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in Environmental Matters

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Item 7 (b) of the provisional agenda

**Procedures and mechanisms facilitating the implementation
of the Convention: compliance mechanism**

Report of the Compliance Committee*

Compliance by the European Union with its obligations under the Convention

Summary

This document is prepared by the Compliance Committee pursuant to the request set out in paragraph 63 of the report of the sixth session of the Meeting of the Parties (Budva, Montenegro, 11-13 September 2017) (ECE/MP.PP/2017/2) and in accordance with the Committee's mandate set out in paragraph 35 of the annex to decision I/7 of the Meeting of the Parties on review of compliance (ECE/MP.PP/2/Add.8).

* The present document is being issued without formal editing.

I. Introduction¹

1. At its sixth session (Budva, Montenegro, 11-13 September 2017), the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) agreed to include the following text in the report of its sixth session:

In the spirit of reaching 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 was compatible with the fundamental principles of the European Union legal order and with its system of judicial review.

2. Through paragraph 63 of its report of the sixth session, 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. In that context, the European Union stated that it reaffirmed its commitment to implement decision V/9g (see ECE/MP.PP/2017/2).

3. In accordance with the Compliance Committee's procedure, the request of the Meeting of the Parties was given the case reference: request ACCC/M/2017/3.

II. Summary of follow-up

4. On 26 February 2018, the communicant of communication ACCC/C/2010/54 submitted a written statement.

5. At its sixtieth meeting (Geneva, 12-15 March 2018), the Committee reviewed request ACCC/M/2017/3 in open session with the participation by audio conference of the Party concerned, the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and Italy, Norway, the Netherlands and Switzerland as observers. The Chair informed the Party concerned that the Committee would invite it to provide a progress report by 1 October 2018 on the measures taken by then to implement request ACCC/M/2017/3.

6. On 13 June 2018, the Party concerned provided a written version of the statement it had delivered at the Committee's sixtieth meeting, together with a "roadmap" on access to justice in environmental matters.

7. On 26 June 2018, the communicant of communication ACCC/C/2010/54 submitted a written statement for the Committee's sixty-first meeting (Geneva, 2-6 July 2018).

8. On 31 July 2018, the secretariat wrote to the Party concerned to remind it of the deadline of 1 October 2018 to report on its progress on request ACCC/M/2017/3.

9. On 1 October 2018, the Party concerned submitted its first progress report on request ACCC/M/2017/3, on time.

10. On 5 October 2018, the secretariat forwarded the Party concerned's first progress report to the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and observers, inviting their comments by 1 November 2018.

¹ This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the findings and conclusions) may take place.

11. On 22 October and 5 November 2018, respectively, the communicants of communications ACCC/C/2010/54 and ACCC/C/2008/32 submitted comments on the first progress report.
12. After taking into account the information received, the Committee adopted its first progress review through its electronic decision-making procedure on 22 February 2019. On 26 February 2019, the Committee's first progress review was sent to the Party concerned, the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and registered observers.
13. On 5 March 2019, the communicant of communication ACCC/C/2008/32 submitted additional information.
14. At its sixty-third meeting (Geneva, 11-15 March 2019), the Committee reviewed the implementation of request ACCC/M/2017/3 in open session, with the participation by audio conference of the Party concerned and the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54.
15. On 30 April 2019, the Party concerned submitted a statement following the open session on request ACCC/M/2017/3 at the Committee's sixty-third meeting, and on 6 May 2019, the communicant of communication ACCC/C/2008/32 submitted comments thereon.
16. On 28 May 2019, the Committee sent advice to the Party concerned with respect to its implementation of paragraph 3 of decision V/9g.
17. On 24 July 2019, the secretariat sent a letter to the Party concerned reminding it of the Committee's invitation at its sixty-third meeting to provide a second progress report by 1 October 2019 on the progress it had by that date made to implement paragraph 3 of decision V/9g and paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (part II).
18. On 30 September 2019, the Party concerned requested an extension of the deadline to submit its second progress report, which the Chair of the Committee granted that same day.
19. On 28 October 2019, the Party concerned submitted its second progress report on request ACCC/M/2017/3. On 30 October 2019, the Party concerned's second progress report was forwarded to the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and registered observers for their comments by 26 November 2019.
20. On 25 November and 13 December 2019, respectively, the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 submitted comments on the second progress report.
21. On 21 January 2020, the secretariat wrote to the Party concerned to inform it that the Committee stood ready to provide advice and assistance with respect to any draft measures to implement paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (part II), and to express the Committee's willingness to meet with the Party concerned in this regard.
22. The Committee prepared its second progress review, taking into account the information on request ACCC/M/2017/3 by then received, and adopted it through its electronic decision-making procedure on 26 February 2020. The second progress review was sent on that date to the Party concerned and the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and registered observers.
23. On 6 March 2020, the Party concerned submitted a further "roadmap" on access to justice in environmental matters. On the same day, observer Justice & Environment submitted additional information.

24. At its sixty-sixth meeting (Geneva, 9-13 March 2020), the Committee reviewed the implementation of request ACCC/M/2017/3 in open session, with the participation by audio conference of the Party concerned and the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54.
25. On 11 March 2020, the communicant of communications ACCC/C/2008/32 sent a written version of the statement it had delivered at the Committee's sixty-sixth meeting.
26. On 30 September 2020, the Party concerned submitted its final progress report on request ACCC/M/2017/3, which was then forwarded on that date to the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and registered observers, with an invitation to comment by 29 October 2020.
27. On 14 October 2020, the Party concerned submitted an update to its final progress report, including a legislative proposal to amend the Aarhus Regulation and a Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on improving access to justice in environmental matters.
28. Comments on the Party concerned's final progress report and legislative proposal were received, on 26 October 2020, from the communicant of communication ACCC/C/2010/54 and the Council of Bars and Law Societies of Europe, and on 28 October 2020, from the communicant of communication ACCC/C/2008/32.
29. On 5 November 2020, the Party concerned requested the Committee to provide it with advice on its legislative proposal to amend the Aarhus Regulation.
30. By letter of 12 November 2020, the Committee confirmed its willingness to provide the requested advice. With a view to preparing its draft advice, the Committee also indicated its intention to hold a videoconference regarding request ACCC/M/2017/3 at its upcoming sixty-eighth meeting (23-27 November 2020) in order to hear the views of the Party concerned, communicants and observers on the extent to which the legislative proposal, and accompanying Communication, would fulfil the requirements of the Committee's findings on communication ACCC/C/2008/32 (Part II).
31. On 25 November 2020, in the context of its sixty-eighth meeting, the Committee held a videoconference with the participation of the Party concerned, the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and observers.
32. On 25 and 26 November 2020, respectively, the communicant of communication ACCC/C/2008/32 and the Party concerned provided practical examples, at the Committee's request, of provisions of acts explicitly requiring implementing measures at the national level.
33. On 29 and 30 November 2020, respectively, the communicants of communications ACCC/C/2010/54 and ACCC/C/2008/32 provided comments on the practical examples provided by the Party concerned.
34. On 30 November 2020, the Party concerned provided comments on the practical examples provided by the communicant of communication ACCC/C/2008/32.
35. On 19 December 2020, the Party concerned informed the Committee that the Council of the European Union had adopted its general approach on the Commission's legislative proposal of 14 October 2020.
36. The Committee prepared its draft advice and agreed it through its electronic decision-making procedure on 18 January 2021. In accordance with paragraph 34 of the annex to decision I/7, the draft advice was forwarded on that date to the Party concerned, the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and registered observers with an invitation to comment by 1 February 2021.

