Ensuring a fair and effective compliance mechanism with an increasing caseload: Chair's proposal to the 61st meeting of the Compliance Committee (Geneva, 2-6 July 2018)

This Chair's proposal will be discussed in open session during the Committee's session on its modus operandi to be held on Monday, 2 July, from 13.30-15.00 CET. Written comments on this Chair's proposal are invited in advance of the meeting and you are welcome to attend the session either in person or by audioconference. If you would wish to attend the session either in person or by audioconference, please inform the secretariat at aarhus.compliance@unece.org *as soon as possible so arrangements can be made.*

According to paragraph 24 of the annex to decision I/7:

> The Committee **shall**, as soon as practicable, further consider communications submitted to it pursuant to this chapter and take into account all relevant written information made available to it, and **may** hold hearings. [emphasis added]

In its report on procedural matters (ECE/MP.PP/2017/31) to the sixth session of the Meeting of the Parties, the Committee reported:

> 22. At the Committee's fifty-fourth meeting (Geneva, 27–30 September 2016), the Committee noted that, in accordance with paragraph 24 of the annex to decision I/7, it had the discretion to proceed to commence its deliberations on the substance of a case without holding a hearing. In deciding in a particular case whether to proceed in such a manner, the Committee would consider, among others, whether there was no, or very limited, disagreement between the parties on the facts of the case and whether the underlying legal issues were well defined. In addition, the Committee would invite the views of the parties to the case and observers would be free to submit their comments, though the ultimate decision as to whether to commence deliberations on the substance of a case without holding a hearing would always rest with the Committee.[1] During the reporting period, the Committee has proceeded to commence deliberations in this manner without holding a hearing with respect to two communications.[2]

In the recitals of decision VI/8, the Meeting of the Parties noted with appreciation the Committee's reports to the sixth session. Paragraph 51 of the report of the sixth session also notes that the Meeting of the Parties welcomed the reports and thanked the Chair and other Compliance Committee members for their work in the intersessional period.

In line with the procedure agreed by the Committee at its fifty-fourth meeting, the Committee has completed its deliberations on one set of findings,[3] is currently deliberating on its draft findings in another[4] and will commence its deliberations on one further communication at its upcoming 61st meeting.[5]

In the light of the high caseload of the Committee coupled with the Committee's experience of several recent cases in which no significant new information or insights was provided from the parties during the hearing, **I propose that, rather than being applied in an *ad hoc* manner as it has been since it was agreed by the Committee at its 54th meeting in September 2016, the procedure should become a routine step in the Committee's management of each case**. This means that, prior to scheduling the hearing in each case, the Committee will first consider whether a hearing is in fact needed before it commences its deliberations.

I make the above proposal in order to ensure that the compliance mechanism is in keeping with the spirit of the Convention, in particular regarding access to justice and timeliness, while ensuring due process and fair procedures.

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[1] ECE/MP.PP/C.1/2016/7, para. 69.
[2] Communications ACCC/C/2014/121 (European Union) and ACCC/C/2014/123 (European Union).
[3] Communication ACCC/C/2014/123 (European Union).
[4] Communication ACCC/C/2014/121 (European Union).
[5] Communication ACCC/C/2015/135 (France).

The Committee currently has more than 25 pending cases in which a hearing has not yet been held. The Committee can potentially hold up to three hearings per meeting and it meets three times per year, meaning that it can hold a maximum of nine hearings per year, though in order to complete its other functions, such as the review of the implementation of MOP decisions on compliance, at some meetings it can hold only one hearing or even no hearings at all. These figures mean that recent communications currently face **a delay of approximately three years before a hearing can be held**. For any future new communications, the delay may be even longer. Moreover, this is just until a hearing is held – after the hearing the Committee will necessarily need further time to prepare its draft findings and recommendations.

Thus, to be consistent with the spirit of the Convention on access to justice and to be procedurally fair to both Parties concerned and communicants, the Committee must take measures to prevent such lengthy delays. In this regard, in some cases a hearing is extremely important to provide clarity on the legal and factual issues at stake. However, it has been the Committee's experience that in a number of cases, the hearing has not provided any relevant new information that was not already contained in the documents.

Accordingly, I propose that, building upon the procedure already in place since the 54th meeting, in each case, prior to scheduling a hearing, the Committee will examine the documentation before it in the case with a view to considering whether a hearing will be needed. Applying the procedure agreed at the 54th meeting as a routine step, rather than in an ad hoc way as it has been until now, will help to improve the timeliness of procedures before the Committee in keeping with the spirit of the Convention.

In accordance with the procedure agreed at the Committee's 54th meeting and reported to the sixth session, in deciding in each case whether a hearing will be needed, the Committee will consider the following criteria:

1. **Whether there is no, or very limited, disagreement between the parties on the facts of the case; and**
2. **Whether the underlying legal issues are well defined.**

If after applying the two above criteria the Committee decides a hearing is needed, both parties will be invited and expected to attend the hearing in Geneva in person.

However, if on the basis of the above two criteria, the Committee's preliminary view is that a hearing will not be needed in order for it to commence its deliberations, the Committee will invite the views of the parties to the case on whether they consider a hearing would be needed. Observers will also be free to submit their comments on this point.

If either party or any observer considers a hearing is indeed necessary, that party/observer should provide a brief explanation to the Committee of the reason(s) why, in the light of particular factual or legal aspects of the case, it considers a hearing should be held.

The Committee will thereafter consider the explanation provided by the party/observer before deciding whether a hearing should be held. In order to preserve the non-confrontational nature of the compliance mechanism and in particular to avoid either party using the issue of whether or not a hearing should be held as a "litigation strategy", it is for the Committee to decide whether the reasons provided are of an objective and substantive nature.

In considering the reasons provided, the Committee will take a careful approach. Accordingly, if the Committee considers that either a party or an observer provides a persuasive reason of why a hearing is needed, the Committee will hold a hearing.

As the Chair, I have the main responsibility to make sure that the cases and the caseload before the Committee are managed in a satisfactory manner, and to propose necessary measures to make sure that the cases are examined effectively while ensuring due process and fair procedures. As stated above, applying the procedure agreed at the 54th meeting as a routine step will help to improve the timeliness of procedures before the Committee in keeping with the spirit of the Convention.
