
Compliance Committee to the Convention on
Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters (Aarhus Convention)

**Second progress review of the implementation of decision V/9g
on compliance by the European Union with its
obligations under the Convention**

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I. Introduction

1. At its fifth session (Maastricht, 30 June–1 July 2014), the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) adopted decision V/9g on compliance by the European Union with its obligations under the Convention (see ECE/MP.PP/2014/2/Add.1).

II. Summary of follow-up action with decision V/9g since the Committee's first progress review

2. By letter of 13 October 2015, the secretariat sent the Committee's first progress review on the implementation of decision V/9g to the Party concerned together with a reminder of the request by the Meeting of the Parties to provide its second progress report to the Committee by 31 October 2015 on the measures taken and the results achieved thus far in implementation of the recommendations set out in decision V/9g.

3. The Party concerned provided its second progress report on the implementation of decision V/9g on 29 October 2015.

4. At the Committee's request, on 6 November 2015 the secretariat forwarded the Party concerned's second progress report to the communicant of communication ACCC/C/2010/54, inviting him to provide any comments on that report by 27 November 2015. The communicant provided comments on 22 November 2015.

5. At its fifty-second meeting (Geneva, 8-11 March 2016), the Committee reviewed the implementation of decision V/9g in open session taking into account the Party concerned's second progress report and written comments received from the communicant of communication ACCC/C/2010/54 as well as the statements made by the Party concerned and the communicant by audio conference during the session. Following the discussion in open session, the Committee commenced the preparation of its second progress review on the implementation of decision V/9g in closed session.

6. On 7 April 2016, the secretariat invited the Party concerned and communicant of communication ACCC/C/2010/54 to submit the comments made during the open session at the Committee's fifty-second meeting in writing, as well as any comments they wished to make, by 12 April 2016.

7. The communicant submitted comments on 9 April 2016 and 26 April 2016 and the Party concerned provided its comments on 20 April 2016.

8. The Committee continued the preparation of its second progress review at its virtual meeting on 13 May 2016, taking into account the further written comments provided by the Party concerned on 20 April 2016 and the communicant on 9 April 2016.

9. On 27 October 2016, the Party concerned provided its third progress report. On the same day, the communicant of communication ACCC/C/2010/54 provided initial comments and subsequently further supplemented them via an email of 1 November 2016.

10. At the Committee's fifty-fifth meeting (Geneva, 6-9 December 2016), the Party concerned and the communicant participated by audio conference in the open session on the implementation of decision V/9g. At the Committee's request, the Party concerned provided further information in writing on 9 December 2016.

11. On 19 December 2016, the secretariat invited the Party concerned to provide some further information by 22 December 2016.

12. The Party concerned provided the requested information by email on 22 December 2016. However, due to a transmission problem, the Party concerned's email and attachments did not reach the secretariat and were resent by the Party concerned on 23 January and 14 February 2017.

13. After taking into account the third progress report and further information received from the parties, the Committee adopted its second progress review through its electronic decision-making procedure on 23 February 2017 and requested the secretariat to forward it to the Party concerned and the communicant of communication ACCC/C/2010/54.

Party concerned's second progress report

14. In its second progress report submitted on 29 October 2015, the Party concerned stated that the Commission services had taken due notice of the Committee's first progress review and stressed that they were committed to fully implement it, in particular its paragraphs 10(a)-(d) and 16.

15. The Party concerned submitted that decision V/9g did not require it to adopt new regulatory measures, nor to modify existing ones. The Party concerned stated that, according to paragraph 3 of decision V/9g, it can decide to adopt "clear instructions" instead and it accordingly undertook relevant activities that it considers fully satisfy the implementation of this recommendation. To this end, the Party concerned submitted that it had given the following instructions to member States:

- (a) Firstly, at the Plenary Meeting of the Concerted Action on Renewable Energy Sources Directive (CA RES) (Dublin, 20-21 May 2015), the Commission services repeatedly reminded all member States' delegates of their country's obligation as signatories of the Aarhus Convention to ensure that its provisions on public participation were duly implemented, especially with respect to National Renewable Energy Action Plans (NREAPs).
- (b) Secondly, by letters of 14 October 2015 signed by the Director-General of Energy and addressed to the member States' Permanent Representatives to the European Union, the Commission services formally asked the member States to include in their 2015 National Renewable Energy Progress Reports, a detailed description of, and reference to, the measures and procedures in force that ensure public participation in the decision-making processes, in accordance with the requirements of article 7, in conjunction with article 6 of the Convention. The same was requested should member States have to send updates of their NREAPs. The Commission would report on member States' replies in the next biannual renewable energy progress report to the European Parliament and Council, due in autumn 2016.

