

Review of the possible options for legal instruments

I. Introduction

This document is intended to facilitate discussions and brainstorming in the next Steering Committee meeting (Geneva, 27-28 October 2021) on a mandate given by the Vienna Declaration of the Fifth High-Level Meeting on Transport, Health and Environment to:

*Establish an ad hoc working group to analyse different legal options to give effect to our vision and strategy, and elaborate draft proposals for possible legal instruments and present them for consideration by the Steering Committee, which will agree on a proposal for adoption at the Sixth High-level Meeting on Transport, Health and Environment.*¹

The following paragraphs provide an analysis of the mandate and indicate questions to stimulate discussions in the Steering Committee.

II. Mandate

Several questions should be replied to before and during the work of the ad hoc working group to implement the mandate.

Ad hoc working group:

Member States will be asked to nominate one or two experts on a voluntary basis to join an ad hoc working group. It might be agreed that member States nominate one expert from each sector (i.e. up to 3 experts), and other stakeholders might also be invited to nominate representatives. The working group will be subordinate to the Steering Committee and will update it on progress on a regular basis. The working group will elect its own chair. The working group will need to nominate a rapporteur to support the Chair and the Secretariat of THE PEP will participate in the working group *ex officio* to provide expert input.

Vision and strategy, and elaborate draft proposals for possible legal instruments:

The first issue is to understand what are the set of problems that any legal instrument would seek to resolve.

The core task of the working group is to study legal options to give effect to the ministers' vision and strategy, before possibly embarking on the drafting of proposals for possible legal instruments. The question must therefore be asked:

- What are the appropriate, necessary and effective means – legal or other – of giving effect to the vision and strategy?
- What are the challenges that a legal instrument would seek to address?
- Should challenges include, for instance, concrete and abstract challenges, such as the the lack of ambition and lack of concrete measures which has meant for slower progress in transport, health and environment policies; or tackling emissions of the transport sector?
- Could other challenges be found in the vision of the Vienna Declaration: because mobility and transport is not clean, safe, healthy or inclusive; because transport systems are not resilient to

¹ THE PEP, Vienna Declaration, Fifth High-Level Meeting on Transport, Health and Environment (Online, Geneva, 17 May 2021), ECE/AC.21/2021/3–EUCHP2018924/4.3.3, [4].

climate change, pandemics or other disasters; because mobility and transport are not socially inclusive, and so on?²

- How are the work on the strategy and the work on legal proposals connected? The aims of the potential legal instrument must align closely with the goals and visions of the strategy, albeit the legal instrument would entail greater commitments and possibly legally binding ones. This relationship – the differences, mutually reinforcing aims, and actions – should be clarified to avoid overlapping
- Are legal options a suitable means to give effect to the strategy?
- How many draft proposals should be presented by the working group to the Steering Committee? The support of a senior lawyer, specialized in international law and with knowledge of national law-making processes, could be beneficial to the work of the group, especially when drafting initial working documents.
- What legal options should be produced? A framework convention with protocols? A fully fledged convention? A simpler agreement?
- Should the aim be to adopt a treaty with a governance structure that would replace the Steering Committee once the treaty comes into force?

III. Further Considerations

When suggesting a legal framework to THE PEP work, benefits and challenges for prospective Parties should be clear. Below are some preliminary considerations:

- THE PEP is a programme in which member States participate on a voluntary basis. It has now reached 20 years of existence and this could be the right time to consider strategic and long-term developments. Indeed, the potential creation of a legal instrument has been in discussion for over two decades in THE PEP and in declarations from its High-level Meetings.³
- Despite progress in this field, filling gaps in existing policy responses has not been sufficient to reach sustainable and healthy transport.⁴
- All declarations by the High-level Meetings have generated non-binding commitments. A legal instrument may be an enabling factor to solving the issues that THE PEP has been trying to address since its inception.
- A legally binding document requires a more elaborate domestic parliamentary approval process and represents a greater degree of political commitment (but also a greater challenge). The negotiation of a legally binding document may lead to more resources being made available for transport, health and environment concerns.

² THE PEP, Vienna Declaration, Fifth High-Level Meeting on Transport, Health and Environment (Online, Geneva, 17 May 2021), ECE/AC.21/2021/3–EUHP2018924/4.3.3, [1]-[2].

³ For reference, please see Annex I of this document.

