

Advice by the Aarhus Convention Compliance Committee to the European Union concerning the implementation of request ACCC/M/2017/3

I. Introduction

1. At its fifth session, the Meeting of the Parties to the Convention adopted decision V/9g on compliance by the European Union. In that decision, the Meeting of the Parties endorsed the findings of the Committee on communication ACCC/C/2010/54 (European Union), and welcomed the recommendations made by the Committee during the intersessional period with respect to those findings.
2. Through paragraph 3 of decision V/9g, the Meeting of the Parties welcomed:

“... the willingness of the Party concerned to accept the Committee’s recommendation, namely, that it adopt a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention with respect to the adoption of NREAPs. This would entail that the Party concerned ensure 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. In addition, such a regulatory framework and/or clear instructions must ensure 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. Moreover, the Party concerned must adapt the manner in which it evaluates NREAPs accordingly.”
3. At its sixth session, while it failed to reach consensus with regard to the adoption of draft decision VI/8f on compliance by the European Union, the Meeting of the Parties requested the Compliance Committee to review any developments that had taken place regarding the matter and to report to the Meeting of the Parties accordingly.
4. In that context, at the sixth session, the European Union “reaffirmed its commitment to implement decision V/9g”.¹
5. At its fifty-ninth meeting, the Committee agreed that the request of the Meeting of the Parties should be given the reference ACCC/M/2017/3 (European Union).²
6. On 26 February 2019, the Committee sent its first progress review on request ACCC/M/2017/3 to the Party concerned, communicants and observers.
7. On 5 March 2019, the communicant of communication ACCC/C/2008/32 submitted additional information, including the text of the European Union’s Regulation on the Governance of the Energy Union³ as adopted on 11 December 2018.
8. At its sixty-third meeting (Geneva, 11-15 March 2019), the Committee held an open session on request ACCC/M/2017/3 with the participation of the Party concerned, communicants and observers.
9. On 30 April 2019, the Party concerned submitted a statement following the sixty-third meeting.

¹ ECE/MP.PP/2017/2, para. 63.

² ECE/MP.PP/C.1/2017/23, para. 13.

³ Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council.

10. On 6 May 2019, the communicant of communication ACCC/C/2008/32 submitted comments on the statement of 30 April 2019 by the Party concerned.

11. After taking into account the information received from the Party concerned, communicants and observers, the Committee adopted the present advice on 28 May 2019. The Committee thereafter requested the advice to be sent to the Party concerned in accordance with paragraph 36 (a), in conjunction with paragraph 37 (a), of the annex to decision I/7 with a view to assisting the Party concerned to meet the requirements of the first three sentences of paragraph 3 of decision V/9g with respect to the adoption by European Union Member States of their integrated national energy and climate plans (NECPs) for the period 2021-2030 (see further paragraphs 20 – 25 below).

12. The Committee agreed to review any measures taken by the Party concerned in the light of the present advice when reviewing developments on request ACCC/M/2017/3.

II. Background

13. The Regulation on the Governance of the Energy Union and Climate Action was adopted by the Party concerned on 11 December 2018 and entered into force on 24 December 2018.

14. Article 9(1) of the Regulation requires each Member State to submit its draft NECP to the Commission by 31 December 2018. Article 3(1) of the Regulation requires each Member State to submit its final NECP to the Commission by 31 December 2019.

15. Recital 14 of the Regulation refers to the Guidance to Member States on integrated national energy and climate plans issued by the Commission on 18 November 2015.⁴ Recital 14 states that:

“the Commission Guidance to Member States on integrated national energy and climate plans provided the basis for Member States to start developing national plans for the period 2021 to 2030 and set out the main pillars of the governance mechanism.”