37. Comments on the Committee's draft advice were received on 31 January 2021 from the communicant of communication ACCC/C/2010/54 and on 1 February 2021 from the Party concerned, the communicant of communication ACCC/C/2008/32 and the European Environmental Bureau as an observer.
38. After taking into account the comments received, the Committee finalized its advice and adopted it through its electronic decision-making procedure on 12 February 2021. On the same day, the secretariat sent the advice to the Party concerned, the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and registered observers.
39. On 5 March 2021, observer Justice & Environment submitted a statement on the Committee's advice to the Party concerned.
40. On 25 June 2021, the Party concerned provided additional information on its progress with respect to request ACCC/M/2017/3.
41. The Committee completed its draft report to the seventh session of the Meeting of the Parties on the progress by the Party concerned to implement request ACCC/M/2017/3 through its electronic decision-making procedure on 2 July 2021. In accordance with paragraph 34 of the annex to decision I/7, the draft report was then forwarded on that date to the Party concerned, the communicants and registered observers with an invitation to provide comments by 16 July 2021.
42. At its seventy-first meeting (Geneva online, 7-9 July 2021), the Committee reviewed the implementation of request ACCC/M/2017/3 in open session with the participation via virtual means of the Party concerned, the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and several observers.
43. Comments on the Committee's draft report were received from the communicant of communication ACCC/C/2010/54 on 11 July 2021, from the Party concerned as well as observer Justice & Environment on 16 July 2021 and from the communicant of communication ACCC/C/2008/32 on 20 July 2021.
44. On 23 July 2021, the Party concerned provided an update.
45. After taking into account the information received, the Committee finalized and adopted its report to the seventh session of the Meeting of the Parties on the implementation of request ACCC/M/2017/3 through its electronic decision-making procedure on 26 July 2021 and thereafter requested the secretariat to send it to the Party concerned, the communicants and registered observers.

III. Considerations and evaluation by the Committee

46. In order to fulfil request ACCC/M/2017/3 with respect to paragraph 3 of decision V/9g, the European Union would need to provide the Committee with evidence that it had adopted a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention with respect to the adoption of national renewable energy action plans (NREAPs). This would entail that the European Union 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 (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 European Union must adapt the manner in which it evaluates NREAPs accordingly.

47. In order to fulfil request ACCC/M/2017/3 with respect to the Committee's findings on communication ACCC/C/2008/32 (part II), the European Union would need to provide the Committee with evidence that:

(a) All relevant European Union institutions within their competences take the steps necessary to provide the public concerned with access to justice in environmental matters in accordance with article 9 (3) and (4) of the Convention.

(b) If and to the extent that the European Union intends to rely on the Aarhus Regulation² or other European Union legislation to implement article 9 (3) and (4) of the Convention:

(i) The Aarhus Regulation is amended, or any new European Union legislation is drafted, so that it is clear to the Court of Justice of the European Union (CJEU) that that legislation is intended to implement article 9 (3) of the Convention;

(ii) New or amended legislation implementing the Aarhus Convention uses wording that clearly and fully transposes the relevant part of the Convention; in particular it is important to correct failures in implementation caused by the use of words or terms that do not fully correspond to the terms of the Convention.

(c) If and to the extent that the Party concerned is going to rely on the jurisprudence of the CJEU to ensure that the obligations arising under article 9 (3) and (4) of the Convention are implemented, the CJEU:

(i) Assesses the legality of the European Union's implementing measures in the light of those obligations and acts accordingly;

(ii) Interprets European Union law in a way which, to the fullest extent possible, is consistent with the objectives of article 9 (3) and (4) of the Convention.

48. The Committee welcomes the three progress reports submitted by the Party concerned as well as the additional information it provided between these progress reports.

49. The Committee also welcomes the comments and information provided by the communicants of communication ACCC/C/2008/32 and ACCC/C/2010/54 and observers.

Paragraph 3, first three sentences, of decision V/9g – Proper regulatory framework or clear instructions with respect to the adoption of national renewable energy action plans

Amendments to member States' 2010 NREAPs

50. On 11 December 2018, the Regulation on the Governance of the Energy Union and Climate Action³ (the Governance Regulation) was adopted by the Party concerned; it entered into force on 24 December 2018.⁴ The Governance Regulation integrates in the Energy Union governance system the previous obligations relating to NREAPs under the Renewable Energy Directive.⁵

51. Accordingly, and as the Committee indicated in its first and second progress reviews, following the entry into force of the Governance Regulation, the Committee will not examine

² Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

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.

⁴ Additional information from the communicant of communication ACCC/C/2008/32, 5 March 2019, para. 3.

⁵ Party's second progress report (decision V/9g), 28 October 2019, para. 17.

the issue of amendments to member States' 2010 NREAPs further.⁶ Rather, the Committee examines the measures taken by the Party concerned to put in place a proper regulatory framework or clear instructions with respect to the adoption of the National Energy and Climate Plans (NECPs), which take the place of NREAPs post-2020.⁷

Adoption of National Energy and Climate Plans post-2020

52. In order to fulfil the first three sentences of paragraph 3 of decision V/9g, the Party concerned must adopt a proper regulatory framework or clear instructions that would ensure that member States put in place arrangements regarding the adoption of NECPs that would meet each of the elements of article 7 set out in that paragraph, including 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.⁸

53. The Committee examines below first whether the Party concerned has to date adopted a proper regulatory framework or alternatively, clear instructions, as required by paragraph 3 of decision V/9g.

Proper regulatory framework

54. In its final progress report, the Party concerned does not report that any amendments have been made to the Governance Regulation of relevance to paragraph 3 of decision V/9g.

