

Environmental accountability is a must for EU decision making on State Aid Guide to the Public Consultation on implementation of ACCC/C/2015/128

Summary

A UN Compliance Body, the ACCC (Aarhus Convention Compliance Committee), has [said that the EU must act](#) to increase oversight and accountability in State Aid decision making to comply with its international law obligations. The absence of mechanisms allowing NGOs and individuals to challenge decisions to offer subsidies/benefits to certain industries and projects on environmental grounds ([State Aid](#)), has left the EU in breach of international law (the [Aarhus Convention UNECE 1998](#)). The lack of environmental oversight has meant that [subsidies to fossil fuel-based industries](#) have gone [unchallenged](#). This makes the switch to renewables less competitive. The recent gas shortage and the cost of living crisis has highlighted the other dangers of fossil fuel dependence. Such oversight is required by international and indeed, EU law. **The EU Commission have opened [a public consultation survey](#) to canvass three approaches to introducing the required accountability and review mechanism. This document is a guide to navigating the survey questions.**

The deadline for responding to the [consultation](#) is Wednesday 5th October (11pm Irish Time, midnight Brussels time).

Background:

The [Winter Energy Crisis](#) has been contributed to by the failure of the EU to heed the warnings of environmental experts that we need to reduce our dependency on fossil fuels. The recent move by [Russia to cut gas supplies](#) has left Europe floundering for [alternative energy supplies](#). Disappointingly, [the response](#) has involved continuing support for gas from alternative sources as well as other fossil fuels. [Revised State Aid guidelines](#) encourage a switch away from Russian gas to either renewables or other fossil fuel sources. Continuing incentivisation of fossil fuel-based industries puts energy from renewables at a competitive disadvantage.

[State Aid](#) is when a government gives some kind of benefit to encourage a particular business or industry (like a grant or a tax break), which gives them an unfair advantage in the market, distorting competition. [This is normally not allowed](#) but Member States may avail of exceptions in pursuit of recognised objectives, through an [approval process](#) to the EU Commission. This decision by the EU Commission is currently not open to challenge or review by NGOs or citizens on environmental grounds, in breach of rights contained in an international treaty (the Aarhus Convention UNECE 1998) that the EU ratified in 2005.

State Aid decisions are deliberately excluded from the EU law mechanism through which decisions can be reviewed on environmental grounds, the [Aarhus Regulation](#) (as [amended 2021](#)), prompting criticism by a UN Compliance Body, the ACCC, last year. They highlighted that this failure breaches international law, the Aarhus Convention UNECE 1998.

ACCC/C/2015/128 or “C128” concerned the EU Commission approval of State Aid by the UK for Hinkley Point C nuclear power plant, which was sought to be reviewed on environmental grounds by FoE. Following a failed challenge before the CJEU, Okoburo submitted a complaint to the ACCC resulting in the [findings in C128](#). These findings were based on a previous set of findings, [C32](#) which found that blanket bans of whole categories of administrative decisions from environmental review breached the Aarhus Convention (on the other hand judicial decision-making or law making bodies

Please cite this document as:

Alison Hough, ‘Environmental accountability is a must for EU decision making on State Aid: Guide to the Public Consultation on implementation of ACCC/C/2015/128’, September 2022 available [here](#).

can be excluded from review). Also, CJEU [case law](#) highlights that all EU decision making, including State Aid, must comply with and be subject to environmental law rules.

The EU were called upon by the ACCC in [C128](#) to put in place a mechanism by which individuals and NGOs could challenge these important State Aid decisions on environmental ground. The EU has agreed to examine this issue and has this [opened a consultation](#). Unfortunately, the consultation is in the form of a questionnaire that steers towards a discussion of whether the rules should be changed, rather than recognising the EU is required by international law to change them and asking for suggestions on how. It is recommended that as you complete the questionnaire, you endeavour to remind the EU Commission of the requirement to comply with international law. Suggestions on how to do this are on the following page.