16. With respect to public participation, article 10 of the Regulation provides that:

“Without prejudice to any other Union law requirements, each Member State shall ensure that the public is given early and effective opportunities to participate in the preparation of the draft integrated national energy and climate plan — as regards the plans for the 2021 to 2030 period, in the preparation of the final plan well before its adoption — as well as of the long-term strategies referred to in Article 15. Each Member State shall attach to the submission of such documents to the Commission a summary of the public's views or provisional views. In so far as Directive 2001/42/EC is applicable, consultations undertaken on the draft in accordance with that Directive shall be deemed to satisfy the obligations to consult the public under this Regulation.

Each Member State shall ensure that the public is informed. Each Member State shall set reasonable timeframes allowing sufficient time for the public to be informed, to participate and express its views.

Each Member State shall limit administrative complexity when implementing this Article.”

17. Pursuant to article 9(2) of the Regulation:

⁴ The Commission's Guidance to the Member States on national energy and climate plans, annex 2 to the Commission's communication of 18 November 2015 on the State of the Energy Union, is available at https://eur-lex.europa.eu/resource.html?uri=cellar:ebdf266c-8eab-11e5-983e-01aa75ed71a1.0008.03/DOC_5&format=HTML&lang=EN&parentUrn=CELEX:52015DC0572.

“The Commission shall assess the draft integrated national energy and climate plans and may issue country-specific recommendations to Member States in accordance with Article 34 no later than six months before the deadline for submitting those integrated national energy and climate plans.”

18. Article 9(3) of the Regulation requires:

“Each Member State shall take due account of any recommendations from the Commission in its integrated national energy and climate plan. If the Member State concerned does not address a recommendation or a substantial part thereof, that Member State shall provide and make public its reasons.”

19. In its statement of 30 April 2019, the Party concerned stated, inter alia, that the Regulation:

“...requires each Member State to attach to the submission of both the draft and final national energy and climate plans (NECPs) and the long-term strategies to the Commission **a summary of the public’s views**⁵ or provisional views. In the case of the draft NECPs covering the 2021-2030 period, this obligation is only relevant for those cases where Member States had already consulted the public ahead of submitting the draft NECP to the Commission.

It is worth noting that, given the tight deadline between the entry into force of the Governance Regulation, on 24 December 2018, and the obligation of Member States to submit their first draft plans by 31 December of the same year, it would have been disproportionate and impracticable to request that a public consultation had taken place before submitting these draft plans to the Commission. However, a number of Member States had already consulted the public on documents underpinning the draft NECP during the previous year, even before the Governance Regulation was in force.

d) As per Article 9 of the Governance Regulation, the Commission shall assess all the draft NECPs and intends to issue recommendations in a customised manner (for each Member State). According to Article 34 of the Governance Regulation these recommendations shall be made publicly available. Moreover, the Member State shall take due account of the recommendations and explain in its final plan how they have followed them, or provide reasoning in case they have departed from all or some of them.

e) When assessing the draft NECPs, the Commission shall monitor whether and how Member States **have complied or intend to comply**⁶ with their obligation to involve the public early and effectively in the preparation of the final national energy and climate plans. However, when issuing its recommendations on the draft plans, the Commission will reiterate, as appropriate, to the Member States their obligation to conduct a public consultation in preparing their final plans, following the Aarhus Convention and all other relevant provisions of Union law.

f) Moreover, the Commission shall also assess the final NECPs and may issue recommendations, including on public consultation processes undertaken by Member States in the preparation of the final NECPs. Member States are also obliged to take due account of these recommendations on the final NECP. If the Member State concerned does not address the Commission recommendation (s), it must provide its reasoning in the following progress report.”

III. Advice to the Party concerned

20. Pursuant to paragraph 36(a) in conjunction with paragraph 37(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.

⁵ Emphasis in original.

⁶ Emphasis in original.

21. The Committee is currently in an ongoing process of dialogue and consultation with the European Union with respect to the Committee's review in accordance with request ACCC/M/2017/3. In line with its normal procedure, after taking into account the second progress report of the Party concerned due on 1 October 2019 and the comments from communicants and observers received thereon, the Committee expects to send its second progress review on request ACCC/M/2017/3 to the Party concerned in early 2020.