55. In its comments on the Party concerned's final progress report, the communicant of communication ACCC/C/2008/32 confirms that the Governance Regulation has not been amended by the Party concerned and states that no other regulatory or legislative measures have been adopted. It thus considers that the Committee's conclusions from its second progress review are still valid.⁹

56. The communicant of communication ACCC/C/2008/32 submits furthermore that, since the first NECPs have now finally been adopted, in order to fulfil paragraph 3 of decision V/9g, the Party concerned will need to provide a proper regulatory framework or clear instructions with regards to the second NECPs in 2029 and possible amendments of the first NECPs in the meantime. It notes that the Party's final progress report does not mention any measures in this respect.¹⁰

57. In its comments on the Party's final progress report, the communicant of communication ACCC/C/2010/54 states that he cannot see any evidence that the Party concerned is making any effort to comply with its legal obligations under the Convention. In particular, the communicant refers to alleged repeated failures by the Party concerned, including in its final progress report, to provide the information requested by the Committee in its progress reviews.¹¹

⁶ Committee's first progress review, 22 February 2019, para. 20; Committee's second progress review, 26 February 2020, paras. 26-28.

⁷ See Committee's second progress review, 26 February 2020, para. 28.

⁸ *Ibid.*, para. 46.

⁹ Comments provided by the communicant of communication ACCC/C/2008/32, 28 October 2020, para. 25.

¹⁰ *Ibid.*, para. 26.

¹¹ *Ibid.*, pp. 2-4.

58. Based on the foregoing, the Committee understands that the regulatory framework remains as examined by the Committee in its second progress review.

59. To that end, article 9 (1) of the Governance Regulation requires each member State to submit its draft NECP for the 2021-2030 period to the Commission by 31 December 2018 and every ten years thereafter.¹² Article 3 (1) of the Governance Regulation requires each member State to submit its final NECP for the 2021-2030 period by 31 December 2019, and its subsequent NECP by 1 January 2029 and every ten years thereafter.¹³

60. Article 10 of the Governance Regulation provides that:

...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... Each Member State shall attach to the submission of such documents to the Commission a summary of the public’s views or provisional views...

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.¹⁴

61. Recital 29 of the Governance Regulation provides that:

When carrying out public consultations, and in line with the Aarhus Convention, Member States should aim to ensure equal participation, that the public is informed by public notices or other appropriate means such as electronic media, that the public is able to access all relevant documents, and that practical arrangements related to the public’s participation are put in place.¹⁵

62. Annex I of the Governance Regulation, which establishes the general framework for national plans, provides that section A.1.3 of each plan should address “consultations with stakeholders, including social partners, and engagement of civil society and the general public”.¹⁶

63. In its second progress report, the Party concerned stressed that all the European Union environmental *acquis* continues to apply in combination with the Governance Regulation.¹⁷

64. Since the Party concerned has made no amendments to the Governance Regulation since the Committee’s second progress review, the Committee’s analysis in that review remains fully applicable and is repeated below.

Transparent and fair arrangements and necessary information

65. The aspirational language that “member States *should aim*” in what was recital 20 bis of the proposed regulation remains unchanged in recital 29 of the Governance Regulation, as adopted (see para. 61 above). The Party concerned moreover has provided no explanation as to how it will ensure that the requirement in article 7 to provide the necessary information to the public is met, despite the Committee’s invitation for it to do so.¹⁸ The Committee accordingly considers that the Party concerned has not yet demonstrated that it has put in place a clear requirement to ensure that the arrangements for public participation in the

¹² Party’s second progress report (decision V/9g), 28 October 2019, annex 1, p. 21.

¹³ Ibid., p. 16.

¹⁴ Ibid., p. 22.

¹⁵ Ibid., p. 5.

¹⁶ Ibid., p. 47.

¹⁷ Ibid., para. 20.

¹⁸ Committee’s first progress review, 22 February 2019, para. 36.

preparation of the member States' NECPs are transparent and fair and that, within the arrangements, the necessary information is provided to the public.

Article 6 (3)

66. The Committee welcomes the requirement in article 10 of the Governance Regulation that “each Member State shall set reasonable timeframes allowing sufficient time for the public to be informed, to participate and to express its views”. The Committee considers that article 10 meets the requirements of article 6 (3) of the Convention.

Article 6 (4)

67. The Committee also welcomes the requirement in article 10 of the Governance Regulation that member States “shall ensure that the public is given early and effective opportunities to participate” in the preparation of the draft plans. However, as the Committee already pointed out in its first progress review,¹⁹ article 10 of the Governance Regulation fails to include an express requirement for the public to have opportunities to participate “when all options are open” as required by article 6 (4) of the Convention. The Committee emphasizes that the phrase “when all options are open” (or another equivalent formulation) is a fundamental component of the legal obligations in article 6 (4) and imposes a requirement that goes beyond “early and effective” opportunities to participate. Accordingly, the Committee considers that the Party concerned has not yet demonstrated that it has put in place a clear requirement to ensure that the requirements of article 6 (4) are met with respect to the member States' post-2020 NECPs.

68. Moreover, with respect to the 2021-2030 NECPs, not only is article 10 of the Regulation silent as to any explicit requirement that public participation take place when all options are open, it requires public participation only on “the final plan well before its adoption”. This means that article 10 only requires public participation on the 2021-2030 NECPs at a time when all options would most likely no longer be open, not least because the draft plans would have already been provided to the Commission for comment. In the light of the above, the Committee considers that the Party concerned has failed to demonstrate that it has put in place a clear requirement to ensure that the requirements of article 6 (4) are met with respect to the member States' 2021-2030 NECPs in particular.

Article 6 (8)

69. Article 10 of the Governance Regulation as adopted lacks any requirement that the member State ensure that due account is taken of the outcomes of the public participation.²⁰ Neither the requirement in article 10 to provide with the NECPs “a summary of the public's views or provisional views,” nor annex I of the Governance Regulation Section A.1.3 establish any obligation on the member States to actually take due account of the outcomes of public participation. Nor has the Party concerned pointed the Committee to any other provision of the Regulation imposing such an obligation.

70. Accordingly, the Committee considers the Party concerned has not yet demonstrated that it has put in place a clear requirement to ensure that the requirements of article 6 (8) are met with respect to the member States' NECPs.

71. Based on the considerations in paragraphs 65-70, the Committee considers that the Party concerned has put in place a regulatory framework that meets the requirements of article 6 (3) of the Convention with respect to the adoption of the member States' NECPs but has not yet demonstrated that it has put in place a proper regulatory framework to ensure that the other requirements of article 7 are met in that regard. The Committee accordingly examines whether the Party concerned has adopted clear instructions to this end below.

