ClientEarth

April 2021

Revision of the Commission notice on the enforcement of State aid rules by national courts

ClientEarth's response to the consultation

ClientEarth[1] welcomes the consultation on the notice on the enforcement of State aid rules by national courts (the Notice). This gives the opportunity to revise the Notice in light of recent legal developments and practical findings on the (lack of) effectiveness of private enforcement actions before national courts.

Our main recommendations

- **Admissibility of actions by NGOs and members of the public** alleging that an aid measure breaches environmental law, shall be explicitly recommended to Member States

- The Notice should explain the **role of national courts in respect of assessing breaches of environmental law by aid beneficiaries**. Nevertheless, the Notice must clarify that this check must **primarily be performed by the Commission** since assessing compatibility of aid measure with the internal market (of which environmental compliance is part) lies within its competence

- Private enforcement will hardly take off without **increased transparency** about the granting of aid

[1] ClientEarth is a not-for-profit environmental law organisation, comprising legal, scientific, policy, and communications experts working to shape and enforce the law to tackle environmental challenges.

1 Legal standing of NGOs and individuals

ClientEarth welcomes recitals 42 and 24 of the draft Notice according to which, respectively: "*National courts have the responsibility to provide effective legal protection to third parties*" and "*a natural or legal person may have an interest in bringing proceedings before national courts, not only to eliminate the distortion of competition created by the unlawful implementation of State aid. National courts must assess the legal interest of the claimant in bringing proceedings, regardless of whether the latter has been directly affected by the distortion of competition arising from the aid measure*."

We recommend that recital 25 (or a new recital) explicitly states that **NGOs and individuals may be regarded as having an interest** in bringing an action to obtain damages and/or the suspension or recovery of an aid measure planned for, or granted to, an activity that breaches its legal obligations including (but not exclusively) **its environmental law obligations**.

This is justified by the principles of equivalence and effectiveness that are recalled at recital 21 of the draft Notice, in light of the case law of the CJEU (see recently the *Hinkley Point C* ruling, C-594/18P).

2 Respective competence of national courts and the Commission to assess violations of environmental law

Compliance of a beneficiary's activity with environmental law (or other legal obligations) is a matter **of compatibility** of the aid, the assessment of which falls within the exclusive remit of the Commission. The *Hinkley Point C* ruling clearly indicates that it is **for the Commission to check** such compliance. Assessments by national courts or granting authorities cannot substitute the Commission's duties and competence in this respect. Neither can actions before national courts against a *national aid measure* substitute an action before the CJEU against ***a Commission's decision*** on the compatibility of an aid measure.

Nevertheless, national courts are generally well placed and competent at national level to assess violations of substantive legislation such as environmental law.[2] Their assessments can therefore be a useful source of information for the Commission and help it to perform this check in specific cases.[3]

To this end, the Notice could provide for a **new section 4.2.4 relating to the role of national courts in assessing compliance of activities with their legal obligations**. This section should start by reminding that in light of the *Hinkley Point C* ruling, compliance of activities with their environmental law obligations is a matter of compatibility of an aid measure with the internal market and this check falls within the exclusive competence of the Commission. This could also be recalled under section 3.1 of the draft Notice.

[2] They must, actually, already check this in State aid-related actions, for example for assessing compliance of an aid measure with the GBER. For instance, national courts should assess whether aid for environmental protection (Article 36) really enables the beneficiary to go beyond the applicable Union standards. For a different type of legislation, national courts must also verify that tenders comply with EU public procurement rules, notably for assessing compliance with Article 14(10 GBER) – see Commission's Practical Guide to the GBER, point 74.

[3] The Commission admits treating complaints against unlawful aid with **a low priority** if there is an action before national courts in parallel (See Code of Best Practices, recital 76). If national courts do not engage in (pre-) assessing violations of environmental law in State aid private enforcement cases, the Commission's assessment will only be delayed and the advantages and **illegalities of the aid beneficiaries will exist for a longer period of time**.

The new section should confirm that national courts are competent to hear violations of legal obligations in a State-aid related action, just as they are in the course of other types of actions. In line with the principle of mutual assistance and the *Hinkley Point C* ruling, a national court finding a breach of legal obligation by a (potential) beneficiary of aid, should:

- Use its powers to order the suspension or termination of the implementation of the aid measure, recovery, interim measures[4] and/or damages, as per section 4.2.3 of the draft Notice;
- If necessary, refer a question for preliminary ruling (Article 267 TFEU) or ask the Commission for support to establish violations of EU law, as per section 5.1 of the draft Notice[5];
- Assist the Commission with the identification of the relevant breaches of law by the beneficiary's activity, as per section 5.2 of the draft Notice.

