Advice by the Aarhus Convention Compliance Committee to Romania concerning the implementation of decision VI/8h

I. Introduction

On 2 February 2018, Romania wrote to the Compliance Committee seeking its advice on how to implement the recommendations set out in decision VI/8h of the Meeting of the Parties to the Convention concerning its compliance.

Pursuant to paragraph 36(a) of the annex to decision I/7, the Committee, in consultation with the Party concerned, may provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention. Accordingly, in reply to Romania's request of 2 February 2018, the Committee provides the following advice concerning possible measures that Romania might take to implement the recommendations set out in paragraphs 2, 3 and 7 of decision VI/8h.

By way of background, the recommendations in paragraphs 2 and 3 of decision VI/8h concern the outstanding points of non-compliance first identified in the Committee's findings on communication ACCC/C/2010/51 and subsequently reported to the sixth session of the Meeting of the Parties in the Committee's report on decision V/9j.[1] The recommendations in paragraph 7 of decision VI/8h concern the points of non-compliance found by the Committee in its findings on communication ACCC/C/2012/69.

At the outset, the Committee stresses that the scope of the recommendations in paragraphs 2, 3 and 7 of decision VI/8h go beyond the questions put by the Party concerned in its request of 2 February 2018. Accordingly, in its advice the Committee starts from the structure of the decision itself. Moreover, while the advice provides guidance on each of the recommendations contained in decision VI/8h, it should not be considered to be exhaustive.

Furthermore, as set out in the Committee's findings on communication ACCC/C/2012/69 and its report to the sixth session of the Meeting of the Parties on decision V/9j, the Committee takes issue with the apparent assertion by the Party concerned in its request of 2 February that it already has all the necessary legislation in force. Rather, taking further legislative measures remains one of the means through which the Party concerned may decide to implement the recommendations in decision VI/8h.

II. Advice to the Party concerned

Paragraph 2 (a) of decision VI/8h:

"Respond to requests of members of the public to access environmental information as soon as possible, and at the latest within one month after the request was submitted, and, in the case of a refusal, to state the reasons for the refusal"

In its report to the sixth session of the Meeting of the Parties on the implementation of decision V/9j, the Committee found:

> "…in order to fulfil paragraph 2 (a) (i) of decision V/9j…, [the Party concerned] would need to provide evidence of the measures it had taken to ensure that public authorities do in fact now fully comply with the requirements of Decision no. 878/2005 in practice."[2]

In addition to considering any necessary legislative changes, in order to fulfil paragraph 2(a) of decision VI/8h, the Party concerned may consider taking the following measures:

[1] ECE/MP.PP/2017/42.

[2] Report to the sixth session of the Meeting of the Parties on the implementation of decision V/9j, ECE/MP.PP/2017/42, para. 19.

(i) To prepare and disseminate administrative orders, instructions or guidance applicable throughout the entire public administration

The Party concerned may consider putting in place administrative orders, instructions or guidance ("administrative instructions") to be circulated to all public officials involved with processing environmental information requests. The administrative instructions should be in a form that will have effect throughout the entire public administration. The administrative instructions should include clear guidance on how to deal with requests for environmental information in accordance with article 4 of the Convention, and in particular should instruct officials on how to comply with each of the recommendations concerning access to information contained in paragraphs 2(a) and (b) and 7(a) of decision VI/8h. This should be done in the context of the relationship between the legal regimes with respect to general access to information, access to environmental information and classified information, in particular the broad discretion of public authorities to classify information as a "professional secret".[3]

The administrative instructions should be circulated to officials/units dealing with requests for environmental information in all government agencies, not only in environmental agencies, and public authorities at all levels (municipalities, regional authorities, national authorities, etc.). In this context it might be useful to draft a list of authorities which are likely to collect and process environmental information without excluding the possibility that any other authority may also possess environmental information. It should also be sent to the central public authorities which control the provision of environmental information of subordinate units referred to in article 9, paragraph 5, of Decision no. 878/2005.

The specific focus of the administrative instructions should be directed to how authorities identify environmental information in documents/databases which may fall within the ambit of more than one regulation for access to information. This should include examples of how exemptions (article 4, paragraphs 3 and 4, of the Convention) should be applied.

In addition to those officials involved with processing environmental information requests, the administrative instruction should be sent to the heads of public authorities responsible for reconsidering such requests in accordance with article 16 of Decision no. 878/2005.