⁴ Please see Vienna Declaration, Fifth High-Level Meeting on Transport, Health and Environment (Online, Vienna, 17-18 May 2021), ECE/AC.21/2021/3–EUHP2018924/4.3.3, Annex I for an overview. For more details, please see National Institute for Public Health and the Environment, Road Transport Facts and Figures: How Health and Environmentally Friendly is our Transport Today? (2021) <https://thepep.unece.org/sites/default/files/2021-05/eMagazine%20Road%20transport%20facts%20%20figures_updated%2017%20May%202021_1.pdf> accessed 3 August 2021.

- If a legal instrument on THE PEP is developed in the form of a framework convention, the advantages would be its flexibility and the provision of a clear and sound legal basis for the institutional and procedural follow up of another instrument, for example in the form of a protocol. There is also flexibility in its implementation at the domestic level and possibility of setting precise parameters and standards by States with different legal and political systems.
- Although financial provisions rarely appear in UNECE environmental conventions (the Aarhus Convention only mentions that a Meeting of the Parties may consider the establishment of financial arrangements⁵), member States will wish to understand the financial implications of the possible legal instruments, including costs associated with any governance or secretariat functions.

IV. Potential Ways Forward (beyond the Steering Committee Meeting if accepted)

In order to ensure that the strategy and the work on legal proposals are aligned with no overlaps, the ways forward could proceed as follows:

- The work on the strategy should start first. It is reminded that the Vienna Declaration requested that the strategy be ready by 2023.
- One of the first tasks of the work on the strategy should be to take stock of the current situation regarding transport, health and the environment, and then to define the challenges that need to be solved.
- After the strategy is produced, the ad hoc working group can start discussing the possible legal framework. The basis of their work could be the findings as noted in the terms of reference below (Annex II).
- As the composition of the ad hoc working group would be open-ended, national experts on international law could also integrate the work of the group.
- A senior consultant on international law could support the work of the ad hoc working group.

V. Role of the Steering Committee

The Steering Committee might wish to adopt the terms of reference for the work on reviewing the possible options for legal instruments, as indicated in annex II of the present document, and agree on the timeframe for follow-up activities.

⁵ UNECE, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entry into force 30 October 2001) UNTS 2161, 447, Article 10(3).

Annex I:

Development of the mandate and negotiations for a legal binding instrument

The ambition to develop a legal binding instrument on transport, health and environment is not new. In situating this mandate, it is important to clarify what forms this ambition has taken in the past.

- 16 – 18 June 1999:
 - o At the Third Ministerial Conference on Environment and Health in London, Ministers judged it appropriate to consider the possibility of new non-legally binding actions and the feasibility, necessity and content of a new legally binding instrument relation to environment and health problems caused by transport. It invited the WHO and UNECE to provide an overview of existing agreements and legal instruments.⁶
- 8 May 2000:
 - o A Joint WHO/UNECE meeting, having considered documents presented by consultants and support from Danish, French, and Swiss Ministries, as well as UNEP, agreed to create a synthesis report which would include information on existing legal instruments, the identification of priority areas for action, the analysis of gaps in the international legislation with respect to the priority areas, and recommendations for further action.⁷
- 17 January 2001:
 - o A report was drawn up to provide an overview of relevant existing agreements and legal instruments.
 - o In the same report, it was recommended to negotiate a process for a framework convention on transport sustainable for health and the environment.⁸ Indeed, it was deemed at the time that current policies were not sufficient to achieve sustainable transport for health and the environment.
- 15 June 2001:
 - o The Joint UNECE – WHO Ad hoc expert group was given the mandate to, inter alia, ‘carry out further preparatory work to facilitate a decision on whether to start negotiations on a framework convention, including the specific task of identifying the possible elements of such an instrument for further decisions to be taken at the second High-Level Meeting on Transport, Environment and Health’.⁹
- 4 May 2001:
 - o Decisions and Recommendations Adopted by the High-level Meeting on Transport, Environment and Health included this provision:
 - Decides that further preparatory work to be able to decide whether to start negotiations of a Framework Convention, including the specific task of identifying the possible elements of such an instrument, shall be carried out at the international

⁶ WHO, London Declaration on Action in Partnership, Third Ministerial Conference on Environment and Health (London, 16-18 June 1999), EUR/ICP/EHCO 02 02 05/18 Rev.5, [18].

⁷ ECE, Other International Activities on Transport and the Environment Relevant to the Implementation of the Programme of Joint Action Joint Meeting on Transport and the Environment (Third session, 6 June 2000), JMTE/2000/6, [I.(e)(iii)].

⁸ ECE, World Health Organization Regional Office for Europe, Overview of Instruments Relevant to Transport, Environment and Health and Recommendations for Further Steps, ECE/AC.21/2001/1 – EUR/00/5026094/1, 17 January 2001, p.5, p.49.

