

The New Internal Review Mechanism Concerning the Compatibility of State Aid Decisions with EU Environmental Law

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1. On 12 May 2025, the European Commission announced that a mechanism for internal review has been created for contesting state aid decisions which potentially violate EU environmental law.¹ Environmental Non-Governmental Organizations (ENGOS) will soon be able to request that the Commission review its final State aid decisions closing the formal investigation procedure initiated under Art. 108(2) TFEU which, in the applicants' opinion, are contrary to EU environmental law. This development appears to be one step forward towards the EU's compliance with the Aarhus Convention, although it would have been preferable to simply amend the Aarhus Regulation.

The new internal review mechanism operates under the rules set out in the updated Code for Best Practices for the conduct of State aid control procedures.² Any ENGO wishing to file a request for internal review must fulfil four criteria: Firstly, they must be established in accordance with a Member State's national law or practice as an independent, non-profit legal person. Secondly, they must pursue the objective of promoting environmental protection in the context of environmental law. Thirdly, they must have existed for more than two years while actively pursuing environmental protection. Fourthly, the objective and activities of the ENGO must concern

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¹ European Commission, Press release of 12 May 2025, *Commission amends State aid rules to provide public access to justice in environmental matters*.

² European Commission, Code of Best Practices of 12 May 2025 for the conduct of State aid control procedures, C(2025) 2823 final, paras 76-99.

the subject matter in respect of which the request for internal review is made.³ The ENGO must prove that it fits the criteria by providing the necessary documentation.⁴ These criteria are identical to those set out for ENGOs in Art. 11 Aarhus Regulation. A notable difference, however, lies in the fact that Art. 10(1) Aarhus Regulation grants the right request internal review also to «other members of the public», which the Code of Best Practices does not.

The request for internal review must be made in writing, respecting several substantive and formal requirements, no later than eight weeks from the publication of the Commission State aid decision in the EU Official Journal (OJ).⁵ The Commission, after collecting comments from the EU Member State in question,⁶ must give a substantiated reply to all requests which are not «manifestly inadmissible or clearly unsubstantiated» no later than sixteen weeks after the end of the eight-week deadline for the ENGO to launch a request after the publication of the original State aid decision in the OJ.⁷ Thus, the Commission reply must occur no later than 24 weeks – i.e., 5.5 months – after the publication of the original State aid decision in the OJ. Exceptionally, the Commission can extend this deadline by six weeks.⁸ These deadlines differ from those laid out in the Aarhus Regulation, as will be explained in more detail in section 4. The new mechanism will only apply as from two months after the publication of the regulation in the OJ, i.e., from mid-August 2025.⁹ Given this timeframe, review decisions by the Commission under this new framework are expected at the earliest at the beginning of 2026.¹⁰

On a substantive level, the Commission assesses whether «the evidence put forward by the non-governmental organisation shows that one or several specific provisions of Union environmental law have been breached by the aided activity or by any aspects of the State aid measure that are indissolubly linked to the objective of the aid».¹¹ To date, it does not seem sufficiently clear

³ Code of Best Practices for the conduct of State aid control procedures, cit., para. 78.

⁴ *Ivi*, para. 79.

⁵ *Ivi*, paras 83–87, 94.

⁶ *Ivi*, para. 92.

⁷ *Ivi*, para. 95.

⁸ *Ivi*, para. 96.

⁹ Commission Implementing Regulation (EU) 2025/905 of 12 May 2025 amending Regulation (EC) No 794/2004 as regards an internal review mechanism to follow up on the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2015/128 and other procedural updates, Recital 5.

¹⁰ See J. DELARUE, *Op-Ed: New State Aid Rules: will the Public finally have Access to Justice?*, in *ELL*, 3 June 2025.