The administrative instructions should be made available to the public, both online and in paper form at the offices of the relevant public authorities, in order to inform the public of their rights.

(ii) To collect and publish statistics concerning requests for environmental information, in combination with monitoring by central public authorities

Whilst welcoming the 2017 information request statistics provided by the Party concerned on 16 May 2018, the Committee points out that the collection and publication of statistics as such does not directly address any of the recommendations in decision VI/8h. However, if combined with a monitoring programme by the central public authorities and administrative penalties for public officials (see below), the collection of statistics on environmental information requests could indeed be a useful measure through which to not only monitor, but also ascertain, that the requirements of paragraphs 2(a) and (b) and 7(a) of decision VI/8h are being fulfilled. In this regard, the monitoring should include all the aspects of article 4 of the Convention addressed in paragraphs 2(a) and (b) and 7(a) of decision VI/8h. The collection and publication of statistics and the monitoring by the central public authorities should also cover all officials dealing with requests for environmental information, including those in other ministries and authorities not under the control of the Ministry of Environment.

(iii) To establish, strengthen and/or enforce administrative penalties for public officials

In addition to monitoring by central public authorities (see above), the Party concerned may consider the imposition, strengthening or enforcement of administrative penalties or other sanctions for public officials who

[3] See Committee's findings on communication ACCC/C/2010/51, ECE/MP.PP/C.1/2014/12, para. 96.

do not comply with the requirements of article 4 of the Convention. In this context, the Committee refers to its findings on communication ACCC/C/2008/30 (Moldova),[4] which concerned refusals of access to information on contracts for rent of forest land. In its report to the fourth session of the Meeting of the Parties on the implementation of decision IV/9d concerning Moldova,[5] the Committee found that the Party concerned was no longer in a state of non-compliance.[6] In coming to this conclusion, the Committee noted that Moldova had, inter alia, put in place administrative penalties for public servants who did not comply with the legislative requirements on transparency of information.[7]

Paragraph 2 (b) of decision VI/8h:

"Interpret the grounds for refusing access to environmental information in a restrictive way, taking into account the public interest served by disclosure, and in stating the reasons for a refusal to specify how the public interest served by disclosure was taken into account"

In its report to the sixth session of the Meeting of the Parties on the implementation of decision V/9j, the Committee found:

> "[…] while article 15, paragraph 3, of Decision no. 878/2005 require reasons for a refusal of an environmental information request to be provided, there is nothing in the Decision expressly requiring the public authorities to specify how the public interest served by disclosure was taken into account […] the Committee therefore invited the Party concerned to explain the measures it had taken to ensure that this aspect of paragraph 2 (a) (ii) of decision V/9j has been met.[8]

The measures described above in the Committee's advice concerning paragraph 2(a) of decision VI/8h apply equally to paragraph 2(b) of decision VI/8h. In addition, a possible further measure which the Party concerned might consider with respect to paragraph 2 (b) of decision VI/8h would be to amend its law in order to include a more explicit requirement to include in the refusal decision a discussion of the public interest, and how that was taken into account.

Paragraph 2 (c) of decision VI/8h:

"Provide reasonable time frames, commensurate with the nature and complexity of the document, for the public to get acquainted with draft strategic documents subject to the Convention and to submit their comments"

In its report to the sixth session of the Meeting of the Parties on the implementation of decision V/9j, the Committee stated:

> "The Committee considers that the above time-frames may, if implemented in practice, meet the requirement to ensure reasonable time-frames. However, as the Committee pointed out in paragraph 37 of its second progress review, Decision no. 1076/2004 was likewise in force at the time of the SEA procedure on the Energy Strategy examined in communication ACCC/C/2010/51, and the public was only given 11 days to comment in that case.[27] In its second progress review, the Committee therefore explained to the Party concerned that it was looking for evidence that the Party concerned has taken measures to ensure its public authorities will comply, in practice, with those provisions in the future."[9]
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> "…the Committee welcomes the Party concerned statement that Decision no. 1076/2004 has been applied to all operational programmes for 2014-2020. The Committee also welcomes the statement that the final

