

Position Paper

Comments on the application of the Aarhus Convention to State aid decisions Reply to the Commission's public consultation on access to justice with regard to State aid decisions

March 2025

As a preliminary point, EDF highlights the contributions made by the Aarhus Convention on public access to information, decision-making and justice in relation to decisions in environmental matters. EDF is convinced of the need to achieve a balanced procedure to ensure a high level of participation while maintaining priority over the challenges of energy transition and achieving the climate objectives set by the European Union.

EDF's projects already take account of public access to environmental information, public participation in environmental decision-making and access to justice. There are already appeal procedures at national level associated with permitting and environmental protection. These procedures allow interested parties to challenge decisions that may breach environmental standards. At the European level, as part of its state aid competence, the Commission is already obliged to ensure that the aid submitted to it complies with the provisions of EU law, including environmental law.

A new procedure could in part duplicate existing national and European procedures.

If the Commission nevertheless intends to modify the existing framework, the revision should ensure legal certainty and speed of procedure, which are essential to avoid slowing down the green transition.

As part of this new consultation, the Commission invites interested parties to submit their comments on its draft amendments to Regulation (EC) No. 794/2004 on the implementation of State aid (hereinafter 'Regulation No. 794/2004') and the Code of Best Practice for the conduct of State aid control procedures (hereinafter 'Code of Best Practice').

I. On the choice of instrument

EDF welcomes the choice of instrument selected by the Commission to comply with the decision of the Aarhus Convention Compliance Committee, with regard to the various options initially considered. An amendment to Regulation No. 794/2004 and the Code of Good Practice has the advantage of giving this procedure a legally binding force, thus providing greater legal certainty and takes account of the specificities of State aid by creating an *ad hoc* review procedure – unlike the option of including it in the scope of the Aarhus Regulation.

II. On the duration of procedural deadlines

The deadlines provided for in the consultation documents are as long as those envisaged in the Aarhus Convention, even though the Commission had considered, in its first consultation in 2022, that shorter *ad hoc* deadlines were preferable in the area of state aid, in order to ensure greater legal certainty.

State aid plays an important role in financing the green transition. Indeed, State aid can accelerate the decarbonisation of the EU economy and promote the development and deployment of green technologies. An efficient and swift State aid process is therefore indispensable, otherwise the green transition and the objective of carbon neutrality may be delayed.

It is therefore important, and this is all the more relevant for the development of the net-zero technologies defined by the NZIA, that procedural deadlines (time limit for review by the European Commission and time limit for appealing against a decision authorising State aid) are circumscribed in the light of these challenges.

We recommend **modifying the deadlines to return, at a minimum, to the deadlines initially envisaged during the first consultation in 2022, namely a referral period of 4 weeks and 12 to 15 weeks for examination.**

III. On the additional deadline in the case of an incomplete application

We consider highly questionable the possibility for NGOs to have up to 30 days to complete their request for review, in the event that the Commission cannot fully assess the admissibility of the request. On the one hand, this could risk further extending the deadlines. Furthermore, this opportunity offered to NGOs to supplement their application a posteriori could encourage them to submit incomplete requests for review, thus favouring longer review periods and increasing legal uncertainty for aid beneficiaries. As it is a time limit for appeal, it should be a firm deadline. **We therefore recommend removing this** option. If, however, the option to supplement their request is maintained, we suggest **removing the suspension of the review period available to the Commission to respond to the request for review.**

IV. On the entry into force and applicability

Any revision should provide sufficient time and non-retroactivity of the new internal review procedure to allow all actors to integrate it into their processes and to guarantee the legal security of projects ;

- (i) With regard to the entry into force described in § 2.6, we suggest **postponing the date of entry into force in order to take into account legal certainty and the legitimate expectations of Member States, stakeholders and aid** recipients. The planned period of 2 months seems largely insufficient to guarantee this legal certainty. It might be useful to refer to the previous revision of the Aarhus Regulation by Regulation 2021/1367, under which entry into force of the new provisions aimed at opening up the possibility for members of the public to make a request for internal review has been postponed for a year and a half (regulation dated 6 October 2021 for the entry into force of the provisions in question on 29 April 2023).
- (ii) In order to ensure legal certainty and not to hamper ongoing projects, an internal review mechanism should not apply to projects which have been the subject of a pre-notification or formal notification to the European Commission before the date of application of that new mechanism.

We **suggest extending the inapplicability of the request for review to aid pre-notified before the entry into force** of the amended Regulation.

This would follow the example of the 2018 amendments to the Code of Practice that apply to notified measures and those brought to the attention of the Commission 30 days after the publication of these amendments in the Official Journal of the European Union. The retroactive effect of that measure would be detrimental to the legal certainty and legitimate expectations of the parties concerned.