

Aarhus Convention Secretariat

c/o Fiona Marshall
Palais des Nations
8-14 avenue de la Paix
1211 Geneva 10, Switzerland

Vienna, 1 March 2021

**Regarding: Comments on the Committee's draft findings regarding communication
ACCC/C/2015/128 (*European Union*)**

Dear Ms. Marshall,

We very much appreciate the opportunity to comment on the draft findings regarding communication ACCC/C/2015/128 (*European Union*) brought by ÖKOBÜRO and GLOBAL 2000.

Moreover, we warmly welcome and thank the Compliance Committee for its thorough and comprehensive deliberations and findings. We also thank the Secretariat for its considerable, expert support regarding case ACCC/C/2015/128.

We are mindful that this is not the proper phase in the compliance procedure to provide information or introduce factual or legal arguments that could have been introduced before,¹ nor to reiterate earlier legal submissions, introduce new ones or to engage in a further exchange of legal arguments.²

¹ Guide to the Compliance Committee, 2nd edition, 2019, para. 201; available at https://unece.org/DAM/env/pp/Publications/Guide_to_the_Compliance_Committee_second_edition_2019_English/Guide_to_the_Aarhus_Convention_Compliance_Committee_2019.pdf (28 February 2021).

² Ibid; see also a clarification on the purpose of comments on draft findings; available at https://unece.org/DAM/env/pp/compliance/C2015-121_European_Union/Correspondence_from_Communicant/toCommC121_06.02.2020.pdf (28 February 2021).

Rather, the purpose of commenting on draft findings is to point out any factual or legal errors in the Committee's draft findings.³

We have reviewed the Committee's draft findings and could not identify any factual or legal errors. To the contrary, we appreciate greatly the clear and robust nature of the Committee's findings and consider moreover that the points raised in the comments of the Party concerned merely reiterate arguments that have already been responded to by the communicant exhaustively and indeed considered by the Committee in detail.

Thus we refrain from further comments on substance and will limit ourselves to pointing out a few issues that are mostly of an editorial nature.

Regarding some specific editorial aspects of the draft findings we would respectfully like to make the following remarks and suggestions:

Para. 33: Regarding the possible complaint to the Commission, we would like to note that, although the relevant legislative act has changed from Regulation 659/1999 (article 20 (2)) to Regulation 2015/1598 (article 24 (2)), the relevant provision on the right to ask the Commission to carry out an investigative procedure as well as the definition of "interested party" according to article 1 (h) remain the same. Moreover, Regulation 659/1999 was the provision in force until 13 October 2015, that is after the 2014 decision-making concerning Hinkley Point C, which was the impetus for or communication, which itself was submitted on 9 March 2015. Thus, this paragraph can easily be amended to reflect that this was the state of play at the time of the facts raised in the communication itself.

Para. 64: As this paragraph refers to a claim by the communications, we suggest adding a reference to the communication, specifically its pages 6 *et seq*, where the communicants discussed specifically potential contraventions of EU law related to the environment (namely articles 191 and 194 TFEU and secondary legislation thereto).

Para 65: The draft findings reflect the argument submitted by ÖKOBÜRO and ClientEarth in their update of 6 November 2020 very well. However, as deliberations on the question whether state aid decisions may contravene national or EU law relating to the environment had already been made in the communication itself as well as in the

³ See again the clarification on the purpose of comments on draft findings, at fn. 2 *infra*.

communicant's comments on the Party's response of 7 September 2016, paragraph 65 could also refer to these previous statements.

Fn. 80: The restrictive interpretation of article 263 (4) TFEU in conjunction with the *Castelnuo* judgement had originally been referred to in the communication (fn. 103) and was then repeated in other submissions, i.e. the ones of 20 May 2021, 7 September 2016 and 6 November 2020.

Para. 110: As already mentioned in the communicant's submission of 7 September 2016 (para. 8), we agree with the Committee that the Commission when authorizing state aid, can rather be seen as a permitting body (see paragraph 110 of the draft findings).

With best regards,



Thomas ALGE
Managing Director,
ÖKOBÜRO – Alliance of the Austrian Environmental Movement