

## **File ACCC/M/2017/3**

### **1) Aarhus compliance case ACCC/C/2010/54**

#### **Background**

1. The 2014 decision V/9g of the Meeting of Parties (MoP) endorsed the following findings of the Aarhus Convention Compliance Committee (ACCC):
  - (a) That the Party concerned, by not having in place a proper regulatory framework and/or Renewable Energy Action Plans (NREAPs) by its member States on the basis of Directive 2009/28/EC, has failed to comply with article 7 of the Convention;
  - (b) That the Party concerned, by not having properly monitored the implementation by Ireland of article 7 of the Convention in the adoption of Ireland's NREAP, has also failed to comply with article 7 of the Convention;
  - (c) That the Party concerned, by not having in place a proper regulatory framework and/or clear instructions to implement and proper measures to enforce article 7 of the Convention with respect to the adoption of NREAPs by its member States on the basis of Directive 2009/28/EC, has failed to comply also with article 3, paragraph 1, of the Convention
2. In light of the above the MoP 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. It also invited the Party concerned to submit to the Committee periodically (on 31 December 2014, 31 October 2015 and 31 October 2016) detailed information on further progress in implementing the recommendations set out above. The EU provided timely updates each time.
3. At the 6th MoP in September 2017, the EU reaffirmed its earlier commitment to implement the 2014 MoP decision. A conference call on the case took place in March 2018, where the Commission presented the state of play of the main measure relevant to this case: the adoption by the EU of the Regulation on the Governance of the Energy Union.<sup>1</sup>
4. In particular, the EU has expressed its view that Article 10 of the Regulation on the Governance of the Energy Union, including its explicit reference to the Strategic Environmental Directive 2001/42, and the explicit reference in the recitals also to the Aarhus Convention, would ensure that the public is involved in the adoption by Member States of National Energy and Climate Plans (NECPs). These plans will include strategies as regards renewables and will replace the existing National Renewable Energy Action Plans (NREAPs). Furthermore, Annex 1, which details the contents of the NECPs, refers specifically to consultations "with stakeholders, including social partners, and engaging with the civil

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<sup>1</sup> 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

society" and their outcome. The Regulation entered into force - in the form reported by the EU in its first progress report - on 24 December 2018.

5. In its first progress review of 26 February 2019 the ACCC found as regards paragraph 3 of decision V/9g:<sup>2</sup>

(a) The European Union has not demonstrated any progress since the sixth session of the Meeting of the Parties to fulfil the first three sentences of paragraph 3 of decision V/9g with respect to any amendments of member States' 2010 NREAPs;

(b) While welcoming the concrete progress made, should the proposed Regulation on the Governance of the Energy Union be adopted in the form reported by the European Union in its first progress report, the European Union would still not yet have met all the requirements of the first three sentences of paragraph 3 of decision V/9g with respect to the plans to take the place of member States' NREAPs post-2020;

(c) The European Union has not yet fulfilled the final sentence of paragraph 3 of decision V/9g with respect to the evaluation of member States' 2010 NREAPs;

(d) The European Union has not yet fulfilled the final sentence of paragraph 3 of decision V/9g with respect to the evaluation of the plans to take the place of member States' NREAPs post-2020.

6. In light of the above, the ACCC requests the European Union, together with its second progress report due on 1 October 2019 to:

(a) With respect to the first three sentences of paragraph 3 of decision V/9g:

(i) To provide evidence that it has adopted a proper regulatory framework for implementing article 7 with respect to the adoption of plans to take the place of member States' NREAPs post-2020, pursuant to which member States are clearly instructed to put in place arrangements to meet each of the elements of article 7 set out in paragraph 3 of decision V/9g. The text of any new Regulation, as adopted, should be attached;

(ii) To comment on the extent to which any new Regulation, as adopted, addresses the Committee's concerns set out in paragraphs 34-37 above;

(b) With respect to the final sentence of paragraph 3 of decision V/9g:

(i) Concerning the evaluation of member States 2010 NREAPs, to provide clear and detailed replies to the Committee's questions of 23 February 2017, namely:

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<sup>2</sup> Paragraph 3 of decision V/9g provides the following: *"Also welcomes 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"*.

a. To 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. To 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.