Practicalities: You must create an “EU Login” account to complete the survey. There are Five Sections, with 19 questions to answer. Questions 1 – 6 seek your views on existing mechanisms. From question 7 – 19 views are sought on the three options proposed by the EU Commission.

Please cite this document as:

Alison Hough, ‘Environmental accountability is a must for EU decision making on State Aid: Guide to the Public Consultation on implementation of ACCC/C/2015/128’, September 2022 available [here](#).

The Consultation Options

The Consultation presents three options for providing environmental review of State Aid decisions.

The findings in [C128](#) are clear – the EU must introduce a mechanism for allowing NGOs and individuals to review State Aid decisions of the EU Commission on environmental grounds. There is an existing review mechanism, under the [Aarhus Regulation](#) ([Regulation 1367/2006](#) as amended by [Regulation 1767/2021](#)), designed for this purpose. However, in Art 2(2)(a) of the Aarhus Regulation there is an explicit exclusion of State Aid decisions from its ambit. **The obvious and most resource efficient approach is Option 1 – removal of the exclusion of State Aid from the Aarhus Regulation.**

Option 1 – Legislative Amendment of the Aarhus Regulation

Option 1 is the option recommended by the ACCC in case [C128](#), which would involve removal of the blanket exclusion of State Aid decisions from the current mechanism for environmental review and review before the EU Courts for individuals and NGOs, the Aarhus Regulation. This option is clearly preferable as bringing matters clearly in line with the international law obligations contained in the Aarhus Convention, and only requires a simple deletion from existing legislation (Art 2(2)(a)). This approach is also in line with subsidiarity and other principles of EU Law.

Option 2 – “Guidelines” approach

This option offers to bring in a “soft” mechanism in the form of non-legislative guidelines on State Aid decisions, which would create a review mechanism. The problems with this option are:

1. The proposal is not sufficiently detailed, and is vague about what it intends to cover. This makes it hard to give a definitive analysis of its effects and impacts, and creates uncertainty.
2. It envisages potentially a narrower category of decisions for review than Option 1, potentially restricting to decisions approved under certain guidelines such as the Climate, Energy and Environmental Aid Guidelines, rather than all State Aid decisions. All State Aid decisions should comply with environmental and climate law of the EU, and therefore there is no reason for this narrow approach. The ACCC have been clear that there can be no broad category based exclusions from review ([C32](#) & [C128](#)).
3. It offers that individuals can review decisions using the review provisions contained in Art 263(4) of the EU Treaties. This is in full knowledge that this review mechanism has limitations and has only very rarely been successfully invoked by NGOs to challenge EU acts. Also it is unlikely that applicants will be able to use Art 263(4) for a decision made under non-binding guidelines, as it requires a decision that is legally binding before the right to review is triggered.
4. “Soft” guidelines are subject to change at any time by the EU Commission, and therefore the rights are not sufficiently protected & guaranteed, and their enforceability is in question. This conflicts directly with the EU’s obligations under the Aarhus Convention to enshrine access to justice rights in legislation which is explicitly stated in Art 9(2) & (3) of the Aarhus Convention.

Option 3 – legislative amendment of the procedural regulation

This is a better choice than Option 2 as it would enshrine in legislation the right of access to justice in relation to State Aid decision making. This could potentially bring the EU into compliance with the Aarhus Convention and the findings in [C128](#), if done correctly. However, again this proposal is excessively vague, making its impacts impossible to assess with any degree of certainty, and there are more potential pitfalls with this approach than with Option 1, due to the level of complexity of

Please cite this document as:

Alison Hough, ‘Environmental accountability is a must for EU decision making on State Aid: Guide to the Public Consultation on implementation of ACCC/C/2015/128’, September 2022 available [here](#).

the legislative drafting involved (compared to Option 1 which involves simple deletion, not additional drafting). The process of drafting clauses to amend the Procedural Regulation to insert the required review mechanism and associated appeal rights into the procedural regulation is a complex and difficult task. Interinstitutional negotiations result in alterations to the process. If this happens (which is quite common), it may be years before the defect is rectified, which is unacceptable. It is impossible to truly assess this option without sight of draft legislative clauses.