16. The Party concerned submitted that the above measures responded to paragraphs 10(a)-(d) of the first progress review. It stated that paragraph 10(d) of the Committee's first progress review would be enforced because the Commission services would be particularly attentive in case there is any amendment of member States' NREAPs under article 4(4) of the Renewable Energy Directive. The Commission would assess NREAPs against the Convention in order to guarantee that public participation measures and procedures were observed in accordance with the requirements of article 6, paragraphs 3, 4 and 8, of the Convention as referred to in article 7.

17. With respect to paragraph 16 of the Committee's first progress review, the Party concerned reported that the Commission's plan of action for 2016 would include the following actions:

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- (a) Two Plenary Meetings of the Concerted Action on Renewable Energy Sources Directive (CA RES) would be held in 2016, at which the Commission proposed to stress the need for compliance of member States' NREAPs with article 7 and to give appropriate instruction where needed;
 - (b) In the first quarter of 2016, the Commission would assess the progress reports of member States in the promotion and use of energy from renewable sources submitted by member States by 31 December 2015. In this assessment, the Commission would evaluate:
 - (i) If the arrangements for public participation relating to the NREAPs notified by member States were transparent and fair and if within those arrangements the necessary information was provided to the public.
 - (ii) If the measures and procedures in force to ensure public participation in the decision-making process related to plans adopted under Directive 2009/28/EC relating to the environment were in accordance with the requirements of article 6, paragraphs 3, 4 and 8, of the Convention, including if member States had reasonable time frames, allowing sufficient time for informing the public and for the public to prepare and participate effectively, allowing for early public participation when all options are open, and ensuring that due account is taken of the outcome of the public participation.

18. The Party concerned also reported on other relevant policy developments, including the Communication "A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy" which foresaw the adoption of a new governance process for integrated governance and monitoring process, to make sure that energy-related actions at European, regional, national and local level all contribute to the European Union's objectives. One of the purposes of that process would be to ensure an energy dialogue with stakeholders to best inform policy-making regarding European Union strategy and support an active engagement of all parties in managing the energy transition. The Communication also announced a new Renewable Energy Package in 2016-2017. The Party concerned indicated that further information on these policy developments would be provided in its third progress report.

19. In its oral statement during the open session on decision V/9g held during the Committee's fifty-second meeting (Geneva, 8-11 March 2016), the Party concerned stated that it was currently assessing the replies received from member States in accordance with its request detailed in paragraph 15(b) above, and would report on those replies in its report to the European Parliament and the Council in autumn 2016. If, while assessing member States' replies, it became aware of any infringements of European Union law, including the Aarhus Convention, then it "might open infringement proceedings"¹ against the member State(s) concerned. It stated that the Aarhus Convention is part of the European Union *acquis*, so it already had to be observed by the member States, and that the Commission, in its letter of 14 October 2015 and in its frequent meetings with member States, had reminded them of their obligation to observe the Convention, and specifically articles 6 and 7 thereof.

20. The Party concerned also stated that it did not have to expressly inform the member States that if they failed to comply with article 7 of the Convention, the Commission would open an infringement procedure, because the member States were very well aware of the consequences of infringing European Union law.²

¹ Audio recording of open session during the Compliance Committee's fifty-second meeting.

² Audio recording of open session during the Compliance Committee's fifty-second meeting.

21. The Party concerned indicated that in its third progress report, it would report on its assessment on the replies by member States to the Commission's letter of 14 October 2015.³

22. By email dated 20 April 2016, the Party concerned provided an overview of the key elements of its statement to the Committee's fifty-second meeting, namely:

- With respect to the Committee's question as to whether it had clearly instructed the member States to properly implement article 7 of the Convention regarding the adoption of NREAPs, the Party concerned stated that, as reported in its second progress report, this had been done through its letters to member States of 14 October 2015 (para. 15(b) above). The Party concerned would assess the member States' progress reports and if applicable, the amended NREAPs, and would include this assessment in its third progress report to the Compliance Committee.
- Given that the Treaty on the Functioning of the European Union (TFEU) itself provided a legal basis for infringement proceedings, no additional instructions or provisions were necessary for member States to be made aware of that risk in case they did not observe their obligations under the European Union's acquis.
- The Party concerned's further progress to implement decision V/9g would be included in its third progress report due by 31 October 2016.

Comments on the second progress report

23. In his comments dated 22 November 2015 on the Party concerned's second progress report, Mr. Pat Swords, the communicant of communication ACCC/C/2010/54, recalled paragraph 3 of decision V/9 on general issues of compliance which considered that the implementation of measures to bring legislation or practice into compliance "should commence as soon as possible once specific problems with compliance have been identified". The communicant also recalled paragraph 77 of the Committee's findings on communication ACCC/C/2010/54 which stated, inter alia:

"The Party concerned should have in place a regulatory framework to ensure proper implementation of the Convention....The Committee in this respect notes that a framework for implementing the Convention with respect to plans and programmes concerning the environment, including plans and programmes related to renewable energy, should have been in place since February 2005, when the EU became a Party to the Convention."

