Austrian Presidency of the Council of the European Union

Aarhus Convention

Comments by the EU and its Member States on the

fifth draft of the revised Guide to the Aarhus Convention Compliance Committee

The EU and its Member States would like to take the opportunity to submit the following comments and drafting suggestions on the 5th draft of the revised Guide on the compliance mechanism:

Committee's Working Method: Access to information about cases before the Committee

In the second paragraph on the posting of personal contact details on the website, the EU and its Member States welcome that the Compliance Committee specifically refers to the protection of personal data in its Guide. However, the part "to the extent feasible" should be deleted as to ensure proper protection of personal data in all postings on the UNECE website.

2.5 Exhaustion of Domestic remedies

The 5th revised draft contains a new paragraph on the application of paragraph 21 of Decision I/7 on the exhaustion of domestic remedies. The amendments open way for the Compliance Committee to consider cases from "other members of the public that have already exhausted the domestic remedies available to challenge the alleged non-compliance".

In that paragraph, the Compliance Committee suggests that not only remedies exhausted by the communicant but also by a third person might be taken into account when assessing the admissibility of a communication. This means that the Committee can conclude that domestic remedies have been exhausted even where the communicant itself has not used any other means of redress. Each individual communication has its own unique facts and circumstances and we do not think it is appropriate to conclude that all domestic remedies have been exhausted on the basis of conclusions which relate to other cases.

From an international law perspective, this wide interpretation of the "exhaustion of domestic remedies" is unique and without precedent. It is very surprising that the revised Guide not only mentions, for the first time, a concrete example for the (non) exhaustion of local remedies, but defines an example that does not reflect international case law practice, but to the contrary extends the concept of "exhaustion of local remedies".

As to the substance, we also note that as far as continental law systems are concerned, there is no "system of judicial precedent", i.e. courts are not bound by previsions decisions of other courts. Thus, it may not inferred, from the outcome of a previous case, how national courts would apply the law as far as the communicant is concerned. In fact, such an approach would hinder national institutions to correct possibly erroneous applications of the law of the past.

In our view, the approach of the ACCC should be reconsidered and the paragraph deleted.

7.1 A hearing with the parties concerned

According to the newly inserted paragraph parties are "expected" to participate in a hearing. The EU and its Member Sates propose to rather use the term "it is recommended" in order to highlight that the decision to participate at the hearing is within discretion of the parties concerned.

Again, we reiterate the statement by the EU and Member States and our proposals for audio conferencing, webinars and video conferencing to be used also for the hearing instead of attendance in person, when the parties prefer such approach.

In that paragraph, we would also like to request for the deletion of the first sentence which states that each party should ensure that its representative(s) taking part in the hearing have the necessary competence to answer the Committee's questions within the scope of the case. We do agree that in certain cases the participation of other relevant ministries or local authorities in the hearing on behalf of the Party concerned may be useful. However, we believe that every Party concerned involved in a compliance case is responsible for defending its interests properly and this with respect to its own organisational structure.

8.3 Committee's review of the implementation of the MOP decision

The new addition enables changes to the Compliance Committee procedure in preparing the MOP progress review. This implies more scrutiny and another opportunity to discuss the cases which may overburden the individual case.

With regard to the 5th paragraph in that section we would like to reinsert the use of video conferencing (see comment above under 7.1) which is now deleted. We would like to see this included as the compliance mechanism should be as technologically inclusive as possible.

In the 1st paragraph of this section, it is said that, in monitoring the follow-up of the MOP-endorsed findings, the Committee will invite also "any observers who have registered their interest with the secretariat to take part in the follow-up on the MOP decision, to comment on the progress by the Party concerned." However, the "parties" regarding the procedure in the implementation phase have to stay the same as those in the previous procedure before the Compliance Committee including the registered observers. We would therefore ask for this part to be deleted.

The second paragraph refers to the progress review by the Compliance Committee which may include "recommendations to the Party concerned on the further actions it may wish to take in order to demonstrate that it has fully met the measures set out in the MOP decision." We have concerns with regard to the competences of the Meeting of the Parties as the sole competent body to issue recommendations in the implementation stage according to Rule 37 (b) of the Annex to Decision I/7. Once the findings have been adopted, the role of the Committee is only that of monitoring whether the adopted recommendations by the MOP have been followed. The Committee therefore cannot recommend to the Party concerned on how to reach compliance. If it is meant that the Committee can ask for further factual information, like translations of national pieces of legislation, this sentence should therefore be rephrased.

8.4 Report to MOP on implementation of MOP decision

The amendments allow for a provision where the ACCC will have the right to finalise the progress report without a final consultation with Parties concerned. We have concerns that the removal of this will not allow for a fair and transparent process for the Parties and Communicants concerned.

8.5 Any developments subsequent to the finalization of the Committee's report to MOP

This section provides that no information which relates to a Party's compliance or implementation will be considered once the Committee has finalised its report (6 months ahead of the MOP). This means that a Party may have come into compliance and/or taken significant steps to implement a MOP decision, but these will not be reflected in the report which is placed before the MOP for adoption. This information will only be considered in the intersessional follow-up meetings and will not be formally recognised until the following MOP (4 years after). It is our view that there should be some flexibility and exemptions within this guide, which allow for the consideration of developments in the law or practice of a Party concerned after the finalisation of the Committee report, particularly where such information could have an impact on the accuracy of the report or could be relevant to a finding of non-compliance.