22. However, pursuant to article 3(1) of the Regulation, Member States' 2021-2030 NECPs must already be adopted by 31 December 2019. It will thus be too late for the Committee in its second progress review to provide advice with a view to assisting the Party concerned to fulfil the requirements of the first three sentences of paragraph 3 of decision V/9g with respect to the adoption of the 2021-2030 NECPs because the 2021-2030 NECPs will by then already be adopted.

23. The Committee moreover notes that the European Commission, in its statement of 30 April 2019 stated its intention to send recommendations to each Member State by 30 June 2019 in accordance with article 9(2) of the Regulation⁷ and that:

“When assessing the draft NECPs, the Commission shall monitor whether and how Member States **have complied or intend to comply** with their obligation to involve the public early and effectively in the preparation of the final national energy and climate plans.”⁸

24. The Committee further notes that, in the above statement, the European Commission, states that:

“when issuing its recommendations on the draft plans, the Commission will reiterate, as appropriate, to the Member States their obligation to conduct a public consultation in preparing their final plans, following the Aarhus Convention and all other relevant provisions of Union law.”⁹

25. In the light of the above, the Committee considers it appropriate and timely to provide the present advice with a view to assisting the Party concerned to fulfil the requirements of the first three sentences of paragraph 3 of decision V/9g with respect to the adoption of the 2021-2030 NECPs.

26. The Committee makes clear that the present advice stands in addition to the advice contained in the Committee's first progress review adopted on 22 February 2019, and in no way negates or supplants the advice in its first progress review. Rather, in line with its mandate under paragraph 36(a), in conjunction with paragraph 37(a), of the annex to decision I/7, the Committee provides the present advice to the Party concerned at this particular time, with the aim of assisting the Party concerned to fulfil the requirements of the first three sentences of paragraph 3 of decision V/9g with respect to the adoption of the 2021-2030 NECPs.

27. As the Committee made clear in paragraph 31 of its first progress review on request ACCC/M/2017/3:

“In order to fulfil the first three sentences of paragraph 3 of decision V/9g, the European Union 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 *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(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 public participation.” (emphasis added)

28. This means that, in order to fulfil the first three sentences of paragraph 3 of decision V/9g with respect to the adoption of the 2021-2030 NECPs, and to adhere to the commitment it made at the sixth session of the Meeting

⁷ Party concerned's statement of 30 April 2019, p. 4, para. (d).

⁸ Party concerned's statement of 30 April 2019, p. 4, para. (e).

⁹ Ibid.

of the Parties to implement decision V/9g,¹⁰ the European Union must adopt a proper regulatory framework and/or clear instructions that will ensure that Member States put in place arrangements with respect to the adoption of 2021-2030 NECPs that meet each of the requirements of article 7 set out in that paragraph.

29. In this regard, the Committee recalls that it has repeatedly made clear, in both its first and second progress reviews on decision V/9g as well as in its report on decision V/9g to the sixth session of the Meeting of the Parties, that “a clear instruction would amount to a direction or order that has to be followed by the Member States”.¹¹

30. The Committee notes that neither article 10 of the Regulation, or any other provision of European Union law, requires that Member States have carried out public participation on their draft 2021-2030 NECPs prior to the draft NECPs’ submission to the Commission on 31 December 2018. The Committee considers that in the light of this, it will be important for the Party concerned to take measures that will ensure that each Member State meets all the requirements of article 7 set out in paragraph 3 of decision V/9g prior to the adoption of the 2021-2030 NECPs.

31. In this regard, the Committee emphasizes that it will be particularly important for the Party concerned to take measures that make clear to each Member State that did not carry out public participation fully meeting the requirements of article 7 prior to submitting its draft 2021-2030 NECP to the Commission, that in order for that Member State to meet the requirements of article 7, in conjunction with article 6(4) and (8), of the Convention, all the options that were open at the time of the preparation of the draft 2021-2030 NECP submitted to the Commission on 31 December 2018 must still be genuinely open at the time of the public participation procedure to be carried out prior to the adoption of the Member State’s final 2021-2030 NECP.