24. The communicant submitted that to date not a single effective measure had been taken by the Party concerned to achieve compliance with the Convention in relation to its renewable energy programme and in particular the adoption of the NREAPs. He cited various correspondence from the European Commission, including that of 12 October 2015 which stated:

"In relation to the NREAP, the Commission has no reason to believe that insufficient public participation took place prior to the adoption of this plan".⁴

25. The communicant stated that, moreover, there was a point blank refusal to address the justification for the NREAP and the renewable energy projects, the impacts and mitigation measures and the alternatives including the zero option. He submitted that

³ Audio recording of open session during the Compliance Committee's fifty-second meeting.

⁴ Email dated 12 October 2015 from Antoinette Long, Directorate-General Environment, European Commission to Mr. Greijmans, see Update enclosing correspondence with European Commission dated 13 October 2015.

planning decisions were pro forma and the public participation was nothing more than a 'box ticking' exercise. With respect to paragraphs 10(b) and (c) of the Committee's first progress review, the communicant stated that when these issues had been raised with the European Commission by Irish individuals and NGOs, there had been a consistent refusal to deal with them.

26. The communicant submitted that the formal request by the European Commission to member States to include in their 2015 National Renewable Energy Progress Reports a detailed description of, and reference to, the measures and procedures in force that ensure public participation in the decision-making processes in accordance with the requirements of article 7 (see paragraph 15(b) above) was time-wasting, because the findings and recommendations of the Committee had clearly instructed this more than three years ago.

27. The communicant queried why the Commission, in its Consultation Questionnaire for the "Preparation of a new renewable energy directive for the period after 2020" published on 19 November 2015, was only at the end of 2015 asking the public to "identify and ideally also quantify the direct and indirect costs and benefits such as macroeconomic effects, competitiveness effects, innovation, cost and cost reductions, environmental and health effects of the [Renewable Energy Directive]". The communicant submitted that the European Union and member States should have had this information assessed and available to justify the decision-making that led to the adoption of the Renewable Energy Directive in April 2009 and the NREAPs in June 2010. In contrast, the NREAP's template's section 5.3 "Assessment of the impacts" was expressly stated to be an optional table in which to set out the estimated costs and benefits of the renewable energy policy support measures. In keeping with its optional nature, nineteen member States left the table blank while others inserted little or no information. The communicant submitted that the Party concerned's proposed plan of action in paragraph 15(b) above was thus completely unnecessary, because the information relating to the inadequacy of public participation was already available to them.

28. With respect to paragraph 10(d) of the Committee's first progress review, the communicant queried whether the Party concerned had to date even attempted to evaluate the NREAPs with regards to its obligations under article 7. He submitted that if it had, it would be evident that the necessary information had not been provided to the public.

29. The communicant submitted that it was essential that the Party concerned be required to clarify to the Compliance Committee in writing the position of decision V/9g and the legal status of the current NREAPs in European Union law with regard to: (i) their implementation; and (ii) any future enforcement by the European Commission of the targets and measures set in them.

30. The communicant also expressed criticism regarding the policy developments reported by the Party concerned, asserting that the European Union and its member States lacked accurate supporting information on the environmental impact of carbon emissions.

31. In his comments of 9 April 2016, the communicant stated that in accordance with Directive 2009/28/EC, the European Union's member States were required to submit their 2015 NREAP progress reports by 31 December 2015. The communicant submitted that a significant number of member States' progress reports were posted on the European Commission's website,⁵ but some reports were missing. He submitted that none of the information provided in the available progress reports could be considered to be "detailed information" as requested by the European Commission in its letter of 14 October 2015 (para. 15(b) above). The communicant provided a table analysing the information on public

⁵ <https://ec.europa.eu/energy/en/topics/renewable-energy/progress-reports>

participation contained in the member States' progress reports. According to the communicant, many progress reports, including those of the United Kingdom, Austria, Netherlands, Romania, Latvia, Finland, Luxembourg, Slovenia, Germany and France, contained no information on public participation with respect to the NREAPs at all. He concluded that this demonstrated that the public was not provided with an opportunity to participate in the decision-making on the NREAPs.

32. The communicant also stated that nineteen member States had left section 5.3 "Assessment of the impacts" of the NREAP template (see para. 27 above) blank and other member States provided little or no information. The communicant queried how effective public participation could have taken place when there was essentially zero information provided on the NREAP's impacts or its justification.

33. During the open session on decision V/9g at the Committee's fifty-second meeting (Geneva, 8-11 March 2016), the communicant submitted that the Party concerned's representatives at that session would have had access to the NREAP progress reports (see para. 31 above) well in advance of that session but at no stage did they indicate that little or, in many cases, zero information on public participation on the NREAPs was provided in those reports. Rather, the Party concerned's representatives had given the impression that a detailed review of the information provided was taking place and that this therefore justified an extended period of several months before the Compliance Committee could be informed of its outcome.

