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## Comments from the Confederation of Swedish Enterprise on the Aarhus Convention and state aid regulations

The EU Commission is currently collecting views on a matter relating to the Aarhus Convention and state aid regulations. Swedish Enterprise would like to make the following points in response.

### Background

The Aarhus Convention is a UN convention on access to information, public participation in decision-making processes and access to legal review in environmental matters. The Aarhus Convention Compliance Committee (ACCC) found in case ACCC/C/2015/128 that the EU fails to meet the requirements of the Convention to provide the public with access to administrative or legal procedures to challenge state aid decisions under Article 108(2) TFEU which contravene environmental EU legislation. The committee therefore recommended that the EU take necessary measures in the form of changes to existing legislation, other regulations or other measures, or adopt new legislation. As a result, the European Commission has started to gather opinions on a number of proposals that the Commission has put forward to accommodate the changes that the ACCC has recommended.

### Swedish Enterprise's starting point

Swedish Enterprise is generally positive towards the Aarhus Convention itself. It is perfectly reasonable and important that the public is given sufficient information and the opportunity to participate in decision-making and access to legal review in environmental matters, as well as generally on other important social issues. In Sweden, there is a long tradition of ensuring a degree of transparency in political and administrative decision-making, and extensive and robust processes to ensure that the public has the opportunity to review political and administrative decisions. Transparency and objective legal principles create greater legitimacy and quality in decision-making and are an important part of the democratic rule of law.

When it comes to state aid, Swedish Enterprise supports a strict state aid regime that ensures a level playing field on the EU single market and that competition between companies exists on the basis on their own merits. The EU Commission's harmonised and efficient examination of state aid from member states is necessary for this to happen. These processes must be characterised by legal certainty for businesses and efficient processing to ensure that the support that is granted is relevant for business.

Although it is important to have a generally strict state aid regime, state aid is sometimes necessary and appropriate. The definition of what constitutes state aid is broad, which means that many policy measures that at first glance cannot be assumed to be state aid nevertheless constitute state aid in a purely legal sense. For example, this applies to various types of differentiated tax rates. State support can be a consequence of central policy implementation that is hard to avoid. Similarly, support may be necessary to address market failures, as well as bail out healthy businesses in temporary crises, such as during the corona pandemic and most recently the war in Ukraine. In such cases, state aid requests can be extremely urgent, and any delay in processing them can result in considerable financial damage.

State aid processes are essentially bilateral processes between member states and the European Commission, in which member states' needs to structure economic policy freely according to their political convictions and economic realities that exist in their own countries clash with the entire EU's interest in a well-functioning single market.

## The Commission's proposed measures

The Commission has put forward three proposals for potential measures.

- **Option 1:** amend Regulation (EC) No. 1367/2006 of the European Parliament and the Council on the application of the Aarhus Convention so that state aid is covered by the internal review process
- **Option 2:** amend the rules on best practice for state aid to enable an internal review process similar to that provided for under the Aarhus Regulation
- **Option 3:** amend Council Regulation (EU) No 2015/1589 on state aid to introduce an internal review process similar to that provided for under the Aarhus Regulation

The three proposals above are not necessarily the only ones possible, but are the first three proposals that the Commission has put forward and on which it wishes to receive views.

## Swedish Enterprise's assessment

Swedish Enterprise would like to state that the application of the Aarhus Convention in state aid matters is, in general, highly problematic. In practice, it would mean that the circle of possible complainants in the state aid approval process is significantly expanded. In particular, there is concern that this will lead to longer and more unpredictable processes. The risk of a widened circle of possible complainants is clear in the sense that there are many national and international environmental organisations that have the resources and knowledge to monitor and question this type of process. Such organisations have shown themselves to be willing and able to initiate administrative and legal processes; one such case is the case mentioned above, (ACCC/C/2015/128). There is also the risk that processes are initiated with the aim of delaying a state aid process. Legal proceedings in EU courts could delay a state aid process for years, during which time investors may withdraw or political changes result in a notification being withdrawn. There are thus strong incentives for certain actors to take advantage of any new opportunities to attempt to delay and/or prevent state aid that is perceived to be in conflict with an aspect of the EU's environmental legislation.

At the same time, it is essential that decisions taken by EU institutions do not conflict with any part of the EU's regulatory framework. This applies to environment-related EU legislation and other EU legislation.

