

Additional information on the implementation of request of the Meeting of the Parties ACCC/M/2017/3 (European Union) and request to the Compliance Committee

1. We welcome the adoption of the first progress review and the findings of the Committee contained therein. We also appreciate that there will be a chance to consider this progress review with the presence of the Party concerned at the upcoming 64th meeting of the Compliance Committee.
2. Prior to this meeting, we would like to draw the attention of the Committee to a number of developments that have taken place since the progress report of the Party concerned and to make a specific request to the Committee with regard to its follow-up.

Adoption and entry into force of the Governance Regulation

3. For one, the Governance Regulation (Regulation (EU) 2018/1999)¹ has been adopted on 11 December and entered into force on 24 December 2018 in the form reported by the EU in its first progress report (except for editorial changes, such as adjusting the numbering of certain provisions etc.). We are enclosing the text of the Regulation with this submission (see Annex).
4. Paragraph 61(c) of the progress review recognizes that
*“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.”* [emphasis added]
5. It is therefore now clear that the legal text of the Governance Regulation fails to comply with the requirements of Article 7 of the Convention and does not fulfil the requirements of paragraph 3 of decision V/9g.
6. While we welcome the above finding of the Committee, we would also like to draw its attention to the tangible implications that have already manifested because of this failure to properly enshrine the text of the Convention in the Regulation.

Lack of public participation on the draft plans prior to submission to the EU Commission

7. As the Committee will be well aware, the Member States had to submit their draft plans to the Commission by 31 December 2018. In order to ensure “early participation when all options are open”, as required by the Convention, the Member States would have had to consult on their

¹ 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

Additional information and request to the Committee on request M3 (EU)

5 March 2019



draft plans before submitting them to the Commission. Accordingly, the Committee invites the Party concerned in paragraph 35 to comment on the fact that the draft plans for 2021-2030 will already have been submitted by the Member States before any public participation has taken place (para. 35).

8. Since by now all draft plans have been submitted to the Commission, we can already confirm that no public participation has taken place in a number of Member States prior to sending the draft plans, for instance in Germany,² Italy,³ Bulgaria,⁴ and France.⁵ In Lithuania, public participation was initiated on 13 December 2018 but is still ongoing (until 15 March 2019), while the draft plan has in the meantime been submitted to the Commission.⁶ Other Member States had only very short participation phases on the draft plan, such as 11 days in Romania (29 November - 10 December 2018),⁷ or 14 days in Greece (which was extended by only 10 days after a complaint from NGOs)⁸. Such short participation phases do not meet the requirements of article 7 in conjunction with article 6(3) of the Convention either.⁹
9. It is therefore of the utmost importance that public participation on the final plans will fulfil as far as possible the requirements of article 7 of the Convention. What will be the first phase of real public participation in many Member States (but should have been the second phase) will have to be organized by each Member State after receiving recommendations from the Commission, if any, (the deadline for this being 30 June 2019)¹⁰ and before notifying the final plans to the Commission (the deadline for that being 31 December 2019).¹¹

² According to the website of the responsible Ministry, Germany has already submitted its draft plan to the Commission and is planning to present a public participation concept within the first half of 2019. See: <https://www.bmwi.de/Redaktion/DE/Textsammlungen/Energie/necp.html>, last accessed on 4 March 2019 (in German). See also section 1.3, p. 24 of the draft NECP as submitted to the Commission: https://ec.europa.eu/energy/sites/ener/files/documents/germany_draftnecp_en.pdf.

³ Italy is also planning to conduct a public participation phase for the first time in 2019, according to unofficial information we received by late Spring 2019. This fact is reflected both on pages 5 and 34 of its draft plan submitted to the Commission (https://ec.europa.eu/energy/sites/ener/files/documents/italy_draftnecp_en.pdf) and in the statement made when submitting the plan, available online at: <https://www.mise.gov.it/index.php/it/per-i-media/notizie/it/198-notizie-stampa/2039046-piano-nazionale-integrato-per-l-energia-e-il-clima-inviata-la-proposta-a-bruxelles> (in Italian) - last accessed on 4 March 2019, which all refer to upcoming participation phases only.

⁴ The draft Bulgarian NECP states that public consultation will be conducted once comments from the Commission on the draft have been received: https://www.me.government.bg/files/useruploads/files/_pdf (in Bulgarian), p. 24 understand that the Bulgarian authorities opened a period of public consultation after the submission of the draft to the Commission (more specifically from January to April 2019), we however note that this does not comply with the requirements of articles 7 and 6(4) of the Convention.