[4] ECE/MP.PP/C.1/2009/6/Add.3, para 42(c).
[5] ECE/MP.PP/2014/18.
[6] ECE/MP.PP/2014/18, para. 29.
[7] ECE/MP.PP/2014/18, para. 24 (c)(v).
[8] ECE/MP.PP/2017/42, para. 27.
[9] ECE/MP.PP/2017/42, para. 32.

alternatives for the draft operational programme and the requisite environmental report or assessment were distributed to the public concerned 45 days before the start of the public commenting period."[10]

"…the Committee has not been provided with sufficient information which would substantiate that adequate time periods for the involvement of the public have been provided for in the preparation of the new Energy Strategy for 2016-2030, or other draft strategic documents subject to the Convention."[11]

In order to demonstrate to the Committee that it has fulfilled the recommendation in paragraph 2(c) of decision VI/8h, the Party concerned should:

(a) Compile a list of strategic documents related to the energy sector within the scope of article 7 of the Convention adopted since the Committee's findings on communication ACCC/C/2010/51. This list should include:
    (i) The Energy Strategy for 2016-2030 as well as any other energy strategies adopted;
    (ii) The operational programmes for 2014-2020 referred to in the Party's second progress report on decision V/9j dated 31 December 2015;
    (iii) Any other strategic documents related to the energy sector within the scope of article 7 of the Convention adopted by the Party concerned since the Committee's findings on communication ACCC/C/2010/51.
(b) For each of the documents in the above list, inform the Committee of the number of days that the public had to get acquainted with the draft strategic document prior to the start of the written commenting period, and the number of days that the public had to send written comments on the draft strategic document.

If, based on the information provided to the Committee in accordance with the above, it is evident that the public was not provided with reasonable timeframes to participate on strategic documents, the Committee may recommend that the Party concerned take further measures to ensure that the timeframes in articles 28-31 of Decision no. 1076/2004 are implemented in practice. This means that the above list of strategic documents and time frames should be provided to the Committee as soon as possible during the intersessional period (e.g. as part of the first progress report due on 1 October 2018), in order that there will still be sufficient time during the intersessional period for the Party concerned to take any further measures recommended by the Committee.

Paragraph 3 of decision VI/8h:

"Provide adequate information and training to public authorities about the above duties"

In order to fulfil paragraph 3 of decision VI/8h, the Party concerned will need to provide both adequate information and training to public authorities involved in implementing the recommendations in paragraph 2 of decision VI/8h. To this end, the Party concerned will need to develop appropriate information materials to address the recommendations in paragraph 2 of decision VI/8h and to disseminate them to all officials involved in implementing these recommendations. The Party concerned will also need to design and carry out two separate training modules:

(a) Training for public authorities dealing with requests for access to environmental information. In this regard, attention should be paid to the need to reach public authorities of different ministries and different levels of government (municipalities, regional authorities, national authorities, etc.). Importantly, the training should be organized after the measures discussed under paragraph 2 (a) and (b) above (and paragraph 7 (a) below) have been taken, and should make specific reference thereto, thereby enhancing the measures already taken and allowing members of public authorities to obtain clarifications on those measures. Thereby, it can be ensured that the training specifically aims at those issues identified in paragraphs 2 (a) and (b).

(b) Training for public authorities that are responsible for the drafting of plans and programmes, including the Energy Strategy and similar programmes. The training should address *all* the requirements of article

[10] ECE/MP.PP/2017/42, para. 35.
[11] ECE/MP.PP/2017/42, para. 36.

7 of the Convention, but in the light of the recommendation in paragraph 2(c), should highlight the need to ensure reasonable timeframes.

In this regard, the Committee welcomes the information provided on 16 May 2018 regarding the training carried out on 10 May 2018. While this training was a useful first step, the Committee stresses that, in order to meet the requirement of paragraph 3 of decision VI/8h, it will be necessary for the Party concerned to demonstrate to the Committee that as many as possible of its public officials that handle matters within the scope of paragraph 2 of decision VI/8h have received the trainings. The Committee will need to examine the content of the trainings and a list of participants, including the name, position and organization of each participant. Both the content of the trainings and the list of participants will need to be provided to the Committee in English.

Paragraph 7 (a) of decision VI/8h:

"Take the necessary legislative, regulatory or administrative measures and practical arrangements, as appropriate, to ensure the correct implementation of the Convention with respect to:

(i) Article 2, paragraph 3: the definition of "environmental information;

The Party concerned should ensure that the correct definition of environmental information in article 2, paragraph 3, of the Convention, is expressly highlighted in all measures taken to fulfil paragraph 2 (a) and (b) of decision VI/8h, as well as in the trainings under paragraph 3 for public authorities dealing with information requests.

