

CCBE Response to the EU Consultation on the draft amendments to State aid Implementing Regulation and State aid Best Practices Code as regards access to justice in environmental matters¹

18 March 2025

1. Introduction

The CCBE welcomes the consultation organised by the Commission seeking the views of stakeholders on the draft amendments to the State aid Implementing Regulation (EC) No 794/2004 (Implementing Regulation) and the State aid Best Practices Code (BPC). These amendments set out a new mechanism which allows members of the public to request a Commission review of certain State aid decisions to establish whether they contravene EU environmental law. In the amended BPC, the Commission sets out the arrangements for the internal review procedure, such as who can request the review, which decisions can be subject to the review, and the applicable deadlines. Annex III to the draft Regulation amending the State aid Implementing Regulation contains a form for the submission of an internal review request.

The Council of Bars and Law Societies of Europe (the CCBE) represents the bars and law societies of 46 countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The CCBE considers the topic of access to justice and compliance with the Aarhus Convention of crucial importance, because access to justice constitutes one of the most important pillars of the Rule of Law. Lawyers, Bars and Bar Associations play a fundamental role in the safeguarding of the Rule of Law. For this reason, the CCBE submitted observations on 14 March 2019 in the context of the Consultation on the EU implementation of the Aarhus Convention in the area of access of justice in environmental matters (hereinafter *the March 2019 CCBE observations*). The CCBE welcomes the opportunity to submit observations in the present consultation and requests the Commission to attribute weight to the view of the CCBE in this matter.

2. Preliminary observation on (direct) access to justice

As noted in recital 2 of the proposed revised Implementing Regulation, “*The Union must address the findings of the Aarhus Convention Compliance Committee (the ‘ACCC’) in compliance case ACCC/C/2015/128. In case ACCC/C/2015/128, the ACCC found the Union to be in breach of the Aarhus Convention for failing to provide members of the public access to administrative or judicial procedures*”

¹ [2025 state aid environmental matters - European Commission](#)

to challenge decisions on State aid measures taken by the Commission pursuant to Article 108(2) of the Treaty which may contravene Union law relating to the environment.”

Recital 3 of the revised Implementing Regulation sets out the way in which the Union addresses these findings:

“The Union takes steps to address the findings of the ACCC by setting up an internal review mechanism. That mechanism applies to State aid decisions closing the formal investigation procedure under Article 108(2) of the Treaty, adopted by the Commission pursuant to Articles 9(3) and (4) of Council Regulation (EU) 2015/1589, having as legal basis Articles 107(3), points (a), first part of (b) (aid to promote the execution of an important project of common European interest), (c), (d) and (e) of the Treaty. In this context, the notifying Member State should confirm that neither the activity subject to State aid, nor any aspects of the notified State aid measure that are indissolubly linked to the object of the aid contravene Union environmental law This confirmation should be given in the form set out in Annex I, Part I, point 6.8 to Commission Regulation (EC) No 794/2004.”

The Aarhus Convention Compliance Committee (hereinafter **the ACCC**) found that the public lacked access to justice in relation to state aid decisions adopted by the EU Commission notably due to the high standard of admissibility set by Article 263(4) TFEU as interpreted by the CJEU (*Plaumann* and subsequent case law) and due to the fact that the preliminary ruling procedure (art. 267 TFEU) is not a substitute for direct access to justice at EU level. These high hurdles for access to justice were extensively discussed in the March 2019 CCBE response.²

In respect of state aid decisions, the study conducted by Milieu Consulting Ltd in 2024, mandated by the Commission, establishes that access to justice for NGOs and other members of the public in relation to state aid decisions at national level is not guaranteed in the majority of Member States and that access to information on state aid at national level is also insufficient.³ This would confirm the existence of barriers to the possibility of challenging the validity of a Commission’s state aid decision with the preliminary reference procedure. We nonetheless appreciate the Commission’s recognition that access to justice at national level is “*complementary, but not an alternative solution to*” access to justice at EU level.

Indeed, in the view of the CCBE access to justice in a manner that complies with Article 9(3) Aarhus Convention would be achieved **through direct access** to the EU Courts for members of the public, under Art. 263(4) TFEU. However, this requires a change of the case law, which the Commission could start advocating, but is not the subject of this consultation.