⁹ WHO, Follow-up and Implementation of the Charter on Transport, Environment and Health, Report on the Fourth Meeting of the Steering Group held in Geneva, 7 June 2001, Annex III, p.12.

level by a tripartite task force to be established within the framework of the London and Vienna follow-up processes, as soon as possible.¹⁰

- 14 June 2002:
 - o Options Available for Addressing the Priority Issues:¹¹
 - Developed detailed arguments and explanations for legally and non-legally binding instruments. Among the non-legally binding options to be considered for implementation was the possibility of establishing the Pan-European Programme on Transport, Environment and Health.
- 5 July 2002:
 - o Second High-level Meeting
 - o Whilst the High-Level Meeting considered the appropriateness of starting negotiations on a Framework Convention, **most States did not consider starting negotiations of a Framework Convention on THE as an appropriate action at that present moment, though THE PEP left this option open for future consideration.**¹²
 - o Within the Declaration adopted by the Second High-Level Meeting on 5 July 2002, the preamble noted that member states should further enhance implementation of existing international agreements and legal instruments related to transport (*thus, no mention of creating something new*).
 - o The High-Level Meeting took note of the assessment of appropriateness of elaborating a Framework Convention, but recognised that **‘the negotiation of a Framework Convention on Transport, Environment and Health seems to be premature and should not be pursued for the time being. Recognise also that the next High-Level Meeting might wish to instruct the Steering Committee, in light of progress of THE PEP, to re-examine the question of whether to start negotiations of a framework convention’.**¹³
- 23 January 2009
 - o Third High-level Meeting, Amsterdam Declaration:
 - o *‘Recognize that the question of a Framework Convention on Transport, Environment and Health has not yet been resolved and that further exploratory work should be considered, for example, in the light of newly emerging issues;’*¹⁴
- 15 April 2014
 - o Fourth High-level Meeting, Paris Declaration:
 - o *‘Recognize that the question of a Framework Convention on Transport, Health and Environment has not yet been resolved and invite interested Member States to elaborate proposals for consideration at the Fifth High-level Meeting;’*¹⁵

¹⁰ Decisions and Recommendations Adopted by the High-Level Meeting on Transport, Environment and Health, 4 May 2001, [5].

¹¹ ECE, Options Available for Addressing the Priority Issues, High-Level Meeting on Transport, Environment and Health (Second session, 5 July 2002, agenda item 5(a)), Conference Room Paper 14 June 2002.

¹² Economic Commission for Europe, World Health Organization Regional Office for Europe, Summary Report of the Second Session of the High-Level Meeting on Transport, Environment and Health (Geneva, 5 July 2002), ECE/AC.21/2002/6 EUR/02/5040828/6, 3 October 2002, 11(h).

¹³ Economic Commission for Europe, World Health Organization Regional Office for Europe, Declaration adopted by the Second High-Level Meeting on Transport, Environment and Health (Geneva, 5 July 2002), ECE/AC.21/2002/8 EUR/02/5040828/8, 21 August 2002, [3]-[5].

¹⁴ THE PEP, Amsterdam Declaration, Making THE Link: Transport choices for our health, environment and prosperity, Third High-level Meeting on Transport, Health and Environment (Amsterdam, the Netherlands, 22–23 January 2009) [14].

¹⁵ THE PEP, Paris Declaration, Fourth High-level Meeting on Transport, Health and Environment (Paris, France, 14-16 April 2014) [21].

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- 17 May 2021
 - o Fifth High-level Meeting, Vienna Declaration:
 - o ‘Establish an ad hoc working group to analyse different legal options to give effect to our vision and strategy, and elaborate draft proposals for possible legal instruments and present them for consideration by the Steering Committee, which will agree on a proposal for adoption at the Sixth High-level Meeting on Transport, Health and Environment;’¹⁶

¹⁶ THE PEP, Vienna Declaration, Fifth High-Level Meeting on Transport, Health and Environment (Online, Geneva, 17 May 2021), ECE/AC.21/2021/3–EUCHP2018924/4.3.3, [4].