The Consultation Questionnaire

The following is guidance for filling in the questions in the consultation. Please do not copy and paste text, try to write it in your own words, as identical submissions will likely only count as a single submission.

Questions 1 – 6 are background information about the person submitting the consultation response, checking are they aware of existing arrangements for challenging decisions, for example through a judicial review in their national court and reference to the CJEU. This is background information and the text boxes can simply be marked n/a if you do not wish to engage with the questions in this section, which misleadingly tend to suggest there are already possibilities for reviewing EU State Aid decisions.

Question 7 – Is there a need for additional ways to challenge Commission State Aid decisions?

Answer: Yes

This question tends to suggest that there are already measures in place allowing NGOs and individuals to effectively challenge such decisions. If there was there would not be an ACCC decision finding that opportunities for such challenge are inadequate (ACCC/C/2015/128 or “C128”). Also it ignores the fact that additional measures must be introduced to bring the EU into compliance with international law (the Aarhus Convention).

Question 8 & Question 9

This question asks consultees whether they think different types of EU Commission decisions should be subject to environmental review by individuals and NGOs. This question ignores the fact that it is clearly established that all decisions should be potentially reviewable, where they contravene environmental law/cause environmental law, and that exclusion of categories of decisions is incompatible with the Aarhus Convention (as per ACCC decisions C32 Part II, and C128, para 111).

Therefore, **the answer to all the subsections of both questions is “Yes”.**

Questions 10 – Feedback on Option 1

This question asks is Option 1 (amendment of the Aarhus Regulation to remove the exclusion of State Aid decisions from the ambit of environmental review) an appropriate way to implement the findings in C128.

The answer is **Yes**.

The question then asks for the Advantages and Disadvantages of Option 1.

These include the discussion above. This Option avoids duplication of effort by bringing State Aid within the existing mechanism under the Aarhus Regulation, avoiding having to construct a new mechanism as per Option 3. The legislative amendment required is therefore much simpler, a deletion of the exclusion of State Aid. Therefore, it is a “fool proof” option that minimises the risk of inadvertent non-compliance.

Please cite this document as:

Alison Hough, ‘Environmental accountability is a must for EU decision making on State Aid: Guide to the Public Consultation on implementation of ACCC/C/2015/128’, September 2022 available [here](#).

There are no real downsides to this approach as it will bring the EU into compliance with international law.

Question 11 – Feedback on Option 2

This question asks is Option 2 an appropriate way to implement C128. This is an amendment of the current Guidelines on State Aid decisions to create a review mechanism, the outcome of which is supposed to be challengeable by way of Art 263(4) action for annulment before the CJEU.

Answer: No - for the reasons outlined under “Option 2” above, on page 2, which are the non-compliance with the requirement for legislative rights, and the uncertainty of rights of review contained in such guidelines. Additionally, the limitations on annulment procedure under Art 263(4).

Question 11(a) asks should NGOs be given the option to comment on meaningful summaries of State Aid notifications.

This would increase transparency, but could be brought in independently of any of the three options.

Answer “Yes” or “No” to this question. Its introduction will not solve the problem of non-compliance with the Aarhus Convention and implementation of the findings of C128, and has no bearing on the matters the object of the consultation. On the other hand they would enhance the transparency of the process.

Question 11(b) asks for the advantages of Option 2. There are none as it would result in illegal non-compliance with international law.

Question 11(c) asks for the disadvantages of Option 2. These are summarised above, and include lack of clarity, certainty, complexity and unnecessary and complex legal drafting. Above all, lack of compliance with international rule of law.

Questions 12 – Feedback on Option 3, which consists of amending the Procedural Regulation to create a mechanism similar to the Aarhus Regulation Mechanism.

