

Subject: Response to the public consultation on the on the draft amendments to State aid Implementing Regulation and State aid Best Practices Code as regards access to justice in environmental matters

Nucleareurope appreciates the opportunity to contribute to this public consultation on behalf of the European nuclear industry. We recognize the significant role of the Aarhus Convention in promoting public access to information, the decision-making process, and justice in environmental matters, and we fully support its overall objectives.

However, nucleareurope also expresses concerns regarding the potential implications of the proposed amendments to the State aid Implementing Regulation (EC) No 794/2004 and the State aid Best Practices Code (BPC), which aim to introduce a new procedure to challenge the legality of authorised State aid decisions.

While we acknowledge the importance of ensuring public participation, it must be guaranteed that this new procedure remains balanced, prioritising the challenges of the energy transition and the achievement of the EU's climate and decarbonisation goals.

The nuclear industry plays a pivotal role in this transition, and the proposed changes must not undermine efforts to achieve these common objectives. Hence, we provide the following general and specific observations:

General Observations

Preferred Instrument: Council Regulation on State Aid (Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union

Amending the Council's Procedural Regulation to introduce an internal review mechanism similar to the Aarhus Regulation originally appeared to be the preferred option to propose an amendment in order to introduce a potential internal review procedure.

This approach is considered the most convenient course of action since it provides legal certainty by granting the procedure legally binding force. It also takes into account the specific characteristics of State aid and ensures the Council's involvement in defining the procedure, particularly given that Member States are responsible for notifications related to the aid. However, the potential negative consequences of having two parallel procedures for challenging the same State aid and in consequence two parallel procedures before the Court

of Justice of the European Union must be taken into account in the design of the procedure, by limiting the redundant possibilities for challenging the decision and by making the procedure as a fast-track procedure.

Accelerated and Strictly Supervised Procedure

The proposed procedure should be subject to accelerated and strictly supervised oversight. It is recommended that the appeal period should be restricted to the minimum time necessary, and the duration of the review should be kept as brief as possible. The procedure should be designed to ensure that review requests are limited to new claims by NGOs that are well-reasoned and demonstrate a legitimate interest in challenging the compatibility of the aid, with minimal impact to legal certainty of an authorised State aid decision.

Legal Certainty through Deferred Application and Non-Retroactivity

In terms of legal certainty, the mechanism should incorporate provisions for deferred application and non-retroactivity. A sufficient application period should be provided, allowing stakeholders ample time to integrate the new procedure into their activities. Additionally, to uphold legal certainty, the internal review mechanism should not be applied retroactively to projects that were formally notified prior to the implementation of the new procedure.

Excessively Broad Scope of the Internal Review Procedure

As stated in Annex III to draft Regulation amending the State aid Implementing Regulation (EC) No 794/2004 (internal review request form), the internal review can be requested for final State aid decisions closing a formal investigation procedure under Article 108(2), in accordance with Articles 9(3) and (4) of Council Regulation (EU) 2015/1589, having as legal basis Articles 107(3)(a), (b), first part (aid to promote the execution of an important project of common European interest), (c), (d), (e) of the TFEU. We consider this scope to be excessively broad, raising concerns regarding legal certainty and administrative efficiency. To avoid this risk, we suggest introducing clearer limitations on the types of aid measures eligible for challenge.

Specific Observations

Draft amendments to the State aid Implementing Regulation (EC) No 794/2004

Article 1(4) of the Draft Regulation amending the State aid Implementing Regulation (EC) No 794/2004 reads:

“In order to allow Member States to adapt to the new requirements stemming from this new internal review mechanism, the obligation for Member States to confirm in their notification

the absence of a breach of Union environmental law should apply as from 2 months following the publication of this Regulation in the Official Journal of the European Union.”

We respectfully observe that the proposed two-month timeframe for Member States to comply with the new requirement is insufficient. Given the diversity of national legal frameworks and the varying levels of readiness among EU Member States to align their domestic legislation with the new internal review mechanism, we consider that a longer adaptation period would be necessary. The proposed timeline does not account for the time required for Member States to undertake the necessary legislative and procedural adjustments, which may involve significant administrative efforts and consultation processes at the national level.

Therefore, we propose extending the timeframe for compliance with this obligation to allow Member States adequate time to fully incorporate the new requirements into their national systems, ensuring proper implementation without undue administrative burden.

Annex III to draft Regulation amending the State aid Implementing Regulation (EC) No 794/2004 (internal review request form)

Section 3: Confidentiality

Section 3 of Annex III which reads *“Confidentiality: If you do not wish your identity to be disclosed, please indicate this clearly”* allows parties to request anonymity in a public legal procedure. This specific provision raises concerns regarding its compatibility with the principles of due process and procedural fairness.

The ability to remain anonymous may undermine transparency and impede the effective exercise of rights by affected parties. Specifically, in the context of State aid procedures, this raises significant concerns regarding the ability of affected beneficiaries, Member States, and other public authorities involved in State aid processes to verify whether the legal representation of the NGO initiating the internal review is duly authorised to act on its behalf. Without such verification, there is a risk of procedural irregularities and potential breaches of fundamental legal safeguards for the parties involved.

Section 4: Eligibility Requirements

Moreover, Section 4.1 of Annex III, which states: *“Is your non-governmental organisation established as a legal entity in accordance with the laws and regulations of an EU Member State?”*, lacks clarity and may lead to misinterpretation. The provision should be adapted to explicitly require not only that the NGO is established as a legal entity under the legislation of an EU Member State but also that it demonstrates active engagement within the EU as well as a direct and legitimate interest in the State Aid decision in question.