34. Finally, the communicant submitted that the Renewable Energy Directive 2009/28/EC was flawed as it was in conflict with the Convention. In this respect, the communicant recalled that, in the context of communication ACCC/C/2006/17, the Party concerned had clarified the impact on the European Community of approval of the Aarhus Convention, including that:

"An agreement concluded by the Council is binding on the Community's institutions and member States. It is the above Court's settled case-law that such an agreement forms **an integral part of the Community's legal order and the Court of Justice ensures compliance with it.**

...**Such agreements take precedence over legal acts adopted under the EC Treaty (secondary Community law).** So if there was a conflict between a Directive and a Convention, such as the Aarhus Convention, all Community or member State administrative or judicial bodies would have to apply the provision of the Convention and derogate from the secondary law provision. This precedence also has the effect of requiring Community law texts to be interpreted in accordance with such agreements.

...Therefore, under Article 226 EC, the Court of Justice may punish a member State for non-compliance with an agreement concluded by the Community."⁶

35. The communicant submitted that the position of decision V/9g with respect to Community law and in particular Directive 2009/28/EC should be clarified in writing by the Party concerned in a similar fashion as had occurred in the context of communication ACCC/C/20106/17, so as to ensure there was no ambiguity going forward as to the seriousness of this matter and the need to ensure compliance.

36. In his comments of 26 April 2016, the communicant reported that in addition to the ten member States listed in paragraph 31 above whose NREAP progress reports contained

⁶Statement by the European Community dated 21 November 2007, original emphasis retained and footnotes omitted.

no information on public participation, a further four member States' NREAP progress reports were at that date available on the European Commission's website and likewise failed to provide such information. Ireland's report contained no information regarding article 7 and the adoption of the NREAPs and Poland, Portugal and Belgium's reports contained no information on public participation at all.

37. The communicant also put before the Committee a letter from the European Commission Directorate General Environment to a Mrs. Joan O'Callaghan dated 26 April 2016 which inter alia stated that:

“The plan prepared under the Renewable Energy Directive by Ireland (the National Renewable Energy Action Plan (NREAP)) has been considered by the Commission in some detail. Whilst no formal SEA was carried out for this plan, we have concluded that there is no reason to believe that insufficient public participation took place prior to the adoption of that plan.

It is important to note that the Commission enjoys a wide discretion in deciding whether to bring enforcement proceedings. There is no duty upon the Commission to bring such proceedings and they do not automatically follow from every complaint.”

38. The communicant expressed his strong frustration at the manner in which the Party concerned was proceeding with respect to its implementation of decision V/9g.

Party concerned's third progress report

39. In its third progress report, dated 27 October 2016, the Party concerned submitted that via the previously announced informal reminders during the Plenary Meetings of the Concerted Action on Renewable Energy Sources Directive (in May 2015 and August 2016), as well as the formal request, by means of a letter signed by the Director-General of Energy and addressed to the member States' Permanent Representatives to the European Union (see paragraph 13(b) above), it had at least taken a significant step in fulfilling the requirements of decision V/9g. The Party concerned submitted that these measures did not only serve as a formal reminder of the obligations of the member States under article 216, paragraph 2, of the TFEU, but also secured the possibility to monitor the implementation of their obligations, through the assessment of the National Renewable Energy Progress Reports submitted.

40. The Party concerned further highlighted a number of good practices of member States in implementing the requirements of article 7 of the Convention in adopting their NREAP, which had become apparent from the 2015 NREAP Progress Reports. It stated that these good practices would be shared with the other member States in the next Concerted Action Plenary Meeting in the first quarter of 2017. The Party concerned further asserted that it would use that meeting to ask specific questions to those member States which had not provided a satisfactory summary of their implementation of article 7 of the Convention in their 2015 NREAP Progress Reports, in order to determine if the legal framework in place in those member States for implementing the Convention requirements was insufficient, or if the lack of reporting was a formal omission.

41. In its third progress report, the Party concerned also reported on the Commission's Communication on a Framework Strategy for the Energy Union, adopted on 25 February 2015,⁷ which foresaw that the Energy Union needed an integrated governance and monitoring process to streamline current planning and reporting requirements. The core of

⁷ COM(2015)080.

the governance system would consist of two components which would enable both member States and the EU to better comply with the Convention's requirements.

42. The first component was the streamlining of planning obligations, including the current NREAPs, into so-called "integrated national energy and climate plans." The Party concerned stated that it was likely that these new plans would be subject to the SEA Directive including its public participation requirements – in which case the requirements of article 7 of the Convention would be covered through the SEA procedure - though this would be for the member States to assess depending on the content of their plan. The Party concerned further reported that, in any event, it would make sure that those requirements are met in practice through a structured dialogue with the member States on their draft plans at an early stage which would enable the Commission services to monitor the implementation of the public participation requirements of the Convention.