If done correctly, in a manner that complies with the Aarhus Convention, this could be potentially a satisfactory mechanism. However, in the absence of draft legislation it is impossible to assess whether this option would comply with the Convention and the ACCC’s findings in C128. There is also the issue of duplication of effort- a mechanism that is compliant with the Convention’s requirements already exists in the Aarhus Regulation, so it seems a poor use of resources to start creating a new one. This involves a much greater level of complex legislative drafting than Option 1, which would involve simple deletion. The use of special legislative procedure mentioned would reduce the role of the EU Parliament which has been the most prominent of the three institutions in supporting access to justice. Finally, this approach mentions potentially taking a category-based approach to the types of decisions that would be reviewable, which would not be compliant with the Aarhus Convention.

Therefore this question could be answered “Yes” or “No”.

Question 12(a) Advantages of Option 3

Option 3 complies with the international law obligation to enshrine access to justice rights in legislation (Art 9(2) and (3) of the Aarhus Convention).

Question 12(b) – Disadvantages of Option 3

Please cite this document as:

Alison Hough, ‘Environmental accountability is a must for EU decision making on State Aid: Guide to the Public Consultation on implementation of ACCC/C/2015/I28’, September 2022 available [here](#).

Option 3 is impossible to assess in the absence of a draft legislative proposal. It is not yet sufficiently developed for anyone to say with certainty whether it would bring the EU into compliance with international law. Even if a compliant proposal was advanced by the EU Commission at this stage, the interinstitutional negotiations that would follow may result in a changed version that is not compliant. Option 3 seems to represent an unacceptable waste of resources in drafting a new mechanism for reviewing State Aid decisions when the Aarhus Regulation mechanism already exists and could be made applicable to State Aid decisions by deleting the current exclusion on State Aid decisions. This proposal seems to entail unnecessary complexity.

Question 13 – This question asked whether there are any other options for implementing C128, including maintaining the status quo.

It is suggested that the best answer here is “No”. There is no space to comment therefore, yes might be taken as supporting the possibility of maintaining the status quo. Doing so would leave the EU in flagrant breach of international environmental law, a situation damaging and harmful to the rule of law generally.

Question 14 – Rank the Options in terms of Access to Justice

Answer: Option 1, 3, 2, “Other”. It is suggested that they are ranked Option 1 first as the best means of ensuring Access to Justice, followed by Option 3 as possibly the next best depending on what legislation is ultimately proposed. Then Option 3 followed by Option 4 – Other approaches including maintaining the status quo. As discussed above Option 3 & maintaining the status quo would both leave the EU in breach of international law.

Question 15 – Rank in terms of EU law compliance

Answer: Options 1, 3, 2 and “Other”. As mentioned briefly the case law of the CJEU in [C-594/18P Austria v. Commission](#) makes it clear that all EU decision making, including State Aid decision making on energy projects must be in compliance with the environmental law of the European Union. No decision making can be categorically exempted. This is similar to the requirements of the Aarhus Convention that a category based ban on environmental review of decisions is flawed and non-compliant with the Aarhus Convention.

Option 1 therefore procures compliance with EU law. The EU Treaties Art 192 (Environment) and 194 (Energy) reinforce this in terms of how they frame the importance of environmental governance. [Art 194](#) measures are to be adopted ‘with regard for the need to preserve and improve the environment’ (Article 194(1)). Article 194 measures are also subject to the integration principle (Article 11 TFEU) which requires the following: ‘Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.’ This covers all of the Union’s policy area and there is no legal basis whatsoever for excluding energy related measures from this: indeed the intrinsic linkage between energy and the environment and the express requirements of Article 194(1)(c) make it obvious that the integration principle is particularly important for energy measures. Article 37 of the Charter of fundamental rights, states that ‘a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development’. Finally, it is the stated policy of the EU Commission in their [Communication on Access to Justice 2020](#) to include specific access to justice clauses in all sectoral legislation, and the commitment to improving access to justice in this note and in the [EU Green Deal](#).

Question 16 – Rank the Options in terms of Legal Certainty.