The mere fact of legal establishment within an EU Member State does not necessarily imply that the NGO conducts activities within the EU. Without such a requirement, NGOs with no substantive operations within EU territory could participate in the internal review process despite lacking a direct and legitimate interest, potentially rendering their involvement procedurally ineffective.

Section 5: Grounds of Request

The requirements set out in Section 5 of Annex III should be further strengthened to ensure that NGOs initiating an internal review procedure demonstrate a direct and legitimate interest in the State aid decision under challenge.

It is necessary that the requesting NGO not only identifies the relevant Commission State aid decision and the alleged breaches of EU environmental law but also substantiates its legal standing as a third party directly affected by the measure. The mere assertion of an interest in the matter is insufficient; the NGO must provide concrete evidence of how the contested State aid decision impacts its objectives or activities.

Without such a requirement, there is a risk that entities lacking a genuine and direct stake in the aid measure could initiate review procedures, potentially leading to procedural inefficiencies and undue administrative burdens. Ensuring that the requesting party can demonstrate a substantive link to the State aid decision is fundamental to safeguarding the integrity and effectiveness of the internal review process.

Moreover, Section 5 of Annex III requires the requesting party to indicate whether any action has been initiated at the national level (administrative or judicial) and to specify its state of play. This section should be further reinforced to ensure procedural clarity and accountability.

The requesting NGO should be required to annex relevant documentation substantiating any such national-level action. This should include explicit reference to the specific administrative or judicial process initiated, the competent authority overseeing the matter, and any relevant procedural developments.

Draft amendments to the State aid Best Practices Code (BPC)

Draft Communication amending the State aid Best Practices Code proposes to insert a new section (Section 11), which must also contemplate the observations we have made in Annex III to draft Regulation amending the State aid Implementing Regulation (EC) No 794/2004, namely:

Section 11.1: Paragraph 79

The eligibility criteria set out in Paragraph 79 should be further reinforced to ensure that only NGOs with a demonstrable and legitimate interest in the State aid decision may request an internal review.

As currently drafted, the provision allows any NGO meeting the formal criteria to challenge a State aid decision without requiring proof of a substantive link to the aid measure being questioned. To uphold procedural integrity and prevent unfounded or speculative challenges, the requesting NGO must demonstrate that it is a third party whose activities are affected by the authorised decision. This entails proving a concrete and legitimate interest by showing how the approved State aid measure materially impacts the NGO's objectives or activities.

Section 11.1: Paragraph 80

Paragraph 80 of Section 11.1 should be further refined to ensure that NGOs not only meet the formal requirements but also demonstrate a direct and legitimate interest in the State aid decision under challenge.

Clause (b) should clarify that an NGO's primary stated objective of promoting environmental protection must be substantiated by evidence of actual and ongoing activities related to environmental law within the EU. Mere formal recognition as an environmental NGO should not suffice.

Clause (d) should explicitly require that the NGO proves a substantive link between the subject matter of the request and its established objectives and activities. It must demonstrate that it is a third party directly affected by the contested State aid decision, rather than merely asserting a general environmental interest.

Additionally, the overall provision should stipulate that the NGO must have demonstrable activities within the EU. The mere fact of legal establishment in an EU Member State does not necessarily indicate operational engagement within EU territory. Without this requirement, NGOs with no substantive presence in the EU could initiate review processes despite lacking a tangible stake, rendering their involvement procedurally ineffective.

Section 11.2(f)

Section 11.2(f) should be further refined to ensure that NGOs requesting an internal review not only meet the formal requirements but also provide concrete evidence of active and ongoing environmental protection activities within the EU. Mere legal establishment in an EU Member State should not be sufficient to confer eligibility if the NGO does not have demonstrable engagement in EU environmental matters. Once more, the evidentiary requirements should include specific documentation attesting to the NGO's operational

presence and activities within the EU. If the NGO is unable to provide such documentation, its involvement in the internal review process should be deemed procedurally obsolete.

Section 11.7

The current time limit of eight weeks established in paragraph 96 for submitting a request for internal review by the non-governmental organisation is excessively long. To ensure procedural efficiency and avoid unnecessary delays, the time limit should be reduced to a more reasonable and prompt period, such as four weeks. This will facilitate a faster review process and encourage timely engagement by interested parties.

The provision in paragraph 97 requiring the Commission to respond within 16 weeks after the expiry of the eight-week deadline is also too long. To ensure a more efficient and accountable process, the Commission's response time should be limited to eight weeks. This will prevent unnecessary delays.

In conclusion, the European nuclear industry suggests refining the details surrounding the new internal review mechanism by limiting the review scope of the decisions being questioned, and ensuring an accelerated process with a minimum appeal period in case a new procedure is initiated. Furthermore, we recommend a non-retroactive application and a sufficient adaptation period for Member States to ensure proper compliance.

Additionally, we have pointed out the need for greater clarity and fairness in the eligibility criteria for NGOs requesting an internal review, ensuring they demonstrate a direct and legitimate interest in the State aid decision. We also propose reducing the timeline for submitting requests and limiting the Commission's response time to enhance efficiency.

By addressing these points, we believe the amendments can better balance public participation with the effective implementation of EU energy and environmental objectives while maintaining legal certainty and procedural integrity of authorised State aid procedures.