¹¹ Code of Best Practices for the conduct of State aid control procedures, cit., para. 90.

what represents an «indissoluble»¹² or «inextricable»¹³ link in practice concerning environmental law. In *Iannelli v Commission*, the Court defined this criterion as the aspects of the aid which are connected to the object of the aid in a manner in which «it is impossible to evaluate them separately so that their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore of necessity be determined in the light of the procedure prescribed in [Art. 108 TFEU]».¹⁴ However, the concrete standard for the intensity of this link remains unclear.¹⁵ The Commission has vowed to publish guidelines on this criterion regarding environmental law.¹⁶ Nonetheless, it has been argued that such guidelines are not legally binding, which calls for further clarification by the CJEU.¹⁷

The ENGOs can file an action for annulment under Art. 263(4) TFEU before the CJEU against the Commission's (negative) response to the request for internal review. In fact, the decision by the Commission is an act which is addressed to the NGOs, which is why they have legal standing under Art. 263(4) TFEU, first limb.¹⁸ Therefore, the *Plaumann*¹⁹ formula, which often precludes standing for ENGOs,²⁰ is not applicable. Importantly, the proceedings before the Court «do not have a suspensive effect on the Commission State aid decision».²¹ Furthermore, the judicial review is limited

¹² See Judgment of the Court of Justice of 22 March 1977, case 75/76, *Iannelli & Volpi SpA v Ditta Paolo Meroni*, para. 14; 15 June 1993, case C-225/91, *Matra SA v Commission of the European Communities*, para. 41; 23 November 2023, case C-210/21 P, *Ryanair v Commission*, para. 84; Judgment of the General Court of 30 November 2022, case T-101/18, *Austria v European Commission* (Paks II), para. 26.

¹³ See Order of the General Court of 3 December 2014, case T-57/11, *Castelnou Energía*, paras 180-193.

¹⁴ *Iannelli v Commission*, cit., para. 14.

¹⁵ Opinion of AG Medina of 27 February 2025, case C-59/23 P, *Austria v Commission* (Paks II), para 29; cf. P. NICOLAIDES, *A Test for Determining Whether State Aid Infringes Other Provisions of EU Law*, in ESALQ, Vol. 24, No. 1, 2025, p. 43 ff., 44.

¹⁶ See European Commission, Aarhus – Requests for internal review of certain State aid decisions, available at competition-policy.ec.europa.eu/state-aid/aarhus-review-requests_en (last accessed 20 June 2025).

¹⁷ J. DELARUE, *Op-Ed: “New State Aid Rules: will the Public finally have Access to Justice?”*, cit., see the proposal by P. NICOLAIDES, *A Test for Determining Whether State Aid Infringes Other Provisions of EU Law*, cit., pp. 49-50.

¹⁸ Cf. L. GROSSIO, *Access to Justice in Environmental Matters Beyond the Aarhus Regulation: Towards an Alternative Adjudicatory Model at the EU Level*, in RCE, forthcoming.

¹⁹ Judgment of the Court of Justice of 15 July 1963, case 25/62, *Plaumann*.

²⁰ See, ex multis, Aarhus Convention Compliance Committee, *Findings and recommendations with regard to communication ACCC/C/2015/128 concerning compliance by the European Union*, 10 September 2021; Aarhus Convention Compliance Committee, *Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union*, 24 August 2011, paras 81-88.

²¹ Code of Best Practices for the conduct of State aid control procedures, cit., para. 97.

to the decision of the Commission to reject the request for internal review. The «parent act» or «underlying act», i.e., the decision approving the aid in question, is not the object under review in this procedure.²² Therefore, the State aid decision cannot be annulled in the same procedure. Should the CJEU annul the decision to reject the internal review request, the Commission must adopt a new decision on the request.²³ In this regard, the internal review mechanism under the Aarhus Regulation has been criticized for not providing adequate access to justice due to its shortcomings regarding the lack of independence of the Commission in reviewing its own acts.²⁴ Recently, it has been proposed in the literature to instead create ‘Environmental Boards of Appeals’ in order to ensure the neutrality of administrative review in this regard.²⁵

2. The recent creation of the mechanism for internal review must be placed in the wider context of the interaction between State aid and environmental law. For a couple of years already, there had been signs of the Commission’s efforts to incorporate sustainability considerations into State aid law.²⁶ Furthermore, the CJEU has ruled on the question of whether State aid decisions must respect EU environmental law. In the 2014 *Castelnuovo Energia* case, the General Court held that the Commission is not required to prohibit State aid which may have negative impacts on the environment, as long as said aid does not harm the internal market.²⁷ In the 2020 *Hinkley Point C* judgment, the CJEU ruled that State aid that violates EU environmental law is not compatible with the internal market and must therefore not be authorised.²⁸ Even though the case was eventually unsuccessful on the merits, it provided an important clarification since the Court stated that «State aid for an economic activity falling within [the nuclear] sector that is shown upon

²² See J. DELARUE, *Op-Ed: New State Aid Rules: will the Public finally have Access to Justice?*, cit.