(ii) Concerning the plans to take the place of member States' NREAPs post-2020, to explain how it has adapted the manner in which it evaluates those plans accordingly.

### **Preliminary Reply**

1. The EU is in the process of preparing its second progress report, where it will address in detail the issues raised by the ACCC.

2. By means of preliminary comments, the EU makes the following points:

**a) As regards the post-2020 period:** the Governance Regulation (EU) 2018/1999 integrates in the Energy Union governance system the previous obligations relating to NREAPs under the renewables Directive (EU) 2009/28. Therefore, planning, reporting and monitoring obligations in the energy and climate fields are streamlined therein. In this vein, the EU reiterates that the key tool for addressing the requirements of Article 7 of the Aarhus Convention is the Governance Regulation.

**b) Article 10** of the Governance Regulation uses explicit and binding language, according to which 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 plans **(or preparation of the final plans "well before adoption" for the plans covering the period 2021-2030)**. It also includes a clear caveat in its very beginning, which states that the application of this Article is without prejudice to any other Union law requirements. This means that all the environmental acquis, including the Aarhus Convention, obviously continues to apply in combination with the Governance Regulation. Moreover, the Article incorporates language used in the Aarhus Convention, such as the requirement that each Member State shall set "reasonable timeframes allowing sufficient time" for the public to be informed, to participate and express its views. This shows that the Governance Regulation has taken fully into account the requirements of the Aarhus Convention.

**c)** The Regulation goes even further than the Convention as it also requires Member States to reduce administrative complexity when they fulfil their obligations regarding public participation. Moreover, it 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** 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** 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.

g) Finally, the above describes the iterative process set out in the Governance Regulation to contribute to the Union achieving its 2030 energy and climate objectives and targets. The Governance iterative process is based on a spirit of dialogue to enable Member States to comply with their obligations to this effect, and to enable the Commission to monitor that such obligations are complied with. However, and in any event, the obligation of Member States to consult the public, to include a summary of their consultations, and to take due account of Commission recommendations, are legally binding under the Governance Regulation.

## **2) Aarhus compliance case ACCC/C/2008/32**

### **Background:**

1. At the 6<sup>th</sup> MoP in Budva from 11 to 14 September 2017, the Parties agreed with regard to draft decision VI/8f on compliance by the EU and in relation to case ACCC/C/2008/32 the following:

*"In the spirit of reaching the consensus, considering exceptional circumstances, the Meeting of the Parties decided by consensus to postpone the decision-making on draft decision VI/8f concerning the European Union to the next ordinary session of the Meeting of the Parties to be held in 2021. The European Union recalled its willingness to continue exploring ways and means to comply with the Convention in a way that is compatible with the fundamental principles of the Union legal order and with its system of judicial review."*

*The Meeting of the Parties also requested the Committee to review any developments that have taken place regarding the matter, and to report to the Meeting of the Parties accordingly.*

2. The Commission notes that the MoP has not yet endorsed the findings of the Committee in Case ACCC/C/2008/32 and that all information is thus only provided on the basis of the **EU's unilateral statement**, as quoted above.
3. On 12 March 2018, a first "**open session**" took place with the ACCC, where the EU was asked to detail any evolution in follow-up to Case ACCC/C/2008/32 until that date.
4. On 8 May 2018, the Commission published its **Roadmap** on "*EU implementation of the Aarhus Convention in the area of access to justice in environmental matters*".<sup>3</sup> The Roadmap was brought to the attention of the ACCC on 13 June 2018, together with the written summary of the EU's observations during the first open session, as also available on the UNECE website.
5. To recall, the Roadmap provides for a **detailed external, independent study** meant to evaluate the redress possibilities in environmental matters covered by EU law which are currently available both in EU courts and via the courts of its Member States. As outlined in the Roadmap, the study will examine the functioning of the existing system, will identify possible shortcomings and, if relevant, will also examine the options for addressing them and assess their respective impacts.
6. The Council on 19 June 2018 adopted **Decision (EU) 2018/881** "*requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 and, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006*".<sup>4</sup>
7. The Commission replied by **note of 24 September 2018**<sup>5</sup>, in which it agreed that it is important to explore ways and means to comply with the Aarhus Convention in a way that is compatible with the fundamental principles of the Union legal order and with its system of judicial review. The Commission further recalled the Roadmap and informed the Council on progress with the independent study, which was already ongoing by that date.