Annex II

Draft Terms of Reference for the Ad Hoc Working Group and proposed Timeline of Work

A. Mandate

The Steering Committee,

Recalling the strategy and actions for achieving the vision of the Vienna Declaration and accelerating the transformation towards sustainable transport and mobility,¹⁷

Recalling the commitment to develop ‘a comprehensive pan-European strategy on transport, health and the environment, including a clear pathway for its implementation, to achieve the agreed vision and guide the further work of THE PEP, for adoption in 2023’,¹⁸

Recalling the mandate given in the Vienna Declaration to ‘*establish* an ad hoc working group to analyse different legal options to give effect to our vision and strategy, and elaborate draft proposals for possible legal instruments and present them for consideration by the Steering Committee, which will agree on a proposal for adoption at the Sixth High-level Meeting on Transport, Health and Environment’,¹⁹

1. Decides to link the current work with the mandate to create a strategy for THE PEP and that the open-ended ad hoc working group responsible to develop the strategy will also lead on this mandate.
2. Consequently, the Steering committee could establish an open-ended ad hoc working group, which will start its work in 2021, to work on THE PEP strategy and the drafting of proposals for possible legal instruments. This group will carry out its work in two main steps. The work on THE PEP strategy will be undertaken first, with the proposed period of work from 2021 – 2023, when the Strategy should be adopted, as per the Vienna Declaration. This will be followed by the drafting of proposals for possible legal instruments in line with the strategy and vision of THE PEP and based on the preliminary work prepared under the strategy. The mandate is proposed for the period 2021 – October 2024.

B. Terms of Reference

1. Composition

3. Each member State could nominate, on a voluntary basis, one or two experts to join the ad hoc working group. Member States might also consider nominating one expert from each sector (i.e. up to 3 experts). The composition of the group may also vary on the topic (i.e. discussion on the strategy or discussion on a legal framework) and it is intended that the group be flexible and open-ended in order to bring together different experts for different needs.

¹⁷ THE PEP, Vienna Declaration, Fifth High-Level Meeting on Transport, Health and Environment (Online, Geneva, 17 May 2021), ECE/AC.21/2021/2/Add.1–EUHP2018924/4.3.2/Add.1.

¹⁸ THE PEP, Vienna Declaration, Fifth High-Level Meeting on Transport, Health and Environment (Online, Geneva, 17 May 2021), ECE/AC.21/2021/2/Add.1–EUHP2018924/4.3.2/Add.1, para [3].

¹⁹ THE PEP, Vienna Declaration, Fifth High-Level Meeting on Transport, Health and Environment (Online, Geneva, 17 May 2021), ECE/AC.21/2021/2/Add.1–EUHP2018924/4.3.2/Add.1, para [4].

4. The group might wish to be supported, at the beginning of each task, initially by a consultant to support the development of the strategy, followed by an experienced consultant on international law.
5. Stakeholders might also wish to nominate a representative.
6. The Secretariat of THE PEP will participate in the working group *ex officio* to provide expert input.

7. Tasks

6. The ad hoc working group will:
 - (a) Take stock of the current situation regarding transport, health and the environment, and define the challenges that need to be solved.
 - (b) Draft the Strategy with a view of adopting it by 2023.
 - (c) Take stock of the work carried out to develop the strategy. In particular, take stock of the findings on the current situation regarding transport, health and the environment, in order to assess the issues faced, the problems to be solved and possible solutions, including those that possible legal instruments can seek to address.
 - (d) Update the scoping exercise of legal instruments that address transport, health and environmental issues.²⁰
 - (e) Elaborate legal proposals for review by the Steering Committee, as per the mandate contained in the Vienna Declaration. Work with the draft documents elaborated so far and improve them further as appropriate.

8. Methods of work

7. The ad hoc working group is expected to meet at least once every 2 months. The meetings should be held at the Palais des Nations in Geneva or in an online or hybrid format.
8. The Chair of the ad hoc working group, appointed at the first meeting of the group, should report on the ongoing work at the annual sessions of the Steering Committee, whilst the final outcome should be submitted to the session scheduled before the sixth High-level Meeting on Transport, Health and Environment.
9. The working group might wish to nominate a rapporteur to support the Chair in the work.
10. The meetings of the ad-hoc working group will be held in English only.

²⁰ The first version can be found here: ECE and WHO Regional Office for Europe, Overview of Instruments Relevant to Transport, Environment and Health and Recommendations for Further Steps Synthesis Report, ECE/AC.21/2001/1EUR/00/5026094/117 January 2001.

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11. Participation in the ad hoc working group is open to all ECE member States and experts. Interested intergovernmental and non-governmental organisations are invited to participate and provide expert advice in compliance with United Nations rules and practices.
12. The ad hoc working group should ensure inclusiveness and so active participation of experts in the group from all ECE member states, and in particular from the countries of Eastern Europe, Caucasus and Central Asia.