(ii) Article 4, paragraph 4: the grounds for refusal and the requirement to interpret those grounds in a restrictive way, taking into account the public interest served by disclosure;

This recommendation effectively reiterates the recommendation in paragraph 2 (b) of decision VI/8h and can therefore be addressed through the measures set out in the Committee's advice on paragraph 2 (b) of decision VI/8h above.

(iii) Article 4, paragraph 6: the requirement to separate confidential from non-confidential information whenever possible and to make available the latter;

This aspect should be included in the measures taken for paragraph 2 (a) and (b) of decision VI/8h as well as in the trainings under paragraph 3 for public authorities dealing with information requests.

(iv) Article 4, paragraph 7: the requirement to provide reasoned statements for refusing a request for access to information;"

This recommendation is already included in paragraph 2 (a) of decision VI/8h and can therefore be addressed by the measures set out, and taking into account the context described, in the Committee's advice on paragraph 2 (a) of decision VI/8h above.

Paragraph 7 (b) of decision VI/8h:

"Review its legal framework in order to identify cases where decisions to permit activities within the scope of article 6 of the Convention are conducted without effective participation of the public (article 6, paras. 3 and 7), and take the necessary legislative and regulatory measures to ensure that such situations are adequately remedied"

This recommendation is based on the Committee's finding on communication ACCC/C/2012/69 that there should have been public participation in the procedure for issuing the archaeological discharge certificate for the Rosia Montana mining project.[12] In that case, the Committee found that:

> "81. The Party concerned indicates that a large amount of the EIA documentation (namely eight of its volumes) deals with the archaeological patrimony of the proposed Rosia Montana site. The Committee considers that this clearly leads to a conclusion that the archaeological site and its legal status are not of minor or peripheral importance. In the Committee's view the issuance of the archaeological discharge

[12] Committee's findings on communication ACCC/C/2012/69, ECE/MP.PP/C.1/2015/10, para. 83.

certificate was a fundamental step in the decision-making process which resulted in a significant change of the subject matter of the EIA. In the present case there is a clear relation between the two procedures — the EIA and the procedure for issuing the archaeological discharge certificate. Thus, in this case the two decisions were part of a "tiered decision-making procedure".

…

83. The importance of the procedure for issuing the archaeological discharge certificate was such that the Party concerned should have provided sufficient time for informing the public and for the public to prepare and participate effectively during the environmental decision-making (art. 6, para. 3) and an opportunity for the public to submit comments, information, analysis or opinions (art. 6, para. 7). For the above-mentioned reasons the Committee finds that, by not providing for any public participation in the procedure for issuing the archaeological discharge certificate, the Party concerned failed to comply with article 6, paragraphs 3 and 7, of the Convention."

In order to fulfil the recommendation in paragraph 7(b) of decision VI/8h, the Party concerned should take the following steps:

(a) For each of the activities set out in Annex I of the Convention (as well as any activities covered by article 6, paragraph 1 (b) of the Convention), list each of the permits/approvals required to be granted prior to it being finally permitted.

(b) For each of the permits/approvals identified above, indicate which ones are required under national law to be the subject of public participation meeting the requirements of article 6 of the Convention, and which ones are not.

(c) For each of the permits/approvals not required by national law to be the subject of public participation meeting the requirements of article 6 of the Convention, provide an explanation of why not.

It would be important that the above information be provided to the Committee as soon as possible during the intersessional period. This is so that there will still be sufficient time for the Committee to consider the information provided and to advise the Party concerned whether any of the permits/approvals that are not currently required by national law to be the subject of public participation would in fact be required to be in order to meet the requirements of article 6 of the Convention. If that were the case, for the Party concerned to fully meet the recommendation in paragraph 7(b) of decision VI/8h during this intersessional period, it would need to put in place legislative, regulatory, administrative or practical measures to ensure that its legal framework requires such permits/approvals to be the subject of public participation meeting the requirements of article 6 of the Convention. It would also need to report to the Committee on the measures taken no later than its final progress report due on 1 October 2020.