⁵ While the French draft NECP, as submitted to the Commission, provides that a number of public consultations were organised in 2017 and 2018 (see https://ec.europa.eu/energy/sites/ener/files/documents/france_draftnecp.pdf, last accessed on 5 March 2019, page 34 et seq.), these procedures were not made in relation to the NECP but rather in relation to the "Pluriennial Energy Plan (PPE)", and the "Low-carbon national strategy (SNBC)", which are plans and roadmaps mandated by the French Energy transition Law No. 2015-992 of 17 August 2015. As the Energy transition law is a legal instrument distinct from the Governance Regulation, as such, the French NECP is distinct from the PPE and the SNBC (even though the French government argues that it forms the bases of the NECP). Further, the National commission of public debate noted that no draft of the PPE had been made available prior to said debate (see pages 45 et seq., <https://ppe.debatpublic.fr/file/2484/download?token=yin-tYPI> last accessed on 5 March 2019). In summary, it is inaccurate to say that a public consultation was organised with respect to the French draft NECP prior to submission.

⁶ For the information on the ongoing consultation, see: <https://epilietis.lrv.lt/lt/konsultacijos/viesoji-konsultacija-del-integruoto-nacionalinio-energetikos-ir-klimate-plano> (in Lithuanian), last accessed on 4 March 2019. It is explicitly indicated that account will be taken of the comments in the preparation of the final version of the plan.

⁷ See pages 51 and 52 of the draft NECP as submitted by Romania: https://ec.europa.eu/energy/sites/ener/files/documents/romania_draftnecp_en.pdf.

⁸ See section 1.3.3., pages 97-98 of the Greek draft NECP as submitted to the Commission:

<http://www.ypeka.gr/LinkClick.aspx?fileticket=nOeUqsWGeBM%3d&tabid=37&language=el-GR> (in Greek).

⁹ As the Committee held in its findings on communication ACCC/C/2010/51 (Romania), ECE/MP.PP/C.1/2014/12, para. 110.

¹⁰ This follows from article 9(2) of the Governance Regulation, which states that the Commission needs to issue any country-specific recommendations the latest 6 months before the deadline to submit the plans.

¹¹ Article 3(1) of the Governance Regulation.

Request to the Committee to call on the Commission to issue clear instructions to the Member States to provide for adequate public participation in the preparation of the final plans

10. Given the insufficient public participation in some Member States so far (see para. 8 above) and the Compliance Committee's finding that the Governance Regulation does not provide for a clear requirement that all necessary information be provided to the public (para. 36) and that due account are taken of the comments (para. 37), it will be of particular importance that the Commission issues additional instructions to the Member States prior to the upcoming participation on the final plans.
11. We therefore call on the Compliance Committee to use the audio conference at the Committee's 64th meeting to call on the European Commission to issue clear instruction to the EU Member State authorities that:
 - a. The Compliance Committee has found that the Governance Regulation does not adequately implement article 7 of the Convention;
 - b. Remind the Member State that they do need to comply with all aspects of article 7 of the Convention based on the fact that the Aarhus Convention forms part of primary EU law;
 - c. Give clear instructions to the Member States on how to implement article 7 in the preparation of their NECPs (in line with para. 63(a)(i) of the first progress review). These instructions should in particular reference all the provisions of the Governance Regulation related to public participation¹² and how they should be interpreted and implemented in order to ensure full compliance with the Aarhus Convention. In particular, the instructions could usefully clarify and recall that:
 - i. Participation must be open to all interested individuals and organisations (members of the public) - consultation of a selected stakeholder group does not fulfil the requirements of article 7;¹³
 - ii. Giving adequate time to the public to familiarize themselves with the plans and to provide comments on the plan is required by article 7 in conjunction with article 6(3) of the Convention. Attention should be drawn to existing findings of the Committee, for instance (i) communication ACCC/C/2010/51 (Romania),¹⁴ where the Committee found 11 days to be insufficient and (ii) communication ACCC/C/2007/22 (France),¹⁵ where it found that a 6-week period to consider the information disseminated by the authorities plus another period of 6 weeks to participate is appropriate;
 - iii. The requirement to actively disseminate all the necessary information to the public, in accordance with article 7 in conjunction with article 6(6) of the Convention, including the draft NECP itself, any recommendations received

¹² Including recitals 28 et seq. and articles 10 et seq.

