

EEB's reply to the consultation on the draft amendments to State aid Implementing Regulation and State aid Best Practices Code as regards access to justice in environmental matters

The EEB is of the view that the proposed new internal review procedure will improve access to justice for EU state aid decisions. In general, the EEB welcomes and supports most of the proposed elements. We would like to highlight some aspects of the proposed new internal review procedure which we think merit particular consideration – both in terms of maintaining positive aspects as well as for potential improvements.

1. General comment on the proposed timeline and format of this new procedure:

We support the Commission's commitment to adopt new rules in the second quarter of 2025. Although this timeline is beyond the limit of October 2024 set by the Compliance Committee, we believe this suggested review procedure coming at this time and in this form will provide the basis for the Union to endorse the findings of the Compliance Committee and hopefully even remedy non-compliance before the Aarhus Convention Meeting of the Parties of November 2025. This proposal therefore gives the EEB some reassurance that we can expect an endorsement of the C128 findings by the EU at the 8th Meeting of the Parties.

2. Broad equivalence to conditions under Regulation 1367/2006 as amended in October 2021 (Aarhus Regulation):

The Commission is proposing to create a new internal review procedure in the implementing regulation and the Code of best practices for the conduct of state aid control (hereafter the 'Code'). The new regime provides that applicants can challenge a Commission review decision before the CJEU. We generally welcome the new possibility to submit an internal review request of certain state aid decisions and the right to judicial review of Commission review decisions. In relation to access to the CJEU (new paragraph 99 of the Code), we understand that the Commission's negative replies to requests will have the character of decisions with legal effects, both when the Commission rejects a request as inadmissible or as ungrounded, equally to review decisions issued under Article 10 Regulation 1367/2006, which is welcome.

Similarly, the eligibility conditions for environmental NGOs and the general features of the internal review procedure (process for submitting a request, time-limits for lodging the request and for the Commission to reply, right to access the CJEU) equate to those featuring in Regulation (EC) No 1367/2006 as amended in October 2021. These conditions are clear and well-known by environmental NGOs and in line with the requirements of paragraphs 3 and 4 of Article 9 of the Aarhus Convention.

3. Deviations from the Aarhus Regulation:

A) Access to justice for omissions to act:

The proposal is missing a regime of access to justice in cases of omissions. In this context, several types of omissions should be reviewable, either by a request for internal review or before the CJEU.

The scope of the new procedure is limited to challenging compliance with environmental law of state aid decisions, but does not explicitly include the right to challenge the Commission's failure to (a) monitor compliance with its decisions; (b) monitor compliance of aid measures; or (c) investigate unlawful (non-notified) aid. In light of Article 9(3) of the Aarhus Convention, it is also essential to provide access to the CJEU in case the Commission omits to reply to a request within the prescribed time-limits.

We therefore recommend including a new paragraph, modelled on Article 12(2) Regulation 1367/2006, to explicitly mention the possibility of submitting requests for internal review also in cases where the Commission fails to act.

B) Members of the public/individuals:

The proposed internal review procedure does not allow members of the public to submit a request for internal review. 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). As in the case of the amended Aarhus Regulation, certain criteria can be tied to the exercise of access to justice rights by private persons, without this amounting to a requirement to establish *actio popularis*.

Therefore, we believe that the proposal should be aligned with the findings of the Compliance Committee by giving the possibility for other members of the public to request an internal review of state aid decisions, in a similar manner as in the Aarhus Regulation.

C) 10-page limit:

The new paragraph 86 of the Code proposes that requests should be limited to 10 pages and that the Commission may revert to the applicant should it need more information (new paragraph 93 of the Code). In contrast, applicants for an internal review request under Article 10 of the Aarhus Regulation can submit up to 50 pages and are required to provide all arguments and evidence at once. As such, we find that the 10-page limit is too restrictive for applicants to develop their legal arguments in a clear and detailed manner supported by evidence.

The case law of the CJEU on Article 12 of the Aarhus Regulation, which will certainly apply by analogy, is strict as to the possibility for applicants to bring new arguments or evidence before the CJEU when challenging a Commission's decision. It is established that applicants shall only challenge the decision upon their internal review requests and that arguments and evidence that were not already included in the internal review request are inadmissible. Should applicants be precluded from demonstrating the illegality of a Commission's decision before the court on the ground that they did not raise certain arguments in their request, whereas they did not have the space for doing so, would be an undue restriction on their right to an effective judicial review and their right to a remedy in contravention of Article 9(3) and (4) and Article 47 of the Charter.

Moreover, even though this new proposed review procedure would allow for additional information requested by the Commission to be considered by the Court, it risks increasing the administrative burden of the internal procedure for the Commission and the applicant, as well as rendering it lengthier. We therefore invite the Commission to reconsider the page limit for the proposed new internal review requests to also be of 50 pages.

4. The notification forms:

The proposal to amend notification forms (by requiring Member States to confirm that the beneficiary's activity or the aid measure does not contravene environmental law that is indissolubly linked with the aid

measure objective) is a positive step. This will facilitate the compliance assessment in state aid decisions. However, we note that it is the Commission who remains responsible for assessing compliance of aid measures with Union law that is indissolubly linked to the objective of the measure, and it cannot simply rely on Member States' statements in notification forms. We therefore believe that further guidance on how the Commission interprets the 'indissoluble link' or 'inextricable link' criterion would be very helpful.

5. Contravention of environmental law and burden of proof:

The definition of 'environmental law' refers to the definition in Article 2(1)(f) Regulation 1367/2006 as amended. This is aligned with the Aarhus Convention and the findings of the Compliance Committee, which the EEB welcomes.

However, we note that the burden of proof expected from applicants in the proposal is not entirely clear. New paragraph 92 of the Code would provide that "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."

This wording appears to place the burden of proof on the applicant NGO, and it is unclear whether and to what extent the applicant will have to demonstrate *the indissoluble link* between the specific provisions of environmental law contravened and the objective of the aid.

Moreover, placing the burden of proof on the non-government organisation stands in contrast to the procedure for internal review requests under the Aarhus Regulation. In this context, the CJEU has recognised that there are asymmetries of information between the Commission and the public and therefore clarified that the applicant NGO only needs to raise sufficient or serious doubts to trigger the obligation of the Commission to investigate further.

This is even more important because the asymmetry of information between the Commission and the applicant NGO is particularly pronounced in state aid matters. The presumption of confidentiality in state aid matters creates a clear asymmetry of information between the Commission and the public on the objectives and design of the aid measures.

An unrealistic evidentiary burden on the applicant amounts to a barrier to access to justice and would therefore not be compatible with Article 9(3) and (4) Aarhus Convention, as well as the fundamental right to effective remedies (Article 47 Charter of Fundamental Rights).

Limited scope of state aid decisions subject to RIR under the proposal:

Finally, we take this opportunity to stress that access to justice for the public in relation to decisions not to raise objections, which constitute the very large majority of state aid decisions, is still not clearly guaranteed in the EU. This should remain a point of attention for improving the EU's global compliance with Article 9(3) of the Aarhus Convention overtime.

Contact: [redacted] Policy Manager for Environmental Law and Justice

Email: [redacted] [@eeb.org](mailto:eeb@eeb.org)

European Environmental Bureau

• Rue des Deux Églises 14-16, 1000 Brussels, Belgium • ☎ +32 228 91090 • eeb@eeb.org • www.eeb.org

International non-profit association • Association internationale sans but lucratif (AISBL) • EC register for interest representatives:
ID number: 06798511314-27 • BCE ID number: 0415.814.848 • RPM Tribunal de l'entreprise francophone de Bruxelles