¹⁹ Ibid., para. 34.

²⁰ Party's second progress report (decision V/9g), 28 October 2019, annex 1, p. 22.

Clear instructions

72. As the Committee has repeatedly made clear, “a clear instruction would amount to a direction or order that has to be followed by the member States.”²¹

73. In its final progress report, the Party concerned submits that in its Communication “United in delivering the Energy Union and Climate Action – Setting the foundations for a successful clean energy transition” dated 18 June 2019, the European Commission recalled the obligation for the member States to enable early and effective public participation in preparing the final NECPs, including by summarising the public’s views, in accordance with the obligations of the Governance Regulation.²²

74. The Committee notes that the Communication of 18 June 2019 states:

Member States need to ensure that the public has early and effective opportunities to participate in preparing the final plans, which should then include a summary of the public’s views.

In parallel, the Commission will also continue to secure the participation of all levels of society in a systemic way, while enhancing stronger synergies between European, national and local efforts via the NECPs.²³

75. The Party concerned submits that, following up on this commitment, the Commission has ensured public access to all draft NECPs on its website, provided English translations of the draft NECPs, provided links to the national websites for the draft NECPs, and developed factsheets summarizing the Commission’s assessment of the draft NECPs individually.²⁴

76. In addition, the Party concerned states that, to support public access to information about the NECPs, the Commission has published all of the final NECPs for the period 2021-2030 on its website, together with an English translation and, where available, a summary of the plans. It states that on the same website, it has also provided guidance to member States on “how to adhere to the obligations for public participation”, including references to the Committee’s advice of 28 May 2019.²⁵

77. Having examined each of the actions in paragraphs 73 to 76 above reported by the Party concerned in its final progress report, the Committee considers that none of them amount to “clear instructions” that would amount to a direction or order that must be followed by the member States. The Committee accordingly concludes that the Party concerned has not demonstrated that it has adopted “clear instructions” for implementing article 7 of the Convention with respect to the adoption of NECPs.

Concluding remarks regarding the first three sentences of paragraph 3 of paragraph 7

78. In light of the foregoing, the Committee finds that the Party concerned has put in place a regulatory framework that meets the requirements of article 6(3) of the Convention with respect to the NECPs but has not yet demonstrated that it has adopted either a proper regulatory framework or clear instructions to ensure that the other requirements of article 7 are met in the adoption of the NECPs, as required by the first three sentences of paragraph 3 of decision V/9g.

²¹ Committee’s first progress review (decision V/9g), 13 October 2015, para 12; Committee’s second progress review (decision V/9g), 23 February 2017, para. 55; ECE/MP.PP/2017/39, para. 20; Committee’s first progress review, 22 February 2019, para. 15; Committee’s advice, 28 May 2019, para. 29, and Committee’s second progress review, 26 February 2020, para. 47.

²² Party’s final progress report (decision V/9g), para. 34 and footnote 3.

²³ Communication, 18 June 2019, p. 21.

²⁴ Party’s final progress report (decision V/9g), para. 34 and footnote 3.

²⁵ Party’s final progress report (decision V/9g), paras. 41-42.

Paragraph 3, final sentence, of decision V/9g – Evaluation of NECPs

79. When reviewing the extent to which the Party concerned has fulfilled the final sentence of paragraph 3 of decision V/9g, which requires the Party concerned to adapt the manner in which it evaluates NREAPs, the Committee has examined the measures taken by the Party concerned during this intersessional period to adapt the manner in which it evaluates:

- (a) Member States' 2010 NREAPs;
- (b) Member States' post-2020 NECPs.

Member States' 2010 NREAPs

80. With respect to the Party concerned's evaluation of the member States' 2010 NREAPs, the Committee, in its second progress review, reiterated its serious concern that

despite having been explicitly invited to do so in the Committee's first progress review, the Party concerned in its second progress report has still not yet replied to the questions put to it in the Committee's second progress review on decision V/9g in the last intersessional period.²⁶

81. While regretting the lack of engagement by the Party concerned on the issue, the Committee concluded that:

Since a proper regulatory framework or clear instructions for implementing article 7 with respect to the NREAPs was never, and upon the NECPs' supersession of the [NREAPs], now never will be, put in place by the Party concerned, there will remain no proper framework or clear instructions for any public participation on the NREAPs to be evaluated against. The Committee thus considers it would be futile for the Committee to spend further time on reviewing the manner in [which] the Party concerned evaluates NREAPs and more expedient to instead focus its review on the evaluation of the Party concerned of the member States' post-2020 NECPs. The Committee underlines that it expects considerably better engagement from the Party concerned moving forward than that it has provided with respect to the evaluation of member States' 2010 NREAPs.²⁷

82. The Committee thus examines below the manner in which the Party concerned has evaluated member States post-2020 NECPs.

Member States post-2020 NECPs

83. In its second progress review, the Committee invited the Party concerned to provide, together with its final progress report:

- (a) For each member State, the relevant sections of its final 2021-2030 NECP which address the public participation carried out thereon;
- (b) For each member State, the evaluation carried out by the Commission regarding the public participation carried out with respect to the final 2021-2030 NECP;
- (c) An explanation of the specific measures it had by that date taken with respect to each member State whose information on the implementation of article 7 in its final 2021-

²⁶ Committee's second progress review, para. 62.

²⁷ Ibid., para. 63.

2030 NECP was either (i) insufficient or (ii) reveals a possible failure to carry out public participation that fully met the requirements of article 7 of the Convention.²⁸

84. The Party concerned, in its final progress report, reports that an assessment of the final NECPs “is being carried out by the Commission services” and is expected to be published in mid-October 2020. It submits that the assessment would contain “observations” on how the Governance Regulation has been applied by member States, on how they have taken into account the Party’s recommendations of June 2019 and “how the Member States report that the public has been involved in the preparation of the final NECPs, pursuant to the obligations of Member States as parties to the Aarhus Convention in their own right.”²⁹

85. The Party concerned further states that, within its discretion as prescribed by the European Union treaties, it would “continue to pursue conformity and compliance of Member States with their EU legal obligations, including those under the Governance Regulation related to public participation where possible and necessary.”³⁰

86. In its additional information sent on 25 June 2021, the Party concerned reports that on 17 September 2020, following the submission of all the member States’ NECPs, it published a Communication on “An EU-wide assessment of National Energy and Climate Plans”. It also states that “the plans have been subject to extensive consultation with stakeholders, civil society and citizens to ensure ownership and wide public support”.³¹

