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in Environmental Matters

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Item 7 (b) of the provisional agenda

**Procedures and mechanisms facilitating the implementation
of the Convention: compliance mechanism**

Report of the Compliance Committee*

Compliance by the European Union with its obligations under the Convention

Summary

This document is prepared by the Compliance Committee pursuant to the request set out in paragraph 19 of decision V/9 of the Meeting of the Parties (ECE/MP.PP/2014/2/Add.1) and in accordance with the Committee's mandate set out in paragraph 35 of the annex to decision I/7 of the Meeting of the Parties on review of compliance (ECE/MP.PP/2/Add.8).

* The present document is being issued without formal editing.



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

2. The Party concerned provided its first progress report on the implementation of decision V/9g on 18 December 2014.

3. At the Committee's request, on 2 January 2015 the secretariat forwarded the first progress report by the Party concerned to the communicant of communication ACCC/C/2010/54, inviting him to provide comments by 23 January 2015. The communicant provided comments on 12 January 2015 and an update on 31 August 2015.

4. By letter of 13 October 2015, the secretariat sent the Committee's first progress report 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. The communicant provided a further update the same day.

5. On 29 October 2015, the Party concerned provided its second progress report on the implementation of decision V/9g. The communicant provided comments on the second progress report by the Party concerned on 22 November 2015.

6. At its fifty-second meeting (Geneva, 8-11 March 2016), the Committee reviewed the implementation of decision V/9g in open session with the participation by audio conference of the Party concerned and the communicant. On 9 and 26 April 2016, the communicant provided additional information regarding the second progress report by the Party concerned. On 20 April 2016, the Party concerned provided additional information regarding its second progress report.

7. 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 provided further comments on 1 November 2016.

8. At the Committee's fifty-fifth meeting (Geneva, 6-9 December 2016), the Committee reviewed the implementation of decision V/9g in open session with the participation by audio conference of the Party concerned and the communicant. Following the session, the Party concerned provided additional information on 9 December 2016.

9. On 19 December 2016, the Committee requested the Party concerned to clarify certain factual matters.

10. On 15 January 2017, the communicant provided additional information.

11. 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.

12. On 23 February 2017, the communicant sent comments on the Committee's second progress review.

13. At the fifty-sixth meeting of the Committee (Geneva, 28 February – 3 March 2017), the Party concerned and the communicant participated by audio conference in an open session to review the implementation of decision V/9g.

14. On 16 May 2017, the Party concerned provided further information in the light of the Committee's second progress review. On 21 May 2017, the communicant provided comments on the information provided by the Party concerned.

15. The Committee adopted its report to the sixth session of the Meeting of the Parties on the implementation of decision V/9g through its electronic decision-making procedure on 7 June 2017 and requested the secretariat to send it to the Party concerned and the communicant.

III. Considerations and evaluation by the Committee

16. 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 national renewable energy action plans (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.

17. The Committee welcomes the three progress reports received from the Party concerned, which were submitted on time, as well as the further information it provided on 20 April and 9 December 2016, 23 January, 14 February and 16 May 2017.

18. The Committee also welcomes the comments and information provided by the communicant on 13 January, 31 August, 13 October and 22 November 2015, 9 and 26 April, 27 October and 1 November 2016 and 16 January, 24 February and 21 May 2017.

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

19. In regard 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:

(a) Any amendments to member States' 2010 NREAPs;

(b) The adoption of new NREAPs post-2020.

20. At the outset, the Committee reiterates that, as it pointed out in both its first and second progress reviews,¹ 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

21. In accordance with 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...”.² 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. However, 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. Therefore, even though no NREAPs have been amended since 2013, this does not preclude the possibility of amendments going forward. The Committee accordingly does not consider the fact that no NREAPs have to date 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.

22. In its second and third progress reports, the Party concerned reported on two separate measures which it asserts amounted to clear instructions to member States with respect to the NREAPs.

23. Firstly, the Party concerned referred to information given during the Plenary Meetings of the Concerted Action on Renewable Energy Sources Directive (CA RES) held in May 2015 and August 2016.³ As stated by the Party concerned, 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.”⁴ Since CA RES meetings are confidential, the Committee is in no position to review the actual content of the instructions given. Moreover, the confidential nature of the instructions also means that they cannot address the Committee’s finding endorsed through paragraph 1 (c), of decision V/9g regarding the failure by the Party concerned 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.

24. Secondly, the Party concerned referred to letters sent by the Director-General Energy to member States on 14 October 2015 in which member States were requested 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

¹ See para. 12 of the Committee’s first progress review and para. 55 of its second progress review.

² Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140.

³ Second progress report, 29 October 2015, p. 2-3 and third progress report, 27 October 2016, para. 5.