Regarding the scope and value of the right to request an “internal review”, the CCBE considers that compliance with Article 9(3) of the Aarhus Convention can only be ensured if the case-law of the EU Courts would interpret the (right of) internal review to allow for the EU Courts to evaluate the legality of the substance of the underlying act, which would in this context be the underlying state aid decision under challenge.⁴

²https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/PD_LUX/PDL_Position_papers/EN_PDL_20190314_CCBE-response-to-the-EU-questionnaire-of-the-Aarhus-Convention-in-the-area-of-access-to-justice-in-environmental-matters.pdf

³<https://www.milieu.be/public-participation-and-access-to-justice-in-environmental-matters-in-the-eu-member-states/>

⁴ See in this respect Advice by the Aarhus Convention Compliance Committee to the European Union concerning the implementation of request ACCC/M/2017/3, 12 February 2021, points 118-119.

It must be acknowledged and noted, however, that the EU Courts case-law so far developed under Article 12 (Proceedings before the Court of Justice) of Regulation 1367/2006⁵ (which will without any doubt be considered by analogy) suggests that the CJEU does not interpret Article 12 as authorising it to review any legal errors made by the EU institution in adopting the underlying act, but only legal errors made in the decision replying to the internal review request. This was notably confirmed in the judgment recently delivered in the *TestBioTech* case (T-606/21, para. 24): “*Worded in that way, the vast majority of those arguments are ineffective. The question which may arise in the context of an action such as that at issue is not the question whether the Commission was required to ‘ensure’ that the applicant for authorisation or EFSA complied with their obligations deriving from Regulation No 1829/2003 and Implementing Regulation No 503/2013 in the context of the procedure which led to the adoption of the authorisation decision. Similarly, the question cannot be whether the Commission failed to request that certain studies be carried out. By contrast, in a case such as that at issue, the question whether and how the Commission responded to the matters raised in the request for internal review is relevant*” (emphasis added).

The CCBE suggests that on this point compliance with the Aarhus convention remains a point of particular attention.

At the same time, the CCBE wishes to note that it welcomes and supports many of the suggested changes submitted to public consultation as it is important to see them as progress.

The CCBE will not discuss all aspects of the proposed changes that are the object of the consultation but wishes to make the following specific observations.

3. Specific observations

3.1 Entities eligible to request an internal review

Under the relevant eligibility criteria, an internal review can be requested by environmental NGOs (hereinafter also referred to as “applicants”). The proposed criteria for eligible environmental NGOs are similar to those applicable under Regulation 1367/2006, as amended, and under Commission Decision (EU) 2023/748.

The CCBE, however, considers it problematic that other members of the public would not be eligible to submit a request for internal review. Article 9(3) of the Aarhus Convention requires that ‘the public’ at large can access justice in relation to EU State aid decisions. In its findings on communication ACCC/C/2015/128, the Compliance Committee recommended that the Union “*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 article 108 (2) TFEU that contravene European Union law relating to the environment, in accordance with article 9 (3) and (4) of the Convention*” (emphasis added). It must be noted here that providing access to justice to members of the public, not only to NGOs, was a condition for ensuring compliance of the Union with the Aarhus

⁵ See 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 Union institutions and bodies, OJ L 264/13, as amended.

Convention in relation to the revision of Regulation 1367/2006 following the Compliance Committee's findings on communication ACCC/C/2008/32 (part II).⁶

By not giving private persons any possibility to request an internal review of state aid decisions, the Commission's proposal does not seem to comply with the ACCC's recommendations.

3.2 Scope of challengeable state aid decisions

Only decisions closing a formal investigation are subject to the new internal review procedure. The CCBE suggests that it is reviewed and reconsidered whether this scope is not too narrow.

The proposed texts exclude from the scope of reviewable decisions those adopted on the basis of 107(2), second indent (crisis aid). This exclusion seems unwarranted and not justified. It is the CCBE's understanding that ACCC findings recommend that access to justice be granted for decisions closing formal investigations regardless of their legal basis.