87. The Party concerned further reports that on 14 October 2020, it published twenty-seven individual assessments, in which it assessed, inter alia, for each member State “whether or not public involvement has taken place at national level in the preparation of the final NECPs.” The aim of this assessment, according to the Party concerned, was to “facilitate public scrutiny” regarding the member States’ obligations under the Convention.³²

88. The communicant of communication ACCC/C/2008/32 claims that neither the “EU-wide assessment” nor the individual assessments published by the Commission (see paras. 86-87 above) constitute an adequate assessment that could form the basis for infringement proceedings against any member State whose information is insufficient or reveals a failure to carry out public participation that fully met the requirements of article 7, as the Committee has held would be necessary to fulfil the requirements of the last sentence of paragraph 3 of decision V/9g.³³

89. The communicant of communication ACCC/C/2008/32 claims that the “EU-wide assessment” merely states that “extensive consultation” and “wide consultation and participation and national and subnational level” on the NECPs took place and that there is no critical reflection on any shortcomings of this public participation procedure. It also submits that no specific section in the “EU-wide assessment” is dedicated to how public participation obligations have been fulfilled by member States.³⁴

90. Regarding the individual assessments of NECPs published by the Party concerned, the communicant of communication ACCC/C/2008/32 claims that these contain only a very brief description of the public participation process in the respective member State and lack any evaluation or announcement of follow-up steps. Moreover, the reports seem to be exclusively based on what the respective member State itself reported. By way of example,

²⁸ Ibid., paras. 67 and 79.

²⁹ Party’s final progress report (decision V/9g), paras. 43-44.

³⁰ Ibid., para. 45.

³¹ Additional information provided by the Party concerned, 25 June 2021, p. 1.

³² Ibid., p. 1.

³³ Comments provided by the communicant of communication ACCC/C/2008/32, 28 October 2020, paras. 30-31.

³⁴ Ibid., paras. 32-33.

the communicant comments on the individual assessments of Spain and Germany's NECPs, while emphasising that these are mere examples and have not chosen for displaying the most egregious failures.³⁵

91. With respect to the individual assessment by the Party concerned of Spain's NECP, the communicant of communication ACCC/C/2008/32 notes that this briefly mentions that the Spanish government had not submitted a summary of the public's views or how they were taken into account in the final NECP. Rather, this fact is merely stated in the assessment, without any evaluation or specific request to Spain in this regard.³⁶ The communicant also points out that the assessment does not mention the fact that there was no public participation in the preparation of the draft NECP, with participation only having occurred on the final version of the plan.³⁷

92. With respect to the individual assessment by the Party concerned of Germany's NECP, the communicant of communication ACCC/C/2008/32 submits that the assessment states that it was unclear how the public's views were taken into account. The communicant notes that the assessment merely states this fact and does not indicate any follow-up on this point.³⁸

93. The communicant of communication ACCC/C/2010/54 submits that the Party concerned should be responsible for ensuring member States' compliance with the Governance Regulation and the Convention, but the Party concerned has no documentation to demonstrate that the legally required public participation for the legally binding NECPs was completed before their adoption.³⁹ For example, with regards to Ireland's final NECP, no summary report of the public participation on the NECP was published and only two out of the three public consultations mentioned by Ireland in its final NECP actually occurred.⁴⁰ Moreover, Ireland's NECP never underwent any form of environmental assessment, although the need for such an assessment had been pointed out during the public consultation conducted on the draft NECP.⁴¹

94. Observer Justice & Environment reports that, according to its research, no Member State provided for public participation at an early stage in the preparation of its draft NECP, that the limited and late consultations carried out were "not very proactive but rather formal", that some of the draft NECPs shared with the public were incomplete or missing entire chapters and that the results of the public consultations were poorly reflected in the NECPs or not reflected at all.⁴²

95. The Committee takes note of the "EU-wide assessment" and the individual assessments of the member States' NECPs provided by the Party concerned on 25 June 2021. However, given that the "EU-wide assessment" was published on 17 September 2020, before the 1 October 2020 deadline for submission of the Party concerned's final progress report, the Committee queries why it was only provided to the Committee nine months after that deadline.

³⁵ Ibid., paras. 34-35.

³⁶ Ibid., para. 36.

³⁷ Ibid., para. 37.

³⁸ Ibid., para. 38.

³⁹ Comments provided by the communicant of communication ACCC/C/2010/54, 26 October 2020, p. 7.

⁴⁰ Ibid., p. 5.

⁴¹ Comments on the Committee's draft report from the communicant of communication ACCC/C/2010/54, 11 July 2021, pp. 1-2.

⁴² Comments on the Committee's draft report provided by Observer Justice & Environment, 16 July 2021, pp. 1-2.

96. Likewise, the individual assessments were published on 14 October 2020. However, despite the Committee in its second progress review having explicitly requested the Party concerned to provide these individual assessments together with its final progress report, the twenty-seven individual assessments were only provided to the Committee more than eight months after they were published. Given the Committee's explicit request, the Party concerned's failure to provide the individual assessments to the Committee promptly after they were published in mid-October 2020 is disappointing.

97. In addition, the Committee regrets that the Party concerned has entirely failed to respond to the Committee's invitation in paragraphs 67 and 79 of its second progress review to provide, together with its final progress report:

(a) For each member State, the relevant sections of its final 2021-2030 NECP which address the public participation carried out thereon;

...

(c) An explanation of the specific measures it had by that date taken with respect to each member State whose information on the implementation of article 7 in its final 2021-2030 NECP was either (i) insufficient or (ii) reveals a possible failure to carry out public participation that fully met the requirements of article 7 of the Convention.⁴³

98. Notwithstanding the Party concerned's late submission of the twenty-seven individual assessments, the Committee has reviewed the contents thereof. In this regard, the Committee welcomes that the Party concerned has indeed assessed, albeit very much in brief, the extent to which public participation appears to have been carried out on each NECP.

99. On this point, the Committee notes with concern that a significant number of the individual assessments find that the member State's NECP contains neither a summary of the public's views nor a summary of how those views were taken into account in its NECP.

100. As the Committee has repeatedly indicated, an assessment by the Party concerned of the information provided by member States on the public participation procedure carried out on their plans, coupled with a real possibility of infringement proceedings against any member State whose information is insufficient or reveals a failure to carry out public participation that fully met the requirements of article 7, may fulfil the final sentence of paragraph 3 of decision V/9g.⁴⁴

101. However, despite the Committee's clear invitation in paragraphs 67 and 69 of its second progress review, the Party concerned has not to date provided any information to the Committee of the specific measures it has taken, or proposes to take, with respect to each of these member States whose information on the implementation of article 7 in its final 2021-2030 NECP is either insufficient or reveals a possible failure to carry out public participation that fully met the requirements of article 7 of the Convention.