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<sup>3</sup> The Commission Roadmap on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters (2018)2432060 was published on 8.5.2018 ([https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2432060\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2432060_en))

<sup>4</sup> Official Journal L 155 of 19 June 2018, page 6, <https://eur-lex.europa.eu/eli/dec/2018/881/oj>

<sup>5</sup> Transmitted to the Aarhus Convention Compliance Committee on 1 October 2018.

8. As to the study timeline, the Commission launched the tendering procedure for this study on 8 June 2018. The tenderer, *Milieu Ltd*, signed the contract on 14 August 2018. The Commission informed the Council that it expects the results of the study, which will be accompanied by a Staff Working Document as outlined in the Roadmap, to be available by end September 2019 at the latest.
9. By way of its **observations** on file ACCC/C/M/3 on **1 October 2018**, the Commission also informed the Aarhus Convention Compliance Committee on the progress of the study.
10. Currently, the study is focused on **gathering evidence** and **mapping the situation** in the EU, which includes the Union and Member State level. The evaluation of the current situation is being conducted in the framework of the Better Regulation Guidelines.<sup>6</sup> Thus, having a **solid evidence base** is crucial. As part of this process, **options** will be looked at especially in relation to their legal implications, as well as their economic, social and environmental impacts. As the Commission outlined in its reply to the Council, the follow-up options will depend on the outcomes of the study. It falls under the right of initiative of the Commission.
11. The Commission is currently also conducting a wider **public consultation**, to allow input from NGOs and other interested stakeholders during a period of 12 weeks.<sup>7</sup> The public consultation will end on 14 March 2019, and its results will be reflected in the study.
12. The Commission equally **engages with stakeholders** independently from the public consultation: Notably, on 30 November 2018, the Commission services discussed with stakeholders, in particular NGOs, the follow-up to Case ACCC/C/2008/32. The meeting documents, including the report of the meeting, are available on the public [CIRCABC](#) page. Furthermore, on 29 January 2019, a meeting took place with national judges.
13. In its efforts of evidence-gathering, the Commission **works closely together with the Member States**. It has called for a meeting of the Expert Group on Aarhus Implementation on 16 April 2018, a second meeting took place on 15 October 2018, and a third on 11 March 2019. The meetings looked at the mapping of evidence and planning of the further work, in parallel to the evolution of the external study.<sup>8</sup>
14. This expert group works in coordination with the "**Environmental Compliance and Governance Forum**", which was established by the Commission at the beginning of 2018.<sup>9</sup> The Forum, which brings together senior officials from the policy-making and compliance public authorities of the EU Member States, provides guidance and steering for the work of the Expert Group on Aarhus Implementation. Two meetings

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<sup>6</sup> Staff Working Document (2017)350 of 4.7.2017.

<sup>7</sup> Link: [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2432060/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2432060/public-consultation_en)

<sup>8</sup> See [https://circabc.europa.eu/ui/group/cafdbfbb-a3b9-42d8-b3c9-05e8f2c6a6fe/library/82ba42cf-8722-4898-a852-a9653bab27f2?p=1&n=10&sort=modified\\_DESC](https://circabc.europa.eu/ui/group/cafdbfbb-a3b9-42d8-b3c9-05e8f2c6a6fe/library/82ba42cf-8722-4898-a852-a9653bab27f2?p=1&n=10&sort=modified_DESC)

<sup>9</sup> Commission Decision of 18.1. 2018 setting up a group of experts on environmental compliance and governance, C(2018)10 final.

took place in 2018 (on 13 March and 7 December 2018, where the Forum was also informed of the study); a third meeting is planned for 14 May 2019. The meeting documents are publicly available via the CIRCABC platform.<sup>10</sup>

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<sup>10</sup> [https://circabc.europa.eu/ui/group/cafdbfbb-a3b9-42d8-b3c9-05e8f2c6a6fe/library/01e1d459-d943-499e-a0da-bbc66b1791e2?p=1&n=10&sort=modified\\_DESC](https://circabc.europa.eu/ui/group/cafdbfbb-a3b9-42d8-b3c9-05e8f2c6a6fe/library/01e1d459-d943-499e-a0da-bbc66b1791e2?p=1&n=10&sort=modified_DESC)