However, state aid is not a phenomenon that constitutes an activity that in itself has an environmental impact. State aid is always related to a real (economic) activity that is intended to be conducted and/or is conducted, and it is the activity itself that may have some kind of impact on the environment and that must comply with relevant EU legislation. When carrying out an activity that may have some kind of environmental impact, there are already solid national permit processes in place to review environmental consequences, including specified production volumes where relevant. Processes also include the opportunity to review decisions made at court and/or higher court level. The fact is that in Sweden permit processes and the ability to review are so widespread and extensive that they are already perceived as a problem by business, especially in terms of much-needed investment in energy and infrastructure. Introducing the right of appeal in state aid cases would entail a doubling of regulation. An activity that has already been granted an environmental permit and that has passed a court review can in practice be prevented if the necessary state aid approvals are held up for several years by a similar review at EU level. New climate-smart manufacturing industries approved in such processes may be hindered if the required tax measures are appealed at EU level. We do not believe that this is a reasonable situation.

The following is a brief overview of further consequences that we believe this would lead to:

- Increased uncertainty surrounding investment where government support for an investment or later the activity in question, for example in the form of a lower tax rate, is necessary, which may discourage private investment. This, in turn, may mean that public support needs to increase for a socially beneficial investment to become a reality.
- State aid processes are already typically lengthy, which can cause problems for businesses that work on significantly shorter time frames. Longer processes also result in increased administrative costs for businesses, which need to provide more information, may be hit by increased legal costs, and considerable costs resulting from stalling investment projects.
- An obstacle to the green transition. Investment support is often provided by member states to accelerate the green transition and create more fossil-free energy production and energy supply. Increased uncertainty and longer processes may slow this extremely urgent transition. Environmental organisations have already shown themselves willing to block these types of projects. Case ACCC/C/2015/128 specifically concerns fossil-free electricity production in the form of nuclear power. At a consultation meeting on September 9, 2022 regarding the Aarhus Convention, the Client Earth organisation specifically cited two cases concerning investment support for hydropower as problematic and ones that it had potentially wished to review.
- Uncertainty over how emergency state aid is to be processed. The major crises we have faced recently and are continuing to endure demonstrate the importance of being able to quickly make and implement state aid decisions to rescue companies and the economy as a whole. It is unacceptable that such measures could be stopped or be affected by considerable legal uncertainty of the type of reviews that are likely to occur. Nor is it clear to Swedish Enterprise how a review of an approval decision by the Commission would be handled. It needs to be clarified whether this

means that the decision still applies during the review period, and in that case whether aid recipients can claim good faith if the decision needs to be annulled, or if it results in state aid being recovered. Another interpretation is that an appeal would entail an automatic inhibition of the decision during the appeal. Both options/interpretations are deeply problematic.

Overall, Swedish Enterprise believes that the Aarhus Convention is already fulfilled in state aid cases, at least in a Swedish context and with a less narrow approach than what the Compliance Committee appears to have adopted in its recommendations. The Committee seems unwilling to adopt a more holistic approach to the issue; rather it appears to be focused on the fact that the state aid process itself needs to include certain procedures for the convention to be considered fulfilled. We believe that this is unreasonable, given the highly extensive and problematic consequences that this results in. The Commission should therefore oppose the demands of the Committee to the extent that the Committee adheres to this view.

Of the options presented by the Commission, Option 2 appears to be the least harmful. This alternative would see the Commission including wording about how the public could ask the Commission to review its own decisions and how such reviews should be carried out in the Commission's *Best Practice Code*, which describes how the state aid process should be conducted. Above all, it is the type of information that must be provided in various contexts by member states to certify whether the environmental impact of a given activity has already been assessed in various ways in a national context, and whether EU environmental legislation has been taken into account in such assessments, which should be set out in the code. As long as member states are able to demonstrate that there are processes that ensure this, corresponding processes should not be necessary within the framework of state aid review. Such a procedure to obtain certificates from member states should in all respects mean that the state aid procedure itself, which is what the Compliance Committee is asking for, genuinely contains steps and measures that ensure that an activity that is the subject of an aid measure is in fact subject to a review in which the conditions of the Aarhus Convention are met.

It is also important, irrespective of the other points, to attempt to limit the number of types of decisions as much as possible, and to establish tight time limits both in terms of the time window during which a decision can be appealed and the time for the review itself.

Swedish Enterprise does not oppose other measures that generally increase the transparency of the Commission's work on state aid cases, given that it is essentially a bilateral process and where certain details cannot immediately be made public given that such details often contain information that can be politically and commercially sensitive and that can influence the stock markets. However, it can also be asked whether it might be reasonable to introduce a register that lists summaries of submitted formal notifications of state aid. Furthermore, measures should be considered to improve the Commission's existing database of granted and disbursed state aid to make these more integrated and user-friendly.

Finally, Swedish Enterprise values the Commission's active and vigilant work exercising supervision over member states' compliance with state aid rules. Greater scrutiny of existing measures and potential illegal state aid measures would be welcome. However,

the increased administrative burden that would result from any new procedures resulting from the recommendations of the Compliance Committee could reduce the Commission's ability to devote resources to its own review activities, which would be extremely unfortunate.

Questions regarding this statement should be addressed to:

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