102. In light of the foregoing, the Committee, while welcoming that the Party concerned has carried out an assessment of public participation on each NECP, albeit in brief, finds that the Party concerned has not yet met the requirements of the final sentence of paragraph 3 of decision V/9g.

⁴³ Committee's second progress review, paras. 67 and 79.

⁴⁴ Ibid., para. 66; ECE/MP.PP/2017/39, para. 38.

Paragraph 123 of the Committee’s findings on communication ACCC/C/2008/32 (part II)

103. On 14 October 2020, the Party concerned submitted the text of the legislative proposal to amend the Aarhus Regulation published on that date by the European Commission.⁴⁵

104. At the request of the Party concerned,⁴⁶ on 12 February 2021, the Committee provided advice to the Party concerned on the extent to which the legislative proposal would fulfil paragraph 123 of the Committee’s findings on communication ACCC/C/2008 (part II).⁴⁷

105. In its advice, the Committee concluded, inter alia, that:

To address the concerns identified in part II of the Committee’s findings on communication ACCC/2008/32, the Party concerned should:

(a) Ensure that access to review procedures to challenge acts and omissions by institutions and bodies of the European Union which contravene EU law relating to the environment is provided not only to NGOs, but also to other members of the public, even if subject to certain criteria in accordance with the Convention;

(b) Remove the word “binding” from the proposed amendment so the relevant wording would state “has legal and external effects” only;

(c) Amend the proposed exception from the scope of review of those provisions of an act for which Union law explicitly requires implementing measures at Member State level so that such provisions are indeed immediately open to review (the Committee does not expect administrative review under the Aarhus Regulation to cover the implementing measures taken by Member States); and

(d) Also bear in mind the Committee’s findings and recommendations on communication ACCC/C/2015/128 in the context of the current legislative process to amend the Aarhus Regulation.⁴⁸

106. The Council of the European Union adopted its General Approach on the legislative proposal published by the European Commission on 17 December 2020 and the European Parliament adopted its negotiating position on 21 May 2021.

107. On 12 July 2021, an agreement was reached at the final trilogue between the co-legislators on the revision of the Aarhus Regulation (the co-legislators’ agreement).⁴⁹

108. The Committee examines the extent to which the co-legislators’ agreement to amend the Aarhus Regulation, if adopted in that form, would meet the requirements of paragraph 123 of the Committee’s findings on communication ACCC/C/2008/32 (part II) below.

Access to review procedures for entities other than NGOs

109. The co-legislators’ agreement provides for other members of the public, in addition to environmental NGOs, to request review of acts and omissions by EU institutions and bodies on the following conditions, to be set out in a newly introduced article 11 (1a) to the Aarhus Regulation:

(a) They [the member(s) of the public] shall demonstrate impairment of their rights caused by the alleged contravention of environmental law and that they are directly affected by such impairment in comparison with the public at large; or

⁴⁵ Email from Party concerned, 14 October 2020, and annex 1.

⁴⁶ Party’s request for advice, 5 November 2020.

⁴⁷ Committee’s advice, 12 February 2021, para. 71.

⁴⁸ Committee’s advice, 12 February 2021, para. 71.

⁴⁹ Party’s comments on the Committee’s draft report, 16 July 2021.

(b) They shall demonstrate a sufficient public interest and that the request is supported by at least 4 000 members of the public residing or established in at least 5 Member States, with at least 250 members of the public residing or established in each of those Member States.

(c) In both cases, the members of the public shall be represented by a non-governmental organisation which meets the criteria set out in the first paragraph above [article 11(1) of the Aarhus Regulation] or by a lawyer authorised to practise before a court of a Member State. That lawyer or non-governmental organisation shall cooperate with the Union institution or body concerned in order to establish that the quantitative conditions in paragraph 1a(b) above are met, where applicable, and shall provide further evidence thereof upon request.’⁵⁰

110. The co-legislators’ agreement furthermore provides for an amendment to article 11 (2) of the Aarhus Regulation, which states that “the Commission shall adopt the provisions which are necessary to ensure transparent and consistent application of the criteria and conditions mentioned in [letter (c)] above”⁵¹

111. The co-legislators’ agreement also provides for a number of recitals to be introduced into the Aarhus Regulation. These include the following:

(4) Taking into account the provisions of Article 9(3) and 9(4) of the Aarhus Convention and the findings and advice of the Aarhus Convention Compliance Committee⁵², Union law should be brought into compliance with the provisions of the Aarhus Convention on access to justice in environmental matters in a way that is compatible with the fundamental principles of Union law and with its system of judicial review.

...

(14b) When demonstrating impairment of their rights, members of the public should demonstrate a violation of their rights. This may include an unjustified restriction or obstacle to the exercise of such rights.⁵³

(14c) Members of the public are not required to demonstrate that they are directly and individually concerned under Article 263, fourth paragraph, TFEU, as interpreted by the CJEU. However, in order to avoid that any member of the public has an unqualified right to request internal review (‘actio popularis’), which is not required under the Aarhus Convention, they should demonstrate that they are directly affected in comparison with the public at large. This may be the case of an imminent threat to their own health and safety or of a prejudice to a right to which they are entitled pursuant to Union legislation resulting from the alleged contravention of environmental law, in line with the case law of the CJEU.⁵⁴

(14d) When demonstrating sufficient public interest, members of the public should collectively demonstrate both the existence of a public interest in preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, or combatting climate change and

⁵⁰ Party’s update, 23 July 2021, annex 1, pp. 13-14.

⁵¹ Ibid., p. 14.

⁵² Footnote in co-legislators’ agreement: See findings and advice of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 at <https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html> and https://unece.org/env/pp/cc/accc.m.2017.3_european-union

⁵³ Ibid., p. 9.

⁵⁴ Ibid., p. 10.

that their review request is supported by a sufficient number of natural or legal persons across the Union by collecting their signatures either physically or digitally.⁵⁵

112. The co-legislator's agreement also provides that article 12 (2) of the Regulation shall be amended to state that members of the public who are not NGOs may equally institute proceedings before the CJEU, in accordance with the relevant provisions of the Treaty on the Functioning of the European Union.⁵⁶

113. The provisions of article 11 (1a) would, according to the co-legislator's agreement, come into effect eighteen months after the date of entry into force of the amended Regulation.⁵⁷

114. The Committee recalls that in its advice to the Party concerned, it held that:

between an approach limiting administrative review to NGOs only, and an *actio popularis*, it is possible to establish a legal framework...which allows access to review procedures to persons satisfying certain criteria, for example, persons demonstrating a "sufficient interest" in the contested act,⁵⁸

and that:

it is for the Party concerned to determine which measures may be most feasible and appropriate, bearing in mind its special character as a regional economic integration organisation.⁵⁹

115. The Committee welcomes that the co-legislators' agreement provides for two alternative pathways for access to justice for members of the public other than environmental NGOs.