⁴ Second progress report, 29 October 2015, p. 2.

the decision-making processes.⁵ The Party concerned provided the Committee with a copy of the letters sent to all twenty-eight member States,⁶ 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.⁷

25. The Committee welcomes the clear reference to the various elements of public participation referred to in the above-quoted text. However, while the Committee considers the letters contain helpful instructions on how to report on any measures already 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.

26. The Committee points out that instructions on how public participation is to be carried out and instructions on how to report upon public participation once carried out 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 put in place such arrangements in the first place and to ensure that they are implemented. The Committee accordingly finds that the letters of 14 October 2015 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.

27. In view of the above, and noting that article 4, paragraph 4, of the Renewable Energy Directive remains in force and that member States may consequently still adopt amended NREAPs in the future, the Committee considers that the Party concerned has not yet 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

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

⁵ Second progress report, 29 October 2015, p. 2 and third progress report, 27 October 2016, para. 5.

⁶ Annex to email in response to clarification request, 23 January 2017 and remainders of letters, 14 February 2017 (both originally sent on 22 December 2016 but not received due to a technical error).

⁷ Annex 1 to email from the Party concerned, 9 December 2016. The other letters referred to in the previous footnote contain the same phrasing in the various languages of the member 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.

29. 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".⁸ Subsequently, the Party concerned informed the Committee of the "Proposal for a Regulation on the Governance of the Energy Union".⁹ It is the Committee's understanding that if this Proposal is adopted together with the proposed amendment to the Renewable Energy Directive published on the same day,¹⁰ 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".¹¹ 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.

30. The Committee welcomes the "Proposal for a Regulation on the Governance of the Energy Union" that, if adopted, would put in place a regulatory framework with respect to the adoption of integrated national energy and climate plans with explicit requirements for public participation. The Committee considers that, if that regulatory framework would ensure that the arrangements for public participation in its member States address all the elements of article 7 addressed in paragraph 3, of decision V/9g, the Party concerned would have fulfilled the requirements of decision V/9g. The Committee accordingly examines the specific requirements for public participation contained in the Proposal in paragraphs 31–32 below.

31. In this regard, the Committee welcomes the inclusion of an operative provision on public consultation in article 10 of the Proposal for a Regulation and the statement in the Proposal's recital 20 that member States should ensure that the public is consulted in accordance with the provisions of the Convention.¹² The Committee further notes the subsection of the template for integrated national energy and climate plans in the Proposal's Annex I entitled "Consultations with stakeholders, including social partners, and

⁸ Third progress report, 27 October 2016, paras. 13-14.

⁹ Email from the Party concerned, 9 December 2016 and further information from the Party concerned, 16 May 2017, p. 5, referring to the Proposal for a Regulation of the European Parliament and of the Council on the Governance of the Energy Union, amending Directive 94/22/EC, Directive 98/70/EC, Directive 2009/31/EC, Regulation (EC) No 663/2009, Regulation (EC) No 715/2009, Directive 2009/73/EC, Council Directive 2009/119/EC, Directive 2010/31/EU, Directive 2012/27/EU, Directive 2013/30/EU and Council Directive (EU) 2015/652 and repealing Regulation (EU) No 525/2013, COM/2016/0759 final, published on 30 November 2016.

¹⁰ Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast), COM/2016/0767 final, published on 30 November 2016.

¹¹ As per article 9, paragraph 1, of the Proposal for a Regulation on the Governance of the Energy Union.

¹² Further information from the Party concerned, 16 May 2017, p. 6.

engagement of civil society”, though the Committee also notes that no further details regarding the requirements of such consultations are specified in the template.¹³

32. With respect to the specific requirements for public participation prescribed in article 10 of the Proposal, the Committee welcomes that these will require “early and effective opportunities to participate in the preparation of draft plans” as well as “a summary of the public’s views” to be attached to the draft plan.¹⁴ The Committee points out, however, that, except for the requirement for public participation to be “early” and “effective”, none of the specific elements of article 7 mentioned in paragraph 3, of decision V/9g are included either in article 10 or anywhere else in the Proposal.

33. In reply to the Committee’s query as to why the Proposal did not explicitly use terminology from the Convention as has been done in some other of its legislation, the Party concerned submitted that “this is a matter of legislative technique” and that “the terminology of article 10 (“early and effective” consultation) and annex I has to be read together with the explicit text and reference to the Aarhus Convention in recital 20”.¹⁵ The Party concerned also submits that this constitutes a “consolidated interpretative technique by the Court of Justice of the European Union.”¹⁶

34. The Committee does not question that – as a matter of law – article 10 and Annex 1 of the Proposal must be read together with the text and reference to the Convention in recital 20. However, as pointed out by the communicant of communication ACCC/C/2010/54,¹⁷ recital 90 of the Renewable Energy Directive also included a reference to the provisions of the Aarhus Convention, and, nonetheless, Ireland did not adequately provide for public participation as required by article 7, of the Convention.¹⁸ While the inclusion of an operative provision which reflects at least some of the elements of article 7 of the Convention would certainly be an improvement on a mere reference to the Convention in the preamble, the Party concerned has not satisfied the Committee that the proposed Regulation, if adopted in its current form, would ensure that the other elements of article 7 highlighted in paragraph 3, of decision V/9g will be met.