²³ L. GROSSIO, *Access to Justice in Environmental Matters*, cit.

²⁴ *Ibidem*.

²⁵ *Ibidem*.

²⁶ European Commission, Communication of 18 November 2021 on A competition policy fit for new challenges, COM(2021) 713 final; Guidelines of 18 February 2022 on State aid for climate, environmental protection and energy 2022, C/2022/481; P. NICOLAIDES, *Must the Commission Prohibit State Aid That Harms the Environment?*, in *ESALQ*, Vol. 22, No. 1, 2023, p. 17 ff., 17–18.

²⁷ *Castelnuovo Energia*, cit.

²⁸ Judgment of the Court of Justice of 20 September 2020, case C-594/18 P, *Austria v European Commission* (Hinkley Point C), paras 43–45; cf. P. NICOLAIDES, *Must the Commission Prohibit State Aid That Harms the Environment?*, cit., p. 23.

examination to contravene rules of EU law on the environment cannot be declared compatible with the internal market pursuant to [Art. 107(3)(c) TFEU]». ²⁹ Nonetheless, in practice, challenging the Commission's State aid decisions for incompatibility with EU environmental law remained extremely difficult, if not impossible, for third parties. ³⁰ Therefore, the possibilities for legality review remained very limited in this regard, hindering access to justice for ENGOs.

3. The mechanism for internal review has been adopted against the backdrop of the Aarhus Convention and, particularly, the findings of the Aarhus Convention Compliance Committee. The Aarhus Convention, an international agreement of 1998, which the EU has ratified in 2005, rests on three main pillars: access to information, public participation in decision-making and access to justice in environmental matters. ³¹ The new internal review mechanism for State aid decisions concerns the third pillar, access to justice.

In 2006, the EU adopted the Aarhus Regulation concerning the application of the Aarhus Convention to the EU institutional framework. ³² Art. 10(1) of the Aarhus Regulation foresees the right to request an internal review for NGOs. However, the Aarhus Regulation explicitly excludes state aid and competition law more generally from its scope of application in Art. 2(2)(a). ³³ This Regulation was amended in 2021, but State aid remains excluded from the scope of the Regulation.

²⁹ *Hinkley Point C*, cit., para. 45.

²⁹ *Austria v European Commission*, cit., para. 45.

³⁰ Aarhus Convention Compliance Committee, *Findings and recommendations with regard to communication ACCC/C/2015/128*, cit., paras 112–127; J. DELARUE, S. D. BECHTEL, *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*, in *ERA Forum*, Vol. 22, No. 2, 2021, p. 253 ff., 258–265; J. DELARUE, *Op-Ed: “New State Aid Rules: will the Public finally have Access to Justice?”*, cit.

³¹ See Art. 1 Aarhus Convention.

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.

³³ The numbering of the Articles refers to the pre-Lisbon version of the Articles, which today would be Arts. 101, 102, 106 and 107 TFEU; cf. Commission Implementing Regulation (EU) 2025/905, Recital 2; Aarhus Convention Compliance Committee, *Findings and recommendations with regard to communication ACCC/C/2015/128*, cit., para. 32. See also J. DELARUE, S. D. BECHTEL, *Access to justice in State aid*, cit., pp. 263–264; A.-L. SCHERER, *Access to Environmental Justice under the Aarhus Convention: Evaluating the Contemporary*

The Aarhus Convention Compliance Committee (ACCC)³⁴ has held in 2021 that the EU violated Arts. 9(3) and (4) of the Aarhus Convention by not enabling the public to challenge state aid decisions on environmental law grounds.³⁵ In particular, the Committee urged the EU to adopt «necessary legislative, regulatory and other measures to ensure that the Aarhus Regulation is amended, or new European Union legislation [...], 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 Art. 108 (2) TFEU that contravene European Union law relating to the environment».³⁶