116. Bearing in mind the special character of the Party concerned as a regional economic integration organisation, the Committee considers that the combination of the two alternative pathways set out in paragraph 109 above appear, on their face, to provide standing for members of the public to comply with the requirements of article 9 (3) of the Convention. The Committee underlines, however, that whether these criteria in practice meet those requirements, including the possibility for members of the public to challenge the substance of the act in a manner which meets the requirements of article 9 (4), will also depend on their interpretation by the relevant administrative bodies and courts in the Party concerned.

117. Based on the information before it, the Committee considers that, provided that they are interpreted in practice in accordance with the requirements of the Convention, the amendments introduced by the co-legislators' agreement, if adopted in that form, would address the Committee's concerns raised in paragraph 93 of its findings on communication ACCC/C/2008/32 (Part II) regarding access to justice for entities other than NGOs, and would thus fulfil the requirements of paragraph 123 of the findings in this respect.

Acts of individual scope

118. The co-legislators' agreement does not provide for any changes of the legislative proposal adopted by the European Commission to withdraw the limitation that only acts of individual scope are subject to review under the Regulation.

119. Recalling paragraph 43 of its February 2021 advice, the Committee finds that the co-legislators' agreement, if adopted in that form, would resolve the concerns raised in

⁵⁵ Ibid., p. 10.

⁵⁶ Ibid., p. 15.

⁵⁷ Ibid., p. 15.

⁵⁸ Committee's advice, 12 February 2021, para. 39.

⁵⁹ Ibid., para. 41.

paragraph 51 of its findings on communication ACCC/C/2008/32 (Part II) regarding acts of individual scope and would therefore fulfil the requirements of paragraph 123 of the findings in that regard.⁶⁰

Acts not adopted under environmental law

120. The co-legislators' agreement does not provide for any changes of the legislative proposal adopted by the European Commission to withdraw the limitation that only acts adopted under environmental law are subject to review under the Regulation.

121. Recalling paragraph 44 of its February 2021 advice, the Committee finds that the co-legislators' agreement, if adopted in that form, would resolve the concerns raised in paragraph 100 of its findings on communication ACCC/C/2008/32 (Part II) regarding acts not adopted under environmental law and would therefore fulfil the requirements of paragraph 123 of the findings in that regard.⁶¹

Acts not having legally binding and external effects

122. The co-legislators' agreement provides that the definition of administrative acts under article 2 (1) (g) of the Regulation will be modified to refer only to acts which have "legal and external effects", instead of "legally binding and external effects".⁶²

123. In addition, two new recitals are to be introduced explaining that:

(10a) In view of Article 263 TFEU, as interpreted by the CJEU, an act is to be considered to have external effects, and thus can be subject to a request for review, if it is intended to produce legal effects vis-à-vis third parties. Preparatory acts, recommendations, opinions and similar non-binding acts that do not produce legal effects vis-à-vis third parties and cannot be considered as having external effects, in line with the case law of the CJEU, should, therefore, not constitute administrative acts under Regulation (EC) No 1367/2006.⁶³

(10b) In order to ensure legal consistency, an act is considered to have legal effects, and thus can be subject to a request for review, in accordance with Article 263 TFEU, as interpreted by the CJEU. Considering an act to have legal effects implies that an act can be subject to a request for review, regardless of its form, as its nature is considered with regard to its effects, objective and its content.⁶⁴

124. The Committee welcomes the co-legislators' agreement to remove the word "binding" from the definition of administrative acts in article 2 (1) (g) of the Regulation. The Committee considers its removal to be in line with paragraph 55 of its February 2021 advice.

125. The Committee recalls that, in its advice, it held that "provided that the requirement to have 'external effect' is not interpreted to require anything more than that the act or omission has the potential to contravene EU law relating to the environment, the Committee does not consider the reference to 'external effects' to be problematic".⁶⁵ It likewise held that "provided that a reference to legal effects is not interpreted to require anything more than that the act or omission is capable of contravening EU law relating to the environment, the Committee does not consider that a reference to acts having "legal effects" would be problematic."⁶⁶

⁶⁰ See *ibid.*, para 43.

⁶¹ See *ibid.*, para 44.

⁶² Party's update, 23 July 2021, annex 1, p. 12.

⁶³ *Ibid.*, p. 7.

⁶⁴ *Ibid.*, p. 8.

⁶⁵ Committee's advice, 12 February 2021, para. 52.

⁶⁶ *Ibid.*, para. 54.

126. Based on the foregoing, the Committee finds that the co-legislators' agreement, if adopted in that form, would resolve the concerns raised in paragraph 104 of its findings on communication ACCC/C/2008/32 (Part II) regarding acts not having legally binding and external effects and would therefore fulfil the requirements of paragraph 123 of the findings in that regard.

Provisions of acts requiring implementing measures at Member State level

127. In accordance with the co-legislators' agreement, the definition of administrative acts in article 2 (1) (g) of the Regulation proposed in the Commission's legislative proposal will be revised to no longer exclude from review acts that require either European Union or national level implementing measures.

128. The Party concerned states that all related recitals in the Commission's legislative proposal will also be deleted.⁶⁷ The Committee notes that the text provided by the Party concerned on 23 July 2021 indeed does not appear to contain such references anymore.⁶⁸

129. Instead, the co-legislators' agreement contains a recital stating that "acts adopted by public authorities of the Member States, including national implementing measures adopted at Member State level required by a non-legislative act under Union law, do not fall within the scope of Regulation (EC) No 1367/2006, in line with the Treaties and the principle of the autonomy of the national courts."⁶⁹

130. The Committee welcomes the co-legislators' agreement to delete the exclusion of acts that require European Union or national level implementing measures from the proposed definition of administrative acts.

131. The Committee finds that the co-legislators' agreement, if adopted in that form, would address the concerns in paragraphs 65-68 of the Committee's February 2021 advice regarding the exclusion from review of acts that require either European Union or national level implementing measures and would therefore fulfil the requirements of paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (Part II) in this respect.

