

Economic Commission for Europe

Meeting of the Parties to the Convention on
Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters

Working Group of the Parties**Twenty-fourth meeting**

Geneva, 1–3 July 2020

Item 7 (a) of the provisional agenda

Preparations for the seventh session of the Meeting of the Parties:**Future work programme**

Explanatory note regarding comments by EU and its Member States¹

Prepared by the Bureau

1. This paper is prepared pursuant to comments by EU and its Member States on the draft note of the Bureau on a rapid response mechanism to deal with cases related to article 3 (8) of the Aarhus Convention (ECE/MP.PP/WG.1/2020/13)².

2. EU and its Member States asked to clarify the following:

(a) We would like to stress that Article 3, paragraph 8, has two sentences and we ask for clarification on which sentence the proposed rapid response mechanism is related to. This is important for the avoidance of any doubt in the future and this should be included as well in writing in the final text proposed for agreement by the Working Group of Parties.

Clarification:

The proposed rapid response mechanism concerns only the first sentence of article 3(8), which is the sentence which imposes the binding obligation on Parties to ensure that persons exercising their rights in conformity with the Convention are not penalized, persecuted or harassed for their involvement. The second sentence of article 3(8) is merely a clarification and does not itself impose a legal obligation.

(b) It would be useful to describe more in detail the scope of powers that should be granted to the special rapporteur or other body. Especially with regard to point 8 of the Annex I we ask for a more accurate description of what is a “protection measure”.

Clarification:

As explained in point 8 of the annex I to the draft note:

“A protection measure would be a measure issued to the Party concerned by the Rapporteur directing the Party concerned either to refrain forthwith from any action that may amount to persecution, penalization or harassment of the complainant and any other person(s) named in the protection measure, or to act without delay in order to protect the complainant and any other person(s) named in the protection measure from persecution, penalization or harassment by third parties.”

A protection measure may be either an “immediate protection measure” or an “ongoing protection measure”. An immediate protection measure would be a protection measure issued to the Party concerned by the Rapporteur on an urgent basis before the completion of the Rapporteur’s investigation at any point after the complaint has been determined

¹ This document was not formally edited.

² See comments by EU and its Member States:

https://www.unece.org/fileadmin/DAM/env/pp/wgp/WGP_24/Statements_and_Presentations/EU_comment_7_a_Future_Work_Programme_as_agreed.pdf

admissible.³ An ongoing protection measure would be a protection measure issued to the Party concerned by the Rapporteur upon his or her concluding that the Party concerned has or may have violated article 3 (8) of the Convention.⁴

For both immediate and ongoing protection measures, the precise content of the protection measure will in every case be tailored to the particular situation. This will depend on the nature of the alleged persecution, penalization and harassment which is the subject of the complaint. The protection measure would list the particular actions the Party concerned is directed to take to ensure that the complainant and any other person(s) named in the protection measure are not subjected to further persecution, penalization and harassment. For example:

- (a) Regarding a complaint that alleges that the complainant has been arrested and detained without trial, the protection measure may direct the Party concerned to ensure that the complainant receives fair and humane treatment, access to legal advice, due process and a fair trial;
- (b) Regarding a complaint that alleges that the complainant has been subjected to threatening telephone calls from the Party concerned's intelligence services, the protection measure may direct the Party concerned to take the necessary measures to ensure that its intelligence services refrain from making any further such calls to the complainant;
- (c) Regarding a complaint that alleges that the complainant has been subjected to harassment by persons acting under the control of a private company operating in the Party concerned (e.g. a mining company whose activities the complainant had been seeking to oppose), the protection measure may direct the Party concerned to take the necessary measures to ensure that the private company, and any person associated with that company, cease all such harassment.

The above list is intended to be indicative. Again, the exact content of the protection measure will depend in every case on the nature of the alleged persecution, penalization and harassment. In some cases this may mean that a protection measure will list several actions that the Party concerned is directed to take in order to ensure that the person(s) named in the protection measure are not subjected to further persecution, penalization and harassment.

(c) A final question which in our view is not clear from the background paper in Annex I is how cases handled by the Rapporteur should be handled in a possible follow-up. Should they for example be automatically transferred to the Compliance Committee for a review and/or possible follow-up once the Rapporteur has fulfilled her/his mandate?

Clarification:

Point 11 of annex I to the draft note on a rapid response mechanism addresses the proposed relationship between the Rapporteur and the Compliance Committee. By way of further explanation, the possible outcomes of a complaint to the Rapporteur would be:

- (a) The Rapporteur determines the complaint to be inadmissible. In this case, the complaint will not be referred to the Committee.
- (b) If the Rapporteur determines the complaint to be admissible:
 - (i) The Rapporteur may at that point, or at any time during the course of his or her investigation, issue an immediate protection measure. The immediate protection measure will thereafter remain in force the Rapporteur completes his/her investigation. At that point, depending on the outcome of the Rapporteur's investigation, the Rapporteur may decide to issue an ongoing protection measure. Alternatively, he or she may decide that there is no need for a protection measure to be in place, and the immediate protection measure will be lifted.
 - (ii) If, upon completing his/her investigation, the Rapporteur decides to close the case without issuing an ongoing protection measure, the Rapporteur would not make a referral to the Compliance Committee.
 - (iii) In contrast, in any case in which the Rapporteur issues an ongoing protection measure, s/he may also decide to make a referral regarding that case to the Compliance Committee.⁵ The Rapporteur may either:

³ See point 9 of annex I to the draft note.

⁴ See point 10 of annex I to the draft note.

⁵ See point 11 (b) of annex I to the draft note.

- a. Make a referral regarding just that specific case; or
 - b. If the Rapporteur has issued ongoing protection measures regarding any other complaints concerning that Party concerned in the same period, s/he may decide to make a single referral to the Compliance Committee covering all such complaints.
- (iv) Whether or not the Rapporteur has made a referral to the Compliance Committee, the Rapporteur will continue to monitor the implementation by the Party concerned of the ongoing protection measure until such time as the protection measure is lifted. This is in line with the rapid response nature of the Rapporteur's mandate, since urgent action may need to be taken if, in contravention of the protection measure, the complainant is subject to further incidents of persecution, penalization or harassment. The Rapporteur will keep the Compliance Committee, the Bureau and the Working Group of the Parties informed on a regular basis.⁶
- (v) An ongoing protection measure may be lifted by the Meeting of the Parties, after taking into account any recommendations from the Rapporteur and/or the Compliance Committee that the protection measure should be lifted.⁷ Pending an upcoming session of the Meeting of the Parties, an ongoing protection measure may be lifted by the Rapporteur if he or she concludes there is no further need for the protection measure to remain in place.
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⁶ See point 11(a) and 12(a) of annex I to the draft note.

⁷ See point 10 of annex I to the draft note.