Paragraph 7 (c) of decision VI/8h:

"Review its legal framework and undertake the necessary legislative, regulatory and administrative measures to ensure that the court procedures for access to environmental information are timely and provide adequate and effective remedies"

This recommendation is based on the Committee's finding in paragraphs 84-90 of its findings on communication ACCC/C/2012/69 that the courts of the Party concerned failed to provide for timely remedies in access to environmental information cases, as the examples considered by the Committee in that case took an average of 2 years or longer to be resolved.

In preparation for the 11th meeting of the Convention's Task Force on Access to Justice (Geneva, 27-28 February 2018), the secretariat prepared a summary of measures taken by Parties to provide for timely settlement of access to environmental information cases.[13] This summary noted that, in their national implementation reports, Hungary, Ireland, Luxembourg, Malta, Montenegro, Poland, Portugal and Sweden each reported that their courts and

[13] Information paper N2, Overview of the implementation of article 9, paragraph 1, of the Aarhus Convention, AC/TF.AJ-11/Inf.2, available online: https://www.unece.org/fileadmin/DAM/env/pp/a.to.j/TF11-2018/TFAJ11_Inf.2_NIRs_Art9.1_final.pdf.

tribunals are required to handle access to information cases in an expedited manner.[14] Malta requires that the first hearing is to be held within six working days from receipt of the application (Regulation 11A of the Freedom of Access to Information on the Environment Regulations).[15] In Portugal, a specific summary procedure applies to access to information cases with decisions tending to be issued within less than one month.[16]

The Party concerned may consider the above as possible good practice examples. In this regard, it may decide to introduce a requirement to ensure that its courts give priority to access to environmental information cases or a requirement that they deal with them within a specified time frame.

Paragraph 7 (d) of decision VI/8h:

"Provide adequate practical arrangements or measures to ensure that the activities listed in subparagraphs (a), (b) and (c) above are carried out with broad participation of the public authorities and the public concerned"

Paragraph 7 (d) is to be addressed through putting in place adequate practical arrangements to ensure the broad participation of the relevant public authorities and the public concerned when fulfilling the recommendations in paragraph 7 (a)-(c) set out above.

Paragraph 8 (a) of decision VI/8h:

As a first step, the Party concerned should submit a report to the Committee on a draft strategy to implement the recommendations in decision VI/8h. Given the overlap in several of the recommendations in paragraph 2 and 7 of the decision, it would be appropriate that the draft strategy address all the recommendations in the decision, not just those in paragraphs 7 (a), (b) and (c). The draft strategy should be published for public comment in accordance with the normal practice of the Party concerned for consultation on strategic documents. The communicants of communications ACCC/C/2010/51 and ACCC/C/2012/69 should be individually notified of their opportunity to provide comments. The draft strategy should also be sent to: (i) the ministries and public authorities dealing with requests for access to environmental information,[17] (ii) the ministries and public authorities responsible for developing strategic documents relating to the environment,[18] (iii) the courts and other bodies involved with reviews of access to information requests,[19] and (iv) the ministries and other public authorities that will be involved in implementing the recommendation in paragraph 7(b) of decision VI/8h.[20] This will require the Party concerned to first identify all those ministries and other public authorities relevant to the recommendations in decision VI/8h. Once the comments from the public and public authorities have been received and taken into account, the adopted strategy should be posted on the Ministry's website.

Similarly, when the relevant ministry or other public authority is preparing the measures to address each of the recommendations, the draft measures should be made available for public comment, and also sent to all other public authorities which may be involved in the implementation of those measures.

In its first and second progress reports (due on 1 October 2018 and 1 October 2019) the Party concerned should report on the practical arrangements by then taken to ensure the broad participation of the relevant public authorities and the public concerned.

Finally, prior to preparing its final progress report to the Committee on the implementation of decision VI/8h (due on 1 October 2020), the Party concerned should invite comments from members of the public and the public authorities involved in implementing those measures on how the measures introduced to address decision VI/8h have in fact worked in practice. A summary of the comments received should be provided to the Committee together with the final progress report.

[14] Ibid, p. 47.
[15] Ibid, p. 29.
[16] Ibid, p. 34.
[17] Paras. 2(a), 2(b) and 7(a) of decision VI/8h.
[18] Para. 2(c) of decision VI/8h.
[19] Para. 7(c) of decision VI/8h.
[20] Para. 7(c) of decision VI/8h.