

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

Seventh session

Geneva, 18–20 October 2021

Item 7 (b) of the provisional agenda

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

Draft decision VII/8f concerning compliance by the European Union with its obligations under the Convention

Prepared by the Bureau [adopted, as amended at the meeting]

(See Annex for accompanying text to be included in the report of the meeting)

The Meeting of the Parties,

Acting under paragraph 37 of the annex to its decision I/7 on the review of compliance,¹

Recalling paragraph 63 of its report of its sixth session (Budva, Montenegro, 11–13 September 2017), through which it requested the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to review any developments that had taken place regarding the implementation of decision V/9g concerning compliance by the European Union² and the Committee’s findings and recommendations on communication ACCC/C/2008/32 (part II) concerning access to justice to challenge acts and omissions by institutions and bodies of the European Union that contravene European Union law relating to the environment,³ and to report to the Meeting of the Parties accordingly,⁴

Taking note of the report of the Committee on the implementation of the above request by the Meeting of the Parties, under the case reference request ACCC/M/2017/3, concerning the compliance of the European Union,⁵ the findings of the Committee on communication ACCC/C/2013/96 concerning the compliance of the European Union in connection with the adoption by the European Commission of a list of “Projects of Common Interest”,⁶ and the findings of the Committee on communication ACCC/C/2014/121⁷ concerning the compliance of the European Union in connection with the reconsideration or updating of

¹ ECE/MP.PP/2/Add.8.

² ECE/MP.PP/2014/2/Add.1.

³ ECE/MP.PP/C.1/2017/7.

⁴ ECE/MP.PP/2017/2.

⁵ ECE/MP.PP/2021/51, *forthcoming*.

⁶ ECE/MP.PP/C.1/2021/3.

⁷ ECE/MP.PP/C.1/2020/8.

permits under the Industrial Emissions Directive,⁸ ~~and the findings of the Committee on communication ACCC/C/2015/128 concerning the compliance of the European Union in connection with access to justice to challenge decisions on State aid measures taken by the European Commission;~~⁹

Encouraged by the willingness of the European Union to discuss in a constructive manner with the Committee the compliance issues in question,

1. *Endorses* the findings of the Committee in its report on the implementation of request ACCC/M/2017/3 that, with respect to decision V/9g:

(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 National Energy and Climate Plans 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 National Energy and Climate Plans, as required by the first three sentences of paragraph 3 of decision V/9g;

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

2. *Reaffirms* its decision V/9g and, in particular, requests 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, 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 ensure 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 National Energy and Climate Plans accordingly;

3. *Endorses* the findings of the Committee with regard to communication ACCC/C/2008/32 (part II) that the Party concerned failed to comply with article 9 (3) and (4) of the Convention with regard to access to justice by members of the public because neither the Aarhus Regulation,¹⁰ nor the jurisprudence of the Court of Justice of the European Union implements or complies with the obligations arising under those paragraphs;

⁸ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), *Official Journal of the European Union*, L 334 (2010), pp. 17–119.

⁹ ~~ECE/MP.PP/C.1/2021/21, forthcoming.~~

¹⁰ 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, *Official Journal of the European Union*, L 264 (2006), p. 13–19.

4. *Also endorses* the findings of the Committee in its report on the implementation of request ACCC/M/2017/3 that, with respect to the Committee's findings on communication ACCC/C/2008/32 (part II), the co-legislators' agreement of 12 July 2021¹¹ 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);

5. *Notes that*, following the adoption of the Committee's report on the implementation of request ACCC/M/2017/3, on [date]5 and [date] 6 October 2021, respectively, the European Parliament and the Council of the European Union have each approved the legislative amendment to the Aarhus Regulation in the form agreed by the co-legislators on 12 July 2021 and that the legislative amendment will enter into force on 28 October 2021-[date], twenty days following its publication in the Official Journal of the European Union; therefore, the Meeting of the Parties considers that, in accordance with the Committee's report on the implementation of request ACCC/M/2017/3, upon its entry into force the Party concerned will have fully met the requirements of paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (part II);¹²

6. *Welcomes* 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 in this regard;

7. *Endorses* the findings of the Committee with respect to communication ACCC/C/2013/96 that:

(a) By not informing the applicant that longer time frames would be needed to reply to the information requests and of the reasons therefor, the Party concerned failed to comply with article 4 (2) of the Convention;

(b) By failing to ensure at least one review procedure that was expeditious, the Party concerned failed to comply with the requirement in article 9 (1), second sentence, of the Convention to ensure an "expeditious" procedure for the reconsideration of information requests;

(c) By failing to demonstrate, in a transparent and traceable way, how due account was taken of the public participation on the first list of "Projects of Common Interest", the Party concerned failed to comply with article 7 in conjunction with article 6 (8) of the Convention;

(d) By not making the main consultation documents, including the notification to the public, available to the public in its official languages other than English, the Party concerned discriminated against non-English-speaking members of the public in the European Union and thus failed to comply with article 3 (9) of the Convention;

¹¹ The agreement on the revision of the Aarhus Regulation reached between the European Parliament and the Council of the European Union (the co-legislators), and the European Commission, at the third and final trilogue meeting on 12 July 2021. See Council of the European Union, Outcome of Proceedings, Interinstitutional File 2020/0289(COD); Council reference number: 11044/21, available at https://unece.org/sites/default/files/2021-07/frPartyM3_23.07.2021_annex1.pdf.