32. To this end, the Committee welcomes the statement by the Party concerned that, in accordance with article 9 of the Regulation, the Commission will assess all the draft NECPs and that it intends to issue recommendations in a customised manner for each Member State (see para. 19 (d) above).

33. The Committee also welcomes the statement of the Party concerned that, when assessing the draft NECPs, the Commission will monitor whether and how Member States have complied with, or intend to comply with, their obligation to involve the public early and effectively in the preparation of the final NECPs. The Committee notes the statement by the Party concerned that, when issuing its recommendations on the draft plans, the Commission will reiterate, as appropriate, to the Member States their obligation to conduct a public consultation in preparing their final plans following the Aarhus Convention and all other relevant provisions of European Union law (see para. 19 (e) above).

34. While in the present advice the Committee does not examine whether recommendations under article 9(2) of the Regulation would amount to “clear instructions” as required by paragraph 3 of decision V/9g, the Committee considers that the recommendations to be issued by the Party concerned to each Member State by 30 June 2019 provide an important opportunity for the Party concerned to take measures so that each Member State meets all the requirements of article 7 set out in paragraph 3 of decision V/9g prior to the adoption of the 2021-2030 NECPs. To this end, the recommendations to be issued by 30 June 2019 by the Party concerned under article 9(2) of the Regulation should:

(a) In accordance with the European Union’s stated intention,¹² be issued to each Member State;

(b) Reiterate to each Member State (and not merely to Member States “as appropriate”),¹³ the obligation of the Member State to meet the requirements of article 7 of the Convention with respect to the preparation of its 2021-2030 NECP;

¹⁰ ECE/MP.PP/2017/2, para. 63.

¹¹ See ECE/MP.PP/2017/39, para. 20.

¹² Party concerned’s statement of 30 April 2019, p. 4, para. (d).

¹³ Party concerned’s statement of 30 April 2019, p. 4, para. (e).

(c) Include a clear statement to each Member State that it should put in place arrangements with respect to the adoption of its final 2021-2030 NECP that meet each of the requirements of article 7 set out in paragraph 3 of decision V/9g, namely that:

- (i) The arrangements are transparent and fair;
- (ii) Within the arrangements the necessary information is provided to the public;
- (iii) The requirements of article 6(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 public participation.

(d) To make clear to each Member State that the European Union considers that the fulfilment of each of the requirements set out in subparagraph (c)(i)-(iii) above are necessary for the Member State to comply with article 7 of the Convention.

(e) For each Member State that did not carry out public participation fully meeting the requirements of article 7 of the Convention prior to the submission of its draft 2021-2030 NECP to the Commission on 31 December 2018, to make clear to the Member State that:

- (i) It should ensure that all options which were open at the time of the preparation of its draft 2021-2030 NECP are genuinely open at the time of the public participation procedure to be carried out prior to the finalization of its 2021-2030 NECP by 31 December 2019;
- (ii) The Member State's fulfilment of the above will be necessary in order for it to comply with the requirements in article 7, in conjunction with article 6(4) and 6(8), of the Convention to provide for early and effective public participation when all options are open and to take due account of the outcomes of the public participation.

35. Finally, the Committee requests the European Union, together with its second progress report due on 1 October 2019, to submit:

(a) For each Member State, the evaluation carried out by the Commission pursuant to article 9(2) of the Regulation regarding the public participation carried out or intended to be carried out by the Member State on its draft NECP 2021-2030;¹⁴ and

(b) For each Member State, the text of the customised recommendations relevant to meeting the requirements of paragraph 3 of decision V/9g issued to that Member State pursuant to article 9(2) of the Regulation on the Governance of the Energy Union and Climate Action.

¹⁴ See Party concerned's statement of 30 April 2019, p. 4, para. (e).