35. To recap, in order to fulfil the first two sentences of paragraph 3, of decision V/9g, the Party concerned should adopt a proper regulatory framework and/or clear instructions that would ensure 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:

- (a) The arrangements are transparent and fair;
- (b) Within the arrangements the necessary information is provided to the public;
- (c) 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.

¹³ Section 1.3 of Annex I, available at http://ec.europa.eu/energy/sites/ener/files/documents/1_en_annexe_proposition_part1_v9.pdf

¹⁴ Further information from the Party concerned, 16 May 2017, p. 5.

¹⁵ Ibid., p. 6.

¹⁶ Ibid., p. 6.

¹⁷ Communicant’s comments on further information from the Party concerned, 21 May 2017, p.5.

¹⁸ See Committee’s findings on communication ACCC/C/2010/54, ECE/MP.PP/C.1/2012/12, para. 83.

36. In the light of the above, the Committee finds that, with respect to the period after 2020, while the inclusion of express requirements for “early and effective” public participation in the proposed Regulation would be an improvement on the current situation, should the Proposal be adopted in its current form, the Party concerned would not yet have fully met the first and second sentences of paragraph 3 of decision V/9g.

37. The Committee also notes that, if the Proposal for a Regulation on the Governance of the Energy Union will ultimately not be adopted, and the Renewable Energy Directive would continue to apply and require the preparation of NREAPs post-2020, the Party concerned would not have met the requirements of paragraph 3 of decision V9g for the period after 2020 for the reasons set out in paragraphs 22-27 above.

Evaluation of NREAPs

38. 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. In its second progress review, the Committee welcomed the statement by the Party concerned that, following its assessment of the information provided by member States, it might open infringement proceedings to enforce the requirements of article 7 of the Convention. The Committee indicated 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. The Committee also noted that 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.¹⁹

39. 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 could be attributed to a formal omission.²⁰ In its email of 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.²¹

40. In the light of the statement by the Party concerned during the audio-conference at the Committee’s fifty-second meeting that, following its assessment of the information provided by member States, it may open infringement proceedings to enforce the requirements of article 7 of the Convention, the Committee in its second progress review invited the Party concerned to:

¹⁹ Committee’s second progress review, 23 February 2017, para. 69.

²⁰ Third progress report, 27 October 2016, para. 11.

²¹ Email from the Party concerned, 9 December 2016.

(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.²²

41. The Committee requested the Party concerned to provide the above information by 1 April 2017.

42. The Committee expresses its concern that the Party concerned has entirely failed to respond to the Committee's questions as set out in paragraph 40 above. In its further information provided on 16 May 2017, the Party concerned provided examples of four member States that had provided for public participation in the preparation of certain measures in the field of renewable energy, apparently as examples of good practice by its member States.²³ However, the Party concerned did not reply at all to the Committee's actual questions (see para. 40 above). As noted in paragraph 39 above, the Party concerned itself has 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. In its second progress review, the Committee thus asked the Party concerned to explain the specific measures it proposes to take with respect to each of these sixteen member States. To date, the Party concerned has provided no information on this point. The Committee therefore finds that the Party concerned has not fulfilled the final sentence of paragraph 3 of decision V/9g either.

IV. Conclusions

43. The Committee finds that the Party concerned has not yet fulfilled the requirements of paragraph 3 of decision V/9g. While welcoming the steps taken by the Party concerned to date in that direction, it expresses its concern at the slow progress by the Party concerned.

44. The Committee recommends to the Meeting of the Parties that it:

(a) Reaffirm its decision V/9g and, in particular, reiterate paragraphs 2, 3 and 4 of decision V/9g in their entirety.

(b) Request the Party concerned:

(i) To apply the recommendation set out in paragraph 3 of decision V/9g 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);

(ii) In the light of the slow progress by the Party concerned to date, to take urgent measures to fully address the above recommendations.

(iii) To provide detailed progress reports to the Committee by 1 October 2018, 2019 and 2020 on the measures taken and the results achieved in the implementation of the above recommendations;

²² Committee's second progress review, 23 February 2017, para. 70.

²³ Further information from the Party concerned, 16 May 2017, p. 4.

(iv) To provide such further information as the Committee may request in order to assist it to review the progress by the Party concerned in implementing the above recommendations;

(v) To participate (either in person or by audio conference) in the meetings of the Committee, at which the progress of the Party concerned in implementing the above recommendations is to be considered.