43. The second component of the Communication on a Framework Strategy for the Energy Union that would enable better compliance with the Convention was a transparent monitoring system, based inter alia on streamlined reporting, which would facilitate the implementation of the Convention's requirements by member States and the EU, notably with regard to access to environmental information.

44. The Party concerned further submitted that it was now established practice to incorporate public participation requirements in EU legislation, including in the energy field, e.g. article 5 of Directive 2013/30/EU on safety of offshore oil and gas operations.

Comments on the third progress report

45. By email of 27 October 2016, Mr. Pat Swords, the communicant of communication ACCC/C/2010/54, expressed his dissatisfaction with the measures taken by the Party concerned. He stated that no progress had been made by the Party concerned since the Committee's findings were adopted in August 2012. He submitted that decision V/9g required the Party concerned to take measures with regard to its current legislative framework, namely Directive 2009/28/EC, which runs through to 2020. The communicant submitted that it was therefore insufficient that the Party concerned announced its "determination to comply with these requirements in its future legislative framework."

46. By email of 7 November 2016, the communicant reiterated his frustration (see para. 31 above) that, despite being already available to the European Commission since the start of 2016, the information on public participation contained in member States' NREAP progress reports had not been provided to the Committee prior to the audio conference held at its fifty-second meeting but only in the Party's third progress report. The communicant referred the Committee to the analyses he had provided on 9 and 26 April 2016 demonstrating the failures of all member States to carry out proper public participation prior to their NREAP's adoption (see para. 31 above). The communicant further submitted that the Party concerned had failed to fulfil the Committee's recommendations in paragraphs 13 to 14 of its first progress review, which invited the Party concerned, inter alia, to provide a detailed plan of action, including a timeline, as to how it proposed to address each of the recommendations in paragraph 3 of decision V/9g.

Subsequent information from the Party concerned

47. During the audio-conference on decision V/9g held in open session at its fifty-fifth meeting (Geneva, 6-9 December 2016), the Party concerned, inter alia, reiterated its view that the letters sent to member States on 14 October 2015 amounted to an "instruction" as required by paragraph 3 of decision V/9g and reported on recent legislative developments.

48. On 9 December 2016, the Party concerned provided its reply to the questions posed by the Committee during the above audio conference. In this regard, the Party concerned provided a copy of a letter sent by the Director-General for Energy to Ireland on 14 October

2015 (see paragraph 15(b) above). It also provided copies of letters sent to member States on 13 November 2013 regarding public participation in the context of the NREAPs. The Party concerned reiterated that, within its legal order, the letters sent to member States on 14 October 2015 were to be considered as “instructions”. The Party concerned further reported that its assessment of the NREAPs (referred to in paragraph 40 above) resulted in the finding that ten member States had not provided any information on the public participation procedures in force, while six member States had provided insufficient information. The Party concerned reiterated that it intended to ask specific questions to these member States in order to determine if the national legal framework in place for implementing the Convention requirements was sufficient.

49. In the information submitted on 9 December 2016, the Party concerned also provided the Committee with a link to the Proposal for a Regulation on the Governance of the Energy Union adopted on 30 November 2016,⁸ and drew the Committee’s attention to recital 20 and article 10 of the proposal on public participation.

50. In the information originally sent on 22 December 2016 but not received and then re-sent on 23 January 2017 the Party concerned stated that two member States (Czech Republic and Portugal) had amended their NREAPs in 2013 and that no other member State was known to be currently doing so. By emails of 23 January and 14 February 2017, the Party concerned also re-sent copies of the letters sent to all member States on 14 October 2015. The contents of the letters were identical to the letter sent to Ireland on 14 October 2015.

III. Considerations and evaluation by the Committee

51. In order to fulfil the requirements of paragraph 3 of decision V/9g, the Party concerned would need to provide the Committee with evidence that:

- (a) It had adopted a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention with respect to the adoption of NREAPs;
- (b) It ensures that the arrangements for public participation in its member States are transparent and fair and that within those arrangements the necessary information is provided to the public;
- (c) It ensures that the requirements of article 6, paragraphs 3, 4 and 8, of the Convention are met, including reasonable time frames, allowing sufficient time for informing the public and for the public to prepare and participate effectively, allowing for early public participation when all options are open, and ensuring that due account is taken of the outcome of the public participation;
- (d) It had adapted the manner in which it evaluates NREAPs accordingly.

52. The Committee welcomes the second and third progress report of the Party concerned, which were both submitted on time.

53. In its first progress review, which reviewed the Party concerned’s first progress report and the comments received from the communicant of communication ACCC/C/2010/54 on that report, the Committee invited the Party concerned, in its second progress report due on 31 October 2015, to provide a detailed plan of action, including a timeline, as to how it proposed to address each of the recommendations set out in paragraph

⁸ (COM(2016)759 final).