4. The Communication by the Commission in 2025 begs the question why this new mechanism had not already been created during the revision of the Aarhus Regulation in 2021. It would have also been possible to extend the scope of the Aarhus Regulation to State aid instead of creating a new mechanism specifically for State aid decisions. In fact, the new mechanism is juxtaposed with Art. 2(2)(c) of the Aarhus Regulation, as the Commission explicitly acknowledges.³⁷

In 2021, the Commission had argued that there were three possible ways to ensure compliance with the Aarhus Convention: a) amending the Aarhus Regulation; b) amending the State Aid Best Practice Code; c) amending the Council State aid Procedural Regulation.³⁸ During the stakeholder consultation, it became apparent that the first option (amending the Aarhus Regulation) was the preferred option of most ENGOs and public authorities protecting the environment. On the contrary, companies/business associations as well as public authorities responsible for State aid largely wanted to maintain

Hurdles for ENGOs in Challenging State Aid Decisions under EU Law, in Journal of European Competition Law & Practice, vol. 15, n. 3, 2024, 197ss., 198.

³⁴ The ACCC was established under Art. 15 Aarhus Convention to provide findings of a «non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention».

³⁵ Aarhus Convention Compliance Committee, *Findings and recommendations with regard to communication ACCC/C/2015/128*, cit., para. 131.

³⁶ *Ibidem*.

³⁷ Commission Implementing Regulation (EU) 2025/905, cit., Recital 2.

³⁸ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Findings Adopted by the Aarhus Convention Compliance Committee in Case ACCC/C/2015/128 as Regards State Aid: Analysing the Implications of the Findings and Assessing the Options Available*, Brussels, 17 May 2023, p. 9; A.-L. SCHERER, *Access to Environmental Justice under the Aarhus Convention*, cit., p. 206.

the status quo or, as a second-best option, amend the Code of Best Practices.³⁹ The ACCC had recommended that the EU «take the necessary legislative, regulatory and other measures to ensure that the Aarhus Regulation is amended, or new European Union legislation is adopted», as stated above. This phrasing leaves room for different avenues to adapt the EU legal framework to ensure compliance with the Aarhus Convention. However, the ACCC cites the amendment of the Aarhus Regulation as the first option.

Therefore, it remains questionable why the Aarhus Regulation was not simply amended to include State aid after the findings of the ACCC were published. Those findings provided a concrete reason to amend the revision proposal to include also State aid: the ACCC findings were published in March, while the Regulation was adopted in October 2021. It would have still been possible to amend the proposal, incorporating the ACCC's findings into the revision of the regulation.⁴⁰ The European Parliament proposed an addition in this sense, which was blocked by the Commission and the Council.⁴¹ Ultimately, it was a political decision by the Council and the Commission to postpone addressing the findings of the ACCC regarding State aid, both internally and externally, i.e., at the Meeting of Parties for the endorsement procedure.⁴²

³⁹ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Findings Adopted by the Aarhus Convention Compliance Committee in Case ACCC/C/2015/128 as Regards State Aid: Analysing the Implications of the Findings and Assessing the Options Available*, cit., p. 10.

⁴⁰ A.-L. SCHERER, *Access to Environmental Justice under the Aarhus Convention*, cit., p. 205.

⁴¹ 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)), Amendment 24; cf. J. DELARUE, *Op-Ed: “New State Aid Rules: will the Public finally have Access to Justice?”*, cit.

⁴² European Commission, *Commission statement* of 23 July 2021, available at europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/ENVI/DV/2021/08-31/Commissionstatement-stateaid_EN.pdf (last accessed 20 June 2025); Economic Commission for Europe, *Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Excerpt from the report of the seventh session of the Meeting of the Parties*, Geneva, 21 October 2021; J. DELARUE, *Op-Ed: “New State Aid Rules: will the Public finally have Access to Justice?”*, cit.; cf. A.-L. SCHERER, *Access to Environmental Justice under the Aarhus Convention*, cit., p. 205.