¹³ This has been clarified by the Committee in its findings on communication ACCC/C/2010/51 (Romania), ECE/MP.PP/C.1/2014/12, para. 109.

¹⁴ ECE/MP.PP/C.1/2014/12, para. 110.

¹⁵ ECE/MP.PP/C.1/2009/4/Add.1, para. 44.

Additional information and request to the Committee on request M3 (EU)

5 March 2019



from the Commission on the draft NECP and any other information relevant to the decision-making on the NECP, such as main reports and advice issued to the public authorities, any information regarding environmental consequences and cost-benefit and other economic analyses held by the responsible authorities and an outline of the main alternatives studied;¹⁶

- iv. Taking the outcome of the public participation into due account as required by article 7 in conjunction with article 6(8) of the Convention;
 - v. Preparing and issuing a document that sets out concretely how the public comments have been taken into account.¹⁷
- d. Last but not least, include a clear warning that the Commission will monitor compliance with article 7 by the authorities of each Member State and, in order to comply with para. 63(b)(ii) of the first progress review, will initiate infringement actions where necessary.
12. Such instructions could be issued by way of a guidance document, such as a Commission Communication or another instrument deemed appropriate by the Party concerned that serves to give clear instructions on how the Regulation is to be implemented and how the Commission will follow up.
13. We would like to emphasize that this is a special situation. Contrary to other follow-ups on decisions of the MOP, where the actual decision-making and participation procedures have long been concluded by the time the Committee conducts its follow-up, in this case the actual public participation procedures are ongoing or yet to be initiated. This is the reason why in this case the Committee can recommend actions to the EU that will have an immediate impact on improving public participation and thereby implementation of the Convention throughout the EU. It also means that (given the timeline), rapid action is needed by the Party concerned to prevent that the original case of non-compliance is repeated, i.e. that the NECPs for 2021-2030 are adopted without public participation that meets the requirements of article 7 of the Convention.
14. It is also important to note that such practical measures appear to be the only way for the Party concerned to fulfil the requirements of paragraph 3 of decision V/9f, other than of course proposing an amendment to the Governance Regulation.
15. It is, moreover, squarely within regular practice of the Committee to issue advice on how a Party may fulfil the recommendations of the MOP decision, as otherwise the Parties were left guessing as to what measures may fulfil the requirements of a given MOP decision. Such advice can be given on a constant iterative basis, as recently in the context of decision VI/8h

¹⁶ This list is based on the Committee's draft findings on communication ACCC/C/2010/100 (United Kingdom), para. 94.

¹⁷ This requirement follows from article 7 in conjunction with article 6(8) because, as clarified by the Committee in its findings on communication ACCC/C/2008/24 (Spain), ECE/MP.PP/C.1/2009/8/Add.1, para. 100), a discussion of how public participation was taken into account in the primary way to demonstrate compliance with article 6(8) of the Convention.

Additional information and request to the Committee on request M3 (EU)

5 March 2019



Romania,¹⁸ as part of a progress review¹⁹ or also during an audio conference on the follow-up.²⁰

16. We remain of course at the Committee's disposal for any clarifications, both prior to the upcoming meeting and during the audio conference on 14 March.

A handwritten signature in black ink that reads 'Maria Kleis Walravens'.

Maria Kleis Walravens

Head of Energy

+32 (0) 28 08 3470

mkleis@clientearth.org

Rue du Trône, 60 (Box 11)

Brussels, 1050 (Belgium)

www.clientearth.org

¹⁸ See Committee advice of 12 July 2018.

¹⁹ This is regular practice for all recommendations. See for instance, first progress review on decision VI/8a (Armenia), para. 24 or first progress review on decision VI/8b (Austria), paras. 32 or 48.

²⁰ For instance, in the context of the follow-up on decision V/9g, the Committee posed specific questions during the audio conference at its 52nd meeting the Committee requested the Party concerned to provide the draft of the Governance Regulation and the texts of any letters sent to Member States, in order to demonstrate compliance with the recommendations of Decision V/9g.

Additional information and request to the Committee on request M3 (EU)

5 March 2019



ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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Brussels

Rue du Trône 60
5ème étage
1050 Bruxelles
Belgique

London

274 Richmond Road
London
E8 3QW
UK

Warsaw

ul. Żurawia 45
00-680 Warszawa
Polska

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