3 of decision V/9g. In that regard, the Committee welcomes the plans of action contained in the Party concerned's second and third progress reports.

Proper regulatory framework and/or clear instructions with respect to adoption of NREAPs

54. With respect to the first and second sentence of paragraph 3 of decision V/9g, the Committee examines the measures taken by the Party concerned to put in place a proper regulatory framework and/or clear instructions with respect to the adoption of:

- (i) Any amendments to member States' 2010 NREAPs;
- (ii) The adoption of new NREAPs post-2020.

55. At the outset, the Committee reiterates, as it pointed out in paragraph 12 of its first progress review, a clear instruction would amount to a direction or order that has to be followed by the member States.

Amendments to member States' 2010 NREAPs

56. Pursuant to article 4, paragraph 4 of the Renewable Energy Directive, "a member State whose share of energy from renewable sources fell below the indicative trajectory in the immediately preceding two-year period...shall submit an amended national renewable energy action plan to the Commission by 30 June of the following year...". In this respect, the Committee understands that, while two member States amended their NREAPs in 2013, no member States have amended their NREAPs since the adoption of decision V/9g and no member States are known to be currently doing so. The Committee notes, however, that article 4, paragraph 4 of the Renewable Energy Directive remains in force and will remain in force until such time as it is amended, repealed or superseded by new legislation. Thus, even though no NREAPs have been amended since 2013, this does not preclude the possibility of amendments going forward. Accordingly, the Committee does not consider the fact that no NREAPs have so far been amended since the adoption of decision V/9g to remove the requirement in paragraph 3 of decision V/9g for the Party concerned to adopt a proper regulatory framework and/or clear instructions for implementing article 7 with respect to the adoption of NREAPs.

57. The Committee notes that the Party concerned, in its second and third progress reports, has reported on two separate measures which it asserts amount to clear instructions to member States with respect to the NREAPs. Firstly, the Party concerned refers to information given during the Plenary Meetings of the Concerted Action on Renewable Energy Sources Directive (CA RES) held in May 2015 and August 2016 (see paragraphs 15(a), 17(a) and 39 above). As the Party concerned noted in its second progress report, the CA RES provides "a forum for confidential and structured discussions and cross learning" between the EU organizations and the member States and constitutes an "exchange of views, approaches and experiences." Given the confidential nature of these meetings, the Committee is in no position to review the actual content of the instructions given. In this regard, the confidential nature of the instructions also means that they do not address the Committee's finding endorsed through paragraph 1(c) of decision V/9g regarding the Party concerned's failure to comply with article 3, paragraph 1 of the Convention in relation to the NREAPs. Instructions given in a confidential setting are by definition not transparent and therefore do not establish a transparent framework to implement the Convention, as required by article 3, paragraph 1 of the Convention.

58. Secondly, the Party concerned refers to letters sent by the Director-General Energy to member States on 14 October 2015 requesting them to include in their 2015 National Renewable Energy Progress Reports a detailed description of, and reference to, the measures and procedures in force that ensure public participation in the decision-making processes (see paragraph 15(b) and 39 above). In this regard, the Party concerned has

provided the Committee with a copy of the letters sent to all twenty-eight member States, which state, inter alia:

As a follow-up to the above findings and recommendations [on communication ACCC/C/2010/54], the European Union has to submit periodically to the Compliance Committee (in 2014, 2015 and 2016) detailed information about progress in implementing the recommendations.

The first report to the ACCC was sent in October 2014 and we are now in the process of preparing the 2nd report.

For the purpose of this reporting exercise, I would like to ask you to include, in the next national progress report to be submitted by 31 December 2015, a detailed description of and reference to the measures and procedures in force that ensure public participation in the decision-making process in accordance with the requirements of Article 6, paragraphs 3, 4 and 8 of the Convention referred to in Article 7, including reasonable time frames, allowing sufficient time for informing the public and for the public to prepare and participate effectively, allowing for early public participation when all options are open, and ensuring that due account is taken of the outcome of the public participation related to plans adopted under directive 2009/28/EC relating to the environment. These public participation measures and procedures are also applicable to any amendment of the NREAP, if any, as provided for by Article 4(4) of the Renewable Energy Directive.

59. The Committee welcomes the clear reference to the various elements of public participation referred to in the text quoted above. Nevertheless, while the Committee considers the letters contain helpful instructions on how to report on the measures in place to carry out public participation, they do not in themselves amount to clear instructions that ensure that the member States carry out public participation in that way.

60. The Committee considers that instructions on how public participation is to be carried out and instructions on how to report upon public participation are not at all the same thing. Instructing member States to report after the fact on the measures they have put in place regarding public participation does not amount to clear instructions to make such arrangements and to ensure they are implemented. Thus, the Committee finds that the letters of 14 October 2015 in themselves do not amount to a regulatory framework or clear instructions to member States on how to implement article 7 that will ensure that all the requirements of that provision including the requirements of article 6, paragraphs 3, 4 and 8, of the Convention will be met.