On the one hand, one might say that by amending the Code of Best practices without amending the Aarhus Regulation, the Commission creates legal uncertainty since the uniformity of rules for internal review mechanisms in different policy areas, as envisaged in the Aarhus Regulation and the Aarhus Convention, is now split up since the Code of Best Practices creates a sector-specific mechanism.⁴³ Furthermore, the Code of Best Practices is not legally binding on all EU institutions and Member States, unlike the Aarhus Regulation.⁴⁴ It has been argued that the update of the Code of Best Practices, by itself, «does not comply with Art. 9(3) or (4) [Aarhus Convention]»⁴⁵ as it does not represent an actual «alternative to an internal review of a State aid decision under the [Aarhus Regulation]»⁴⁶. On the other hand, before the adoption of the new internal review mechanism, it had been argued by the Commission that this new internal review mechanism could provide an approach that is tailored to State aid, with shorter deadlines for requests and replies compared to the Aarhus Regulation.⁴⁷ However, the final version of the new Best Practices Guide, in reality, establishes longer deadlines than those in the Aarhus Regulation.⁴⁸ Hence, this argument seems less convincing.

It remains to be seen whether the ACCC will accept this new mechanism as compliant with the Aarhus Convention and how the CJEU case-law will develop. Moreover, the developments of the Meeting of Parties this November should be closely monitored regarding the so-called endorsement

⁴³ Cf. A.-L. SCHERER, *Access to Environmental Justice under the Aarhus Convention*, cit., p. 208.

⁴⁴ *Ivi*, p. 207.

⁴⁵ *Ibidem*.

⁴⁶ *Ibidem*.

⁴⁷ See European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Findings Adopted by the Aarhus Convention Compliance Committee in Case ACCC/C/2015/128 as Regards State Aid: Analysing the Implications of the Findings and Assessing the Options Available*.

⁴⁸ See Code of Best Practices for the Conduct of State aid control procedures, cit., para. 95: «as soon as possible, but no later than 16 weeks after the expiry of the eight-week deadline [for the ENGO to launch the internal review request]», which can be extended to 22 weeks according to para. 96, compared to a 12-week deadline under Art. 12(2) Aarhus Regulation, which can be extended to 18 weeks under Art. 12(3) Aarhus Regulation. Under the Aarhus Regulation, the NGOs have six weeks to launch the request, according to Art. 10(1) Aarhus Regulation. Thus, the Commission has 16 (exceptionally: 22) weeks to reply under the internal review mechanism for State aid, but only 12 (exceptionally: 18) weeks under the Aarhus Regulation».

process, through which the EU could be forced to acknowledge its own non-compliance with the Aarhus Convention.⁴⁹

5. In summary, the effects of this new review mechanism can only be assessed after it becomes operative. In practice, the chances of success of an internal review request seem to be «very low», if one considers the lessons learned from the practical implementation of the Aarhus Regulation internal review mechanism.⁵⁰ Nonetheless, internal review, as a complimentary avenue to direct and indirect actions before the CJEU, «offers a route for ENGOs to dispute State aid decisions that contravene EU environmental law».⁵¹ On a positive note, the gap between State aid and access to justice has been at least partially bridged.⁵² Therefore, this development seems to be a step forward for the EU on the rocky road towards compliance with the Aarhus Convention. Nonetheless, it would have been preferable to amend the Aarhus Regulation to include State aid, instead of relying only on the Code of Best Practices.

⁴⁹ J. DELARUE, *Op-Ed: New State Aid Rules: will the Public finally have Access to Justice?*, cit.

⁵⁰ *Ibidem*. Cf. European Commission, Repository of requests for internal review lodged with the European Commission pursuant to Article 10 of Regulation (EC) No 1367/2006 (“Aarhus Regulation”), available at environment.ec.europa.eu/law-and-governance/aarhus/requests-internal-review_en (last accessed 20 June 2025); case T-579/22, *ClientEarth v Commission*, pending; case T-215/23, *ClientEarth and Others v Commission*, pending; case T-214/23, *Greenpeace and Others v Commission*, pending; case T-120/24, *Global Legal Action Network and CAN-Europe v Commission*, pending; case T-449/24, *Dryade and Others v Commission*, pending.

⁵¹ A.-L. SCHERER, *Access to Environmental Justice under the Aarhus Convention*, cit., p. 205.

⁵² J. DELARUE, *Op-Ed: New State Aid Rules: will the Public finally have Access to Justice?*, cit.