



Warsaw, 20.03.2025 r.

**Re: PEJ position concerning draft amendments to the State aid Implementing Regulation (EC) No 794/2004 ('draft Implementing Regulation') and to the State aid Best Practices Code ('amended BPC') with respect to new rules on access to justice following the Aarhus Convention Compliance Committee's findings in case ACCC/C/2015/128**

- (1) Polskie Elektrownie Jądrowe sp. z o.o. ("**PEJ**") is 100% State-owned company established to carry out the investment process for the construction of nuclear power plants in Poland under the Polish Nuclear Power Programme ("**PNPP**").
- (2) The PNPP foresees a total installed nuclear capacity from approx. 6 to approx. 9 GWe. To this end, at least two investment projects will be carried out, each involving one nuclear power plant and one designated site. The first investment project involves the construction and operation of a nuclear power plant that consists of three nuclear reactors with a total maximum installed capacity of up to 3750 MWe, using U.S. AP1000 reactor technology ("**NPP**").
- (3) Nuclear energy undeniably plays an essential role in the EU's climate objectives for decades to come, ensuring energy security, supporting Europe's green transition and its decarbonisation goals whilst promoting economic development in the region through a consistent and uninterrupted supply of a low-carbon energy source. **State aid decisions supporting national nuclear power projects are essential in achieving these goals.**
- (4) Moreover, PEJ also participated in previous consultation concerning the matter submitting its position in an open consultation process on 27 June 2024 and participating in the following targeted consultation.
- (5) In accordance with the European Commission ("**EC**") invitation to submit opinion during consultations, PEJ consider itself to be vested to submit comments in respect to the consultation on the draft amendments to the State aid Implementing Regulation (EC) No 794/2004) and to the State aid Best Practices Code with respect to new

rules on access to justice following the Aarhus Convention Compliance Committee's findings in case ACCC/C/2015/128.

- (6) These amendments set out a new mechanism which allows members of the public to request a EC review of certain State aid decisions to establish whether they contravene EU environmental law.
- (7) PEJ notes the developments leading to the necessity of introducing a new mechanism related to the State aid proceedings and understands the rationale behind the proposed solutions. Ensuring a transparent and efficient legal framework for handling State aid cases is crucial for legal certainty and the proper functioning of the internal market. However, while the proposed changes aim to sustain procedural clarity, they also introduce certain challenges and potential negative consequences, particularly regarding the financial burden on investors, procedural complexities and legal certainty.
- (8) Please find below the most important issues that should be raised and addressed in the draft Communication.

#### **Financial burden for investors**

- (9) One of primary concerns is the additional financial burden that the new procedure may impose on investors. While PEJ recognizes the need for an effective appeal mechanism, the proposed solution could lead to increased costs related to potential delays (e.g. construction delays) caused by this additional legal uncertainty.
- (10) In order to mitigate this risk, it is essential to ensure that the procedure does not extend the risk related to the State aid. Therefore, clear guidelines on the proceeding and its scope of procedural obligations would help to maintain a fair balance between legal certainty and economic feasibility. Therefore, PEJ would like to propose following changes to the proposed documents:

**(a) Limiting the time of the procedure:** party submitting a form should attach the confidentiality version of the form as it will limit the length of the procedure;

**(b) Time for the action:** it should be clarified that the request for internal review should be made by the non-governmental organisation within a time limit not exceeding eight weeks after the Commission State aid decision has been published on the EC website, not the official journal as it is in the case of State aid decision. **Moreover we would suggest to short the period of submitting the**

**request from 8 to 4 weeks as it should be deemed as sufficient for preparation of the request that should not be longer than 10 pages.**

**(c) Confidentiality:** as this solution only undermines transparency and hinders the effective exercise of the rights of affected parties, the possibility to remain anonymous must be removed. Allowing to maintain NGO's anonymous due course of the procedure makes it impossible to verify the NGO's ability to challenge the decision. **In fact, it will be a limitation of the procedural rights of the Member State to defend itself.**

**(d) Restricting the procedure to NGOs operating within the EU:** while maintaining the efficiency and timing of the procedure, the procedure should make clear that having a registered office in the EU and having a stated primary objective of promoting environmental protection is not sufficient. Only those NGOs with real activities within the EU should be able to challenge the decision. In addition, such a declaration should be substantiated by evidence of actual and ongoing activities in relation to environmental law within the EU. **Mere formal recognition as an environmental NGO should not suffice.**

**(e) Issues raised during the internal review:**

- i. the EC shall only verify matters that were not already in detail verified during the State aid proceeding. In case, where applicant raises issues already described in detail in the State aid decision, EC shall be obliged to consider a request as manifestly unfounded according to the point 90 of the draft Communication.
- ii. the applicant should not be allowed to raise issues that it has already raised or could have raised in the national appeal procedure concerning Environmental Impact Assessment. In our view, the possibility of subjecting identical claims to adjudication within two different legal paths (national EIA procedure and EU state aid procedure) should be excluded.