Further amendments

132. The co-legislators' agreement provides for a new article 10 (2) in the Regulation which would require a Union institution or body to consider any request for review, unless it is manifestly unfounded or clearly unsubstantiated.⁷⁰ The new article 10 (2) would also provide that "in the event that a Union institution or body receives multiple requests for review of the same act or omission, the institution or body may combine the requests and treat them as one."⁷¹

133. On this point, a new recital would also be introduced stating that:

(14f) In the event that a Union institution or body receives multiple requests for review of the same act or omission and it combines such requests to assess them in a single procedure, the Union institution or body should consider each request on its own merits in its reply. In particular, if any such request is considered inadmissible on procedural grounds or if it is rejected on substance, this should not prejudice the consideration of the other review requests assessed in the same procedure.⁷²

⁶⁷ Party's comments on the Committee's draft report, 16 July 2021, pp. 2-3.

⁶⁸ See Party's update, 23 July 2021, annex 1, pp. 3-15.

⁶⁹ Ibid., p. 9.

⁷⁰ Ibid., p. 9.

⁷¹ Ibid., p. 12.

⁷² Ibid., p. 11.

134. The co-legislators' agreement would also insert an article 11a into the Regulation, requiring Union institutions and bodies to "publish all internal review requests as soon as possible after their receipt, as well as all final decisions on those requests as soon as possible after their adoption." Article 11a would also provide that they "may establish on-line systems for receipt of internal review requests and may require that all internal review requests shall be submitted via their online systems."⁷³

135. A further recital to be included into the amended Regulation would specify that:

(3a) Without prejudice to the Court's prerogative to apportion costs, court proceedings under Regulation (EC) No 1367/2006 are not to be prohibitively expensive, in line with Article 9 (4) of the Aarhus Convention and accordingly the Union's institutions and bodies will endeavour only to incur and thus to request reimbursement for reasonable costs in such proceeding.⁷⁴

136. The Committee welcomes the proposed recital outlined in paragraph 135 above regarding the need for procedures falling under article 9 (3) of the Convention not to be prohibitively expensive. It also welcomes the newly introduced requirement to publish all requests and final decisions as soon as possible, as outlined in paragraph 134 above.

137. The Committee considers that, based on the information before it, none of the proposed amendments outlined in paragraphs 132-135 above appear to run counter to the requirements of paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (part II).

Committee's findings on communication ACCC/C/2015/128

138. In the light of the relevance of its findings on communication ACCC/C/2015/128 for the then-ongoing legislative process to amend the Aarhus Regulation, the Committee in its February 2021 advice considered that the Party concerned should bear in mind the Committee's findings and recommendations on communication ACCC/C/2015/128 in the context of the current legislative process to amend the Aarhus Regulation.

139. The Party concerned reports that the European Commission is to issue a statement in which it commits to carry out an analysis on how best to address the Committee's findings on communication ACCC/C/2015/128.⁷⁵

140. While closely related, the Committee's findings on communication ACCC/C/2015/128 are separate and distinct from the findings on communication ACCC/C/2008/32 (part II). The Committee thus does not consider the fact that the co-legislator's agreement does not provide for an amendment to the Aarhus Regulation that would address the recommendations in paragraph 132 of the Committee's findings on communication ACCC/C/2015/128 to mean that the co-legislators' agreement does not meet the requirements of paragraph 123 of the findings on communication ACCC/C/2008/32 (part II).

141. The Committee will review the progress by the Party concerned to implement the recommendations in paragraph 132 of the findings on communication ACCC/C/2015/128 in the context of its follow-up on that case.

Concluding remarks regarding paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (part II)

142. The Committee welcomes the significant progress made by the Party concerned to implement paragraph 123 of the Committee's findings on communication ACCC/C/2008/32

⁷³ Ibid., p. 14.

⁷⁴ Ibid., p. 5.

⁷⁵ Party's comments on the Committee's draft report, 16 July 2021, p. 1.

(part II) and its constructive engagement with the Committee during the intersessional period in this respect.

143. In light of the considerations in paragraphs 109-141 above, the Committee finds that the co-legislators' agreement to amend the Aarhus Regulation, if enacted in that form prior to the opening of the seventh session of the Meeting of the Parties, would fulfil the requirements of paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (part II).

IV. Conclusions

144. The Committee finds that:

(a) The Party concerned has put in place a regulatory framework that meets the requirements of article 6 (3) of the Convention with respect to the NECPs but has not yet demonstrated that it has adopted either a proper regulatory framework or clear instructions to ensure that the other requirements of article 7 are met in the adoption of the NECPs, as required by the first three sentences of paragraph 3 of decision V/9g;

(b) While welcoming that the Party concerned has carried out an assessment of public participation on each member State's NECP, albeit in brief, the Party concerned has not yet met the requirements of the final sentence of paragraph 3 of decision V/9g.

145. The Committee recommends to the Meeting of the Parties that it reaffirm its decision V/9g and, in particular, request the Party concerned, as a matter of urgency:

(a) To provide the Committee with evidence that it has adopted a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention with respect to the adoption of National Energy and Climate Plans (NECPs), and, in particular, to take the necessary legislative, regulatory or practical measures to:

(i) 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;

(ii) Ensure that the adopted regulatory framework and/or clear instructions ensures that the requirements of article 6(4) and (8) of the Convention are met, including allowing for early public participation when all options are open, and ensuring that due account is taken of the outcome of the public participation;

(b) To adapt the manner in which it evaluates NECPs accordingly.

146. The Committee finds that the co-legislators' agreement to amend the Aarhus Regulation, if enacted in that form prior to the opening of the seventh session of the Meeting of the Parties, would fulfil the requirements of paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (part II).

147. The Committee recommends to the Meeting of the Parties that it endorse the Committee's findings on communication ACCC/C/2008/32 (part II).

148. The Committee recommends to the Meeting of the Parties that, provided that the amendment to the Aarhus Regulation is enacted in the form agreed in the co-legislator's agreement prior to the opening of the seventh session of the Meeting of the Parties, to welcome the committed action by the Party concerned to fully address the recommendations in paragraph 123 of the findings of communication ACCC/C/2008/32 (part II) and to bring its legislation and practice into compliance with the Convention.

149. The Committee further recommends to the Meeting of the Parties that it request the Party concerned:

(a) To provide a detailed plan of action, including (a time schedule, to the Committee by 1 July 2022, including a time schedule, regarding the implementation of the recommendations in paragraph 145 above;

(b) To provide progress reports to the Committee by 1 October 2023 and 1 October 2024 on the measures taken and the results achieved in the implementation of the plan of action and the above recommendations;

(c) To provide such additional information as the Committee may request in between the above reporting dates in order to assist the Committee to review the progress by the Party concerned in implementing the above recommendations;

(d) To participate (either in person or by virtual means) in the meetings of the Committee at which the progress of the Party concerned in implementing the above recommendations is to be considered.
