legal act may never be amended, withdrawn or annulled. It only implies that if such amendment, withdrawal or annulment affects individual rights, those rights must be protected to the extent guaranteed by law; for instance "*in certain cases in view of*

vested rights withdrawal on grounds of unlawfulness does not have a retroactive effect [but] it always takes effect from the present".[20] In state aid matters, the principle can prevent the recovery of unlawful aid, for instance.[21]

The principle of legitimate expectations cannot be an obstacle for a third party to challenge a state aid decision through judicial or administrative review, nor for the Court to annulling a state aid decision or an administrative review decision. A system of judicial or administrative review derives from the principle of the rule of law, which requires that Union acts that breach Union law, such as state aid decisions contravening environmental law, do not persist in the Union legal order (see Q1).

9. Can small and medium-size enterprises be targeted?

Whereas this is a legitimate concern given the need of SMEs for support and the administrative burden associated with the state aid procedure, the purpose of an access to justice regime is not to 'target' SMEs' business model but to ensure that environmental law is adequately enforced.

The system implies, firstly, that the request would only target breaches of environmental law. **Enterprises, however small, that comply with environmental law should not be concerned by a review procedure.**

Secondly, a review procedure at EU level would only target the EU Commission's decision to authorise an aid that contravenes environmental law. **A review request will never directly be addressed to a public authority or a company.** It is possible, nonetheless, that in reviewing the validity of its decision the Commission may need to consult the public authorities (as a primary contact point) and aid beneficiaries to gather more information – although in principle, all information should have been provided during the assessment of the aid.

Thirdly, SMEs often receive support which falls below the *de minimis* ceilings (which recently increased to 300,000 euros per 3 years[22]), in which case the amount does not qualify as 'state aid' and would be outside the scope of a review procedure. Aid received under the General Block Exemption Regulation (GBER), which constitutes the vast majority, is valid only if it does not entail a non-severable violation of Union law[23] – hence, the verifications performed by public authorities should prevent compliance issues and legal risks.

[20] See e.g. Judgment of the Court of 12 July 1957, *Dinecke Algera e.a. v Common Assembly of the European Coal and Steel Community*, Joined Cases C-7/56 and C-3/57, ECLI:EU:C:1957:7; Judgment of the Court of 1 June 1961, *Gabriel Simon v Court of Justice of the European Communities*, Case 15-60, ECLI:EU:C:1961:11; Judgment of the Court of 13 July 1965, *Lemmerz-Werke GmbH v High Authority of the ECSC*, Case 111-63, ECLI:EU:C:1965:76
[21] Article 16(1) of Council Regulation 2015/1589
[22] Commission Regulation (EU) 2023/2831 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L, 2023/2831, 15.12.2023
[23] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (consolidated version), Article 1(5)

10. Will confidential business information be disclosed during the proceedings?

In principle, no. The confidentiality of business information is well protected under EU law[24] and national law.

In particular, the CJEU established a presumption of confidentiality of the state aid file[25], meaning that third parties can have access to confidential information about a notified state aid only if there is an overriding public interest – which is a very restrictive test which has not been overcome to date. This case law already firmly applies to court challenges brought by competitors.

The state aid decisions that would be subject to challenge would be the public versions exempt from confidential business information. Besides, the review procedure will be conducted by the Commission, who already holds the relevant information about the state aid (in the notification file) or can request it on a confidential basis from the public authorities and the aid beneficiaries. The Commission and the Member States are bound by the obligation of professional secrecy.[26]

[Deep dive into the legal aspects and technicalities]

11. Would a review procedure affect the 'bilateral' character of the compatibility assessment procedure between the Commission and the Member States?

Some stakeholders argue that the state aid procedure is 'bilateral' by nature between the Commission and the Member States and this would prevent any interference from third parties.