Option 1, followed by 3, 2 and “Other”. It is clear that the most efficient and clear approach would be deletion of the exclusion on State Aid from the remit of the Aarhus Regulation, allowing State Aid decisions to be challenged on environmental grounds under that existing mechanism. It is a known quantity, it has been recommended by the ACCC in

Please cite this document as:

Alison Hough, ‘Environmental accountability is a must for EU decision making on State Aid: Guide to the Public Consultation on implementation of ACCC/C/2015/128’, September 2022 available [here](#).

C128 as compliant with the Aarhus Convention, and has been approved. The legislative drafting required is extremely straightforward, particularly compared to that required by the next best option, Option 3, which would involve drafting legislation to create a new mechanism. This seems like an unnecessary duplication of effort, and carries with it the risk that the new mechanism will not be compliant. This could lead to years of litigation until the mechanism is refined and corrected. This is what happened with the original Aarhus Regulation, originally passed in 2006, but was only brought into compliance with the Convention in 2021, after years of litigation.

Option 3 Amendment to the Procedural Regulation to create a new mechanism, carries the potential risk of legal uncertainty, particularly as the proposal has not yet been developed, so it is impossible to assess it for compliance. Option 2 and Other would prolong the legal uncertainty which currently prevails and lead to continuous litigation until the situation is rectified.

Question 17 – Which Option best ensures legitimate expectations for the beneficiaries of State aid?

Answer: Option 1. This is a strange question. Legitimate expectation is the expectation companies and industries have that State Actors will follow the law. In this case EU and International law is clear that State Aid decisions should be subject review on environmental grounds. It is hard to see how changing the legal rules to fully recognise the true legal situation will have any effect on the legitimate expectation of companies that benefit from State Aid. Legitimate expectation has never been a reason not to change the law, particularly not to bring EU law into compliance with its international law obligations, as this question seems to suggest.

Question 18 - Which of the options would minimise delays in State aid decision making?

Answer: Option 1. Again this is another strange question, as the fact that it will introduce delays is again no justification for breaching international law. It almost trivialises the importance of the fundamental rights at stake here (democratic participatory rights and access to justice rights) to suggest that these are things business does not have time for, or that they are optional extras. Clearly Option 2 is framed as the speediest process, but given that it would be illegal, it will likely be beset by legal challenges immediately, and in the end lead to the opposite of speedy decision making. Therefore, the speediest legal option would seem to be Option 1. It is impossible to assess Option 3 for speed as the legislative proposal has not been made available. The “Other” option, is not really an option at all, and is also a breach of international law if it involves maintaining the Status Quo.

Question 19 - Please rank the options from most to least preferred.

Answer: Option 1, followed by 3, 2, “Other”.

Section 5 – General Comments.

It is considered important here to highlight the importance of EU compliance with international law, and Option 1 as the best approach to achieving this. Also that compliance with international law, and fundamental rights that underpin the rule of law such as access to justice and public participation in environmental decision making cannot simply be cast aside for a speedy decision making process or because the beneficiaries of State Aid feel an entitlement to by-pass the requirements of the international legal order. Finally, it might be a good place to air your views on the EU’s failure to fully implement the Aarhus Convention, the fact it took 16 years from ratification to introduce the correct version of the Aarhus Regulation, the fact that it has used/abused its voting block at the Meeting of the Parties of the Aarhus Convention to block findings of the ACCC against it in both C32 (at the 2017 MoP) and C128 (at the 2021 MoP). This is while trying to position itself as a global leader on environmental governance and claiming to set an example for other countries in term of environment and climate action.

Please cite this document as:

Alison Hough, ‘Environmental accountability is a must for EU decision making on State Aid: Guide to the Public Consultation on implementation of ACCC/C/2015/128’, September 2022 available [here](#).

Please cite this document as:

Alison Hough, 'Environmental accountability is a must for EU decision making on State Aid: Guide to the Public Consultation on implementation of ACCC/C/2015/128', September 2022 available [here](#).

The [Access to Justice Observatory](#) Project has been generously funded by the European Climate Foundation and is led by Alison Hough BL who is a lecturer in law at Technological University of the Shannon. For more information on EJN or the Access to Justice Observatory Project, visit our website: www.ejni.net or email admin@ejni.net