61. In the light of the above, and bearing in mind that article 4, paragraph 4 of the Renewable Energy Directive remains in force and that, consequently, member States may still adopt amended NREAPs in the future, the Committee is not yet convinced that the Party concerned has complied with the first and second sentences of paragraph 3 of decision V/9g with respect to the adoption of amendments to the 2010 NREAPs.

Adoption of NREAPs post-2020

62. Article 23, paragraph 9, of the Renewable Energy Directive states:

“In 2018, the Commission shall present a Renewable Energy Roadmap for the post-2020 period.

That roadmap shall, if appropriate be accompanied by proposals to the European Parliament and the Council for the period after 2020. The roadmap shall take into account the experience of the implementation of this Directive....”

63. In its third progress report, the Party concerned reported that the Commission's Communication on a Framework Strategy for the Energy Union, adopted on 25 February

2015, envisaged the streamlining of planning obligations, including the current NREAPs, into so-called “integrated national energy and climate plans”. More recently, during the audio conference at the fifty-fifth meeting and in its written information of 9 December 2016, the Party concerned informed the Committee of the “Proposal for a Regulation on the Governance of the Energy Union” (see paragraphs 41 and 49 above). It is the Committee’s understanding that if this proposal is adopted together with the amendment proposed to the Renewable Energy Directive published on the same day,⁹ member States would not be required to adopt new NREAPs in 2020 but rather to submit by 1 January 2019, and every 10 years thereafter, “integrated national energy and climate plans”.¹⁰ The Committee further notes that article 3, paragraph 2, of the proposed amended Renewable Energy Directive states that member States’ contributions to the Union’s 2030 target of energy from renewable sources shall be set and notified to the Commission as part of their integrated national energy and climate plans. It follows that should the proposed amendment to the Directive be adopted, the integrated national energy and climate plans will substitute NREAPs, in which case paragraph 3 of decision V/9g would apply to the adoption of integrated national energy and climate plans, just as it currently does for NREAPs.

64. Bearing in mind the above, the Committee welcomes the efforts undertaken to include public participation requirements in the Proposal for a Regulation on the Governance of the Energy Union. The Committee notes with appreciation the reference in recital 20 to the need that public participation procedures conducted by the member States comply with the Convention. With regard to the operative provisions of the proposal, the Committee notes the obligation to conduct “early and effective opportunities to participate in the preparation of draft plans” as well as to attach to the proposed plan “a summary of the public’s views” in article 10 of the proposal. The Committee also notes, however, that none of the elements of article 7 mentioned in paragraph 3 of decision V/9g are referred to in article 10 or elsewhere in the Proposal, except the need for public participation to be “early” and “effective”.

65. In this regard, in order to fulfil paragraph 3 of decision V/9g, the Party concerned’s measures must amount to a proper regulatory framework or clear instructions that ensures that member States put in place arrangements with respect to the adoption of NREAPs (or the plans that take their place) that would meet each of the elements of article 7 set out in that paragraph, namely that:

- The arrangements are transparent and fair;
- Within the arrangements the necessary information is provided to the public;
- The requirements of article 6, paragraphs 3, 4 and 8 are met, including reasonable timeframes, allowing sufficient time for informing the public and for the public to prepare and participate effectively, allowing for early public participation when all options are open, and ensuring that due account is taken of the outcomes of the public participation.

66. The Committee notes that in paragraph 14 of its third progress report, the Party concerned said –

“...It is likely that [integrated national energy and climate plans] will be subject to the SEA Directive – which is for the member States to assess according to EU law depending on the content of their draft plan-, in which case the public participation

⁹ Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast), published on 30 November 2016.

¹⁰ As per article 9, paragraph 1, of the Proposal for a Regulation on the Governance of the Energy Union.

requirements of Article 7 of the Convention will be covered by the application of the SEA procedure. In any event, the Commission will make sure that those requirements are met in practice through a structured dialogue with the member States on their draft plans at an early stage which will enable the Commission services to monitor the implementation of the public participation requirements of the Convention.”

67. This seems to imply that the Party concerned does *not* intend to rely upon the proposed new legislation to implement article 7 with respect to integrated national energy and climate plans after 2020. The Committee is concerned that the proposed new legislation does not include provisions that comprehensively implement paragraph 3 of decision V/9g after 2020 and requests further information on how the Party concerned will implement that paragraph.

68. In the light of the above, the Committee is not in position to conclude that, should the proposed legislation be adopted in its current form, the Party concerned would comply with the first and second sentences of paragraph 3 of decision V/9g with respect to the period after 2020.