It is correct that under EU law, the Commission and the Member States handle the notification of aid measures bilaterally, without even always involving future aid beneficiaries.[27] The Commission is empowered to ask information to or consult targeted stakeholders or the public on the compatibility of an aid measure only if it opens a formal investigation i.e. when it doubts of the

[24] See Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ L 145, 31/05/2001, p. 43-48;* Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, *OJ L 41, 14.2.2003, p. 26–32*; 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, *OJ L 264, 25.9.2006, p. 13–19*

[25] Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07, ECLI:EU:C:2010:376, paras. 58, 61-62

[26] Article 30 of Council Regulation 2015/1589. See also Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions, OJ C 297, 9.12.2003, p. 6–9

[27] The Commission assesses aid measures notified to it by a Member State on the basis of the information provided by that Member State. In this context, the Member State is under a duty of sincere cooperation with the Commission (Article 4(3) TEU) and thus should give all relevant information to the Commission on the aid measure. Pursuant to Council Regulation 2015/1589 as it stands, only the Member State can decide to involve the potential beneficiary(ies) of aid in this process.

compatibility of an aid measure. The Commission's obligation to take into account observations from third parties outside this formal process is very limited.[28]

Nevertheless, the fact that the compatibility assessment procedure generally involves only the Member State and the Commission and that the final decision is only directed to the Member State, does not affect the fact that **the decision must be lawful**.[29] **A post-decision review procedure is compatible with the bilateral character of the notification procedure** leading to a decision.

Under Article 9(3) of the Aarhus Convention, the public and NGOs have a legal interest in requesting the review of administrative acts which contravene environmental law. It is irrelevant whether these stakeholders participated in the decision-making process leading to the adoption of the relevant act (here a state aid decision). Moreover, the Compliance Committee held that "*introducing such a general requirement for standing would not be in line with the Convention*".[30]

Under EU law, to assess whether an applicant such as an undertaking (beneficiary or competitor) has standing to challenge a state aid decision, the Court does not require that this person must have participated in the state aid procedure.[31] This supports the argument that the bilateral character of the assessment procedure is irrelevant for assessing whether a final decision can be challenged.

12. Why challenge a Commission's state aid decision instead of challenging environmental law violations before national courts?

An action at EU level against a state aid decision neither excludes nor prevents an action against environmental law violations by an aid beneficiary before national courts. The two types of actions are clearly distinct in both their scope and their objectives. Whereas one action has a direct impact on the grant of aid, the other type 'only' addresses the environmental law breach.

Actions before national courts to challenge a breach of environmental law by an undertaking or a public authority are generally available to the public and NGOs in the Member States who comply with the Aarhus Convention, even though gaps in access to justice persist.[32]

The Commission's state aid decisions are administrative acts producing legal effects since they authorise the grant of aid – which would otherwise be prohibited (Article 107 TFEU). It is correct, but irrelevant to say that the Member State is not then obliged to grant the aid – it is enough, legally speaking, that the Commission has authorised it to do so.

[28] See e.g. Judgement of 2 September 2021, *Commission v. Tempus Energy Ltd and Tempus Energy Technology Ltd*, C-57/19P
[29] See CJEU (Grand Chamber) judgment of 22 September 2020, *Austria v. Commission (Hinkley Point C)*, C-594/18P, paragraphs 44-45 and 100
[30] ACCC/C/2012/76 (Bulgaria), para. 68
[31] Judgment of the Court of First Instance of 15 September 1998, *BP Chemicals Limited v Commission*, Case T-11/95, ECLI:EU:T:1998:199, para. 77; Order of the Court of First Instance of 27 May 2004, *Deutsche Post AG and DHL International Srl v Commission*, Case T-358/02, ECLI:EU:T:2004:159, para. 36
[32] See e-Justice portal at: https://e-justice.europa.eu/300/EN/access_to_justice_in_environmental_matters

The Commission is obliged, when it adopts a state aid decision, to comply with EU law. This obligation is clearly judiciable, meaning that if the state aid decision is unlawful for any reason, one must be able to challenge it before the CJEU so an unlawful decision does not persist in the EU legal order. The review of an aid decision would entail that the undertaking cannot benefit from an aid measure; but the environmental law breaches would still have to be remedied independently.

Furthermore, the possibilities for the public and NGOs to bring an action at national level against a national act granting state aid vary but are virtually inexistent in many Member States due to admissibility requirements.[33] In Germany for instance, the Environmental Appeals Act (Umwelt-Rechtsbehelfsgesetz) contains an exclusive list of acts and decisions for which environmental NGOs can seek judicial review, which does not include state aid measures. Nevertheless, when procedures exist at national level, they can be used as appropriate.