¹² ~~This paragraph reflects the indicative timeline for adoption of the amendment to the Aarhus Regulation set out by the European Union in its comments of 16 July 2021 on the draft of the Committee's report on the implementation of request ACCC/M/2017/3. This paragraph will need to be reviewed and updated, including with the dates of approval by Council and Parliament and the entry into force of the amendment to the Aarhus Regulation, at the time of the seventh session of the Meeting of the Parties to ensure that it correctly reflects the status of the European Union decision-making process at that time. NB: The present footnote will not form part of the adopted decision.~~

8. *Recommends* that the Party concerned take the necessary legislative, regulatory or other measures and practical arrangements to ensure that in public participation procedures within the scope of article 7 of the Convention carried out under the Trans-European Networks for Energy Regulation,¹³ or any superseding legislation:

(a) The main consultation documents, including the notification to the public, are provided to the public in all the official languages of the Party concerned;

(b) Due account of the outcomes of the public participation is taken, in a transparent and traceable way, in the decision-making;

9. *Endorses* the findings of the Committee with respect to communication ACCC/C/2014/121 that, by putting in place a legal framework that does not envisage any possibility for public participation in relation to reconsiderations and updates under article 21 (3), (4) and (5) (b) and (c) of the Industrial Emissions Directive, the Party concerned fails to comply with article 6 (10) of the Convention;

10. *Recommends* that the Party concerned put in a place a legally binding framework to ensure that, when a public authority in a member State of the Party concerned reconsiders or updates permit conditions pursuant to national laws implementing article 21 (3), (4) and (5) (b) and (c) of the Industrial Emissions Directive, or the corresponding provisions of any legislation that supersedes that Directive, the provisions of article 6 (2)–(9) will be applied, *mutatis mutandis* and where appropriate, bearing in mind the objectives of the Convention;

~~11. *Endorses* the findings of the Committee with respect to communication ACCC/C/2015/128 that:~~

~~— (a) — By failing to provide access to administrative or judicial procedures for members of the public to challenge decisions on State aid measures taken by the European Commission under article 108 (2) of the Treaty on the Functioning of the European Union¹⁴ that contravene European Union law relating to the environment, the Party concerned fails to comply with article 9 (3) of the Convention;~~

~~— (b) — By failing to provide any procedure under article 9 (3) of the Convention through which members of the public are able to challenge decisions on State aid measures taken by the European Commission under article 108 (2) of the Treaty on the Functioning of the European Union that contravene European Union law relating to the environment, the Party concerned also fails to provide an adequate and effective remedy regarding such decisions as required by article 9 (4) of the Convention;~~

~~12. *Recommends* that the Party concerned take the necessary legislative, regulatory and other measures to ensure that the Aarhus Regulation is amended, or new European Union legislation is adopted, to clearly provide members of the public with access to administrative or judicial procedures to challenge decisions on State aid measures taken by the European Commission under article 108 (2) of the Treaty on the Functioning of the European Union that contravene European Union law relating to the environment, in accordance with article 9 (3) and (4) of the Convention;~~

~~13.11. *Requests* the Party concerned to:~~

¹³ Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 Text with EEA relevance.

¹⁴ Consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 326 (2010), pp. 47–390.

(a) Submit a plan of action, including a time schedule, to the Committee by 1 July 2022 regarding the implementation of the recommendations in paragraphs 2, 8 ~~and~~ 10 ~~and 12~~ above;

(b) Provide detailed 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 recommendations in paragraphs 2, 8 ~~and~~ 10 ~~and 12~~ above;

(c) Provide such further information as the Committee may request in order to assist it to review the progress by the Party concerned in implementing the recommendations in paragraphs 2, 8 ~~and~~ 10 ~~and 12~~ above;

(d) 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 recommendations in paragraphs 2, 8 ~~and~~ 10 ~~and 12~~ above is to be considered;

~~1412.~~ Undertakes to review the situation at its eighth session.

Annex

Accompanying text to be included in the report of the meeting:

The Meeting of the Parties

- i. Adopts draft decision VII/8f concerning compliance by the European Union with its obligations under the Convention, as amended at the meeting.
- ii. Decides to include in the meeting report the following text:

With regard to draft decision VII/8f concerning compliance by the European Union with its obligations under the Convention, the Meeting of the Parties agreed to include the following text in the report of its seventh session:

“In the spirit of reaching consensus, considering exceptional circumstances, the Meeting of the Parties exceptionally decided, by consensus, to postpone the decision-making on the Committee’s findings and recommendations on communication ACCC/C/2015/128 (European Union)¹⁵ to the next ordinary session of the Meeting of the Parties to be held in 2025. The Meeting of Parties stresses that this exceptional decision shall in no way establish a practice under the Convention. The Meeting of the Parties also requested the Committee to review any developments that have taken place regarding the matter, and to report to the Meeting of the Parties accordingly.”

In this context, the Party concerned stated that it reaffirms its commitment to implement its obligations under the Convention. In this regard, the Meeting of the Parties:

Took note of the statements by Norway, Switzerland and ECO Forum and of their requests to reflect their positions in the meeting report.

¹⁵ ECE/MP.PP/C.1/2021/21