**(f) Non retroactive application of the new mechanism:** it is important to emphasize the need to ensure that the new mechanism applies only to the cases initiated after its entry into force. Applying the new mechanism to the ongoing proceeding would undermine legal certainty. **Therefore, PEJ suggests to introduce transitional provision that should explicitly state that the**

**procedure applies only to the state aid measures formally notified to the EC after the entrance into force of this new mechanism.**

**(g) Procedural Issues – parallel CJEU Judgements:** another significant concern is the risk of two parallel judgements from the Court of Justice of the European Union in the same case dealing with the same issues. The possibility of multiple rulings could create legal uncertainty and procedural confusion, leading to the inconsistent outcomes and difficulties in enforcement.

To prevent such challenge it is crucial to establish a procedural framework that ensures coherence and avoids contradictory decisions..

### **Importance of a precise interpretation of the Inextricable link**

- (11) According to the well-established jurisprudence, the procedure under article 108 TFEU must never produce a result which is contrary to the specific provisions of the Treaty. However, not all provisions must be included in the analysis. **Of relevance for the case should be only the EU law provisions that are inextricably linked with the State aid.**
- (12) It is important to recall when EU law provisions are inextricably linked with the State aid. Aspects of the aid might be considered to be inextricably linked where they are so indissolubly linked to the object of the aid that it is impossible to evaluate them separately<sup>1</sup>. Secondly, aspect of the aid should not be deemed as inextricably linked where the conditions or factors of an aid scheme, even though they form part of the aid, may be regarded as not being necessary for the attainment of its object or for its proper functioning<sup>2</sup>. **Moreover, if the aspect of the aid can be separated from the object of the aid, then the EC is not required to assess its compatibility with provisions other than those relating to State aid in the context of the procedure provided for in Article 108 TFEU<sup>3</sup>.**
- (13) General Court underlined that the **powers exercised by the Commission while conducting proceedings under 106, 107 or 108 TFEU and the specific procedure for assessing the compatibility of aid cannot replace infringement proceedings,**

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<sup>1</sup> Judgment of the European Court of Justice of 31 January 2023, case C-284/21 P, *Antony Braesch and Others vs Commission*, p. 97- "indeed, where the modalities of an aid measure are so indissolubly linked to the object of the aid that it is impossible to evaluate them separately, their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore of necessity be determined in the light of the procedure prescribed in Article 108 TFEU"

<sup>2</sup> Judgment of the General Court of 3 December 2014, case T-57/11, *Castelnou Energía vs Commission*, p. 182.

<sup>3</sup> Ibidem, p. 184.

**which the Commission uses to ensure that Member States are complying with all provisions of EU law<sup>4</sup>.**

- (14) Therefore, PEJ would like to remind that according to the jurisprudence, **environmental law can be only in specific circumstances verified during State aid procedure** – the General Court stated that *“when assessing an aid measure which does not pursue an environmental objective, the Commission is not required to take account of environmental rules in its assessment of the aid and of the aspects which are inextricably linked to it.”*<sup>5</sup> **Therefore, acknowledging that, environmental issues, where they are not inextricable linked to the aid should not be subject to the compatibility assessment.**
- (15) However, lack of such link, does not release the investors from obligation to provide the compatibility with environmental law. There are different sources of obligation, such as environmental impact assessment with cross-border consultations, which must be conducted in compliance with EU secondary legislation requirements, that will bring the possibility to guarantee compliance with environmental regulations and to challenge decisions on separate forums and we believe that, even with introduction of this new mechanism, this clear division should be maintained.
- (16) Therefore, PEJ suggests to rephrase point 79 in the following way:
- “Any non-governmental organisation that meets the criteria set out below shall be eligible to request an internal review with the Commission in respect of the State aid decisions listed in Section 11.4, on the grounds that the activity subject to State aid and/or any of the aspects of the State aid measure, **that pursue an environmental objective**<sup>6</sup>, approved by that decision that are indissolubly linked to the object of the aid, contravene a specific rule or rules of Union environmental law, which is defined in Article 2, 1, (f) of Regulation No 1367/2006.”
- (17) The preamble of State aid Implementing Regulation and State aid Best Practices Code should be completed mutatis mutandis.

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<sup>4</sup> Ibidem, p. 190.

<sup>5</sup> Judgment of the General Court of 3 December 2014, Case T-57/11 *Castellnou Energía vs Commission*, p. 188-189.

<sup>6</sup> Ibidem.

## **Conclusions**

- (18) While PEJ acknowledges the introduction of a proposed new mechanism and procedural guarantees for the member state of the beneficiary, we urge the EC to consider the financial, procedural and legal implications of the proposed measures.
- (19) We remain open to further discussion and constructive dialogue to refine the proposed procedure and address the concerns outline in submitted position paper.

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