3.3 Commission assessment and time-limits

The proposal lays down time limits, respectively, of eight weeks to submit a request and of 16 to 22 weeks for the Commission to reply. These time limits seem adequate to ensure that there is sufficient time to file a request for review and to have requests being dealt with in a timely manner.

However, the CCBE submits that the suspension of these time limits for potential consultation with the applicant and/or with the relevant Member State needs to be reconsidered as there is a risk (and there should be safeguards to avoid) that these consultations would unduly extend the time of reply to a request and subsequent judicial review.

3.4 Page limits

Paragraphs 85, 86 and 87 of the proposed revised BPC provide the following:

85. The request for an internal review of a Commission decision in accordance with paragraph 79 should be made in writing, using the form in Annex III to Regulation [xx] and it should:

(a) specify the Commission final State aid decision for which a review is sought;

(b) indicate the specific provisions of Union environmental law that are alleged to have been breached by the aided activity or by any aspects of the notified State aid measure that are indissolubly linked to the objective of the aid;

(c) state the grounds on which the request is made;

⁶ Advice by the Aarhus Convention Compliance Committee to the European Union concerning the implementation of request ACCC/M/2017/3, 12 February 2021, point 93; Report of the Compliance Committee on compliance by the European Union on request ACCC/M/2017/3, 26 July 2021 (ECE/MP.PP/2021/51), point 117.

(d) provide relevant and structured information and documentation as well as facts or legal arguments supporting each of those grounds;

(e) specify the name and contact details of the person empowered to represent the requesting party vis-à-vis third parties for the internal review;

(f) provide evidence that the requesting party is eligible to make the request in accordance with the criteria and conditions set out in paragraphs 79 to 81.

86. The request for internal review should not exceed 10 pages (not including documents to provide evidence that the eligibility criteria set out in paragraph 80 have been met and other annexes to support the request).

87. Annexes should be numbered, should have clearly marked headings, and should be referenced in the request for internal review, to provide evidence on specific factual and/or legal arguments raised by the non-governmental organisation.

In view of the information, arguments and evidence that must be set out in the request, the rigid page limit of 10 pages contained in paragraph 86 seems very problematic and would in fact, in the CCBE's view, not serve any party involved. State aid situations tend to be complex and it is **hardly conceivable that a case for review can be adequately made—in terms of both evidence and legal arguments—in only 10 pages.**

There seems also to be a need for clarification: Para 86 seems to indicate that the number of pages of annexes with evidence not relating to the eligibility criteria set out in para 80 would be taken into account for the "page count" of the request. Paragraph 87 does however clearly set apart annexes. There is no doubt that annexes with evidence will be required and that taking into account the pages of the annexes not relating to the eligibility criteria would not work. The CCBE strongly recommends to clarify that Annexes to the request are not to be counted for the purposes of the page limit of the request.

The CCBE further notes that, pursuant to Article 1(2) of Commission Decision (EU) 2023/748, applicants to a request under Article 10 Regulation 1367/2006 can submit up to 50 pages and are required to provide all relevant arguments and evidence at once. The CCBE has been informed that this page limit of 50 pages is already a significant challenge for internal review requests. It seems that there is therefore a clear need to allow for **a page limit of at least 30 pages and allow for exceptions when clearly needed because of the complexity of a case.**

3.5 Burden of proof and Asymmetry of information

Under the new paragraph 92 of the Code, *"The Commission should verify that 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 notified State aid measure **that are indissolubly linked** to the objective of the aid."* (emphasis added)

The CCBE submits there needs to be a careful consideration here of the standard of proof in a context where there seems to be (very often) an asymmetry of information. Requiring applicants to demonstrate contraventions of specific provisions of environmental law is of course consistent with Article 9(3) of the Aarhus Convention and with the ACCC findings. At the same time, it should be

avoided that the suggested standard of proof on applicants is so high that it constitutes an unsurmountable hurdle in fact and law and, as a result, a barrier to access justice. A particular hurdle to be avoided here is that applicants would be put in the impossible position of having to demonstrate *indissoluble link* between the specific provisions of environmental law contravened and the objective of the aid. It must be avoided that this is interpreted and turned into a requirement that turns out to be an excessively high standard of proof for applicants.