Evaluation of NREAPs

69. The final sentence of paragraph 3 of decision V/9g requires the Party concerned to “adapt the manner in which it evaluates NREAPs accordingly”. In this regard, in its oral statement given during the audio conference on 8-11 March 2016, the Commission stated that it was assessing the information provided by the member States in their 2015 National Renewable Energy Progress Reports and that it “might open infringement proceedings” where this information was insufficient (see paragraph 19 above). The Committee welcomes the Party concerned’s statement that it might open infringement proceedings to enforce the requirements of article 7 of the Convention following its assessment of the information provided by member States. The Committee considers that such assessments, coupled with a real possibility of infringement proceedings against any member State whose information is insufficient or whose information reveals a failure to carry out public participation that fully met the requirements of article 7, may indeed address the Committee’s finding endorsed through paragraph 1(b) of decision V/9g regarding the absence of proper monitoring. Likewise, the combination of assessment and infringement proceedings by the Party concerned may meet the recommendations contained in paragraph 3 of decision V/9g regarding evaluating the NREAPs.

70. In its third progress report, the Party concerned stated that it had assessed the 2015 National Renewable Energy Progress Reports received and that, during the next Concerted Action Plenary Meeting in the first quarter of 2017, it intended to ask specific questions to the member States which had not provided a satisfactory summary of their implementation of article 7 of the Convention, in order to determine if the legal framework in place in those member States for implementing the Convention requirements is insufficient, or if the lack of reporting can be attributed to a formal omission (see paragraph 40 above). In this regard, by email dated 9 December 2016 in reply to the Committee’s questions during the audio conference at the fifty-second meeting, the Party concerned stated that ten member States had entirely failed to report on public participation in the preparation of their NREAPs and a further six member States had provided insufficient information (see paragraph 47 above). Noting the Party concerned’s statement during the audio-conference at the Committee’s fifty-second meeting on 8-11 March 2016 that it may open infringement proceedings to enforce the requirements of article 7 of the Convention following its assessment of the information provided by member States, the Committee invites the Party concerned to:

(a) Provide more detailed information regarding its assessment of the public participation carried out by each member State based on the information provided in each 2015 NREAP progress report, and

(b) Explain, for each member State whose information on their implementation of article 7 was either insufficient or revealed a possible failure to carry out public participation that fully met the requirements of article 7, the specific measures it proposes to take with respect to that member State.

Other matters

71. On a related point, the Committee notes the Commission's statement in its letter to Mrs. O'Callaghan of 26 April 2016 that:

“Whilst no formal SEA was carried out for this plan [Ireland's NREAP], we have concluded that there is no reason to believe that insufficient public participation took place prior to the adoption of that plan”.

The Committee expresses serious concern at the Commission's statement which is clearly inconsistent with paragraph 83 of the Committee's findings on communication ACCC/C/2010/54 that held that:

“with respect to the consultation with the public conducted by Ireland the Committee finds that it was conducted within a very short time frame, namely two weeks. Public participation under article 7 of the Convention must meet the standards of the Convention, including article 6, paragraph 3, of the Convention, which requires reasonable time frames. A two week period is not a reasonable time frame for “the public to prepare and participate effectively”, taking into account the complexity of the plan or programme”.

IV. Conclusions

72. The Committee welcomes the second and third progress reports of the Party concerned, which were submitted on time, and the additional information provided by the Party concerned at the audio conferences held at the Committee's fifty-second and fifty-fifth meeting and on 20 April 2016 and 9 and 22 December 2016.

73. The Committee is not yet convinced that the Party concerned has fulfilled the requirements of paragraph 3 of decision V/9g, but welcomes the steps taken by the Party concerned to date in that direction.

74. In order for the Committee to prepare its report to the sixth session of the Meeting of the Parties on the implementation of decision V/9g, the Committee invites the Party concerned to submit further information by 1 April 2017 concerning the following matters:

(a) With respect to the recommendation in paragraph 3 of decision V/9g, to provide evidence that it has adopted a proper regulatory framework or clear instructions for implementing article 7 with respect to:

- (i) The adoption of any amendments to the 2010 NREAPs;
- (ii) The adoption of the corresponding post-2020 plans (whether in the form of NREAPs, integrated national energy and climate plans or otherwise),

pursuant to which member States are clearly instructed to put in place arrangements to meet each of the elements of article 7 set out in paragraph 3 of decision V/9g;

(b) With respect to the final sentence of paragraph 3 of decision V/9g concerning the evaluation of the NREAPs, to:

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- (i) Provide more detailed information regarding its assessment of the public participation carried out by each member State based on the information provided in each 2015 NREAP progress report, and
 - (ii) Explain, for each member State whose information on their implementation of article 7 was either insufficient or revealed a possible failure to carry out public participation that fully met the requirements of article 7, the specific measures it proposes to take with respect to that member State.

75. The Committee informs the Party concerned that all measures necessary to implement decision V/9g must be completed by, and reported upon by no later than 1 April 2017, as that will be the final opportunity for the Party concerned to demonstrate to the Committee that it has fully met the requirements of decision V/9g.