13. What are the options in EU law to grant access to justice against state aid decisions?

In its Communication of 17 May 2023 precited, the Commission proposed three options to grant access to justice in state aid matters:

- **Option 1:** amending the **EU Aarhus Regulation**[34] to enable internal review requests against state aid decisions – state aid decisions are expressly excluded from the scope of the Aarhus Regulation at the moment;
- **Option 2**: providing for a new procedure under the **Code of Best Practices for the conduct of State aid control procedures**.[35] This is a Commission's Communication without binding legal effects for third parties;
- **Option 3:** providing for a new procedure under **Council Regulation 2015/1589**, which is where most state aid control procedures are provided.[36] This is a State aid law framework and currently does not address the specific interests of the public in environmental law matters.

Options 1 and 3 offer the advantage of **both being legally binding frameworks**, which would secure legal certainty as to a new administrative review procedure to challenge state aid decisions. The review decisions adopted by the Commission pursuant to such procedure would have legal effects towards the applicants, who could then challenge such decision before the CJEU; and the rules would arguably be clear and consistent. These are essential features for complying with the Aarhus Convention.[37]

Furthermore, amending the EU Aarhus Regulation (Option 1) has the obvious additional advantage to offer legal certainty that this is a framework that complies with the Aarhus Convention. Therefore, enabling the public to challenge state aid decisions pursuant to the Aarhus Regulation would

[33] ClientEarth report "Access to justice in State aid matters in EU Member States – Where do NGOs stand?" (May 2023); See also the study conducted by Milieu Consulting Ltd, to be published.
[34] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02006R1367-20211028
[35] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0719(01)&rid=1
[36] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015R1589
[37] See ACCC's review of the EU's first progress report in ACCC/M/2021/4 (European Union), 19 February 2024, para. 32

undoubtedly comply with the ACCC findings and international law.[38] It would also be the most democratic solution given the European Parliament's involvement. Nevertheless, since state aid procedures are usually described in Council Regulation 2015/1589, this framework could also be appropriate subject to providing for a procedure that complies with the Aarhus Convention.

14. Would a complaint procedure be enough?

No.

Complaints procedures by which the public can ask the Commission to investigate a breach of state aid law or environmental law already exist under EU law. Relevant ones are (i) the complaint procedure for unlawful or misused aid set under Articles 12 and 24 of Council Regulation 2015/1589[39] and (ii) complaints for infringements of EU law stemming from Article 258 TFEU.[40]

The Compliance Committee has clarified several times that **such complaints procedures do not amount to a 'challenge' of a decision under Article 9(3) of the Aarhus Convention**.

For the Compliance Committee, "*Article 9(3) requires more than a right to address an administrative agency about an illegal activity*".[41] A mere right to ask an authority to take action does not amount to a challenge, "*especially not if the commencement of action is at the discretion of the authority*"[42] – which is clearly the case for infringement proceedings. Moreover, applicants must be able to participate in the process of review.[43] Regarding the complaint procedure for state aid specifically, the Compliance Committee held that "*a right to ask the Commission to carry out an investigative procedure under article 108 (2) TFEU is far from a right to challenge the decision consequently taken by the Commission under article 108 (2) as a result of that investigative procedure*."[44]

A complaint mechanism against a national aid measure, addressed either to national authorities or the Commission, is thus not a substitute to a challenge of a Commission's decision, as per the requirements of Article 9(3) of the Aarhus Convention.

[38] Idem
[39] https://competition-policy.ec.europa.eu/state-aid/complaints_en
[40] https://commission.europa.eu/about-european-commission/contact/problems-and-complaints/complaints-about-breaches-eu-law-member-states/how-make-complaint-eu-level_en
[41] ACCC/C/2006/18 (Denmark), para. 28 and ACCC/C/2013/85 & ACCC/C/2013/86 (United Kingdom), ECE/MP.PP/C.1/2016/10, para. 83
[42] ACCC/C/2013/85 & ACCC/C/2013/86 (United Kingdom), para. 83; ACCC/C/2015/128 (European Union), para. 116
[43] ACCC/C/2013/85 & ACCC/C/2013/86 (United Kingdom), para. 84
[44] ACCC/C/2015/128 (European Union), para. 117

For any questions or queries, please contact:

Juliette Delarue, Senior Environmental Democracy lawyer/juriste, jdelarue@clientearth.org

Catherine Derenne, State Aid lawyer/jurist, cderenne@clientearth.org