Different courts within a Member State may be competent to hear actions on State aid and on other areas of law such as environmental law. The Notice should recommend Member States to facilitate an efficient coordination between the relevant national courts, within their own procedural systems.

3 Increasing transparency of aid measures to facilitate enforcement

Recital (2) of Regulation (EU) 2015/2282 as regards the notification forms and information sheets[6] provides that "*Aid measures should also comply with the transparency criteria set out in the Transparency Communication, which aim to* ***promote compliance, reduce uncertainty and enable companies to check whether aid granted to competitors is legal****. Transparency also* ***facilitates enforcement*** *for national and regional authorities by* ***increasing awareness of aid granted*** *at various levels, thus ensuring better monitoring and follow-up at national and local level. For that purpose, the notifying Member States should provide relevant information concerning the publication of information on the aid measures*."

The lack of transparency of aid measures is often cited as one of the obstacles to private enforcement actions at national level.[7]

Indeed, the lack of (publicly) available data makes it excessively burdensome for a claimant to assess and prove the impact of aid on the beneficiary's situation (and how it improved it) on the market, on competitors and on the claimant's own situation, especially in actions for damages. Some procedural systems allow national courts to order the defendant to disclose certain evidence that is not accessible to the claimant, because of its confidential character. However, national courts must often be convinced that the case has

[4] Paragraph (86) of the draft Notice providing that "*where the national court wishes to await the outcome of the Commission's compatibility assessment before adopting a final ruling, it may adopt* ***appropriate interim measures*****" is particularly relevant in the context of assessing compliance with environmental law** (or other) as a matter of compatibility of an aid measure.

[5] This is even more useful since the 2019 Enforcement Study shows that "*a number of national reports stress that State aid claims often require national courts to assess the legality of the measure under different areas of law (e.g. tax, administrative, contract law); the interaction of different legal regimes makes the evaluation of the measure under State aid rules more complex*." (see 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxemburg, 2019, available at https://state-aid-caselex- accept.mybit.nl/report, Chapter 2)

[6] Commission Regulation (EU) 2015/2282 of 27 November 2015 amending Regulation (EC) No 794/2004 as regards the notification forms and information sheets, OJ L 325, 10.12.2015, p. 1–180

[7] See 2019 Enforcement Study

merits before ordering such disclosure, meaning that claimants must already provide sufficient evidence to file their damage claims in the first place.

We therefore recommend to explicitly recall in the revised Notice that transparency of aid measures facilitates enforcement at national and local levels, along the lines of recital (2) Regulation (EU) 2015/2282 quoted above.

National courts should be reminded that **transparency requirements must be enforced *per se***, and the revised Notice should recommend that national courts **order publication** of relevant information without delay when a granting authority is in breach, applying all relevant remedies including periodic penalties if available under national procedural rules.

Simplified procedural rules, including administrative complaints to granting authorities directly (subject to review by national courts) could be recommended for this type of actions: a claimant must not bear excessive procedural burden and costs to merely request publication of information on aid measures.

Beyond the scope of the revision of the Notice, we stress that the **Commission itself should lead by example** and improve the enforcement of the transparency requirements:

- The EU State aid Transparency Register[8] does not contain any information on aid granted in certain Member States (e.g. Romania) and is obviously incomplete for others (e.g. Cyprus).

- The notification forms of aid ask Member States to "*indicate whether the following information will be published on a single national or regional website* (…)", with replies "yes" or "no"[9]; it is unclear what the consequences are if a Member States replies "no". The stricter requirement to publish information only applies to aid measures granted under certain guidelines, but not generally to all aid measures granted under Articles 106 or 107 TFEU, nor to aid amounts below €500,000.

- Information on notified aid is not available until a final Commission's decision is adopted, which limits information and thus the opportunity for third parties to provide evidence of breaches of law (e.g. environmental law) by the potential beneficiaries of aid, that the Commission should take into account when assessing the compatibility of aid.

We refer further to our previous recommendations on the improvement of the State aid procedure and transparency.[10]

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[8] https://webgate.ec.europa.eu/competition/transparency/public?lang=en
[9] Regulation (EU) 2015/2282, Annex I, section 6.7
[10] https://www.clientearth.org/media/kthkuhb4/clientearth-reply-to-call-competition-policy-and-green-deal_20-11-2020.pdf, section 2.1.4