This is a real risk if one takes into account the asymmetry of information that applicants for a review are confronted with and need to navigate. It is established case-law that the Commission is entitled to presume that a state aid file is confidential and that documents must be disclosed only if there is an overriding public interest in disclosure.⁷ This presumption of confidentiality creates a clear asymmetry of information between the Commission and the public on the objectives and design of the aid measures. These features are however important to demonstrate an indissoluble link in a particular case.

The CJEU has recognised the asymmetries of information between the Commission and the public. Therefore, according to the case-law, the Commission is required to examine all relevant information of its own motion:

“15 In order to set out the grounds for conducting the review in the manner required, a party requesting the internal review of an administrative act under environmental law is required to put forward the facts or legal arguments of sufficient substance to give rise to substantial or serious doubts as to the assessment made in that act by the EU institution or body (see, to that effect, judgments of 12 September 2019, TestBioTech and Others v Commission, C-82/17 P, EU:C:2019:719, paragraph 69; of 15 December 2016, TestBioTech and Others v Commission, T-177/13, not published, EU:T:2016:736, paragraphs 67, 83 and 88; and of 4 April 2019, ClientEarth v Commission, T-108/17, EU:T:2019:215, paragraph 57)(emphasis added).

16 Where the Commission concludes that the evidence adduced by a party requesting an internal review is substantial and liable to raise serious doubts as to the formal or substantive lawfulness of the grant of that authorisation, it is required to examine all relevant information of its own motion (judgments of 15 December 2016, TestBioTech and Others v Commission, T-177/13, not published, EU:T:2016:736, paragraph 85, and of 4 April 2019, ClientEarth v Commission, T-108/17, EU:T:2019:215, paragraph 216). At the end of its review, the Commission may withdraw or amend the authorisation decision, thereby granting in whole or in part the request for review, or maintain the authorisation as it was granted, by rejecting the request.”⁸(emphasis added)

The CCBE respectfully suggests that the possibility should be considered to include a provision that codifies this obligation and allows for other safeguards that assist in avoiding that applicants be faced with an impossibly high standard of proof that would prevent the entire review instrument from being effective and meaningful. Avoiding strict page limits, discussed above, may be one of such safeguards.

3.6 Consultation of Member States

⁷ First established in case C-139/07 *Commission v Technische Glaswerke Ilmenau*, paras 55-57. See also C-666/17 P *AlzChem v Commission*, para. 32, C-271/15 P *SeaHandling v Commission*, para. 41. Recently, Judgement of 2 October 2024, *Sara Soares v Commission*, T-606/23, para. 43.

⁸ Judgment of 18 October 2023, *TestBioTech v Commission*, T-606/21, para. 15-16.

The CCBE is of the view that it is crucial that consultation of Member States takes place right at the beginning within the prescribed time-limits of 16 to 22 weeks.

It seems moreover difficult to justify why consultation of Member States should lead to a suspension of the internal review proceeding, given that (a) the notifying Member State would have confirmed compliance of the aided activity or the aid measure with environmental law in the notification form⁹ and (b) the proposal is to grant access to justice only in relation to decisions not to raise formal objections, which supposes that (i) interested parties have had the opportunity to submit comments, (ii) an in-depth assessment has been performed and (iii) any doubts have been cleared, including (iv) after thorough exchanges with the granting authorities.

The Commission and the Member States should thus be able to assess the merits of a request in a timely manner.

In this context of the consultation of Member States, the CCBE strongly recommends that the **comments made by the aid-granting Member State on the arguments presented in the request for internal review will be published or made available to the requestor**. As the discussion is about compliance with environmental law, there is a public interest to share the comments made and the view taken by the Member State in question on the arguments contained in the request for review.

3.7 Applicability of the new procedure

In order to remedy non-compliance of the Union with the Aarhus Convention as rapidly as possible, the CCBE recommends that the new procedure be applied to final Commission decisions that will be adopted after the publication of the amendments in the Official Journal of the European Union.

⁹ COMMUNICATION FROM THE COMMISSION 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, 17.5.2023 COM(2023) 307 final